SHOOK LIN & BOK EST 1918 KUALA LUMPUR

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# Shook Lin & Bok Sponsors Hong Kong Law Conference


The firm was given the honour of co-sponsoring the 3rd Annual Asia Law & Practice, Asia Pacific in-house Counsel Summit in Hong Kong on 15th and 16th March 2006. The full report follows inside.

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Shook Lin & Bok

# Shook Lin & Bok Sponsors Hong Kong Law Conference

The 3rd Annual Asia Law & Practice, Asia Pacific In-house Counsel Summit was held at the Inter Continental Hong Kong on 15th and 16th March 2006.

The firm was invited to be a co-sponsor of the conference. The ambit of the conference encompassed the most pertinent legal, regulatory and commercial issues, challenges and opportunities facing enterprises doing business in the Asia Pacific region, including effective management of the differences in the legal, regulatory and compliance environments of the countries in the region, in the context of multi jurisdictional and cross border business in the region.

The plenary sessions addressed issues such as China's Legal Evolution, Protecting Intellectual Property, Improving Corporate Governance, Maximizing Value in Asia Pacific's Capital Markets, Conflict Resolution, Mergers & Acquisitions in Asia Pacific, Labour Laws in Asia Pacific, Regional Regulatory Compliance and Free Trade Agreements in Asia Pacific. In addition, there were individual Country workshops on the major trading countries in the region.

The firm's representation included its Chief Executive Partner Too Hing Yeap, Michael Soo, Romesh Abraham and Jal Othman. Michael, Romesh, and Jal were panellists in the Workshop on Malaysia hosted by the firm, on Doing Business in Malaysia: Recent Developments. Michael was a panellist in the plenary session on Protecting Intellectual Property. Romesh was a panellist in the sessions on Conflict Resolution and Labour Laws in Asia Pacific. Jal was a panellist in the session on Improving Corporate Governance.

Other legal firm co-sponsors included leading law firms such as the international firm of DLA Piper Rudnick Gray Cary, Nagashima Ohno & Tsunematsu Japan, Baker Mckenzie Wong & Leow Singapore, Sycip Salazar Hernandez & Gatmaitan Philippines, Tilleke & Gibbins Thailand, Crawford Bayley & Co India, and Kim & Chang Korea. Delegates to the conference came predominantly from Hong Kong and the Asia Pacific Region, but also from further afield.

Asia Law & Practice is a leading Asia focused publisher and conference organizer and since 1992 has been under the umbrella of Euromoney Institutional Investor PLC, a leading media group focused on the international finance sector.

"The firm is honoured to be invited to be a co-sponsor of the Conference", the firm's Chief Executive Partner Too Hing Yeap said. "The conference, which has become a premier event on the annual calendar of legal and business conferences in the region provides a forum for discussion and ventilation of the most important issues and concerns affecting the international business community in the region. It is also an opportune avenue for corporate networking, and renewal of ties and forging of new ones, among the participants in the corporate and legal communities in the Asia Pacific region.

With regard to the Workshop on Malaysia hosted by the firm, I notice that there was solid interest in the developments in the country, in particular the general legal environment, and specific areas such as labour law and arbitration, which augurs well for continuing foreign interest and investment in the country."

## New Arbitration Act 2005

Malaysia recently passed the new Arbitration Act 2005 (**the Act**). The Act replaces the previous Arbitration Act 1952. The Act came into force on March 15, 2006.

In most parts, it adopts the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on International Commercial Arbitration 1985, with some modifications and additions which were necessary. The Act applies to both domestic as well as international arbitrations.

Adopting the Model Law harmonises our law with rules that the international business community is familiar with. The Act makes Malaysia a more attractive venue for foreign businesses wanting a neutral third country venue to settle trade disputes within a familiar and acceptable set of rules.

