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Technology, Business and Law – Global Perspectives

INTER-PACIFIC BAR ASSOCIATION

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The President's Message

Denis McNamara
President



Dear Colleagues,

My term as President of the IPBA is, as I write this message, coming to an end in a few months at the Annual General Meeting and Conference in Manila.

The IPBA was formed in 1991 at a meeting in Tokyo. A 'generation' is often referred to as 'a period between 25 and 30 years'. Consequently, my Presidential Year and the Manila Conference happen to coincide with the transition period between the end of the first generation and the commencement of the second generation of the IPBA. This provides an opportunity for a few reflections.

In 1997, founding member Mark Shklov wrote a most informative article on the origins of the IPBA. This was published in the IPBA Journal and can be found on the IPBA website in the section 'About IPBA', under the heading 'The Spirit of Katsuura'. I recommend that all IPBA members (and potential members) read that article and consider the principles that apply to the Spirit of Katsuura, and how much they hold true today.

As with the passing of generations, there comes the time for the next generation to pick up the challenge and move forward.

A number of steps have been taken in the last 12 months to do this, including:

- the formation of the Ad Hoc Next Generation Committee of the IPBA;
- the entering into of a formal arrangement with the College of Law for a co-branded LLM degree, with students becoming IPBA members;
- the signing of an extension of the MOU with the AIJA (International Young Lawyers Association); and

- the increased funding to the Scholarship Program thanks to the generous donation by the family of IPBA Past President, the late Mr MS Lin.

Each of these steps has the capacity to introduce younger lawyers to the IPBA. It is then up to us to ensure that the needs of these folk are met.

During the course of my Presidency, I attended a number of 'round table' meetings of presidents of different law societies and legal organisations. A common theme has been the future of the legal profession and of lawyers in general. As far as threats go, many see as threats to the profession the introduction of artificial intelligence, the removal of 'protected' areas of legal practice and the predations of other professions into areas that were traditionally the exclusive area of lawyers.

For my own part, I accept the reality of these but do not see them as being fatal to the practice of law. Indeed, since 1991 in many jurisdictions the practice of law has changed, new areas of legal activity have emerged and tools available to lawyers have become far more sophisticated and useful. It is through organisations such as the IPBA that lawyers can learn from others and keep up-to-date. Rather than speak of 'threats', we should speak of 'challenges'.

Reflecting back to 1991 when the IPBA was formed:

- (1) mobile phones did not exist to any great extent;
- (2) working internationally meant often staying in hotels and hard-wiring laptops into telephone lines, as WiFi did not exist;

- (3) legal search engines were very much in their infancy; and
- (4) many jurisdictions were still struggling under traditional professional rules (such as no advertising, the outlawing of touting, the requirement of firm names being reflective of partners in the firm, and so on.)

Over time, for most jurisdictions, these rules have certainly changed.

A further aspect of legal practice in 1991 was that it was still very much a male-dominated profession. It is of interest to review the involvement of women lawyers in the IPBA during the the 26 years of its existence. There have been three women Presidents of the IPBA:

- (a) Susan Glazebrook—New Zealand (1998–1999);
- (b) Vivien Chan—Hong Kong (2002–2003); and
- (c) Lee Suet Fern—Singapore (2010–2011).

I certainly look forward to the time when more women will take on a Presidency. As far as Secretaries-General are concerned, there have been two women Secretaries-General:

- (i) the current Secretary-General, Caroline Berube; and
- (ii) her predecessor Miyuki Ishiguro.

In my own jurisdiction (New Zealand), the gender balance of lawyers holding practising certificates is virtually 50/50, with women lawyers having a slight predominance (6,553 women to 6,515 men). The gender balance of members of the IPBA is currently approximately 77% male and 23% female. However, in terms of Committee leadership (chairs, co-chairs, and vice-chairs) approximately 30% of the leadership are women, with 70% men and of the 15 Officers of the IPBA, five are women (33%).

I would also like to comment on the venues chosen for the annual IPBA meeting. The first meeting was in Tokyo in 1991. The IPBA returned to Japan in 2001 and 2011, and the members there have officially expressed interest to hold the 2021 Annual Meeting and Conference in Japan. In fact it would be no exaggeration to opine that

without the support of the Japanese lawyers, the IPBA would probably not exist. It gave me great pleasure to sign a Memorandum of Understanding with the Japan Federation of Bar Associations during 2017.

The IPBA returns to the Philippines for the third time this year and to Singapore for the third time next year. New Zealand, Australia, Malaysia, India, Canada, United States of America have each hosted twice, China, Taiwan and Indonesia each once, with China nominated to be the host jurisdiction for the second time in 2020.

The next generation of the IPBA will surely see more jurisdictions added to the list of hosts.

Hosting an IPBA Conference is not an easy task for the host jurisdiction lawyers, and in my own case I certainly take this opportunity to express my appreciation for the support I received in the lead up to, during, and after Auckland 2017 from my committee (in particular Regional Coordinator Neil Russ, New Zealand JCM Ewe Leong Lim, and fellow 1991 charter member Richard Fyers), my firm (Lowndes), the New Zealand Law Society, and of course Rhonda and Yukiko at the IPBA secretariat in Tokyo.

There have been occasions in the past where the IPBA Leadership team found itself in the awkward position of needing to 'lean on' members from jurisdictions to host a conference. Those days have passed and now there is quite healthy competition for the hosting opportunities for both the annual conference and the Mid-Year Council Meeting.

When I joined the IPBA at the first meeting in 1991, I never anticipated that one day I would become its President. It has been an honour and a privilege to serve the IPBA members and the Association. My presidential term has been very busy, involved a lot of travel, enabled me to meet very interesting people and, all in all, has been a very satisfying experience.

I would like to think that during my period as President, the IPBA has moved forward on a number of fronts and that it is well equipped to face any future challenges with confidence and success.

Denis McNamara
President



The Secretary-General's Message

Caroline Berube
Secretary-General



Dear IPBA Members,

The 2018 conference is special to me as it is my 10th IPBA conference! Time flies and I will always remember my first IPBA conference held in Los Angeles. First, I had met a Canadian lawyer based in Luxembourg a few years before who sent me the flyer he had received from the IPBA about the upcoming conference. He thought it would be of interest to me given that I was based in Asia. Second, I had been on a crazy business trip for 10 days all over the US before the Los Angeles conference—I was exhausted, stressed and I had popped over to Quebec city to deal with contractors and final purchases for the lakehouse we were building. It was Saturday, I was squeezing everything in: the purchase, I was missing my kids, I wanted to fly back to Asia and was thinking about cancelling my attendance to this Los Angeles IPBA conference. I didn't know anyone attending, I had no time to read about the organisation and the programme, etc. My mom talked me through, saying that I had a commitment to attend as I had shown interest and paid for the conference fees and hotel. I finally flew from Quebec to Los Angeles in a terrible mood—with no interest to attend the sessions, to network and to show up for 24 hours and fly back to Asia! Well, as soon as I showed up, I got dragged into the Women's Reception, the opening ceremony, cocktail reception and the Japan Night. I met amazing people who, until today, still remain close friends—10 years later. I have been in charge of the IPBA Journal and I am now proudly the Secretary-General of the IPBA. It is a great way to celebrate my 10th year anniversary at the IPBA. I am in a position to play an active role within the organisation and make sure that the IPBA continues to adapt to the ever-changing legal industry while having fun and meeting great colleagues. A real joy!

My first year as Secretary-General has been exciting and fun—working with Denis McNamara, our IPBA President, and with President-Elect Perry Pe regarding the Manila conference. I enjoyed working with Denis as he is a

very straight-forward person and has been absolutely dedicated to the IPBA the entire year. I do hope he will enjoy a good rest after Manila and manage to spend some time with his family!

In terms of actions: I feel the IPBA has never been as active as it is now. We had a dozen regional conferences held in different parts of the world since Auckland, promoting the IPBA and the Manila conference. Our President has attended a high number of 'opening of the legal year' celebrations in different countries in Asia. Our program for 2018/2019 is shaping up to be equally exciting, with conferences and training days organised by our JCMs and other members in Yangon, Bangkok, Vienna, Brussels, Los Angeles, Santiago, and more. Please be on the lookout and check our website which is regularly updated with all the IPBA events listed for the new year. As all events are organised in advance, try to combine them with your business trips. It is worth it in terms of gaining legal knowledge at these events and also for networking.

We also have added a new committee to attract the Millennials: it is called the Ad Hoc Next Generation Committee. By 2025, apparently, one third of the workforce will be made of Millennials! The IPBA is interested in building the next generation of members and they are important to us to keep the IPBA going. This committee has fun sessions during the Manila Conference and one of them is very special: we have to sign up to join (there is a maximum limit of attendees who can join) and it is very interactive. At the moment of writing this, it is apparently nearly full.

We will close this year with our IPBA financial year books being fully audited and our update of the annual conference manual being nearly completed. This is good news for all our members!

We will bid farewell to some amazing officers at IPBA Manila as their terms are ending: Masafumi Kodama (Committee Coordinator), Anne Durez (Membership Committee Chair) and Leonard Yeoh (Publications Committee Chair). They did a fabulous job with their committees in being very proactive and taking on a lot of initiatives. I have no doubt the new line-up of officers (Nini Halim, Tatsu Nakayama and John Wilson, respectively) will continue their amazing work

this year and will make a great contribution from now until we meet again at the Singapore IPBA Conference in April 2019.

I hope you all enjoyed the Manila Conference and I look forward to seeing some of you in Chiang Mai/Bangkok in the fall for our Mid-Year Council Meeting Regional Conference, and all of you in Singapore in 2019, if not sooner.

