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IPBA JOURNAL

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The President's Message



Dear Colleagues,

Let me give you some updates on IPBA activities since my previous message to you.

Mid-Year Officers and Council Meetings

The Mid-Year Officers and Council Meetings were held from October 30 to November 1 at Park

Lane Hotel in Hong Kong. The Council passed a number of guidelines, including those on co-sponsorship requests, as well as the hosting of mid-year meetings and regional conferences. The Council also approved a special liaison relationship by the IPBA Committee on Competition Law and the ABA Section on Antitrust Law. Subject to certain guidelines to be formulated, the Council approved in principle a partnership with the International Law Office.

Regional Seminars

Following the Mid-Year Council Meeting was a seminar entitled "Asia – The Eye of the Financial Storm?", which was organised by Allan Leung, Jurisdictional Council Member for Hong Kong, with the assistance of Deputy Program Coordinator Christopher To. This seminar was well attended and successful.

Equally successful was the special seminar organised by Jan Kooi, Regional Coordinator for Europe, in Amsterdam on October 2, 2009. The seminar dealt with the legal aspects and customs related to take-overs by Asian companies of European targets.

IPBA Website

The Webmaster, Sylvette Tankiang has begun implementing Phase II of the IPBA Website Project. This features not only a membership directory accessible only by the members and searchable with photos, but also intra-committee access. There will be an automated reminder for membership renewal, and important e-mail messages sent to IPBA members will contain images and hyperlinks for better clarity. A key-word search will be provided through the contents of the website, save for the membership directory. Pilot will take over from Jadfly the technical control of the website as well as the hosting thereof.

2010 Singapore Conference

The programme for the Singapore Conference is in place. Among its highlights will be the special question-and-answer

session with Minister Mentor Lee Kuan Yew, and the keynote speech of former US Vice President Al Gore. The plenary session will be moderated by Prof Tommy Koh, with Dr Rajendra K Pachauri, Nobel Laureate from India, and Mr Don Henry of the Australian Conservation Foundation being among the speakers.

There will be a special session for the judiciary to discuss transnational issues facing judges in the new global financial and business climate. The Chief Justice of Singapore, the Right Honourable Chan Sek Keong, will provide a keynote address and the Chief Justice of the Supreme Court of Delaware, the Right Honourable Chief Justice Myron T Steele, the Chief Justice of the Supreme Court of New South Wales, the Right Honourable Chief Justice James Jacob Spigelman, the Master of the Rolls of England and Wales, Lord Sir Anthony Clarke, and our own Past President Kunio Hamada, a former judge of the Supreme Court of Japan, will speak.

The various Committee sessions are also in place, along with a Corporate Counsel Forum, all in the context of the conference theme "Climate Change and Legal Practice".

2011 – 2012 Annual Conferences

As we approach the Singapore Conference, preparations are being made for the Kyoto/Osaka Conference scheduled for April 21-24, 2011, with Vice President Shiro Kuniya at the helm. The venue will be the Kyoto International Conference Center.

It was decided too that the 22nd Annual Conference will be held in India in 2012. The exact venue in India is still to be chosen, with Mumbai being considered as a probable site. The election of Lalit Bhasin as the next Vice President, effective at the end of the Singapore Annual Conference, was recommended by the Nominating Committee.

Manila Conference Remittance

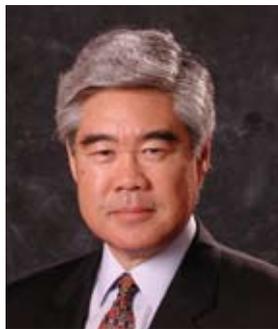
Finally, I am pleased to report that the Manila Host Committee remitted to the IPBA Secretariat the initial amount of US\$200,000 as surplus from the 19th Annual Conference.

Let me end by urging you once again to attend the forthcoming Annual Conference in Singapore. Let us support the Singapore Host Committee led by our indefatigable President-Elect, Suet-Fern Lee!

Wishing you all a Merry Christmas and a Prosperous New Year!

Rafael A Morales
President

The Secretary-General's Message



Dear IPBA Members:

As I write this message, 192 nations and 15,000 participants have convened in Copenhagen to negotiate a treaty to continue international efforts to deal with climate change after the Kyoto Protocol expires in 2012. When you read this message, the results of Copenhagen will be known.

Whatever that outcome, that meeting will be an historic milestone in our efforts to lessen climate change resulting from human activities.

In the weeks preceding this Conference of the Parties 15 (COP 15), major developed and developing countries committed to significant reductions of greenhouse gas emissions, increased use of nonfossil and renewable energy resources, and promotion of energy efficiency throughout their economies. Moreover, public concerns about the possible consequences of climate change for present and future generations are becoming more widespread globally. Civil society, publics at large and businesses and business organisations are promoting public awareness of climate change, sponsoring specific climate change initiatives, and calling for effective governmental, business and community actions to deal with these impacts. While climate change during earth's history generally occurs from natural geophysical changes, the widespread scientific consensus is that in recent decades, anthropogenic sources are likely aggravating the rapidity and extent of climate change.

The potential and already visible actual impacts of climate change, the identification of the human activities that contribute to climate change, and the growing awareness of and concerns over the long-term implications and consequences of climate change have focused our attention on how best to deal with those human activities that contribute to climate change. And here we immediately identify the roles of the law and lawyers as essential to shaping our approach to this historic and globally critical set of issues.

The most prominent climate change legal regimes include the UN Framework Convention on Climate Change (1992) and the Kyoto Protocol (1997). The European Union established the world's first CO₂ emission trading system (2003) that covers its member states (EU ETS). In countries such as the United States ("US"), which do not have national legislation similar to the EU ETS, several groups of states have established regional emissions trading systems, and voluntary carbon trading and offset markets have been established.

Much of this work has been in the realm of public international law, in treaty negotiation and implementation. Less visible is the substantial amount of work involving interactions between laws affecting business, commerce and investment, on the one side, and public policies and legal

regimes governing environmental, regulatory and related legal dimensions dealing with emerging climate change issues, on the other side. Indeed, in many countries, including those without mandatory emissions trading systems, it is business and business organisations that are pursuing corporate policies seeking to minimise human activities that contribute to climate change.

Businesses recognise that the impacts of climate change issues on their business operations on local, national, regional and global levels raise difficult and complex issues regarding how they, and hence their legal advisers, need to adapt to comply with current, and impending, regulatory requirements, and equally important, how to remain ahead of, and take the lead on, promoting business and corporate policies and actions that can help them remain competitive and successful in their operating environments and markets.

Many of these legal dimensions involved are clear. These include environmental pollution through emissions; release of greenhouse gases in farming and forestry developments; liability issues in land use planning and development, especially along coastal or riparian areas; required disclosures of potential or actual global warming issues on a company's business in securities offerings and transaction and in M&A transactions; legal aspects of establishing and operating voluntary carbon trading systems, particularly where such systems are not otherwise regulated and use online trading systems; and other potential developments that are still emerging. In short, almost every aspect of business and business law is directly or indirectly affected by climate change issues. These impacts may be even greater if a global climate change treaty is successfully negotiated and enters into force.

I emphasise climate change legal issues not only because of COP 15, but also because the IPBA's upcoming Annual Conference, scheduled for May 2-5, 2010, in Singapore centers on "Climate Change and Legal Practice". This will be the first conference of lawyers in Asia to deal with this vital issue. Among its very prominent speakers are Minister Mentor Lee Kuan Yew (formerly Singapore's Prime Minister), former US Vice President Al Gore (Nobel Peace Prize winner), and Dr Rajendra K Pachauri (Nobel Peace Prize winner and Chair, UN Inter-Governmental Panel on Climate Change). Substantive sessions highlight climate change and sustainability issues in aviation, construction projects, M&A transaction, the environment, cross-border investments, finance, securities, clean tech, legal practice, and more.

The IPBA's commitment to our members and supporters is to pursue cutting edge business legal issues and thereby enable lawyers to enhance their contributions to business law and clients generally. The IPBA 2010 Annual Conference promises to continue this pursuit, and we welcome your attendance and participation in the IPBA.

With all best wishes,

Gerald A Sumida
Secretary-General

Inter-Pacific Bar Association (“IPBA”) Seminar: Asia – The Eye of the Financial Storm? 2 November 2009



IPBA Secretary-General Mr Gerald A Sumida deep in discussion with the seminar guest speakers and other IPBA Officers. Left to Right: Chief Judge of the High Court of Hong Kong, The Honourable Mr Justice Ma; IPBA Immediate Past President Mr Gerold A Libby; the Honourable Madam Justice Kwan JA; Mr Sumida; Mr Barrie Barlow SC.