### Highlights of the Act

Some of the significant elements of, and changes introduced by, the Act are as follows:

- Unlike the previous Act, the new Act provides a comprehensive definition of what constitutes a written agreement for arbitration between parties. This includes, amongst others, an exchange of letters or other communication which provide a record of the agreement. Even an exchange of a statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other is sufficient proof of an arbitration agreement in writing (Section 9 of the Act).

- One of the most notable changes is that the Act makes it imperative on the Court, on an application by a party, to stay proceedings commenced in court in respect of a matter which is the subject of an arbitration agreement, to enable the matter to be arbitrated, unless that agreement is null and void, inoperative or incapable of being performed, or there is in fact no dispute between the parties. In contrast, previously there were various discretionary grounds on which the court may decline to grant a stay. Further, it seems that the burden has been shifted to the party bringing the action in Court, to justify why stay should not be granted. Previously the burden to justify stay lay on the party applying for stay. The changes are meant to reinforce the enforceability of an arbitration agreement.

- The Act also limits intervention of the Courts in arbitration proceedings. Section 8 of the Act states that no court shall intervene in any matter governed by the Act. However, the Act does allow parties to apply to the High Court for interim orders, including security for costs, discovery of documents and for preservation, interim custody or even sale of property which is the subject matter of the dispute. The Act also provides that where the arbitral tribunal has already ruled on a matter which is relevant to the application, the High Court shall treat such finding as conclusive for the purposes of the application (Section 11 of the Act).

Interestingly, the Act now accords to the arbitral tribunal similar powers to provide interim orders as the High Court (Section 19 of the Act).

- Under the previous Act, where there is disagreement over the appointment of arbitrators, parties may apply to the High Court for an appointment of a suitable arbitrator. Under the new Act however, generally if there is dispute over the appointment of an arbitrator or if a party (or their appointed arbitrators in a three member tribunal) fails to comply with procedure in appointing an arbitrator, then either party may apply to the Director of the Kuala Lumpur Regional Centre for Arbitration (KLRCA) for such appointment. The decision on the appointment by the Director of the KLRCA is final and not appealable. This will help alleviate delays resulting from disagreements over appointment of the arbitrators.

- Previously, any challenge to the jurisdiction of an arbitral tribunal could only be determined by the High Court. Under the new Act, the arbitral tribunal may now rule on its own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement (Section 18 of the Act). Any ruling on its jurisdiction is appealable to the High Court but while such appeal is pending, the arbitral tribunal may continue with the proceedings and even make an award to minimise delay caused by the appeal.

- Under the previous Act, a party could at any time refer a question of law to the High Court for determination, usually resulting in delays in proceedings. Under the new Act, a party can only refer a question of law to the High Court for determination during the proceedings, with the consent of the arbitral tribunal or of all the parties. Where consent is given, the arbitral proceedings may continue notwithstanding that the reference is pending. Where there is no consent to refer a question to the High Court, it appears that a party can only refer a question of law to the High Court after the arbitration award has been given (Section 41 of the Act). The new restrictions will help prevent delays in arbitral proceedings.

- In the past, arbitrators are often challenged on the grounds of misconduct leading to their removal causing delay in the proceedings. With the new Act, an arbitrator may be challenged only if the circumstances give rise to justifiable doubts as to that arbitrator's impartiality or independence or the arbitrator does not possess qualifications agreed to by the parties. The challenge can only be for reasons which that party becomes aware of after the appointment. The arbitral tribunal is given an opportunity to withdraw itself upon the challenge, or to decide upon the challenge, before the party may appeal to the High Court in respect of such challenge. Whilst the application is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award. Again, this helps minimise delays.

- The Act by Section 37, limits the grounds on which an arbitral award may be appealed against and set aside by the High Court, to specific grounds set out therein. These include invalidity of the arbitration agreement, the award contains decisions beyond the scope of the submission to arbitration, the award is in conflict with the public policy of Malaysia, including that it was induced by fraud or corruption and that it is in breach of the rules of natural justice. Any application to set aside an award must be made within 30 days from the date of receipt of the award.