Caroline Berube
Secretary-General



| IPBA Upcoming Events | | |
|---|----------------------|---------------------------|
| Event | Location | Date |
| IPBA Annual Meeting and Conferences | | |
| 29th Annual Meeting and Conference: Technology, Business & Law - Global Perspectives | Singapore | April 24-27, 2019 |
| 30th Annual Meeting and Conference | Shanghai, China | Spring 2020 |
| IPBA Mid-Year Council Meeting & Regional Conferences | | |
| 2018 Mid-Year Council Meeting (IPBA Council Members Only) | Chiang Mai, Thailand | November 2-4, 2018 |
| Regional Conference: 4th IPBA Arbitration Day | Bangkok, Thailand | November 5, 2018 |
| IPBA Events | | |
| The World at your Doorstep: IPBA Australian-New Zealand Regional Forum | Sydney, Australia | July 19, 2018 |
| IPBA 2nd Indochina Regional Forum | Yangon, Myanmar | August 25, 2018 |
| Doing Business with Asia: Developments in Trade, IP, Investment and Dispute Settlement | Los Angeles, USA | September 20, 2018 |
| LatAm Legal Views on Investment, Trade, Compliance & International Dispute Resolution | Santiago, Chile | September 28, 2018 |
| IPBA 4th East Asia Regional Forum | Seoul, Korea | November 7, 2018 |
| IPBA European Regional Conference: International Commercial Courts in Various European Jurisdictions & in Singapore | Brussels, Belgium | November 22, 2018 |
| IPBA Mid-East Regional Forum | Dubai, UAE | January 24, 2019 |
| IFLR/IPBA Asia M&A Forum | Hong Kong | February 28-March 1, 2019 |

IPBA Upcoming Events

| Event | Location | Date |
|---|------------------------|--------------------|
| IPBA-supported Events | | |
| Wolters Kluwer's China: 3rd Annual International Arbitration, Compliance and Competition Law Summit - Shanghai | Shanghai, China | April 18, 2018 |
| Wolters Kluwer's Qatar & ME: 4th Annual International Arbitration Summit | Qatar | May 9, 2018 |
| VIII St. Petersburg International Legal Forum | St. Petersburg, Russia | May 15-18, 2018 |
| TP Minds Australia 2018 | Sydney, Australia | May 29-30, 2018 |
| ALB's Japan Law Awards | Tokyo, Japan | June 13, 2018 |
| Wolters Kluwer's Hong Kong: 7th Annual Global Competition Law Forum | Hong Kong | July 5, 2018 |
| Wolters Kluwer's Singapore: Annual International Arbitration, Compliance and Competition Law Summit | Singapore | August 2, 2018 |
| ALB's Japan IP Forum | Tokyo, Japan | August 22, 2018 |
| Wolters Kluwer's Japan: 5th Annual International Arbitration, Compliance and Competition Law Summit | Tokyo, Japan | September 6, 2018 |
| Wolters Kluwer's: Turkey & ME: 5th Annual International Arbitration Summit | TBA | September 27, 2018 |
| Wolters Kluwer's South Korea - 7th Annual International Arbitration, Compliance and Competition Law Summit | Seoul, Korea | October 24, 2018 |
| ALB's Japan Corporate Compliance Forum | Tokyo, Japan | October 25, 2018 |
| Wolters Kluwer's China: 4th Annual International Arbitration, Compliance and Competition Law Summit - Beijing | Beijing, China | November 15, 2018 |
| Wolters Kluwer's Indonesia and SE Asia: 6th Annual International Arbitration, Compliance and Competition Law Summit - Beijing | TBA | December 6, 2018 |

More details can be found on our web site:
<http://www.ipba.org>, or contact the IPBA Secretariat at ipba@ipba.org

Young Lawyers' Training and Growth in China

As an important issue that affects the future development of the legal profession in China, the training of young lawyers has drawn wide attention in recent years. However, due to differences in geography, economic conditions and cultural background, young lawyers' training has led to different results in different areas of China. In general, some of the training progress is still random and disorderly. Hence, the question of how to realise scientific, systematic and comprehensive young lawyers' training has become a significant topic.



The Importance of Young Lawyers' Training

Young lawyers are the new and reserve force of lawyers and are also the basis for the long-term development of law firms. Judging from the current group of lawyers, it is not enough for there to be a rapid increase in numbers, it is also necessary to have a simultaneous improvement in quality so as to meet the growing social demand for legal services. Through our analysis, we have strengthened our understanding of the importance, necessity and urgency for training young lawyers. We have a sense of responsibility and a sense of mission to conduct this work of young lawyers' training.

Lawyers are not only the safeguarding power of a harmonious society, but also the building force of such society. In the process of building a harmonious society and thus shouldering an important historical mission and social responsibility, lawyers play an indispensable role in advancing the legal construction of society, promoting social fairness and justice, and maintaining social harmony and stability. Therefore, we should safeguard the healthy development of the legal profession in all aspects and the nurture and support of young lawyers is key to the development of the legal profession.

The Objectives of Young Lawyers' Training

Outstanding lawyers, when required, should show courage in their work and at all times safeguard the rights and interests of clients. Successful lawyers are not only eloquent, but should also obtain integrated knowledge structure, have a great physical presence, and most important of all, have a sense of justice, kindness, honesty and trustworthiness. Law is a kind and fair technique. Knowing the law is not just about understanding its theory, it is about grasping its spirit and substance. In general, a good lawyer should have impeccable professional ethics, profound professional knowledge, skilled eloquence, intelligent legal thinking, profound writing skills, an elegant manner and superior communication skills. This is not only the concept that we should uphold, but also the ultimate goal of the legal profession in training young lawyers.

Measures and Suggestions for Cultivating Young Lawyers

Change from the Training Mode of Law Schools

Nowadays, legal internships are a prerequisite for becoming a lawyer. There are roughly four modes in the legal profession. The first is that the legal profession has

a uniform standard of practice. Attending lawyers are considered as part of a legal internship. The internship includes judges, prosecutors, lawyers and government administrations, which is more than an internship in a law firm, such as in Germany or Japan for example. The second is the choice of judicial officials to implement a unitary system: prosecutors are lawyers; judges are mainly selected from lawyers; lawyer internship is part of training, such as in the United Kingdom and countries and regions which inherited the British judicial system. The third is that there are different methods of selection of legal professionals and the internships of different lawyers and other legal professions are different, such as in France. The fourth is the American model—the acquisition of a legal qualification does not require a certain period of internship or professional training, being simply education in a law school.

In order to further strengthen the theoretical and practical basis for young lawyers and to integrate them into legal practice faster and more efficiently, one option is to reform the traditional four-year undergraduate education system according to the basic needs of students and change it to a '2+2' mode. That is, at the end of the second year of university, different training modes are chosen according to the different needs of students.

Focus on Strengthening the Training of Young Lawyers, Especially Trainee Lawyers

Young lawyers are the future of the legal profession. It is a lawyer's responsibility to train them to be qualified practising lawyers to meet the growing needs of the community for legal services. Young lawyers have become an important motivation for a firm's rapid and steady development and are an important human resource for a firm. Every law firm that wants to develop must actively explore ways to cultivate young lawyers in a pragmatic and innovative manner, do a better job of training young lawyers and promote the development and prosperity of lawyers. In order to continuously promote the development of a law firm and to better enhance its own core competitiveness, every law firm seeking development must not take the training of young lawyers lightly. The diversity of thinking of these young people can promote the development of the entire law firm.

To strengthen a law firm's training of young lawyers, the following four aspects are suggested:

Law firms should
conduct regular
business training and
guidance for young
lawyers.

- (1) Ideally, law firms should expedite the training of young lawyers and cultivate reserve talents in pursuit of greater development in the future.
- (2) From the point of view of the system, the law firm should formulate a management system of specialised young lawyers and trainee lawyers and strictly observe the admission, reception and training of lawyers in accordance with the system.
- (3) Physically, the law firm should formulate material security policies for young lawyers, especially trainee lawyers. Apart from the policy of the lawyers' association, law firms should provide material support for their own 'fresh blood'. Only by first solving their basic living requirements can we gain better development.
- (4) From the perspective of business, law firms should conduct regular business training and guidance for young lawyers. Whether these are business exercises organised by the law firm or business training funded by law firms, these can play a significant role in the development of young lawyers. Such a practice can allow young lawyers to get involved in the law firm as soon as possible to better conduct legal business.

Other Factors

Young lawyers should establish a correct global view, outlook on life and values, establish lofty ideals and ambitions and truly integrate their own personal ideals with the social ideal of building a socialist legal system, so as to truly realise their own values in life and the unity of social values.

In addition, young lawyers should be modest and studious and actively learn from senior lawyers, who have very extensive practical experience which has no monetary value. Young lawyers would obtain an invaluable benefit for their growth from respecting their law firm and senior lawyers, learning from them and listening more to them.

Young lawyers, from the commencement of practice, should develop good habits and work towards the goal of providing customers with the best quality service. They should treat each case and party with a pragmatic working attitude, perform their duties with due diligence, obtain the trust of the parties concerned and exercise due diligence in the handling every case. They would be well advised to cherish every case, cherish every consultation opportunity, cherish every court hearing, do their best in every aspect of legal practice, and provide clients with efficient and quality services to enhance their awareness and practical ability to work.

Finally, young lawyers should be proficient at communication and using networks to promote themselves and expand their business. Although they do not have as many personal connections as older lawyers, they have many advantages, such as an ability to use the Internet. The constant development of the Internet brings a new development opportunity for lawyers and young people are adept at quickly accepting new things. They would be advised to seize these opportunities to enhance themselves, such as to use network resources and social networking sites to promote their profession or to use the Internet to answer questions online, etc.

Foster Excellent International Legal Talents with Both Ability and Political Integrity to Integrate into the International Community

Cultivating outstanding international legal professionals with both ability and political integrity is an important measure to implement the spirit of the 19th National Party Congress and Xi Jinping's socialism with Chinese characteristics in the new era. Jin Mao Partners boasts 'three overseas' and 'five high ends', that is, 'the world's top 500 foreign legal professionals; the world's top 100 foreign law firms with more talent; foreign students to obtain a master's degree or above'; 'There are many talents with a high level of scientific research and innovation. There are many talents with high-quality practical ability such as judges and arbitrators. They have a high ability to participate in the participation and administration of state affairs. There are a great number of qualified personnel with qualified Chinese and foreign lawyers.' The Firm has consistently focused on cultivating young lawyers' international perspective, advocating and guiding young lawyers to join international bar organizations such as the Inter-Pacific Bar Association and actively participating in legal research and services for overseas investment and financing of Chinese enterprises.

Chinese president Xi Jinping pointed out with great foresight that the world we live in is full of hope and full of challenges. In the process of nurturing young lawyers we cannot give up our dreams because of the complexity of reality and we cannot give up our pursuit because of their remoteness. Young lawyers should actively join hands with Chinese and foreign lawyers in building a community of legal services and take the initiative to integrate themselves into the 'Belt and Road Initiative' and the legal practice of global governance which has

actively promoted the freedom and facilitation of trade and investment with the wisdom and talent of the legal persons in the new era and promoted the development of economic globalisation in the direction of becoming more open, inclusive, balanced and a 'win-win' situation, building a community of a shared future with our efforts.



Jack Li (Li Zhiqiang)

Founding Partner, Jin Mao Partners

Jack Li is the Founding Partner of Jin Mao Partners. He was one of the Top Ten youth in Shanghai in 2001. His practice involves capital markets, M&A, banking and ADR. He is the JCM for China of the IPBA, a member of the Administration Reviewing Committee of the Shanghai Municipal Government and a legal advisor of Shanghai MOFCOM, and an arbitrator of The Kuala Lumpur Regional Centre for Arbitration, the Shanghai International Arbitration Centre, the Shanghai Arbitration Commission and Nanjing Arbitration Committee. He was a former Director of the Young Lawyers' Growth Committee of the Shanghai Bar Association. During his tenure with regard to cultivating young lawyers, Jack organised a book entitled 'Thinking about Success' which pays great attention to the training objectives and methods for young lawyers. Jack has written or compiled more than 30 books. He has been identified by an international legal grading agency as one of Asia's leading commercial lawyers for many years. He was appointed as 'Shanghai Conference Ambassador' in 2017.