Guest Speakers and IPBA Officers listening intently to the Chief Judge of the High Court of Hong Kong, The Honourable Mr Justice Ma (not pictured). Left to Right: the Honourable Madam Justice Kwan JA; IPBA Secretary-General Mr Gerald A Sumida; Mr Barrie Barlow SC; Mr Wayne Porritt; Mr Alan Tang; IPBA Vice-President Mr Shiro Kuniya.

The IPBA Seminar “ASIA – The Eye of the Financial Storm?” was successfully held at the Park Lane Hotel in Hong Kong on Monday 2 November 2009 following the conclusion of the IPBA Mid Term Council Meeting. Over 90 people, including lawyers, accountants, insolvency practitioners and corporate counsel from various jurisdictions attended the seminar. Preparation took many months, involving the selection of a distinguished panel of speakers and the determination of key topics that are highly relevant to the profession in the midst of the current global economic conditions. The result was a seminar which highlighted the “Challenges of Cross Border Insolvencies” and experiences in handling China related insolvency – a “Mission Impossible – Successful Asset Recovery in China”, presented by a distinguished panel of speakers.

Following the opening speech by Mr Rafael A Morales, President of the IPBA, Mr Barrie Barlow SC presented a case study on the *Re Legend International Resorts Ltd* (“Re Legend” case). By reference to the facts in the Re Legend case in which he was leading counsel for the company, Mr Barlow highlighted the problems and obstacles in dealing with cross border insolvencies in the absence of the enactment of the UNCITRAL Model Law on Cross Border Insolvency.

The Honourable Madam Justice Kwan JA, the trial judge of the *Re Legend* case, provided insights to the attitude of the Hong Kong courts in the context of recognition and assistance in cross border insolvencies, the court’s application of common law and considerations of judicial comity through her unique analysis of the *Re Legend* case, and the usefulness of the UNCITRAL Model Law in assisting the Hong Kong courts in adjudicating cross border insolvency issues. The presentation prompted interest from the audience to ask questions and many took advantage of this rare occasion since it is usually the judge who questions the practitioners.

Mr Wayne Porritt, Regional Head, North East Asia, Standard Chartered Bank’s Group Special Assets Management, called for the utopia of “similarity of laws and process”, which he believes will be a solution to reducing problems related to

the financial impact, the competing interests of local versus foreign creditors and the challenges involved in complex organisational and capital structures.

Mr Allan Leung then followed by highlighting how the management of cross-border insolvencies can be enhanced and smoothed by the enactment of UNCITRAL Model Law using a recent example of a case in Korea. He also made reference to the new provisions in the Rules of Procedure on Corporate Rehabilitation (2008) in the Philippines which, to a large extent, mirror the UNCITRAL Model Law on Cross Border Insolvency.

Mr Leung opened part two of the presentation by highlighting the importance of Asia and China as being the eye of the financial storm and the liquidators' challenges in dealing with China related insolvency. It was the perfect introduction to what Mr Alan Tang, Partner of Grant Thornton, had in store for the audience.

Focusing on the recent developments in the PRC (People's Republic of China), Mr Tang provided an overview of the new Enterprise Bankruptcy Law, a summary of cases involving foreign proceedings and the recognition of foreign liquidators in China.

Last but not the least, the Guest of Honour, the Honourable Mr Justice Ma, Chief Judge of the

High Court of Hong Kong SAR, gave a luncheon speech to end the seminar with a duly reminder of practitioners' duty to the court, and a few words that triggered giggles from the crowd by borrowing a part of a speech from Chief Justice McLaughlin on "'breastfeeding' and the law" to emphasise the importance of "press freedom"!



JCM for Hong Kong Allan Leung introduces the Chief Judge of the High Court of Hong Kong, The Honourable Mr Justice Ma, as the guest of honour luncheon speaker.



Left to Right: JCM for Malaysia, Mr Dhinesh Bhaskaran; At-Large Council Member for the Philippines, Mr Valeriano R del Rosario; IPBA President, Mr Rafael A Morales; attendee, Ms Heidi Wild.



Nearly 100 delegates attended the seminar at the Park Lane Hotel, Hong Kong.

Announcements



Dr Philip Pillai

- IPBA is pleased to announce the recent appointment of Dr Philip Pillai as Judicial Commissioner of the Supreme Court of Singapore. Dr Pillai served as IPBA's Secretary-General between 2001 and 2005. IPBA is honoured to have past officers who have been appointed and have served on the highest judiciaries of their nations, including Kunio Hamada in Japan and Susan Glazebrook in New Zealand.
- The application deadline for IPBA Scholarships 2010 was extended to December 1, and we had a total of 35 applicants. All applications are now under review and a decision will be made early next year.
- Early Bird registration for the 20th Annual Conference in Singapore ended November 15. There are now close to 450 registrants. Please visit the official web site at www.ipba2010.org to register.
- The seminar, "Asia – the eye of the financial storm?" held in Hong Kong on November 2 had close to 100 delegates in attendance. Thanks to Allan Leung, JCM of HK, for making the event a great success! (Read more on pages 6-7.)
- The European seminar "Your (EU) Company is Taken Over by an Asian Group", held on October 2nd in Amsterdam, was another great event, thanks to Jan Kooi, Regional Coordinator in charge of Europe. Read about his initiative to organise a Leadership Committee in Europe below.

New EMEA Leadership Committee

Certain jurisdictions represented in the IPBA have, in the past, organised Leadership Committees ("LC"). The aim of these committees is to assist Jurisdictional Council Members (JCMs) to promote IPBA activities in their jurisdictions and to promote IPBA in general.

The new European (EMEA) Coordinator, Jan Kooi, from the Netherlands, has taken the initiative to organise an LC for his region (EMEA). The initial members of this LC, will be Jan Kooi (Chair, the current EMEA coordinator), Gerhard Wegen (the incoming JCM of Germany, where the next Mid-Year Council Meeting will be held), Jean-Claude Beaujour (the out-going JCM for France), Paul Key (the current JCM for the United Kingdom), Urs Lustenberger (Switzerland, and Deputy Committee Coordinator), and Hans-Peter Wüstiner from Switzerland.

The aim of the LC is to promote IPBA activities among its members in the EMEA area, especially by exchanging information. The LC for the EMEA is seeking new/additional members who would be interested in promoting the IPBA in other jurisdictions, especially Spain, Italy, Sweden, Austria, Poland, the Czech Republic, Russia, the Middle East and Africa. The EMEA region presently represents well over 12 per cent of the IPBA membership.

The LC for the EMEA plans, where possible, to organise regional conferences like the seminar conducted in Amsterdam on October 2, 2009 for the IPBA in the EMEA area. Such a seminar will most likely be held in conjunction with the Mid-Year Council Meeting, which is scheduled for October or November, 2010 in Germany.

Interested members in the European, Middle East and African region are requested to join the LC for the EMEA and to generate ideas and suggestions on how this initiative can be furthered.

Contact: jkooi@ziggo.nl or kooi@internationalcounsel.com

For more details and the latest information, view the IPBA website: www.ipba.org, or contact our Secretariat at ipba@tga.co.jp.

Publications Committee Guidelines for Publication of Articles in the IPBA Journal

The IPBA Publications Committee is soliciting quality articles for the Legal Update section of the December 2009 and March 2010 issues of the IPBA Journal. If you are interested in contributing an article, please contact **Mr Kap-You (Kevin) Kim**, Publications Committee Chair, at kyk@bkl.co.kr or **Mr Hideki Kojima**, Publications Committee Vice-Chair, at kojima@kojimalaw.jp and/or submit articles by email to Mr Kim or Mr Kojima at the foregoing addresses.

Proposed themes for upcoming editions:

- **Antitrust/Competition Law (March 2010)**
Deadline for submissions: February 25, 2010
- **Environmental Law/Annual Conference Review (June 2010)**
Deadline for submissions: May 25, 2010

The requirements for publication of an article in the IPBA Journal are as follows:

1. The article has not been previously published in any journal or publication;
2. The article is of good quality both in terms of technical input and topical interest for IPBA members;
3. The article is not written to publicize the expertise, specialization, or network offices of the writer or the firm at which the writer is based;
4. The article is concise (2,500 to 3,000 words) and, in any event, does not exceed 3,000 words; and
5. The article is written by an IPBA member.

IPBA Event Calendar

Event	Location	Date
Annual Meeting and Conference		
20th Annual Meeting and Conference	Singapore	May 2-5, 2010
21st Annual Meeting and Conference	Kyoto/Osaka, Japan	April 21-24, 2011
22nd Annual Meeting and Conference	India	2012
Regional and Local Events		
APEC Lecture and Reception (in Japanese)	Tokyo	Dec 15, 2009
Mid-Year Meeting and Conference	Europe	Fall 2010
Supporting Events		
IPBA / IFLR Asia M&A Forum	Hong Kong	March 3-4, 2010

Details can be found at www.ipba.org, or contact the IPBA Secretariat at ipba@tga.co.jp.