Keanu Ou (Ou Long)

Lawyer, Jin Mao Partners

Keanu Ou, Master of Law University of East Anglia and Bachelor Degree of Law Shanghai University of Political Science and Law. Keanu has rich experience in Corporate Law, Investment, Banking and Finance, Capital Markets, Intellectual Property, Private Equity and Cross-Border Transactions. Keanu has published an article in the magazine of the Ministry of Justice of China regarding the operating mechanism of government counsel and, in addition, he has published a series of articles in different periodicals regarding outbound investment and risk protection for investment.

Dealing with Insurance Fraud: The Latest Decision of the Malaysian Court of Appeal

Insurance fraud, especially cases of arson to claim on fire policies, are usually rampant during a downturn in the economy. On 19 December 2017, the Malaysian Court of Appeal delivered a comprehensive and well-reasoned 150 page judgment in *AmGeneral Insurance Berhad & Sun Life Malaysia Takaful Berhad v Veheng Global Traders Sdn Bhd & RHB Islamic Bank Berhad* in respect of the law of insurance governing such cases.



Background

In the recent Malaysian Court of Appeal case *AmGeneral Insurance Berhad & Sun Life Malaysia Takaful Berhad v Veheng Global Traders Sdn Bhd & RHB Islamic Bank Berhad*, Veheng Global Traders Sdn Bhd's ('the Insured') was issued with two Fire Material Damage policies ('FMD') and two Fire Consequential Loss policies ('FCL'). On 5 January 2009, a fire occurred at the Insured's warehouse resulting in the loss of



all stock therein. The Insured then made a claim for RM107,787,325 against AmGeneral Insurance Berhad and Sun Life Malaysia Takaful Berhad ('the Insurers') under the four policies.

After investigating the Insured's claim, the Insurers repudiated liability under all the four policies on the grounds that:

- (1) the fire was 'deliberately caused by, or occasioned by the wilful act of' the Insured or 'with the connivance of the Insured through one or more of their servants or agents' and use of fraudulent means and devices; and
- (2) There were breaches of various conditions and warranties, including Condition 15 of the FMD Policies, Condition 12 of the FCL Policies and the Fire Extinguishing Appliances ('FEA') Warranties under the policies.

Dissatisfied with the repudiation, the Insured initiated a claim against the Insurers in the Malaysia High Court. At the same time, RHB Islamic Bank Berhad ('the Mortgagee') initiated a claim against the Insured under the Mortgage Charge clause and a Deed of Assignment of Insurance Proceeds for one of the policies. After hearing this case for 44 days, where 22 witnesses gave evidence, the High Court delivered a decision on 29 January 2016 holding in favour of the Insured. The learned Judge also held that there was a valid assignment of one of the policies by the Insured to the Mortgagee.

The Insurers then appealed against the High Court's decision. On 19 December 2017, after hearing the parties' elaborate submissions, the Court of Appeal overturned the findings of the High Court and dismissed both the claims of the Insured and the Mortgagee, *inter alia*, for the reasons stated below.

Grounds of Judgment

Standard of Proof in Civil Proceedings Where Fraud is Alleged

Before 10 August 2015, the standard of proof in civil proceedings where a fraudulent claim is being alleged was one of beyond reasonable doubt pursuant to the case of *Asean Security Paper Mills v CGU Insurance Berhad* [2007] 2 CLJ 1. On 10 August 2015, the Federal Court overturned *Asean Security Paper Mills* in the

landmark decision of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1, where it was held in no uncertain terms that the applicable standard of proof in all civil proceedings, including where fraud is alleged, is only on a balance of probabilities.

The High Court in this instant case applied the principle of *Asean Security Paper Mills* and disregarded the new legal position of *Sinnaiyah & Sons*. As such, the Court of Appeal held that the Learned High Court Judge fell into error by failing to appreciate the current state of law and to take cognisance of the Federal Court's decision in *Sinnaiyah & Sons*.

Breach of Condition 15 of the FMD Policies and Condition 12 of the FCL Policies

Condition 15 of FMD Policies provided that: 'If the claim be in any respect fraudulent ... or if any fraudulent means or devices are used by the Insured ... all benefit under this Policy shall be forfeited.' Condition 12 of the FCL Policies was couched in terms similar in every detail to the above Condition 15.

The Court of Appeal accepted that when a term in an insurance contract is stipulated to be a condition precedent to the liability of an Insurer, such as Condition 15 of the FMD Policy and Condition 12 of

the FCL Policy, the Insurer is not liable under the policy unless the term has been strictly complied with by the Insured. The Court of Appeal further observed that Condition 12 of the FCL Policies will only respond if the FMD Policies under which the premises are insured respond to the claim by virtue of the following proviso to the preamble of the policies:

PROVIDED THAT AT THE TIME OF THE HAPPENING OF THE DAMAGE there shall be in force an insurance covering the interest of the Insured in the property at the premises against such Damage and that payment shall have been made or liability admitted therefor under such insurance.

By applying *Sinnaiyah & Sons*, the Court of Appeal held that the Insurers had on the balance of probabilities successfully tipped the scale in their favour when they proved that the Insured had breached Condition 15 of the FMD Policy and Condition 12 of the FCL Policy based on the following circumstantial evidence:

- (3) there was a *probable motive* to set the premises on fire due to financial reasons on the basis that there was evidence to show a high level of obsolete and slow-moving stock at its warehouse and a very slow turnover rate;



When an insured sues upon a policy, it is affirming the policy to be his contract.

- (4) the intruders/arsonists only caused maximum damage to the stock of autoparts in the warehouse and not the office building;
- (5) the intruders/arsonists had prior knowledge of where the security system was;
- (6) the allegation that the fire was caused by a competitor *remained* unproved and was at worst a *made-up* fact. At all material times, the burden of proof on the Insured to prove such allegation was not discharged.

Further, based on the available evidence, the Court of Appeal held that it was clear from the Insured's trial witnesses that the Insured was trying its hardest to enhance its claim as a result of the fire, that is, to improve or embellish the facts surrounding the claim by some lies. The Court of Appeal found that these were definitely fraudulent devices being used by the Insured to claim under the policies and dubious evidence was led by the Insured in proving its claim.

The Court of Appeal went further and held that the Insurers had successfully proved the Insured's contractual breach of Condition 15 of the FMD Policies and Condition 12 of the FCL Policies in view of the evidence led in the full trial and, on that score alone, the Insured's claim ought to be dismissed.

Breach of Fire Extinguishing Appliances ('FEA') Warranties

The Insurers' experts had conducted a thorough physical inspection of the risk premises and they found breaches of the FEA Warranties I, II, VI & XI. which, *inter alia*, were:

- (1) the fire alarm system at the premises was not linked to a central monitoring system;
- (2) the fire extinguishers that were found had either no or expired Fire Department certificates;
- (3) there were serious defects to the sprinkler system, hose reel system, fire alarm system and the CO2 system such that they were not functioning at the time of the fire; and
- (4) the sides of the compound of the premises were blocked.

The Court of Appeal held that where there was a breach of warranties of an insurance policy and the courts have consistently found that such breaches entitle the insurer to avoid liability as the strict compliance with warranties are conditions precedent to the insured's right to claim and the insurer's obligation to pay.

The Court of Appeal also held that the High Court judge erroneously concluded that there was no question of breach of any of the warranties as there were no proposal forms and this constituted a waiver of such breaches. First of all, warranties are not found within proposal forms as warranties are usually stated in the insurance policy jacket and/or schedule. Furthermore, it is apparent that the Insured was suing the Insurers on the FMD and FCL Policies and, by doing so, it was plainly clear that the Insured was affirming these policies and therefore the rights and obligations of the Insurers and Insured will be determined by reference to the policies. When an insured sues upon a policy, it is affirming the policy to be his contract and it is not a matter of picking and choosing which particular provisions of the policies apply or do not apply. The Insured cannot approbate and reprobate on the terms of the policies.

The Insured had also argued that the Insurers had knowledge of the Insured's breaches of the FEA Warranties and the Insurer by accepting and renewing the policies had waived their rights to rely on the Insured's breach of the FEA Warranties. In so arguing, the Insured had relied on an initial risk survey report which was conducted prior to the inception of the policies. In order to constitute waiver and estoppel, the Insured must prove that the Insurers had full, actual and complete knowledge of the breaches. The Court of Appeal held that the initial survey, which was conducted in 2006, cannot form the basis that the Insured would be in compliance with the FEA Warranties in 2009. Nor could it be said that the acceptance of premiums in subsequent years and in renewal of the policies was conduct amounting to waiver by reason of the initial survey which was carried out in 2006. There was no evidence that the Insurers either knew or ought to have known of the breach by the Insured or that the breach by the Insured of the FEA Warranties was 'of common knowledge, or that the Insurers should learn of such breach in the ordinary course of business' as is required under the law.

The Court of Appeal also made an important note that the Insurers have no corresponding duty to remind the

Insured to comply with the terms of the Policy as the duty of disclosure is on the Insured. Silence or a non-reminder does not amount to a representation upon which the Insured may mount its defence to a contention of breach of warranties.

Another argument put forth by the Insured was that the FEA Warranties were not applicable or enforceable as no discounts on the premiums were given or provided for the Insured under the policies. On this point, the Court of Appeal found that the FEA Warranties were well enshrined in the policies, whether or not discounts were given.

There was further evidence of a series of quotations that led to the issuance of the policies where those quotations were unchallenged and unequivocally showed that the insurance coverage under the policies was always subject to the FEA Warranties since the initial period of cover in 2006. Therefore, the Insured was bound by them and was not at liberty to choose which parts of the policies apply and which do not, as it suits the Insured. Further, in the absence of an application to rectify the policies by the Insured, it would be erroneous to allow the Insured, as one of the contracting parties, to renege on the plain terms and conditions of the policies.

The Court of Appeal further agreed with the Insurers that the amount or adequacy of the premium and thereby the discount in relation to the risks run by the Insurers under the policies, was a matter for the Insurers to decide and not the Court.

Liability Towards the Mortgagee

The Mortgagee argued that the Mortgagee/Chargee clause under the policies created a collateral contract allowing the Mortgagee to sue in its own name under the policies. The Mortgagee also argued that the Deed of Assignment of Insurance Proceeds executed between the Insured and the Mortgagee in respect of the FMD Policy gave the Mortgagee the right to sue the Insurers.

The Court of Appeal held that the mere mention of the Mortgagee rights in the Mortgagee/Chargee Clause in the policy did not confer contractual rights to the Mortgagee to sue in its own name since the Mortgagee was a stranger to the contract of insurance. A mortgagee clause *per se* is a mere loss payee clause which gives no right to the loss payee, like the Mortgagee, to make a claim unless it also constitutes an assignment, which it did not, based on the wording of the policy.

The purpose of the Mortgagee/Chargee Clause is to merely authorise the Insurer to pay the insurance money whenever payable to the mortgagee. As the Court of Appeal had found that the Insured's claim was not payable due to the breaches of the terms and conditions of the policies, nothing therefore became payable to the Mortgagee under the policies as the Mortgagee/Chargee Clause would not be triggered. If the Insurers were liable to pay the outstanding debt of the Insured to the Mortgagee, it would be tantamount to the Insured benefiting from its own wrong. By its wrongdoing, the Insured's liability to the Mortgagee under the loan agreement would appear to be discharged by that wrongdoing. On this ground of public policy alone, the Court of Appeal found that the Mortgagee's claim here should not be entertained.