The Honorable Hironobu Takesaki, Chief Justice of the Supreme Court of Japan



Hideki Kojima

On October 23, 2009 I was given the opportunity to interview The Honorable Hironobu Takesaki for the IPBA Journal. The following is a condensed version of the interview:

Interview by Hideki Kojima*

Kojima Law Offices, Tokyo, Japan

Responsibilities of Judges and Legal Professionals

Q: Thank you very much for taking time out of your busy schedule for this interview. I would like to begin by asking what you believe are the most important qualities that a judge should possess?

A: I have found through my experience as a judge that, above all, fairness and impartiality are the most important qualities. With that being said, I frequently tell younger judges that there are basically three qualities that a judge must possess. The first is that, due to the fact that judges are professionals, they must possess a solid foundation of technical skills necessary for the profession. Secondly, it would be difficult for a judge, without having knowledge of or education in fields other than law, such as natural science, history and so on, to understand the circumstances of each case that comes before their court. The third quality that a judge should possess is human characteristics. By human characteristics, I mean characteristics such as honesty, diligence and integrity, including the aforementioned qualities of fairness and impartiality. It is necessary for judges to have a balance of these three qualities. If a judge is excellent in one of the three qualities, but does not

possess the other two, you will never consider him or her as a good legal practitioner. However, I do feel that the third quality that I mentioned, human characteristics, is particularly important for judges.

Q: In my experience handling civil cases in court, although I believe that this question would also be appropriate for criminal court cases, the dispute is generally about facts and disputes concerning the law are very rare. Given this reality, I believe that Japanese legal professionals do not receive any education or training on fact-finding skills during their university studies, preparation for the bar examination or their training at the Legal Training and Research Institute¹. Therefore, it would seem that the fact-finding ability of legal professionals and lay persons in Japan are basically the same. In this connection, do you have any thoughts on how legal professionals can improve their fact-finding skills?

A: I believe that it is not necessary to have any particular qualification to find facts, because that is what people do in their everyday lives. Therefore, it could be safely said that a legal professional's fact-finding process is analogous to the fact-finding process of members of society who are not legal professionals. However, I do believe that the question of whether any individual is good or poor at fact-finding is itself an issue. In discussing this issue I often provide the example of a tennis player.

* Hideki Kojima is currently serving as the Vice-Chair of the Inter-Pacific Bar Association's Publications Committee.

Although there is no qualification necessary to play tennis, there is a gap between the skills of a good player and those of a poor player. As such, I think there will inevitably be individuals with good fact-finding skills and those with poor fact-finding skills. In this regard, I believe that because fact-finding is a skill, it can be improved through education and practice.

In fact, at the Legal Training and Research Institute, trainees are taught fact-finding skills. At the Institute, trainees mainly deal with a certain type of fact-finding in which circumstantial evidence is used to prove the existence or non-existence of the essential elements of a legal claim. With this type of fact-finding, to be a good fact-finder depends on how to present appropriate hypotheses focusing on facts in issue based on circumstantial evidence. The fact-finding skills of legal professionals in Japan are formed through training of such an ability in presenting appropriate hypotheses. By receiving training at the Legal Training and Research Institute and by implementing such training in subsequent practice, the overall fact-finding skills of legal professionals can be improved. However, the second quality that a judge must possess as I mentioned before, knowledge of or education in fields other than law, will certainly affect the potential fact-finding skills of the legal professional.

Q: Although presiding over a court on a regular basis is valuable experience for judges in Japan in terms of implementing and improving fact-finding skills, do you believe that the fact-finding skills of judges can be improved by more interaction with society outside of court in an unofficial capacity?

A: I guess that you might be referring to the frequently quoted phrase that “judges are greenhorn”. To paraphrase, I believe the quote essentially is a reflection of the view that because judges are uninformed about society they cannot make proper judgments. At the root of this view is the reasoning that unless a judge has first-hand experience with the factual circumstances presented in any given case, a correct judgment cannot be rendered. Although I agree to the extent that experience is very important, the amount of experience that any individual can amass is limited. As judges have to frequently deal with a wide range of cases based on an even broader range of factual circumstances, it would be unrealistic to expect judges to have first-hand experience regarding each and every court case that they handle. The important quality for a judge is not to have first-hand experience on everything, but to present appropriate hypotheses flexibly, using his or her basic experience and wide range

of knowledge of or education in various fields.

In fact, there was significant debate during the period leading up to the latest reforms of the judicial system surrounding the issue of whether legal professionals, including judges and attorneys, need to have more contact with society at large. This issue not only applies to judges but also to attorneys. I think that both judges and attorneys have in-depth knowledge of certain specific areas. In this regard, I believe the important question is how each judge or attorney can generalize such specific in-depth knowledge by distilling the fundamental knowledge from the specific in-depth knowledge, to be applied to a broader range of situations.

Presence of the Supreme Court in Japanese Society

Q: In the United States, the US Supreme Court has a comparatively strong influence or importance in society compared to that of the Supreme Court of Japan. Do you feel that there is anything that can be done to increase the presence of the Supreme Court of Japan in Japanese society?

A: As a threshold matter, let me point out that whether such an increase in presence is preferable or not is itself a debatable issue. With that being said, I do believe that

the Supreme Court of Japan has incrementally increased its importance within Japanese society. In the period leading up to the latest reforms of the judicial system, the lack of impact of the judiciary as a whole was frequently debated. The terminology employed in this debate was that the judiciary was only using 20 per cent of its potential influence. However, assuming that the percentage is only 20 per cent, I believe that this has no bearing on the issue of whether society is adversely affected by such lower influence of the judiciary.

In comparing the Supreme Court of Japan with the US Supreme Court, we need to consider that there are fundamental differences in the social forces, customs and history affecting the judiciary. For example, the society of the US is multi-ethnic, while the Japanese society seems much different in this aspect. It has been often said that, in Japan, disputes are often mediated through unofficial



The Honorable Hironobu Takesaki

procedures and are not frequently litigated. As a result, the number of disputes is also significantly lower, compared with other countries such as the US. As you are well aware, resolving conflicts through legal means has been thought to be society's method of last resort.

However, currently in Japan, declining economic growth and the shift in the trust held by citizens towards the various dispute-resolution processes other than litigation, combined with increased deregulation with a focus on free competition have increased the need for a stronger judiciary to act as a safety net. Essentially, this is what the latest reforms of the judicial system were addressing. With the convergence of the aforementioned factors, I am quite certain that the weight and functions of the judiciary will increase and I believe public trust in the judiciary will grow as it corresponds to the social needs properly.

The Judge Assessment System



Q: Do you think that the Judge Assessment System is an effective way to assess the performance of individual judges?

A: As one of the components of the new system for personnel evaluation of judges, the process for collecting information about judges from outside the judiciary was established. Regarding the process, although I think it is not necessary to provide assessments based on a numerical scale, substantive and specific assessments are necessary, whether negative or positive. It is clear that a determination cannot be made on a single assessment. But, if multiple assessments are presented and they all point to the same negative issues, you might consider that some action should be taken. In the extreme, the Appointment Advisory Committee² can issue a determination

that a judge is unfit for reappointment, although such cases are rare. Without going to such an extreme, for example, judges can be told during their assessment conference by chief judges of their courts that assessments have been received regarding certain behavior and that such behavior needs to be addressed. As an organisation, both positive and negative assessments can be used by judges to relate to what is working well and what is not. With that being said, I believe that the majority of judges are usually not conscious of, and accordingly are not adversely affected by the assessment system when they preside over a court. I tell judges that they should perform their work naturally. In any case, in the course of a judge's work, I think that outside opinions, whether positive or negative, can be used for the self-discipline of the judiciary.

The Lay Judge System

Q: As you are well aware, the Lay Judge System³ was implemented in Japan on 21 May 2009. In this regard, I am reminded of Tocqueville's⁴ comment that the jury system in the United States was an effective means to educate people on the meaning of democracy. In the period leading up to the implementation of the Lay Judge System, I felt that there was no discussion regarding whether the Lay Judge System would educate the Japanese people. Do you believe that the Lay Judge System will serve to educate the Japanese people?