With regards to the Deed of Assignment of Insurance Proceeds which was executed soon after the fire, the Insurers had challenged the validity of the assignment for want of compliance with Condition 9(d) of the FMD Policies which states that the sanction of the Insurers is required before any benefit under the policies may be assigned to a third party. The Court of Appeal agreed that the execution of the Deed of Assignment was in breach of Condition 9(d) and was also against the contractual prohibition to assign rendering the said assignment ineffective and hence it could not vest any contractual rights to the Mortgagee as the purported assignee.

The Court of Appeal further held that it is trite in law that an assignee cannot be in a better position than the assignor. As such, since the Insured was not entitled to any insurance monies under the policies, the claim was also not payable to the Mortgagee as the assignor.

The Court of Appeal in its final analysis observed that the Mortgagee had pursued its claim under two inconsistent footings. If the Mortgagee claimed that it was making this claim as a contracting party under the Mortgagee/Chargee Clause, it cannot at the same time be an assignee under the Deed of Assignment for the same insurance proceeds.

Issues on Quantum

The Court of Appeal found that the learned High Court Judge, in determining the quantum of the Insured's claim, had allowed the same without having regard to the policy terms and conditions, and without strict proof of loss. As

the policies were clearly 'unvalued policies' and were for indemnity by their nature, the Insured was required to prove actual loss resulting from the fire incident.

The Court also found that the documents submitted by the Insured were dubious and not proven according to the rules of evidence. Among the findings was that a simple reconciliation of the sales and purchase invoices tendered by the Insured showed that all stock would have been sold prior to the fire. This would mean that there would have been no stock present at the risk premises at the time of the fire.

In allowing the Insured's claim under the FCL policies for the maximum sum insured, the Court of Appeal held that the High Court Judge had erred as there was no explanation or evidence of the causal link between the awarded sum and the fire. There was also no evidence that the Insured had suffered a multimillion consequential loss as a result of the fire, nor was there any evidence that the fire had affected the Insured's business for a full three years. With all the expert

evidence tendered by the Insurers, it was found that the learned High Court Judge had wholly disregarded the large body of evidence presented before his Lordship without any judicial acknowledgment or consideration of the fundamental nature of insurance policies which are indemnity in nature.



Tunku Farik
Senior Partner
Azim, Tunku Farik & Wong

Tunku Farik, LL.B (Bristol), LL.M (Cambridge) is a Barrister of Gray's Inn. He is a Senior Partner of Azim, Tunku Farik & Wong and has been specialising in Insurance/Reinsurance and Takaful/Retakaful Law, both in advisory and litigation/arbitration, for over 30 years. He was the Chair of the IPBA Insurance Committee in 2016-2017, and was previously a vice-chair from 2007-2011 and 2014-2016. He is currently the Jurisdictional Council Member for Malaysia at the IPBA.

Publications Committee Guidelines for Publication of Articles in the IPBA Journal

Please note that the IPBA Publication Committee has moved away from a theme-based publication. Hence, for the next issues, we are pleased to accept articles on interesting legal topics and new legal developments that are happening in your jurisdiction. Please send your article to both **John Wilson** at advice@srilankalaw.com and **Priti Suri** at p.suri@psalegal.com. We would be grateful if you could also send (1) a lead paragraph of approximately 50 or 60 words, giving a brief introduction to, or an overview of the article's main theme, (2) a photo with the following specifications (File Format: JPG or TIFF, Resolution: 300dpi and Dimensions: 4cm(w) x 5cm(h)), and (3) your biography of approximately 30 to 50 words together with your article.

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 publicise the expertise, specialization, or network offices of the writer or the firm at which the writer is based;
4. The article is concise (2500 to 3000 words) and, in any event, does not exceed 3000 words; and
5. The article must be written in English, and the author must ensure that it meets international business standards.
6. The article is written by an IPBA member. Co-authors must also be IPBA members.

The World of Competition: Two Years into the Hong Kong Competition Ordinance

More than two years have passed since the implementation of the Competition Ordinance (Cap 619 of the laws of Hong Kong) (the ‘Ordinance’) on 14 December 2015 and the Competition Commission (the ‘Commission’) has made limited but significant steps in upholding the competition regime, in particular, two cases have been brought before the Competition Tribunal (the ‘Tribunal’) and the first block exemption order has been issued for vessel sharing agreements in the liner shipping industry. This article provides an overview of the key developments in the competition regime and the significance of these developments for businesses.



The Law

As a recap, the Ordinance provides for general prohibitions in three areas of anti-competitive conduct through the First Conduct Rule, the Second Conduct Rule and the Merger Rule.

First Conduct Rule

a. Overview

The First Conduct Rule governs anti-competitive conduct involving more than one party. Undertakings, which include any entity and individual engaging in economic activity (the 'Undertakings'), are prohibited from making or giving effect to agreements or engaging in concerted practices or decisions *with an object or effect to prevent, restrict or distort competition in Hong Kong*. In other words, the First Conduct Rule only applies when undertakings enter into certain arrangements with other market players. The First Conduct Rule also has an extra-territorial effect. Even if the whole agreement or concerted practice or any other arrangement is concluded outside Hong Kong, the undertakings will still be caught under the Competition Ordinance if such arrangement has the effect of preventing, restricting or distorting competition in Hong Kong.

b. Categorisation and Exclusion

The following are specifically identified as 'serious anti-competitive conduct':

- (1) Price fixing: Fixing, maintaining, increasing or controlling the price for the supply of goods or services;
- (2) Market sharing: Allocating sales, territories, customers or markets for the production or supply of goods or services;
- (3) Output limitation: Fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services (including volume and type); and
- (4) Bid rigging: Agreements between competitors not to compete with each other for tenders without the knowledge of the person requesting a tender.

For 'serious anti-competitive conduct', the Commissioner will have the discretion to issue and even publish an infringement notice (requiring the undertaking to make a commitment to cease or discontinue any contravening

acts) or commence enforcement proceedings in the Tribunal directly without notice.

On the contrary, for other anti-competitive conduct not classified as 'serious anti-competitive conduct', it is mandatory for the Commission to issue warning notices before commencing proceedings in the Tribunal. A warning notice will in general require the contravening undertaking to cease the contravening conduct within a certain timeframe and not to continue/repeat afterwards, failing which the Commission may commence proceedings against the contravening undertaking.

c. Leniency Policy for Cartel Conduct

Undertakings that have engaged in cartel conduct (that is, breach of the First Conduct Rule) can report to the Commission and enter into a leniency agreement in which the Commission will undertake not to commence proceedings against the undertaking in exchange for cooperation in the investigation. However, only the first undertaking who reported to the Commission will be offered full immunity, which extends to the current directors, officers and employees of the undertaking. For subsequent reporters, the Commission may consider providing a lower level of enforcement action, including recommendations for a reduced pecuniary penalty to the Tribunal, which has the final decision on the level of penalty to be imposed.

Second Conduct Rule

a. Overview

The Second Conduct Rule governs anti-competitive conduct which may involve only one party. Under the Second Conduct Rule, undertakings that have a 'substantial degree of market power' are prohibited from abusing their power to engage in conduct that has the object or effect of preventing, restricting or distorting competition in Hong Kong. The Second Conduct Rule applies only to undertakings with substantial market power acting on its own. This rule aims at prohibiting huge undertakings from dominating the markets from illegitimate use of their marketing power. The existence of substantial degree of market power per se and the use of it in a non-abusive manner, would not render an Undertaking liable under the Second Conduct Rule.

b. The Application of the Second Conduct Rule

Whether an undertaking may be caught by the Second Conduct Rule depends largely on how 'market',

'substantial degree of market power' and 'abuse' are interpreted. For the term 'market', the Commission makes reference to the international practice in defining the relevant market for competition laws, which states that the practice is to analyse the relevant substitutable products and geographical boundary of the demand and supply of the products or services in issue. It is likely the Commission will rely on overseas experience as a reference to determine the relevant market.

In relation to 'substantial degree of market power', there is again no clear definition under the Ordinance. The Government indicated that it would take into account international practices and the actual circumstances of Hong Kong, and at present suggested that a market share of 25% should be adopted as the minimum threshold of 'substantial degree of market power'. It is to be noted that while market share is a determining factor in deciding the degree of market power of an undertaking, other factors, such as the undertaking's power to determine the price and barrier for competitors to enter into the relevant market, would also be relevant.

As to 'abuse', under the laws, the conduct of an undertaking would be considered as 'abusive' if it involves: (1) predatory behavior towards competitors; or (2) limiting production, markets and technical development to the prejudice of consumers. Some of the examples of abusive conducts as suggested by the Commission include:

- (a) cut-throat price war, whereby the Undertaking sets prices below costs in the short run to force out competitors;
- (b) tie in sale, whereby the sale of one product is substantially conditional on the other product, and the Undertaking makes use of this to force out competitors;
- (c) an Undertaking which controls the supply of the upstream market, using its market power and/or forcing other suppliers to increase production costs of other competitors or even refusing to deal with the competitors; or
- (d) an exclusive purchase or supply obligation to squeeze out competitors.

Merger Rule

The last competition rule is the Merger Rule. For the time being it only regulates telecommunications carrier licensees. The Rule provides that these licensees are prohibited from carrying out a merger that has or is likely to have the effect of substantially lessening competition in Hong Kong. The rationale behind the narrow scope of this Rule is that Hong Kong may not yet be ready for extensive merger control. This Rule is subject to review in a few years' time.

Upcoming Proceedings at the Tribunal First Enforcement Action

On 23 March 2017, the Commission has, for the first time, commenced proceedings in the Tribunal against five information technology ('IT') companies over alleged contravention of the First Conduct Rule by engaging in bid-rigging conduct. The case concerns a tender issued by the Hong Kong Young Women's Christian Association ('YWCA') in July 2016 for the supply and installation of a new IT server system. In the first round of tenders, only one bid was received. As it was a requirement to receive at least five bids, a second round of tenders was instigated and a total of four bids were received from the other four respondents of this case. Upon review, it was found that the formats and contents of the subsequent four bids were highly similar, from which arose suspicion of bid rigging. The Commission claimed that there were collusions to submit 'dummy' bids in order for the first bidder to secure the contract. Remedies sought include pecuniary penalties and a declaration that each company had contravened the First Conduct Rule. The case has been set down by the Tribunal for hearing in June 2018.

Second Enforcement Action

Five months after its first enforcement action, the Commission brought its second case to the Tribunal in August 2017 against ten construction and engineering companies for alleged contravention of the First Conduct Rule by making and giving effect to a market sharing agreement and a price fixing agreement in relation to the provision of renovation services at Phase 1 of On Tat Estate, a public rental housing estate in Kwun Tong, Kowloon.