A: During the debates leading to the enactment of the law creating the Lay Judge System, the Japan Federation of Bar Associations recommended a jury system in which the jurors would have the sole power to determine issues of fact. I believe that this viewpoint was very much based along Tocqueville's views. I believe that the American Jury system is not just a judicial system, but essentially a political system in nature as well. As I mentioned above, the United States has a multi-ethnic and multi-cultural society. It seems to me that the jury system functions to remind the US people of the identity between the people who try and the people who are tried. On the other hand, the Lay Judge System in Japan is essentially a judicial system. With that being said, I am certain that the participation of Japanese citizens does have an educational component. One of the significant effects of the Lay Judge System is that the lay judges learn why crimes are committed, how the judicial system works, how criminals are punished, etc. Further, I believe that participation does instill a sense of involvement in and responsibility to society. However, I believe that these are not the main purposes of the Lay Judge System, just

derivative benefits.

The main purpose of the Lay Judge System is to perform criminal trials properly and it is important for Japanese citizens to recognise this. In particular, the Lay Judge System should be a vehicle for the population at large to determine whether in the criminal context, the judiciary is properly operating and whether there is any departure from the common sense of Japanese citizens in its operation.

Q: Currently, the Lay Judge System is only applied to certain serious criminal offences. I understand that there is a view amongst legal pundits that the Lay Judge System should be extended to civil courts. Do you believe that the Lay Judge System should be extended to civil courts?

A: The general trend in the rest of the world seems to be a move away from having juries in civil courts. If my understanding is correct, the United Kingdom has abolished civil juries and has even abolished juries for certain economic crimes.

In civil trials, as opposed to criminal trials, the relationship of rights between the parties can be quite complex and confusing for lay judges. On the other hand, crimes can be more easily understood by the population. I think that the defining feature of the Lay Judge System is its potential to infuse the criminal courts with this understanding or sense that Japanese citizens have about criminal acts and how they should be punished, because punishment is the most serious exertion of power in society.

Message for IPBA Members from Chief Justice of Japan

Q: As this interview will be published in the IPBA Journal, do you have any specific message for IPBA members?

A: Yes. In principle, laws and judicial systems

are of a domestic nature because they are intended to address domestic issues. However, the current transformation that influences the most basic requirements for human life, such as crisis concerning the environment, food supply and energy, has a worldwide effect. To respond to this transformation, a certain degree of universality is necessary. In this regard, I believe that the law is a common language that can be utilised to solve international problems. I also believe that all legal professionals should keep in the back of their minds the idea that such a common language can be used to solve international problems, while at the same time fulfilling the domestic role of legal professionals.

The twentieth century was a century of growth and competition. However, I believe that one cannot avoid the conclusion that the twenty-first century will have to be a century of coexistence, coordination and harmony. The human race has



already come to this point. To realise such a century, I believe that the law must become more universal. In this connection, I believe that legal professionals will have a greater role to play.

Notes

¹ Mandatory training for persons who have passed the Japanese bar examination.

² The Appointment Advisory Committee, established by the Supreme Court of Japan in 2003, has the authority to issue recommendations on the appointment and re-appointment of judges and whether any judge is unfit for re-appointment.

³ System implemented in Japan where members of the general public, together with professional judges, participate in the trial of certain criminal cases to determine whether the accused is guilty or not guilty and to determine the sentence (in the event that an accused is found guilty).

⁴ Alexis de Tocqueville, French political scientist, historian and politician (1805-1859).

Warranties Against Marine Pollution: A European Perspective



With focus on protection of the environment on the rise in recent years, the perspective of the shipping industry has been altered to consider a bigger picture that factors in provisions for environmental preservation and protection. All actors of the shipping industry are concerned and Europe wants to show exemplarity.

Anne Durez
Senior Legal Counsel, Total S.A.

Introduction: Europe Ranks First in the Worldwide Commerce of Oil Products

Shipping is probably one of the most international and dangerous of all the world's great industries although it is, statistically, the least environmentally damaging mode of transport. Most of the time, products are transported quietly and safely and pollution by ships is a mere hazardous risk despite the 60,000 ships which travel on the worldwide seas.

Almost 90 per cent of the oil trade with Europe is done through shipping. Each year, 800 million tons of oil products are shipped from and to European ports.¹ Almost 70 per cent of oil shipping in Europe is done along the Atlantic coast and in the Northern Sea, which are therefore both vulnerable areas to pollution.

Although world seaborne trade increased by around 135 per cent between 1985 and 2006, in sharp contrast, estimate of the quantity of oil spilled into the sea during the same period show a steady reduction by some 85 per cent. However,

the environmental concern has grown enormously during the past decades. It is all the more important since the size of tankers has increased and that the shipping of crude oil and refined products may cause huge pollutions in the event of an accident.

For a long time, maritime pollution control remained a minor concern, especially because most oil pollution resulted not from shipping itself but from routine shipboard operations such as the cleaning of cargo tanks close to land. However, things have changed, especially since the *Torrey Canyon* disaster in 1967: 120,000 tons of crude oil were spilled into the sea while the ship was entering the English Channel. It resulted in the biggest pollution ever recorded up until that time and it was then necessary to think about the prevention of pollution accidents on sea.

Marine pollution is often an environmental and financial disaster

Several other main pollution disasters occurred since then and now form part of the shipping history, although accidental oil pollution has declined over the last 30 years.

Famous oil pollution disasters remain in all

memories: the *Amoco Cadiz* disaster, which occurred in 1978 and gave France its worst oil spill ever when the tanker filled with 223,000 tons of crude oil, lost its entire cargo, covering more than 130 beaches in oil. Twenty years ago, the *Exxon Valdez*, loaded with more 1,200 million barrels of crude oil, ran aground in the northeastern portion of Prince William Sound, spilling about one-fifth of its cargo. More recently, in 1999 the *Erika* broke in two on the heavy seas off the coast of Brittany, France. Some 14,000 tons of oil were spilled and more than 100 miles of Atlantic coastline were polluted. Ten years later, the case is pending before the Court of Appeal in Paris.

In Europe, public opinion and non governmental organisations are very active

Because public opinion is very sensitive to the protection of environment it plays a very active part in watching, informing and condemning all forms of environmental pollution. In Europe, in particular, non governmental organisations (NGOs) cannot be ignored and are very strong partners in the public debate of environment preservation. Because they have technical, financial and human resources such as engineers, experts, they are able to mobilise quickly and efficiently to run a widespread campaign both in the media and before judicial courts to try and have both national and European regulations amended for a better protection of, and indemnification for victims of shipping pollution. In this respect, media exposure is considered as a major risk for all economic actors.

The risk of criminal procedures and length of trials

In France, companies and/or their executives may incur a risk of criminal proceedings and penalties when accused of having committed a criminal offence. When criminal courts declare to have jurisdiction over them to judge cases of marine pollution – such an issue being challenged due to the complexity of applicable national, European and international laws and jurisdictions – victims and third parties, provided certain conditions are met, are allowed to be civil parties to the criminal trials and seek for civil indemnities. NGOs and associations aiming at the preservation of environment, therefore, use criminal courts as a means to expose companies and their executives to the threat of criminal penalties. They tend to be very active parties to the cases since they know the reputation of the defendants will be damaged during the length of the proceedings, which may last from 10 to 20 years on average. Since both criminal and reputational risks are not insurable, economic actors have to take into account such risks in their decision making process.

The multiplicity of actors does not facilitate the determination of liabilities and indemnification of the victims

Many actors are involved in the whole chain of shipping: the ship owner, the charterer, the ship management company, the classification company, the captain of the ship, the crew, etc... Furthermore, these actors are often registered in different countries applying different regulations. In case of a pollution event, they are not always insured or financially able to participate, when declared liable, in the indemnification of the victims.

Yet victims of marine pollution are justified in seeking for a quick court decision. This is the reason why international regulations were adopted in the 1990's to allow victims of marine pollution to be quickly indemnified.

The CLC/IOPC civil liability regime was created to oblige ship owners to subscribe insurance policies which allow victims of marine oil pollution to be quickly indemnified. However such regulations do have their limits, in particular because there is no obligation for other actors of the shipping activity to be insured (I); obviously the best way to avoid marine pollution remains prevention (II).

I – The International Regulation: The CLC/IOPC Regime

History of the CLC/IOPC regime

The IMO (International Marine Organisation) has adopted international regulations aimed at improving, among others, safety at sea. The CLC (International Convention on Civil Liability for Oil Pollution Damage) and the IOPC (International Oil Pollution Compensation Fund) were respectively adopted and created in 1971 and 1992. They have been amended twice since then to increase the amount of money, which may be granted to victims of marine pollution caused by hydrocarbons.

Both the shipping industry and oil importers provide automatic cover for accidents caused by oil transported by ship, regardless of fault. The main contributions come from Japan, Italy, the Netherlands, France, the United Kingdom (“UK”), Germany, Spain, Greece, Sweden, Norway, Portugal and Finland.

The system is twofold:

1. The ship owner's civil liability is subject to the CLC convention, although its civil liability may be limited ; it is bound to subscribe an insurance policy to cover its civil liability in case of a marine oil pollution and buys “entries” from insurance companies called P&I's Clubs mainly located in London and in Scandinavia ; and

2. The IOPC is a fund that is supplied by almost 100 countries depending on the volume of their oil importations in the State parties to the convention. It applies when the ship owner is not liable for the pollution or when it has no financial capacity to indemnify the victims or when the amount of the loss claimed by the victims overwhelms the amount of civil liability of the ship owner covered by the P&I Clubs.

Around one hundred countries have ratified both international conventions. However, the United States (“US”), for instance, have refused to join the CLC/IOPC regime and have adopted their own civil liability regime after the *Exxon Valdez* disaster in 1989.

The twofold system may be easily implemented, without waiting for a court decision, and with a worldwide coherence. The fact that ship owners are strictly liable and that only the reasonable costs of repair of the environment (cleaning costs) altogether with economic losses may be indemnified, avoid any contingent interpretation by different jurisdictions, whatever the nationality of the victims.

During those past thirty years, around 140 marine oil pollution accidents occurred in more than 20 countries and around one billion US dollars were granted to indemnify the victims.²

As an example, in the *Prestige* disaster, approximately €2.8 million (£21.8 million) in compensation was available from the ship owner’s liability insurer (the London P&I Club). Additional compensation of up to approximately €148.7 million (£142.2 million) was available from the 1992 Fund. In other words, a total of €171.5 million (£164 million) was available. However, the figures given in May 2003 by the Governments of the three States affected by the incident, Spain, France and Portugal, as to the damage caused, indicated that the total amount of the damages in the *Prestige* disaster could be as high as €1,050 million (£1,004.3 million).

If oil companies are not the ship owners, they are not obliged to subscribe civil insurance policies
In practice two options appear:

1. Either the oil company is the ship owner and the charterer at the same time. This is mainly the case for NOC (National Oil Companies). For other oil companies, because of the nature of the risks incurred together with the cost of purchase and maintenance of shipping, they tend not to own the ships they charter. Ship owners have to buy “entries” from entities

called P&I Clubs which are located in the UK and in Scandinavia ; and

2. When the oil company is not the ship owner but only the charterer of the ship, there is no legal obligation to subscribe a civil insurance policy. However, oil companies which operate in countries that have ratified the IOPC Convention, pay a yearly subscription to the IOPC. They also tend to subscribe specific insurance policies at the same P&I Clubs which guarantee that they are structured to avoid any conflict of interest between ship owners and charterers.

The CLC/IOPC regime is criticised

The *Erika* (1999) and the *Prestige* (2002) disasters have given rise to high criticism of the CLC/IOPC regime. Its overall effect appears to be limited by several factors that cannot be corrected by means of modification of the CLC and IOPC conventions.

In this respect, over the last three decades:

1. the amounts granted pursuant to the CLC/IOPC conventions have not been sufficient enough to fully indemnify the victims, although such amounts have been extended in 2003;



2. the limitation of civil liability of ship owners cannot apply in the event of a serious misconduct, which means in practice that ship owners can almost always limit their liability;
3. the CLC/IOPC conventions only allow quantified losses to be repaired, such as the reasonable measures to repair natural resources. However they do not include environmental losses; and
4. the fact that the whole regime of civil liability lies on the registered ship owner prevents the victims from claiming additional indemnities to other actors of the shipping activity on the grounds of this regime, thus obliging the victims to issue long and contingent judicial proceedings.

II – The Best Way to Avoid Oil Pollution is to Set Up a Strong Prevention Policy

Although the international civil liability regime lacks perfection, it still represents an efficient way for the victims of marine pollution to be quickly indemnified.

Yet, the best way to prevent any marine pollution remains the awareness of all actors

involved in the shipping activity to conform to the most stringent standards of construction and running of cargo tanks.

Prevention based on European regulations called Erika I, II and III

During the past ten years, the European Commission has adopted various regulations called Erika I, II and III³ (the latter was adopted on 28 May 2009). They all aim at improving marine security by imposing the withdrawal of simple hulls ships by 2010 and their replacement by double sided hulls and by asking State members to better control ships.

Although several European countries have attempted to convince the European Commission to limit the obligations pending on all actors involved in shipping (especially the UK, Greece, Malta and Cyprus), the Erika III European regulation can be considered as a major progress towards a better maritime security. Among all obligations now pending on State members, one can mention the following:

1. The determination of specific locations and ports where ships may stay when faced with a difficulty which may endanger human life or the environment;
2. The mandatory connexion to the European network SafeSeaNet which includes data regarding shipping passing on European seas;
3. The increase in number and frequency of controls over the ships entering the European maritime area; and
4. The determination of European common rules pursuant to which ships shall be controlled and visited.

These regulations should create common best practices all over Europe and reduce the risk of co-existence of strict and flexible rules depending on the location of the ports where ships cast anchor.

Compliance rules (vetting procedures)

The necessity to improve prevention is all the more true that French courts tend to take into account the possible existence of internal compliance rules to reinforce marine security. Such approach may be useful to help companies to be more efficient in their prevention and the improving of marine security. However it may appear risky if no limit is set up by the courts to determine what would be a good prevention versus what would be an insufficient one.



Photo: Greg Nicholas

This is the reason why all actors of the shipping activity should probably debate in order to set up common and reasonably applicable rules regarding what could be considered as a good prevention policy. Indeed the common goal shared by economic actors and courts, that is to say prevention, must be a reasonable goal to reach.

The training of the crew

Another way of improving prevention, and thus the security of shipping, resides in the training of the crew. However, now, sailing is considered less attractive than it used to be because of time constraints, although some countries such as China or the Philippines have more sailing training schools than Europe.

The prevention of crisis management

Companies must be prepared to face a marine pollution. Because such a disaster occurs suddenly, it may very quickly take huge proportions for the victims. The media will focus on all actors of the shipping activity involved in the disaster and the reputation of the company will then be highly affected due to the exposure. Thus, all prevention measures must be taken before such a disaster occurs. A company will also be judged by the courts, victims, public opinion and the media upon its capacity to react as quickly as possible and to be as efficient as possible to repair what can be repaired.

Finally, prevention is necessary because criminal law tends to take an increasing part in our European society and even to overwhelm maritime law.

Memberships

All actors of the shipping transport and especially oil companies should be sensitive to the necessity of being members of anti-pollution equipment co-operatives. Some include the Oil Spill Response (in the UK), the Clean Caribbean Cooperative (in Florida), the East Asia Response limited (based in Singapore) or the CEDRE (in France) in order to be able to mobilise the technical and human resources needed in case of urgency, quickly and efficiently.

The co-operation with international associations such as the International Petroleum Industry Environmental Conservation Association (IPIECA), which is of the industries' principal channels of communication with the United Nations, is also a good way of seeking to improve maritime security and liaising with non governmental organisations. Within the IPIECA, Oil Spill Working Group serves as a key international industry forum to help improve oil spill contingency planning and response around the world. The group aims to enhance the state of preparedness and response to marine oil spill incidents through acting as a high level strategic and technical forum for members to exchange information and best practices and supporting joint industry-government co-operation at all levels.

Conclusion

All international actors of the shipping industry must work together to prevent and reduce the risk of marine pollution, especially when transporting oil. Insurance companies are obviously an important partner in the chain of shipping because they are among the first to be involved in case of a maritime pollution.

European actors must show exemplarity in their behaviour, especially since Europe wants to appear as one of the leading parties to promote maritime safety. It is even contemplated that a regulation called "Erika IV" be adopted, which would relate to the impact of the shipping industry on climate.

Notes:

- ¹ http://europa.eu/legislation_summaries/transport.
- ² See FIPOL Annual Report for 2008 [www.http://en.iopcfund.org](http://www.iopcfund.org).
- ³ Dir. 2009/17/CE, April 23, 2009 : JOUE n° L131, May 28, 2009.

Marine Insurance: Is Foreign Law Applicable in Argentina?



Omar Beretta



Karina Castellano

The purpose of this article is to determine if in Argentina, it is possible to apply foreign law to insurance policies that are related to international trade and worldwide shipping activities.

Omar Beretta

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Introduction

The development of commerce and the improvement in technology turned the insurance and maritime sections of the Argentine Commercial Code (enacted in 1890) into an anachronism and demanded the passing of new rules on these matters.