The companies allegedly made a market-sharing agreement whereby the supply of decoration works services to tenants of three residential blocks in the public estate was divided amongst them. Each

Market sharing and price fixing are serious anticompetitive practices which lead to reduced consumer choices and uncompetitively high prices.



company was allocated four floors of each of the three blocks and agreed to:

- (1) refrain from actively seeking business from tenants on the floors allocated to other companies;
- (2) refrain from accepting business from tenants on the floors allocated to the other companies; and
- (3) refer tenants on the floors allocated to the other companies to their allocated companies.

The ten companies were also alleged to have reached a price fixing agreement by using the same promotional leaflets to advertise their services to tenants of the housing estate. The basic renovation packages advertised in the promotional leaflets were offered at the same price to each tenant and the Commission considered that such arrangement had the effect of maintaining or controlling the price of renovation services since the transaction price was either determined or influenced by the prices on the leaflets, which served as the starting or reference point for negotiations or gave

the impression that all companies charged similar prices. Again, the Commission is seeking remedies including pecuniary penalties and a declaration that each company had contravened the First Conduct Rule. The case has been set down by the Tribunal for hearing in November 2018.

The chairperson of the Commission, Ms Anna Wu, has commented that:

Market sharing and price fixing are serious anti-competitive practices which lead to reduced consumer choices and uncompetitively high prices, hurting consumers, other businesses and the economy as a whole. The Commission accords priority to combating such conduct which are particularly egregious when the people directly affected belong to low income groups such as the residents of the relevant public housing estate in the present case.

The case follows the Commission's 2016 report on the market for residential building renovation and

maintenance, where it is often covered in the media for widespread collusive activity in tenders for renovation and maintenance projects. The Commission expressed concern in the participation of contractors in bid-manipulation practices and calls upon the relevant professional bodies to develop appropriate codes of conduct to ensure compliance with the competition laws. Hence, it was no surprise that the Commission chose this case to be its second case before the Tribunal. It appears that the Commission will place the interests of the public as its top enforcement priority and will exercise the full extent of its powers to combat such actions.

First Block Exemption Order

Shortly before its second enforcement action, the Commission issued its first block exemption order (the 'Order') on 8 August 2017 for vessel sharing agreements in response to the application by the Hong Kong Liner Shipping Association (the 'HKLSA') for two types of agreements to be exempted:

- Vessel Sharing Agreements ('VSAs'): agreements between carriers in which parties agree on certain operational arrangements relating to the provision of liner shipping services, including the joint operation of vessel services, and the exchange or charter of vessel space, similar to code-sharing or alliance agreements of airlines.
- Voluntary Discussion Agreements ('VDAs'): agreements between carriers in which parties discuss commercial issues relating to a particular trade, including freight rates and surcharges, and may reach agreements on pricing recommendations.

A block exemption order is issued for a category of agreement where it satisfies the criteria for the economic efficiency exclusion under the Ordinance and would therefore be exempted from the First Conduct Rule. These agreements include any agreement that:

- contributes to (1) improving production or distribution or (2) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit;
- does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the above efficiencies; and



- does not afford the undertaking concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

Following an 18-month review, the Commission was satisfied that the economic efficiency exclusion under Schedule 1 of the Ordinance was met in respect of VSAs and granted the Order on the following conditions:

- parties to the VSA do not collectively exceed a market share limit of 40%;
- the VSA does not authorise or require shipping lines to engage in cartel conduct; and
- shipping lines are free to withdraw from the VSA without incurring a penalty on giving a reasonable period of notice.

The Order will be valid for a period of five years until 8 August 2022 and it will be reviewed by the Commission a year before its expiry (that is, on or before 8 August 2021).



However, the application for exemption of VDAs was rejected by the Commission, commenting that the efficiency claims submitted by the HKLSA were not supported by sufficient evidence to address the potential restriction of competition resulting from the VDAs.

Being the first BEO issued by the Commission, it is helpful in shedding light on the Commission's reasoning and approach towards granting block exemption applications, in particular the level of evidence that is required to satisfy the economic efficiency exclusion under the Ordinance. Future applicants for the block exemption order will have to take note of the narrow interpretation adopted by the Commission and any claimed efficiencies will have to be supported by clear evidence that they are shared with direct consumers, which presumably would be a high burden to meet.

Market Study of the Auto-fuel Market

In May 2017, the Commission completed its study of the Hong Kong auto-fuel market and issued a report on its findings. Hong Kong's high petrol prices have often been under the news spotlight. While the Commission was unable to find evidence of anti-competitive conduct

within the market, it identified a number of structural and behavioural features of the market that hindered competition and which the Commission believed would likely have contributed to high prices. These included high seller concentration and a high degree of vertical integration, high barriers for new market players to enter and expand, similar cost structures among the major retailers and limited variation in retail prices across time or geography.

To address these issues, the Commission made a number of recommendations including (1) the re-introduction of alternative cheaper products to provide greater choices for consumers; (2) increasing the number of petrol-filling stations ('PFS') sites; (3) review of the tendering system for PFS sites; (4) prominent display of pump prices and walk-in discounts at PFS; and (5) exploring potential structural reform options.

Next Steps

From the effective date of the Ordinance to the end of October 2017, the Commission has received over 2,500 enquiries and complaints from the public, of which 60% related to the First Conduct Rule, with a particular focus on the real estate and property management, machinery and equipment and telecommunications sectors. Supported by additional litigation funding of HK\$200 million (approximately US\$26 million) and led by its new senior management including new Chief Executive Officer, Mr Brent Snyder (former deputy assistant attorney general at the antitrust division of the United States Department of Justice), it is expected that the Commission will be actively taking enforcement actions against violations of the competition rules. The decisions that will be issued by the Tribunal later this year on the two cases will also provide important guidance for businesses on the pecuniary penalties for breach of the Ordinance.



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Exhaustion of Local Remedies in Bilateral Investment Treaties— A Guide for Foreign Investors

Foreign investors perceive exhaustion of local remedies in the Host State as a hurdle before initiating an investment treaty claim. This article assesses factors foreign investors or Host States must consider while negotiating a local remedies clause in investment contracts or BITs. It briefly refers to the current dispute resolution regime in India, and highlights the importance of building effective judicial courts and specialized national investment courts to resolve investor-State disputes.



Introduction

Foreign investors contemplating a bilateral investment treaty ('BIT')¹ claim against the Host State occasionally face a clause requiring them to resort to local remedies. Some present-day BITs mandate pursuit of local remedies (administrative, judicial or both) in the Host State for a certain period of time, before commencing international arbitration. Very few age-old BITs require exhaustion of local remedies for an indefinite time, as opposed to pursuit of local remedies for a certain duration. Various BITs treat local remedies clauses differently, some even expressly waiving the local remedies rule. To a foreign investor, it is therefore important to examine if the stairway to international arbitration is built on steps such as cooling off periods and resort to local remedies. This is more so for countries like India and Argentina that have suffered a huge onslaught of investment disputes under BITs; it is a crucial decision to vest jurisdiction over BIT disputes in their own administrative or judicial bodies, at least as a first step.

India tops the list of countries standing as Respondent in investor-State disputes, with more than 15 investment treaty claims filed against it. The majority of its disputes are pending before international arbitral tribunals. The impact of an investment treaty claim is more significant on a country that is adopting critical regulatory measures, making ground-breaking economic decisions to revamp its national landscape and making an international footprint.

This is possibly the reason why India has revamped its investor-friendly regime of the past two decades by unilaterally terminating several BITs and introducing a new Model BIT in 2016—with an exhaustive 'local remedies' clause. The clause requires the investor to first submit its claim before the relevant domestic courts or administrative bodies and exhaust all judicial and administrative remedies relating to the measure underlying the claim for at least a period of five years before initiating international arbitration proceedings.



This article sets out the significance of local remedies as a mark of investment attractiveness for the Host State. At a bilateral State level, it evaluates the gains and pitfalls of adopting a local remedies clause in a BIT. For foreign investors and Contracting States, this article assesses factors to be considered while negotiating a local remedies clause under investment contracts or BITs. It briefly refers to the current dispute resolution regime available to foreign investors in India. While doing so, it highlights the importance of building effective judicial courts and specialised national investment courts to resolve investor-State disputes.

Local Remedies: Snapshot of State's Legal Environment

The legal framework of a Host State is a sum of its laws, rules and regulations, public administration, dispute resolution mechanism, execution or enforcement machinery and the international obligations of the Host State. Transparency and due process in introducing legislative changes and enacting legislation, in addition to political will and macro-economic factors, help determine the stability of the legal framework of the Host State.

The state of local remedies provided by a host State through its administrative and judicial bodies is a critical determinant for foreign investors to invest in a State. The majority of investment operations entail working with administrative bodies of the Host State (for site-related aspects, approvals, registrations and functions, among others). These administrative bodies often carry out governmental functions or are considered instrumentalities of the Host State acting under their direction or control. Their acts are often attributable to the Host State. Local administration therefore plays an important role in day-to-day operations of a foreign investor. Further, certain primary redressal mechanisms are also vested in administrative bodies and tribunals.

Domestic courts and the judicial appellate machinery constitute an important part of the judicial legal framework. The enforcement machinery of the Host State plays a critical role in assuring finality and culmination of judicial decisions and proceedings. Local remedies shape the legal environment and help in assessing the time and costs involved in adjudication of disputes—thereby informing the decisions of foreign investors.

In addition, a foreign investor may also keep sight of the international obligations of a Host State, the nature of



international treaties it has signed and the international conventions of which it is a part. These obligations form a part of the international legal framework of the Host State and play an important role in informing the foreign investor of a State's outlook towards other nations and international issues.

Contracting States: To Resort or Not to Resort to Local Remedies

Resort to local remedies comes with several advantages and disadvantages. The issue is a matter of debate for Contracting States.

This customary international law rule of exhaustion of local remedies aims at safeguarding state sovereignty. For the Host State, the number of disputes and quantum of claims awarded in international arbitration can be catastrophic for the public exchequer. Host States find comfort in believing that it is safer to place the fate of the public exchequer in the hands of its local courts than with an international arbitral tribunal. It is assumed that local courts are in a better position to fully understand the exigencies of a nation, its public needs and the nuances involved while adopting regulatory measures, as opposed to an international arbitral tribunal.



The majority of investment operations entail working with administrative bodies of the Host State.

A certain degree of subjectivity may also be assumed. In addition, pursuit of local remedies, particularly for a certain period of time, offers time to the Host State to evaluate its options prior to initiation of international arbitration. Put in reverse, it results in delaying international arbitration and the resultant award. Resort to the local remedies rule can therefore, in practice, be a tactical decision for the Host State. This may also compel the foreign investor to incur greater legal costs and expenses.

However, this may also be disadvantageous for the Host State. Adjudication of an international investor-State dispute before domestic courts of a country opens the dispute to the public eye, in contra-distinction to confidential international arbitration. Foreign investors would be wary of being a party to tiresome litigation which may, during its course, open a can of worms or damage goodwill and reputation. More importantly, it can have an adverse impact on the global image of the Host State—thereby affecting its attractiveness for foreign investment.

Further, local courts often apply domestic law as opposed to international law. The domestic law of

a country may not be sufficient or at the level of international law to protect the interests of foreign investors. We are witnessing an era where international investment law constitutes *lex specialis*. General, non-special domestic law may not rise to the level and sufficiency of protection and standards offered by the specialised body of international investment law.

Negotiating a Local Remedies Clause in Investment Contracts and BITs: What to consider

Negotiation skills, conversationally called 'bargaining powers', of the parties shape the contours of a treaty. A treaty or an agreement is a product of negotiation—the strength of its provisions being a factor of good or bad negotiation. A local remedies clause can be incorporated either in an investment contract between the foreign investor and the State agency or in a BIT.

For a Contracting State that is relatively developed and more often a capital-exporting State, it is crucial to understand the impact of a local remedies clause on its investors in the capital-importing Host State. While the traditional gaps between the two sets of countries has now been minimised, certain strongholds remain in the world with respect to making or accepting foreign investment. While one State moves forward to compel the foreign investor or another State to adopt a local remedies clause under the investment contract or the BIT respectively, it is essential to consider a range of factors before forming a decision and shaking hands.

First, the foreign investor or the Contracting State must assess the 'ease of doing business' in the Contracting State and examine its regulatory framework. These serve as stepping stones to provide a bird's-eye view on the procedural and administrative efficacy of the Contracting State. The quality of administration, that is, the working of administrative bodies in a country helps assess the ground-level realities with respect to operation of the investment activity, among other functions. Administrative or quasi-judicial bodies engage in a series of functions relating to establishment and conduct of investment. The common functions include grant, termination or renewal of licenses, permits, tax assessment and demands.

The quality of administration has a close bearing on subsequent local remedies available to investors in the event an administrative or quasi-judicial measure contravenes the law or violates the investor rights. The

next step in the ladder is to examine the quality of administrative redressal mechanisms. Every violation by a public body does not witness court adjudication. Specialised administrative tribunals provide specific remedies to the aggrieved investors. It is important to assess whether the tribunals can be approached with ease, work in a time-bound manner, have certain stable procedures, follow procedures efficiently and deliver effective decisions while resolving administrative disputes.

The judicial machinery of the Contracting State plays a key role in informing the decision on adopting a local remedies clause. Certain pertinent questions are: whether it is simple to understand and distinguish between the jurisdiction of courts in the Contracting State (helps reduce parallel proceedings); what is the hierarchy of courts (to understand levels of appeal); and what is the scope of preferring an appeal (to understand grounds and extent of review). Other important factors are the legal costs and expenses involved in a litigation in the Contracting State. The time normally consumed in the investor-State dispute litigation is a critical factor, considering the value of investments at stake, the losses being caused and the consequent erosion of expected economic benefit.

The quality of judges will also matter. Investor-state disputes before local courts will demand the need for specialised and trained judges who have a sound understanding of commercial disputes. The execution machinery in the Contracting State, its laws on execution of administrative and judicial decisions, the hurdles in terms of public policy or grounds objecting to execution and the timelines involved in final execution, are important factors.

Another important, perhaps the most significant factor, is the strength of national law governing the investment. A body of laws that are incoherent or inconsistent with each other or are volatile and subject to constant change and conflicting interpretation, can reduce confidence in the legal framework of the Host State, standing on the edge of instability. Thus, it is relevant to consider if the Host State maintains a *judicial constante* that forges uniformity of interpretation and application of its laws.

A Host State's outlook towards international treaties and conventions throw light on its commitment

to fulfil international obligations and assume the responsibility of a global player. While it may appear that the aforesaid may not affect the local remedies in the Contracting State, it is essential to note that a country party to several international treaties and conventions will normally be expected to have a legal framework and a judiciary that respects and furthers the international obligations assumed by the State.

Further, the other provisions of a BIT itself offer factors to inform the decision to adopt or reject a local remedies clause in the investment contract or the BIT. Presence of a most-favoured nation ('MFN') clause can help a foreign investor to wriggle out of the local remedies clause—if the local remedies clause is absent in other treaty (ies) between the Host State and other State(s). A denial of benefits clause can have the opposite impact. An effective means for dispute resolution in another treaty may be imported by way of an MFN clause. A forum selection clause in an investment contract that refers disputes to local courts may compel investors to resort to local remedies—this in turn being dependent on several other factors such as the basis of the dispute, umbrella clauses, approach of tribunals in elevating contract claims, etc. A fork in the road leading to choice of local remedies will foreclose the ability of the investor to initiate international proceedings. Thus, these factors can play a significant role in negotiating a local remedies clause.

India Model BIT: Peculiar Local Remedies Clause

India's initial investor-friendly approach to investment treaties started undergoing a sea-change after the case of *White Industries*² in 2011. It is not surprising to note that the *White Industries* case entailed an investment treaty award against India under the India-Australia BIT for failure to provide effective means of dispute resolution to *White Industries*—after enforcement of an international commercial award in favour of *White Industries* remained pending in Indian courts for nine years. Thereafter, several cases were filed against India between 2011 and 2016. As a result of the growing surge of BIT claims, India unilaterally terminated several BITs in 2016.

In 2016, India introduced a Model BIT with an exhaustive chapter on 'Settlement of Disputes between an Investor and a Party'. This chapter contains the most peculiar dispute resolution provisions in a BIT so far.

The road to investment treaty arbitration under the 2016 India Model BIT is extremely long and exhausting for the foreign investor—in as much as the investor is required to exhaust local remedies before the relevant domestic courts or administrative bodies of the Defending Party in respect of the same measure or similar factual matters for which a breach of BIT is claimed. If, after exhausting all judicial and administrative remedies for at least a period of five years, the investor may commence international arbitration proceedings by transmitting a notice of dispute to the Defending Party. This five-year period for exhaustion of local remedies is absolutely onerous and regressive. It deviates from the equivalent international standard term of three to 18 months.

However, a silver lining appears for the foreign investor. The requirement to exhaust local remedies is not applicable if there are no available local remedies that can provide relief with respect to the relevant measure. Accordingly, the onus to demonstrate non-existence of an appropriate domestic remedy lies on the foreign investor.

Strengthening Local Remedies: Investor Versus India

Are Indian courts better equipped to handle BIT disputes in the present-day than they were during *White Industries*? The India Model BIT, 2016 may appear to protect the State but the changed Indian judicial system has geared up to protect investors and commercial players. In the last two years, significant efforts have been made by the Indian legislature and judiciary in providing effective and efficient dispute redressal machinery for commercial disputes. In 2015, India enacted the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act ('Commercial Courts Act') to cater to commercial disputes of a specified value, create special courts to adjudicate and amend civil procedure for speedy and efficient disposal of commercial matters. A commercial dispute³ includes disputes related to transactions of the nature of dealing in mercantile documents, partnership agreements, intellectual property rights, joint ventures, shareholders agreements or exploitation of natural resources.



The judicial machinery of the Contracting State plays a key role in informing the decision on adopting a local remedies clause.

The Commercial Courts Act provides an express explanation while defining commercial disputes. It also provides that a commercial dispute shall not cease to be a commercial dispute merely because one of the contracting parties is the State or any of its agencies or instrumentalities or a private body carrying out public functions. The explanation clearly envisages governmental contracts and disputes arising therefrom to be commercial disputes. A typical investor-State dispute would fall under the ambit of a commercial dispute. Considering the high stakes often involved in such disputes, they would certainly fulfil the threshold of 'specified value' of INR10,000,000 (approximately USD155,000) to fall within the jurisdiction of commercial courts.

The special courts include Commercial Courts (at the District Court level), Commercial Division (where original jurisdiction vests in the High Court) and Commercial Appellate Division (established in the High Courts to hear appeals from Commercial Courts and Commercial Division). Commercial courts have already started functioning under the jurisdiction of the Delhi High Court, Bombay High Court, Himachal Pradesh High Court and the Gujarat High Court. Further, the Commercial Courts Act provides for appointment of more judges with special expertise in handling commercial disputes; to ensure adequate and continuous training facilities for the judges. Further, the Act significantly curtails scope and time for appeals, in addition to amending the Code of Civil Procedure, 1908 for time and cost-efficiency.

Conclusion

The decision to include a local remedies clause in an investment contract or a BIT is difficult. However, once incorporated, it is incumbent upon the Host State to strengthen its investor-State dispute resolution machinery. It is quintessential that administrative and judicial bodies of the Host State build expertise and commercial knowledge to effectively adjudicate upon BIT claims. It is also critical to develop a bar having specialisation in investment treaty law to assist the foreign investors, Host States and the judiciary.

The enactment of the Commercial Courts Act in India is a welcome example. While its provisions are optimistic, efforts will have to be taken both by the judicial bodies and the bar to help the provisions see the light of the day. On similar lines, the author proposes that national investment courts must be established in countries (for India, in cities such as New Delhi and Mumbai), manned

by expert judges with sound commercial acumen and knowledge of international investment treaty law—to effectively adjudicate upon claims arising out of BITs. This will go a long way in promising sound local remedies to foreign investors.

Notes:

¹ 'Bilateral Investment Treaties are agreements that protect investments by investors of one state in the territory of another state. These treaties articulate substantive rules governing the host State's treatment of the investment, and establish dispute resolution mechanisms applicable to alleged violations of those rules': 41 *Harv. Int. L.J.* 469, 469-470 (2000).

² *White Industries Australia Limited v The Republic of India*, Final Award, 30 November 2011 ('White Industries').

³ Section 2 (c) of the Act.



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A New Tide: Key Changes in Malaysia's Maritime Laws

Malaysian maritime laws have seen changes in the last few years with the government recognising the importance of keeping Malaysia in line with global maritime laws and standards. This article will briefly highlight the main maritime legislation in Malaysia, the key amendments to the MSO 1952, and developments on the horizon.



Malaysia is well placed to play a dynamic role in the global shipping landscape, with its strategic location in the Straits of Malacca and boasting container ports ranked among the top 20 in the world. However, for many years, Malaysian maritime laws, which form the regulatory 'keel' to Malaysia's maritime infrastructure, have not kept pace and were slow to change.

This situation has since changed over the last few years as there has been amendments to Malaysian maritime laws, with the Malaysian government recognising the importance of keeping Malaysia in line with global maritime laws and standards. The main amendments have been to Malaysia's most comprehensive piece of maritime legislation, the Merchant Shipping Ordinance 1952 ('MSO 1952'). This article will briefly highlight the main maritime legislation in Malaysia, the key amendments to the MSO 1952, and the developments on the horizon.

Malaysia's Primary Maritime Legislation

The MSO 1952 is the main regulatory framework covering, among others, ship registration and licensing, safety and security, liability and limitation of liability and rights of seafarers. The East Malaysian states of Sabah and Sarawak apply their own version of the MSO 1952.

The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels 1924 ('Hague Rules'), is given effect under Malaysian law by the Carriage of Goods by Sea Act 1950, applicable in Peninsular Malaysia. The equivalent laws in Sarawak and Sabah respectively are the Merchant Shipping (Implementation of Conventions relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 and the Merchant Shipping (Applied Subsidiary) Regulations 1961.