Consequently, the Insurance Law No 17,418 (“IL”) and the Maritime Law No 20,094 (“ML”) came into force in 1968 and 1973, respectively, and abolished the above-mentioned sections of the Argentine Commercial Code. Also, Law No 20,091, which governs the insurance activity and created the Superintendence of Insurance,¹ (hereinafter, the “SI”) was enacted in 1973.

In addition, Law No 12,988, enforceable since 1947, requires the purchase of policies with local insurance entities when the risk is within the Argentine jurisdiction.

Finally, executive orders and resolutions issued by the competent authorities complement these Laws.

Law No 12,988 – Insurance market reserve

Section 2, Law No. 12,988

Pursuant to s 2, Law No 12,988, “Persons, assets or any other insurable interest² within the Argentine jurisdiction shall not be insured abroad.”

The quoted section means that risks within the Argentine jurisdiction must be insured locally.

In order to obtain local insurance, the agreement must be entered into with the following entities: companies incorporated in Argentina,³ branches of foreign companies, co-operative entities and public institutions.⁴ After being approved by this authority, these entities can be insurers.

Violation of Section 2, Law No 12,988

The insured violating the prohibition established in s 2, Law No 12,988 is punished by fine. In addition, the insurance contract will be rendered null and void.⁵

Purpose of Law No 12,988

The purpose of Law No 12,988 was to set up an insurance market reserve through which Argentine insurance entities could achieve development and obtain a good capitalization and the insured could have access to local insurance covering their needs.⁶

In addition, Law No 12,988 protects the rights

of the local insured who, upon breach of the insurer, may bring an action against it before local courts. If there were no obligations like s 2, Law No 12,988, in order to enforce a court decision, the insured would be in a disadvantageous position by suing the insurer abroad.

Insurance Law and Maritime Law

Section 157 of the IL and s 408 of the ML indicate that the IL will apply to marine insurance except for those aspects amended by ss 408 to 453 of the ML.

According to s 158 of the IL, certain provisions cannot be amended by the parties and other provisions can only be amended in favor of the insured party. Finally, there are provisions that may be freely amended by the parties. These criteria are also applicable to marine insurance since the ML covers specific issues and the remaining ones are under the scope of the IL. However, it could be sustained that in marine insurance, the parties have wider possibilities to agree on the policy terms.⁷

International private provisions in the ML

Applicable law

Pursuant to s 609 of the ML, the insurance policy is governed by the law applicable in the territory of the insurer's domicile. If insurance is hired from a branch, then the policy will be governed by the law of the place where the branch is settled.

This Section applies when no choice of law is made in the policy. Although the parties in Argentina may negotiate certain terms and conditions of the marine insurance policy, pursuant to Law No 12,988 the risks located in Argentina must be insured by an entity authorised by the SI and the contractual conditions of the insurance policy must be approved in advance by this authority.⁸

Therefore, if an insurance entity submits contractual conditions with the SI for its approval, including a clause determining the application of a foreign law, the SI will challenge it. If an insurance entity changes the conditions approved by the SI and this amendment is not submitted with this authority, then the agreement could be declared null and void.

This means that the Argentine law will govern the marine insurance policies.⁹ In other words, under Law No 12,988, the parties are not able to choose the applicable law. If there were no obligations to insure local risks with local insurance entities, the Argentine insured could choose a foreign insurance entity, not under the control of the SI, and then determine the application of foreign law.

However, these statements are subject to the exceptions applicable to Law No 12,988 analyzed below.

Jurisdiction

Pursuant to s 620 of the ML, Argentine courts have jurisdiction over cases where the insurer is domiciled in Argentina. However, if the insurer is the plaintiff, it is allowed to bring an action before the courts with venue in the territory of the insured party's domicile.

The inclusion of an arbitration clause in the policy is not valid under the ML. Nevertheless, according to s 621 of the ML, only after occurrence of a loss, the parties may agree to submit their controversies to arbitration or to foreign courts. This notion is also included in s 1 of the Argentine Code of Civil and Commercial Procedure.

Marine Insurance

Marine cargo insurance

Application of Law No 12,988

Section 4, Law No 12,988 provides that the following policies must be purchased from Argentine insurance companies:

1. Insurance covering goods entering into Argentina, through any means, when the transportation risk is assumed by the person receiving the goods.
2. Insurance covering goods leaving Argentina, through any means, when the transportation risk is assumed by the person sending the goods.



In 1994, the Ministry of Economy and Public Works issued Resolution No 589 and amended s 4, Law No 12,988 based on Executive Order No 2284/1991 ratified by Law No 24,307, which abolished all rules restricting the offer of goods and services. Under such Executive Order, the Argentine economy was de-regulated and conducted under the principles of free market.

Although the whereas of the Resolution mention that the market reserve over insurance covering goods and services entering and leaving Argentina is abolished, the ruling part of the Resolution indicates that s 4 is no longer in force because it forbids executing insurance agreements covering freights from foreign insurers.

The wording of this Resolution is open to criticism. Instead of simply abolishing s 4, it makes it possible to interpret that only insurance over freights may be purchased from foreign insurers.

We conclude that Law No 12,988 is still in force as to insurance covering the imports of goods into Argentina and the exports of goods from Argentina when the risks are on the head of the Argentine importer or exporter.

Therefore, when the international merchandising sale agreement is subject to the following INCOTERMS conditions:

1. EXW, FCA, FAS, FOB, CFR, CIF, CPT and CIP – the Argentine **importer** must purchase local insurance. In these cases, the risk is transferred from the seller/exporter to the buyer/importer when goods are delivered to the latter in the warehouse of the former (EXW) or to the carrier in charge of the transportation (in remaining INCOTERMS). In EXW, FCA and FAS INCOTERMS, the policy that the Argentine importer must purchase locally must cover risks that may take place abroad. In the rest of INCOTERMS conditions, the risks covered are those that occur during international transportation.
2. DAF, DES, DEQ, DDU and DDP – the Argentine **exporter** must hire local insurance. In these cases, the exporter is liable for the risks that may occur during (i) the local transportation of goods from its warehouse to the international port; (ii) ocean transportation; and (iii) in certain cases, during the transportation of goods in a foreign territory (DAF, DDU and DDP).

Insurance policies

In the Argentine insurance market, the most frequently used policies for covering risks over the goods during ocean transportation are those developed by the Joint Committee of the Institute of London Underwriters and the Lloyds's Underwriters Association, known as the 1982 Institute Cargo Clauses (the "1982 Clauses").¹⁰ The old Ship and Goods Policy is still used but in a reduced proportion for export transactions. The 1982 Clauses and the Ship and Goods Policy were translated into Spanish and adapted into Argentine law.

The hull and machinery insurance

The vessels under Argentine fly, which means that they are registered under the Argentine Coast Guard (*Prefectura Naval Argentina*), constitute a local risk. Therefore, in these cases, pursuant to Law No 12,988, the hull and machinery risks must be covered by a policy purchased from a local insurance entity.

Although the Ship and Goods Policy is still used in the Argentine market, local insurance policies covering hull and machinery risks were developed through Resolution No 18,079 issued in 1985 by the SI. This Resolution sets forth the contractual conditions with the following scopes:

1. All risks;
2. Listed risks;
3. Free of Particular Average;
4. Absolutely Free of Particular Average; and
5. Total Loss



Photo: Jeff Nagy

As a general condition, Resolution No 18,079 included the application of the Argentine law (IL and ML) to all the aspects of the insurance policy not ruled by the particular and general conditions.

The Protection and Indemnity Insurance

General aspects

Protection and indemnity insurance, commonly known as P&I, is a type of marine insurance whereby coverage is granted by a club of ship-owners. Under the concept of mutuality, the club assumes the risks related to the liabilities arising from owning and operating ships and the liabilities against third parties.¹¹

Is Law No 12,988 applicable to P&I insurance? Resolution No 18,077 issued in 1984 by the SI set forth that insurance entities willing to cover risks under the P&I insurance had to request previous authorisation and apply to the policies the contractual conditions included in this Resolution.

In addition, the insurance entities were obliged to inform the percentage of risk retained and the percentage assigned to the Federal Institute of Reinsurance (*Instituto Nacional de Reaseguros*), which monopolized the reinsurance activity in Argentina.

By virtue of the economy de-regulation, the dissolution of Federal Institute of Reinsurance was decided in 1992 through Executive Order No 171 and the reinsurance market was opened to local and foreign entities. After such dissolution, Resolution No 18,077 was abolished in 1993 by Resolution No 22,393.

In a context of new market conditions, the SI considered that ship-owners do not violate Section 2, Law No 12,988 by membership to a P&I club, since the P&I's coverage is not granted by the local or the foreign insurance market.¹²

In this sense, the P&I club could be considered as a non-profit making organisation, inspired by the solidarity concept, with the purpose of granting reciprocal help against risks, through periodic contributions, ruled by s 2, Law No 20,321 of Mutual Associations.