In so far as the admiralty jurisdiction of the Malaysian High Court is concerned, Malaysia adopts the jurisdiction of the English Courts under the Senior Courts Act 1981 *in toto*.

Key Developments — Amendments to MSO 1952

Tonnage Limitation

Until March 2014, Malaysia applied the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 ('1957 Convention'). In March 2014, the MSO 1952 was amended to give effect to the Convention on Limitation of Liability for Maritime

Claims 1976 ('LLMC 1976') and the 1996 Protocol in line with other leading maritime nations.

Under the LLMC 1976, the parties entitled to seek limitation of liability include shipowners, salvors and any person whose act, neglect or default the shipowner or salvor is responsible for. The term 'shipowner' is not limited to just owners but extends to charterers, managers and operators of seagoing ships. The claims which are subject to limitation of liability include claims in respect of loss of life or personal injury or loss or damage to property which occur on board, or in direct connection with the operation of the ship or with salvage operations, together with the arising consequential losses; or claims for loss resulting from delay in the carriage by sea of cargo, passengers or their luggage.

With the LLMC 1976, claimants would now enjoy a higher tonnage limitation amount than previously provided under the 1957 Convention. The limit of liability is calculated based on the gross tonnage of the ship and the value of Special Drawing Rights, as opposed to the value of gold francs used prior to the amendments. The value of Special Drawing Rights is determined by the International Monetary Fund and the amount will be converted into the national currency of the country in which limitation is sought, based on the value of the national currency either at the date the limitation fund is constituted, or when payment or security is given.

This higher tonnage limitation enjoyed by claimants is counterbalanced with a change in the applicable test to break limitation. The LLMC 1976 removes the 'actual fault and privity' test contained in the 1957 Convention and shifts the burden of proof from the person seeking to rely on limitation to the claimant. The claimant now has the burden of proving that the loss resulted from the personal act or omission of the person seeking to limit liability, which was committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result. This makes it extremely difficult for the claimant to break limitation (see the rare case in which limitation was successfully broken: *Kairos Shipping Ltd v Enka & Co LLC (The Atlantik Confidence)* [2016] 2 Lloyd's Rep 525).

In relation to claims arising from an incident, where there are several claims or potential claims, it is

The main amendments have been to Malaysia's most comprehensive piece of maritime legislation, the Merchant Shipping Ordinance 1952.



any rights against any assets of the person for whom the limitation fund was constituted.

Protection of Seafarers

The next major amendment to the MSO 1952 occurred in March 2017, this time to give effect to the Maritime Labour Convention 2006 ('MLC 2006'). The main amendments giving effect to the MLC 2006 are set out in the new Part III of the MSO 1952.

The application of Part III is broad, covering owners, that is, any person who has interest in the ownership of the ship, a charterer, or a person responsible for the navigation and management of the ship in circumstances where neither the owner nor the charterer is responsible for the same, and

seafarers. While most of the provisions apply to Malaysian ships, certain provisions apply to foreign ships. Government or state-owned ships, fishing vessels, pleasure yachts, Malaysian ships trading or operating exclusively within Malaysian ports, FPSO and FSO vessels are excluded from coverage.

customary for the person seeking to rely on limitation to set up a limitation fund. A limitation fund does not have to be constituted in order for limitation of liability to be invoked. Where no limitation fund has been set up, the provisions of Article 12 of the LLMC 1976 will nonetheless apply in respect of distribution of funds to competing claimants. Procedural questions will be determined in accordance with the local law of the country where the action has been commenced.

Should the person seeking to rely on limitation choose to set up a limitation fund, a limitation action has to be commenced. If there is only one claim from an incident, limitation proceedings do not need to be commenced and the person seeking limitation may just plead limitation in his defence or counterclaim.

In a limitation action, once the court decides that the relevant person is entitled to limit his liability, the court will go on to determine the limitation quantum. The procedure relating to limitation actions is contained in Order 70 rules 35 to 38 of the Rules of Court 2012. Subsequently, a limitation fund will be set up in accordance with Article 11, and all claimants will have a share in that fund. A claimant who makes a claim against the fund will be barred from exercising

The requirement for a Maritime Labour Certificate ('Certificate') serves to ensure compliance with the provisions of Part III. All ships of at least 500 gross tonnage engaged in Malaysian waters and all Malaysian ships of at least 500 gross tonnage engaged in international voyages or operating from a port or between ports outside Malaysia must hold a valid Certificate before she can commence a voyage or excursion. Issuance of the Certificate by the Director of Marine is on the basis that (1) the ship has complied with the requirements under Part III; and (2) the ship has been issued with a Declaration of Maritime Labour Compliance. If there is contravention of the provisions of Part III or breach of condition(s) of the Certificate, the Certificate may be initially suspended and thereafter revoked if no corrective action is taken by the owner.

Part III provides protection to seafarers across a wide range of areas, such as in relation to conditions of

employment, accommodation, recreational facilities, food and catering, health protection, medical care, welfare and social security protection. Some of the key protection provided to seafarers in Part III include the following requirements:

- Written contract for all seafarers employed on board a Malaysian ship, the terms of which the seafarer must have been given an opportunity to examine beforehand.
- Provision of adequate training and familiarisation to seafarers to ensure that the seafarers (a) are adequately trained and familiarised with specific duties and with the ship's arrangements, procedures and characteristics which are relevant to their duties; and (b) effectively co-ordinate activities in an emergency situation or in prevention or mitigation of pollution.
- Payment of wages, including overtime and holiday pay for seafarers on Malaysian ships, and deductions from such wages only in limited prescribed circumstances.
- Minimum hours of rest and annual leave for seafarers on board Malaysian ships.
- Free repatriation for seafarers on board Malaysian ships, except in cases of default by the seafarer.
- Provision of medical care, sickness benefit and employment injury benefit to all seafarers, regardless of nationality.

In addition to protection for seafarers, the regulation of the conduct and discipline of seafarers are also provided for. There are penalties for conduct endangering ships, structures or persons (applicable to seafarers on board Malaysian ships or on board foreign ships within Malaysian waters) and disobedience of lawful commands or neglect of duty (applicable to seafarers on Malaysia ships). Seafarers can avail themselves of defences such as proving they have taken all reasonable steps to discharge the duty or taken all reasonable precautions and exercised all due diligence to avoid committing the offence.

These amendments set out above show the importance placed by Malaysia on the humanitarian

aspect of Malaysia's shipping industry, by ensuring the welfare of seafarers is comprehensively protected. It also signifies Malaysia's commitment to its international maritime law obligations.

2017 Amendments

The most recent amendments to the MSO 1952 are primarily aimed at increasing and potentially simplifying the ship registration process in Malaysia, and for the first time, provide for a bareboat charter registry. The amendments were made via the Merchant Shipping (Amendment) Act 2017 ('MSAA 2017'), which was passed by Parliament in December 2017 but has not come into force.

Registration of Ships

By way of background, Malaysia has a dual registry system. Ships may be registered in Malaysia under the Malaysia Ship Register ('MSR') or the Malaysia International Ship Register ('MISR'). The Malaysia Ship Register is maintained in Port Klang, Penang, Kota Kinabalu and Kuching, while the Malaysia International Ship Register is maintained in Labuan. Ships plying Malaysian territorial waters or her exclusive economic zone must either be registered as a Malaysian ship or registered in any other country, subject to MSO 1952 and any other written law.

MSR

Currently, the law contains several requirements which must be satisfied by the owner of the ship if it is to be registered as a Malaysian ship under MSR. The owner must either be a Malaysian citizen or corporation incorporated in Malaysia. In relation to a corporation, it must additionally have its principal office in Malaysia, carry out management mainly in Malaysia and have majority Malaysian shareholding and directorship.

The MSAA 2017 appears to relax these requirements. It stipulates that the owner must be a Malaysian citizen or to an extent as may be determined by the Minister, a body corporate incorporated in Malaysia. When the MSAA 2017 comes into force, we can expect regulations to be issued by the Minister on the exact requirements to be met.

MISR

Presently, only a corporation incorporated in Malaysia may register its ship as a Malaysian ship under MISR. There are also requirements pertaining to foreign shareholding, paid-up capital and appointment of a ship manager, for corporations intending to register under MISR.

With the amendments, local incorporation will no longer be required, and any foreign individual or foreign corporation may register with MISR. The present age and tonnage criteria for registration with the MISR will be abolished and the new criteria will be set out in regulations to be issued by the Registrar. No such regulations have been issued to date.

The requirement for appointment of a ship manager before applying for registration under MISR has also been removed. However, a non-Malaysian citizen or a foreign body corporate applying to register a ship as a Malaysian ship under MISR will be required to appoint a representative person so long as the said ship remains registered in Malaysia. This representative person must be a Malaysian citizen or corporation incorporated in Malaysia which has its permanent residence or principal place of business in Malaysia. The role of a representative person is more limited in scope than a ship manager, and encompasses filing documents or furnishing information required under the MSO 1952, and accepting service of any document on behalf of the owner in relation to offences under the MSO 1952.

Registration of Ships Under Bareboat Charters

The MSA 2017 provides for the registration of ships under bareboat charter terms as Malaysian ships. The phrase 'bareboat charter terms' is defined as the hiring of a

ship for a stipulated period on the terms which give the charterer possession and control of the ship, including the right to appoint the master and crew of the ship. In order to be registered, evidence of the suspension of the ship's registration at its primary registry or the consent to such suspension by the authority of the primary registry must be shown. These ships however may not be mortgaged in Malaysia.

Malaysian ships may also be registered as a bareboat charter in a foreign registry, subject to the conditions set by the Director of Marine and with the consent of the Registrar of Ships ('bareboat chartered-out ships'). While the ship is bareboat chartered-out and re-registered in another country, registration of the ship in the Malaysian registry will be suspended.

The registration of ships under bareboat charters is welcome and places Malaysia in line with regimes in other countries such as the United Kingdom and Singapore.

Increase in Penalties

Failure to comply with the provisions of the MSO 1952 will carry greater implications as the amendments under the MSA 2017 increase penalties across the board in the event the MSO 1952 is contravened. Such increases include the penalty for a person who uses a



Ships may be registered in Malaysia under the Malaysia Ship Register or the Malaysia International Ship Register.

ship or causes or permits a ship to be used without a licence or for a purpose other than the purpose for it is licensed, which sees the maximum fine go up 10-fold to RM100,000, and additionally a term of imprisonment not exceeding two years.

Malaysia Shipping Development Fund

Malaysia's recognition of the importance of continued development and improvement of her shipping industry is evident from the introduction of the Malaysian Shipping Development Fund ('MSDF'). The MSDF is to be funded by sums collected through annual tonnage fee payments, and will be administered and controlled by the Malaysia Shipping Development Fund Committee ('Committee').

Specifically, this Fund will be expended to improve the shipping industry, provide awards, fellowships, scholarships and research grants, sponsor research projects and to organise seminars, expositions and other similar activities.

The Waters Ahead

The amendments are just a start—the voyage has not ended. Changes on the horizon include the adoption of the widely used Hague Visby Rules 1968 to replace the pre-container revolution Hague Rules and the enactment of Malaysia's very own admiralty jurisdiction act. These developments will augur well for Malaysia as it launches full steam ahead on her path to becoming a leading maritime nation.



Siva Kumar Kanagasabai
Partner, Dispute Resolution Division,
Skrine

Siva Kumar Kanagasabai is currently the Head of SKRINE's Shipping Practice Group. He has wide experience including charter party disputes, mortgages, freight claims, vessel damages and arrests, seafarers' contracts and enforcement of debenture holders' rights against vessels. Kumar is named as a leading shipping lawyer in Chambers Asia-Pacific for 2014–2018.

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IPBA New Members

December 2017 – February 2018

We are pleased to introduce our new IPBA members who joined our association from December 2017 – February 2018. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

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| Australia , Sandeep Gopalan <i>Deakin University</i> | France , Céline Barbosa <i>IncentAct</i> |
| Australia , Mary-Anne Sotiropoulos <i>Finlaysons</i> | Hong Kong , Gabin Paul Nesbitt <i>Deacons</i> |
| Chile , Fernando de Cárcer <i>CMS Carey & Allende</i> | Hong Kong , Robert San Pe <i>Arbitration Chambers (Hong Kong)</i> |
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| China , Hsichia Chen <i>Pinsent Masons LLP</i> | Hong Kong , Ben Yates <i>RPC</i> |
| China , Shuo Chen <i>Jin Mao Partners</i> | India , Arunabha Ganguli <i>Supreme Court Of India</i> |
| China , Yuan Cui <i>Jin Mao Partners</i> | India , Sujit Kumar Ghosh <i>Advaita Legal</i> |
| China , Xiao Dong <i>AnJie Law Firm</i> | India , Atul Gupta <i>Trilegal</i> |
| China , Tao Huang <i>King and Wood Mallesons</i> | India , Rawley Muddappa <i>Rawley & associates</i> |
| China , Byron Phillips <i>Hogan Lovells</i> | India , Akshat Pande <i>Alpha Partners</i> |
| China , Xiaorong Qu <i>River Delta Law Firm</i> | India , Sharanya Ranga <i>Advaya Legal</i> |
| China , Pengchen Song <i>Jiangsu Yiyou Tianyuan Law Firm</i> | India , Ravindra Singh <i>Ravindra Singh</i> |
| China , YT Sun <i>Jin Mao Partners</i> | India , Yogesh Singh <i>Trilegal</i> |
| China , David Wang <i>Zhonglun Law Firm</i> | India , Arya Tripathy <i>PSA</i> |
| China , Chengyi Zhang <i>Jin Mao Partners</i> | Indonesia , Adhitya Nugraha <i>SA PARTNERS LAW FIRM</i> |
| Denmark , Till Kosche <i>Noerr LLP</i> | Indonesia , Sandro Mieda Panjaitan <i>Roosdiono & Partners</i> |

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| Indonesia , Andrew Heibert Barkat Tambunan <i>SA PARTNERS LAW FIRM</i> | Japan , Tatsuya Soeda <i>Hibiya-Nakata</i> |
| Iran , Elham Zareie <i>Iran Central Bar Association</i> | Japan , Yuri Sugano <i>Nishimura & Asahi</i> |
| Japan , Mugiko Ashiwa <i>AsiaWise Legal Japan</i> | Japan , Misaho Takagi <i>Miyake, Ushijima & Imamura</i> |
| Japan , Sho Awaya <i>Nagashima Ohno & Tsunematsu</i> | Japan , Tomotaka Tokuno <i>Miyakezaka Sogo Law Offices</i> |
| Japan , Masao Dan <i>TMI Associates</i> | Japan , Masashi Watanabe <i>Creativity & Insight Legal Professional Corporation</i> |
| Japan , Naozumi Haruta <i>Creativity & Insight L.P.C.</i> | Korea , Steve Ahn <i>SEUM Law</i> |
| Japan , Yoshihisa Hayakawa <i>Uryu & Itoga / Rikkyo University</i> | Korea , Brendon Carr <i>Gangnam LLP</i> |
| Japan , Aiko Hosokawa <i>Oh-Ebashi LPC & Partners</i> | Korea , Yun Heui Cho <i>Yulchon LLC</i> |
| Japan , Takafumi Inukai <i>Takashima Law Office</i> | Korea , Jae Hoon Choi <i>Lee & Ko</i> |
| Japan , Hiroshi Ishihara <i>Anderson, Mori & Tomotsune</i> | Korea , Cecil Sae Hoon Chung <i>Yulchon LLC</i> |
| Japan , Michiko Kasuga <i>Creativity & Insight Legal Professional Corporation</i> | Korea , Hae Sung Jeong <i>SHIN & KIM</i> |
| Japan , Daiki Kouso <i>TMI Associates</i> | Korea , Su Gu Kang <i>Yulchon LLC</i> |
| Japan , Lucinda Lohman-Oota <i>InScribe Language Services</i> | Korea , Beom June Kim <i>Yulchon LLC</i> |
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| Japan , Rina Masumoto <i>Yodoyabashi & Yamagami LPC</i> | Korea , Hyeong Gun Lee <i>Lee & Ko</i> |
| Japan , Akira Nishimura <i>Hideaki Kinomura Law Office</i> | Korea , Kyung Jun Lee <i>Yulchon LLC</i> |
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| Japan , Satoshi Ogiwara <i>Yodoyabashi & Yamagami LPC</i> | Korea , Philippe Shin <i>SHIN & KIM</i> |
| Japan , Ken Sekiya <i>Yodoyabashi & Yamagami LPC</i> | Korea , Tehyok Daniel Yi <i>Yulchon LLC</i> |

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| Malaysia , Tatiana Polevshchikova Asian International Arbitration Centre | Singapore , Hanim Hamzah ZICO Law |
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| Malaysia , Wooi Hong Tan Zaid Ibrahim & Co. | Singapore , Arvindran Manoosegaran K&L Gates LLP |
| Malaysia , Joan Ting Zaid Ibrahim & Co. | Singapore , Cheryl Ng Intelleigen Legal LLC |
| Malaysia , Kenneth Wong Daniel & Wong | Singapore , Preetha Pillai Conyers Dill & Pearman Pte. Ltd. |
| Malta , Jean-Pie Gauci-Maistre Gauci-Maistre Xynou (Legal Assurance) | Singapore , Amardeep Singh |
| Myanmar , Thit Thit Kyaw ZICO Law Myanmar Limited | Singapore , Jin Song Tan KEL LLC |
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| Philippines , Maria Theresa Gonzales VeraLaw | Singapore , Vivien Yui WongPartnership LLP |
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Members' Note

Stephan Wilske, Germany

Stephan Wilske, Germany, authored the contribution 'The Duty of Arbitral Institutions to Preserve the Integrity of Arbitral Proceedings' published in the Contemporary Asia Arbitration Journal Vol 10(2), November 2017. This article is based on a speech he gave at the 2017 Taipei

International Conference on Arbitration and Mediation on 28 August 2017. Furthermore, he has joined the Hong Kong International Arbitration Centre (HKIAC)'s Panel of Arbitrators and the Mediation and Conciliation Network (MCN)'s Panel of Neutrals.



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 organising conference in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then it has grown to over 1400 members from 65 jurisdictions, and it is now the pre-eminent organisation 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 organisations 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: 23. Each committee focuses on different aspects of business law, indicating the scope of expertise and experience among our membership as well as the variety of topics at our seminars and conferences. All IPBA members are welcome to join up to three committees, with the chance to become a committee leader and have a hand in driving the programmes put on by the IPBA.

The highlight of the year is our Annual Meeting and Conference, a four-day event held each spring. Past conferences have been held at least once, sometimes twice, in Tokyo, Osaka, Sydney, Taipei, Singapore, San Francisco, Los Angeles, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali, and Beijing. Conferences in recent years have attracted over 1,000 delegates and accompanying guests. In addition to the Annual Conference, the IPBA holds in various jurisdictions seminars and conferences on issues such as Arbitration, Dispute Resolution, M&A, and Cross-Border Investment. Check the IPBA web site (ipba@ipba.org) for the latest information on events in your area.

IPBA members also receive our quarterly IPBA Journal, with the opportunity to write articles for publication. In addition, access to the online and annual printed Membership Directory ensures that you can search for and stay connected with other IPBA members throughout the world.

APEC

APEC and the IPBA are joining forces in a collaborative effort to enhance the development of international trade and investments through more open and efficient legal services and cross-border practices in the Asia-Pacific Region. Joint programmes, introduction of conference speakers, and IPBA member lawyer contact information promoted to APEC are just some of the planned mutual benefits.

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.

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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 31 August will be registered as a member for the current year. Those who join the Association after 1 September will be registered as a member for the rest of the current year and for the following year.

Membership renewals will be accepted until 31 March.

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.

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) 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.

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See overleaf for membership
registration form





IPBA SECRETARIAT

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For inquiries please email:
Michael Butler: Michael.Butler@finlaysons.com.au
Roger Saxton: roger.saxton@connorco.com.au

➤ **IPBA 2nd Indochina Regional Forum**

24 August 2018
Rangoon, Myanmar
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Shigehiko Ishimoto: shigehiko.ishimoto@mhmjapan.com

➤ **Doing Business with Asia: Developments in Trade, IP, Investment and Dispute Settlement**

20 September 2018
Los Angeles, California (Crowell & Moring, LLP's office)
For inquiries please email:
Jeffrey Snyder: JSnyder@crowell.com
Corey Norton: cnorton@tradepacificlaw.com

➤ **LatAm Legal Views on Investment, Trade, Compliance & International Dispute Resolution**

28 September 2018
Santiago, Chile
For inquiries please email:
Rafael Vergara: rvergara@carey.cl

➤ **4th IPBA Arbitration Day**

5 November 2018
Bangkok, Thailand
For inquiries please email:
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Hiroyuki Tezuka: h_tezuka@jurists.co.jp
Colin Ong: dco@onglegal.com
Punjabom Kosolkitiwong: punjabom@dejjudom.com

➤ **IPBA 4th East Asia Regional Forum**

7 November 2018
Seoul, Korea
For inquiries please email:
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YJ Chang: yjc@leeko.com

➤ **IPBA European Regional Conference International Commercial Courts in Various European Jurisdictions & in Singapore**

22 November 2018
Brussels, Belgium (Stibbe's office)
For inquiries please email:
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➤ **IPBA Mid-East Regional Forum**

24 January 2019
Dubai
For inquiries please email:
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Richard Briggs: r.briggs@hadefpartners.com

➤ **Asia M&A Forum 2019**

28 February to 1 March 2019
For inquiries please email:
Myles Seto: myles.seto@deacons.com.hk
Wilson Chu: wchu@mwe.com

➤ **Global Challenges, Local Solutions & Singapore Being an International Hub**

IPBA 29th Annual Meeting and Conference in Singapore 2019
24 - 28 April 2019
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Please visit the IPBA 2019 booth at Level 3, Foyer Area of Grand Ballroom
Shangri-la The Fort

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