If P&I clubs are not insurance entities, they do not fall within the scope of Law No 20,091. Thus, it is possible to state that they do not offer insurance policies and the coverage granted is a specific notion of maritime law that is exempt from the obligation set forth in Law No 12,988.

Reinsurance Agreements

Applicable law and competent jurisdiction

The purpose of a reinsurance agreement is to cover the insurer's liability upon occurrence of the insured loss in favor of a third party. It is of an international nature given that the parties

usually have their domicile in several jurisdictions and the risks insured may be located outside such jurisdictions. In view of such characteristics, the IL does not impose any conditions on the insurer and its reinsurer in order to determine the applicable law to the reinsurance agreement.

However, Resolution No 33,320 issued in 2008 by the SI requires that automatic and facultative reinsurance agreements executed by local insurers must establish the Argentine law as the applicable law and the Argentine's courts as the courts of competent jurisdiction. The grounds for such requirement consist in the fact that the risk assumed by the insurer is located in Argentina.

The reinsurance agreements that do not comply with Resolution No 33,320 will be rendered unenforceable by the SI. This means that the assignment of the risk to the reinsurer will not be considered and, therefore, the insurer will be obliged to include the economic reserves in its accounting records to bear all the risks.

Even though Resolution No 33,320 does not prohibit the hiring of reinsurance from foreign companies, it imposes a significant limitation on the free will of the contracting parties.

The fronting practice

As mentioned above, only Resolution No 589 and P&I insurance imply an exception to Law No 12,988. For this reason and due to the fact that the local insurance market in certain cases is not enough for covering the "big risks", the fronting practice turns to be an alternative for fulfilling Law No 12,988 and meeting the needs of the insured party. In this practice:

1. The insurer assigns 100 per cent of the risk assumed to a foreign reinsurer.
2. The insurer assigns 100 per cent of the premium against a fee commission.
3. The reinsurer has control over the losses under the "claims control clause."
4. After a claim, the insurer will compensate the insured once it has received the respective funds from the reinsurer.

There is no rule prohibiting fronting; however, the SI only admits it when the insured is aware of how this practice works and there is a real need by the insured (in general terms, a corporation) to be covered by a foreign entity. On the other hand, the SI will not accept the fronting practice when it is decided unilaterally by the local insurance entity as a way of avoiding its legal obligations and distorting the nature of an insurance agreement.

Another Exception to Law No 12,988

In 1994 Argentina became a Member of the World

Trade Organization (“WTO”) by executing the WTO Agreement and all its Annexes and approving them through Law No 24,424.

The General Agreement on Trade in Services (“GATS”) is Annex 1B of the WTO Agreement. When adopting this Annex, the Members assumed certain specific commitments related to the services listed in attached schedules of the Annex. These schedules determine which services sectors and under what conditions the basic principles of the GATS – market access, national treatment and most-favored-nation treatment – apply within the Member’s jurisdiction. The commitments are in every case entered with respect to each of the four modes of supply which constitute the definition of trade in services in s 1 of the GATS: these are cross-border supply; consumption abroad;¹³ commercial presence; and presence of natural persons.

Regarding the consumption abroad of marine and air transportation insurance, in April 1994, Argentina established no limitation. On the

contrary, Argentina reserved its right to rule the life, accident and health insurance as well as non-life insurance services.

Pursuant to s 75 (22) of the Argentine Constitution, treaties are in a superior hierarchy than laws. Consequently, it could be sustained that WTO Agreement, its Annex 1B and Argentina’s commitments have abolished s 2, Law No 12,988 regarding marine insurances.

This interpretation is also based on s 24 of Executive Order No 1010/2004, which sets forth that P&I insurance and hull and machinery insurance can be hired in accordance with the GATS.

Conclusion

Although the general principle is that Law No 12,988 is in force and there is an obligation to purchase policies from Argentine insurance entities, there are exceptions applicable to maritime risks. In these cases, foreign law may be chosen by the parties.

Notes

¹ Superintendence of Insurance is the authority in charge of controlling and enforcing the pertinent insurance-related rules.

² According to s 60 of the IL, the insurable interest is the lawful and economic interest on the non-occurrence of a loss.

³ Pursuant to the Foreign Investment Law No 21,382 and Resolution No 24,805 issued by the SI, there is no restriction regarding the nationality of the shareholders of a company incorporated under the Argentine Companies Law.

⁴ Section 2, Law No 20,091.

⁵ Section 61, Law No 20,091.

⁶ Domingo López Saavedra, *Ley de Seguros Comentada y Anotada*, (La Ley ed.) (2007).

⁷ Jorge Radovich, *Régimen Legal del Seguro Marítimo*, p 22, (Centro de Estudios Estratégicos).

⁸ Sections 23 and 24, Law No 20,091.

⁹ Pursuant to s 415 of the ML, the legal and technical meaning of foreign words will be that of their language, unless it can be determined that the parties gave them a special meaning or they have another purpose according to their use in the place where the policy was issued.

The use of words in a foreign language may imply the indirect application of a foreign law. In case of controversies, although the governing law will be the Argentine law, words

or clauses in foreign language will be subject to the local court’s interpretation, which may demand the analysis of foreign law.

¹⁰ Since February 2006, the Joint Cargo Committee, composed of members of the International Underwriting Association and the Lloyds Market Association, has been in charge of reviewing and updating the 1982 Clauses. The final version was ready for implementation on January 1, 2009.

¹¹ One characteristic of P&I insurance is the “pay to be paid clause”, under which the club reimburses the amounts the member had to pay as compensation. In Argentina, this clause was analysed in 1996 by the Federal Civil and Commercial Court of Appeals of Buenos Aires City in an en banc judgment, in which it concluded that when the ocean carrier cannot afford a third party’s claim due to its insolvency, the effects of the court’s decision against the carrier may be extended to the P&I club. Therefore, under carrier’s insolvency the “pay and to be paid clause” is not enforceable.

¹² Mercedes Canovi, *Contracción directa de seguras en el exterior (seguros “off shore”). Su regulación en Argentina. Introducción al “fronting”*, (El Dial ed).

¹³ Consumption abroad means the freedom for the Member’s residents to purchase services in the territory of another Member.

Distressed Ship Financing in China – Options to Consider



The tumultuous financial conditions have taken their toll on many industries, shipping included. This article examines the financing challenge that shipowners face and options available to them in less than favourable economic conditions in the context of China.

Siew Lin Mok
Salans LLP, Shanghai, China

In just one year, the tides have turned. The global financial tsunami has swept across the major economies and wiped out global trade, which in turn crippled freight rates. Simultaneously, the orderbook for newbuilds for the just-past boom of the shipping cycle saw shipyards bursting at their seams. Based on the statistics for Capesizes alone, the orderbook for Capesize bulk carriers in January 2009 stood at 143 million dwt in comparison to the size of the current fleet at 142 million dwt during the same period. These orders were placed during the boom time when freight rates were high and banks were lending money at very favourable rates.

With imminent deliveries, the banks are not lending or do not have the money to lend; in typical ship financing arrangements which are governed by English law, loan-to-value ratios which have in the past been a matter of formality but never strictly enforced, are now being called out of the backburners and banks are calling on shipowners to find additional financing to make up the gap as valuation of vessels decrease in the current market. As the freight rates continue to decline and banks tighten their credit lines for the financing of new vessels, shipowners are forced to seek alternatives or even cancel orders.



China has much at stake being one of the largest shipbuilding nations with private and state-owned shipyards cumulatively holding 61.1 per cent of the world's new shipbuilding orders and 38.3 per cent of orders in hand for the first 11 months of 2009 according to statistics released in December 2009. In the first eleven months of 2009, new orders have decreased by 61 per cent year-on-year and Chinese shipyards are seeing an increasing number of cancellation of orders. The shipbuilding industry is of strategic importance to China and in light of the global financial crisis, the State Council in China has passed a stimulus plan for 2009 to 2011 to boost the shipbuilding industry. The stimulus plan is being implemented in the following ways:

1. Domestic banks are being encouraged to provide seller's credit to provide the necessary cash flow for shipyards with valid orders;
2. Domestic banks are encouraged to issue payment and refund guarantees to shipowners and shipping companies of good reputation;
3. Permitting the mortgage of ships-under-construction to raise finance;
4. Listing of shipping/ shipbuilding companies to raise capital;

5. Setting up of funds for investment in the shipping sector; and
6. Encouraging financial institutions to give buyer's credit to foreign large shipping companies and companies with bareboat shipping companies;

In the context of China, we set out below some options that shipowners could consider to obtain additional financing in China ("domestic financing") in light of the credit squeeze in the West.

1. Arranging for Buyer's Credit with Chinese Banks

China's Export-Import Bank ("EXIM Bank") is one of the policy banks led by the State Council to carry out its stimulus plan and has become one of the first lender for shipbuilders and foreign shipowners. Based on a news report from China Daily on July 2, 2009, a senior credit manager of EXIM Bank expressed that they have come up to lend to top 20 shipowners overseas, in an effort make them order ships in China. He added that the bank will also lend to shipbuilders at any phase of the building process, provided they qualify under the bank's evaluation. There is currently a long queue of shipowners who have submitted applications for buyer's credit with EXIM Bank in recent months. The successful cases have been few and they have mainly been for tankers.

Based on reports in Lloyds List in November, Bank of China came to the rescue of Schulte Group, a German shipowner. This marks the first time the Chinese state-owned bank has lent to a foreign owner that has ordered vessels at a Chinese yard. The bank has extended a US\$149m credit line to the German owner for nine chemical tankers due to be delivered in 2010 and 2011.

Other domestic banks are cautious; according to the abovementioned China Daily news report, an insider from ICBC (the world's largest bank by deposits) said that loans are made on consideration of risks, instead of governmental policies. Another unnamed insider has indicated that the barometer for risk control is that shipbuilders have orders on hand.

2. Approaching Chinese Credit Insurance Companies

An alternative to approaching domestic banks would be to approach Chinese credit insurance companies like China Export Credit Insurance Corporation ("Sinasure"). Credit insurance



Photo: Jacus

companies basically guarantee lending banks financing to shipowners based on the credibility of shipowners. Credit insurance opens up options of obtaining financing from non-traditional ship financing banks in China as these other commercial banks would be encouraged to grant credit as their risk is insured by the credit insurance firm.

According to reports in Lloyds' List in December, French shipfinance bank Société Générale broke new ground in December 2009 with a \$167m loan to a leading Danish tanker company, Torm, backed by Sinosure. The deal was to finance a fleet of medium-range tankers.

Société Générale, acting as co-mandated lead arranger on the deal along with the Bank of China, said that half of the loan is covered by the export credit agency for up to 95% of its value, while the other half remains an uncovered, commercial loan.

3. Sale and Lease-back of Vessels

Shipowners can consider entering into a sale and lease-back arrangement with a credit insurance company whereby the ownership of the vessel belongs to the credit insurance company, but the shipowner enters into a long term charter with the credit insurance company for 10 to 15 years and at the end of the charter, buys back the vessel for a nominal sum.

However, credit insurance companies will probably only buy the vessel at the current market value and there may be a shortfall in the newbuilding cost and current market value which shipowners may have to finance with equity. We note from other news reports that the Central Government will extend the policy of giving a 17% subsidy on ship prices for domestic ocean-going ship buyers until 2012. This subsidy may help the domestic buyers to bridge the gap between the newbuilding cost and the market value.

For options (1), (2) and (3) above, shipowners may have to explore signing long term charters or contracts of affreightment ("COAs") with Chinese state-owned chartering corporations like COSCO, China National Chartering Corporation ("Sinochart") or large state-owned steel mills, as this will add to the vessel's commercial value and viability which will be a factor that financial institutions will consider favorably when

deciding whether to grant credit.

4. Additional New Orders to Leverage on Credit Offered for New Buildings

From a policy perspective, the Central Government is trying to encourage new orders in light of the massive decrease in new orders; according to statistics released, China's shipbuilders received only 22.94 million dwt of new orders in the first eleven months of 2009 which marks a 61% decrease year-on-year.

Accordingly, in order to encourage new orders, we understand that it has been easier to obtain financing for new orders as compared to financing for existing orders. Therefore if adding new orders are in line with the shipowner's plans, there is a possibility that the current orders can leverage on the credit that may be offered by the Chinese bank for new vessels or discuss a package deal for all the vessels considered together.

5. Approaching Chinese Shipping-focused Private Equity Funds

To aid the shipbuilding industry, a 20-billion yuan shipping assets investment fund initiated by the State Council is being formed in Tianjin, China, which would aid in equity investment, ship leasing, supporting mergers and acquisitions among shipyards and purchasing vessels that are cancelled by buyers. This private equity fund has to-date raised about 2.85 billion yuan from several state-owned enterprises and investment funds, including Tianjin City Infrastructure Investment Co, Tianjin Jinneng Investment Co, Tianjin Innovative Finance Investment Co, and China Shipping Assets Investment Fund Management Co. According to recent news reports, this investment fund will be managed by China Shipping Assets Investment Fund Management Co, and the trustee bank will be Shanghai Pudong Development Bank. Therefore, there may be opportunities to explore co-investment, equity investment by these investment funds.

In conclusion, shipowners would need to be aware that although the Central Government has given its green light for providing the shipbuilding sector with an additional boost, the demand for domestic financing is immense and therefore the commercial viability of the vessel will be a very important consideration to make the proposal attractive for the banks to lend.



An Invitation to Join the Inter-Pacific Bar Association

The Inter-Pacific Bar Association (IPBA) is an international association of business and commercial lawyers who reside or have an interest in the Asian and Pacific region. The IPBA has its roots in the region, having been established in April 1991 at an organizing conference in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then, it has grown to over 1,400 members from 65 jurisdictions, and it is now the pre-eminent organization in the region for business and commercial lawyers.

The growth of the IPBA has been spurred by the tremendous growth of the Asian economies. As companies throughout the region become part of the global economy, they require additional assistance from lawyers in their home country and from lawyers throughout the region. One goal of the IPBA is to help lawyers stay abreast of developments that affect their clients. Another, is to provide an opportunity for business and commercial lawyers throughout the region to network with other lawyers of similar interests and fields of practice.

Supported by major bar associations, law societies and other organizations throughout Asia and the Pacific, the IPBA is playing a significant role in fostering ties among members of the legal profession with an interest in the region.

IPBA Activities

The breadth of the IPBA's activities is demonstrated by the number of specialist committees. All of these committees are active and have not only the chairs named, but a significant number of vice-chairs to assist in the planning and implementation of the various committee activities. The highlight of the year for the IPBA is its annual multi-topic 4-day conference, usually held in the first week of May each year. Previous annual conferences have been held in Tokyo (twice), Sydney (twice), Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali and Beijing, attracting as many as 700 lawyers plus accompanying guests.

The IPBA has organized regional conferences and seminars on subjects such as Practical Aspects of Intellectual Property Protection in Asia (in five cities in Europe and North America respectively) and Asian Infrastructure Development and Finance (in Singapore). The IPBA has also cooperated with other legal organizations in presenting conferences—for example on Trading in Securities on the Internet, held jointly with the Capital Market Forum.

The IPBA also publishes a membership directory and a quarterly *IPBA Journal*.

Membership

Membership in the Association is open to all qualified lawyers who are in good standing and who live in, or who are interested in, the Asia-Pacific region.

- | | |
|--|-------------------|
| • Standard Membership | US\$195 / ¥23,000 |
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Annual dues cover the period of one calendar year starting from January 1 and ending on December 31. Those who join the Association before August 31 will be registered as a member for the current year. Those who join the Association after September 1 will be registered as a member for the rest of the current year and for the following year.

Qualified lawyers who attend the IPBA Annual Meeting and Conference and pay the non-member conference fee will be automatically registered as a member for the current year ending on December 31.

Membership renewals will be accepted until July 31.

Selection of membership category is entirely up to each individual. If the membership category is not specified in the registration form, standard annual dues will be charged by the Secretariat.

Further, in order to encourage young lawyers to join the IPBA, a Young Lawyers Membership category (age under 30 years old) with special membership dues has been established.

There will be no refund of dues for cancellation of all membership categories during the effective term, nor will other persons be allowed to take over the membership for the remaining period.

Corporate Associate

Any corporation may become a Corporate Associate of the IPBA by submitting an application form accompanied by payment of the annual subscription of (¥50,000/US\$500) for the current year.

The name of the Corporate Associate shall be listed in the membership directory.

A Corporate Associate may designate one employee ("Associate Member"), who may take part in any Annual Conference, committee or other programmes with the same rights and privileges as a Member, except that the Associate Member has no voting rights at Annual or Special Meetings, and may not assume the position of Council Member or Chairperson of a Committee.

A Corporate Associate may have any number of its employees attend any activities of the Association at the member rates.

- | | |
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Payment of dues can be made either in US dollars or Japanese yen. However, the following restrictions shall apply to payments in each currency. Your cooperation is appreciated in meeting the following conditions.

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See overleaf for membership
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IPBA SECRETARIAT

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