## Malaysia-US Free Trade Agreement

On 10th May 2004, Malaysia entered into a Trade and Investment Framework Agreement (TIFA) with the United States (US) to promote trade and investment between Malaysia and the US. The TIFA established a Joint Council on Trade and Investment (hereinafter referred to as the said Council) which meets at least once a year, for consultation on issues of trade and investment with a view to concluding a US-Malaysia Free Trade Agreement (US-Malaysia FTA).

Meetings on trade and investment have been held periodically in the said Council since commencement of TIFA and recently on 8 March 2006 the U.S.-Malaysia Free Trade Negotiations (US-Malaysia Trade Negotiations) were launched in Washington D.C. to draft and conclude the much awaited US-Malaysia FTA.

The US Trade Representative, Mr. Rob Portman, and Malaysia's Minister of International Trade and Industry, Y.B. Dato' Seri Rafidah Aziz, appear optimistic about the prospects of the US-Malaysia FTA.

The US-Malaysia FTA is envisaged to further promote trade and investment between these two nations by enhancing market access, removing barriers to trade, and harmonising standards and criteria for market acceptance.

The US and Malaysia boast of strong relations in trade and investment with impressive trade volume totalling USD 42.5 billion in 2005. US exports to Malaysia for the year 2005 totalled US$10.4 billion and is higher than US exports to India (at US$8.0 billion), to Thailand at (US$7.2 billion), to Russia at (US$3.9 billion) and to Indonesia at (US$3.0) billion. The US was Malaysia's largest source of foreign investments in 2005, with investment amounting to US$1.4 billion, representing 29% of total Foreign Direct Investments approved in the manufacturing sector for year 2005.

The US has expressed interest in more involvement in the area of services and investment, especially telecommunications, financial services, energy distribution, health care, audiovisual, professional and sector services.

One of the areas of interest, which Malaysia may hope to see more development in, is in the area of biotechnology. Investments by American companies in the area of biotechnology may lead to transfer of technology vital for boosting the biotechnology sector in Malaysia.

In a recent press conference on the US-Malaysia Trade Negotiations, the Deputy US Trade Representative responsible for Asia, Ambassador Karan K. Bhatia, stated that the Office of the US Trade Representative is interested in concluding the US-Malaysia FTA before the expiration of the US's trade promotion authority in Mid 2007. The trade promotion authority allows the White House to submit entire trade agreements to Congress for a Yes-No vote. This enables the submitted trade agreements to be adopted by Congress through a more expeditious procedure.

Considering the urgency of the US-Malaysia Trade Negotiations, there is a need for vital issues to be considered as soon as possible.

Some of the intellectual property related issues which may arise during the course of the negotiations are enforcement of intellectual property laws, extent and duration of protection of intellectual property rights, biosafety relating to movements of genetically modified organisms, data exclusivity, extent of regulatory bodies' power to impose conditions for compulsory licensing, technology transfer and data protection as well as competition law. Malaysia may also be invited to consider becoming a party to one or more international treaties on protection of intellectual property, which the United States is already a party to.

It is important to note that Malaysian law on data protection, competition, biosafety and biopiracy is still lacking. Nevertheless, it is gratifying to note that effective measures have been adopted over the years by the regulatory authorities in Malaysia to enhance enforcement of laws against counterfeiting and copyright infringement. Suggestions have also been made to set up a specialised court on intellectual property to ensure more effective dispensing of cases in relation to intellectual property law.

Recently, in respond to the Memorandum submitted by the Malaysian Intellectual Property Association ("MIPA"), the Minister of Domestic Trade and Consumer Affairs reiterated the Ministry's aim for Malaysia to become a party to the Patent Cooperation Treaty, the World Copyright Treaty, the Performers Rights Treaty and the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure.

Efforts have been made for many years to improve intellectual property laws and enforcement in Malaysia. With the advent of the US-Malaysia FTA, more efforts seem necessary in order that Malaysia could meet the standards of intellectual property protection required by the US in its bilateral Free Trade Agreements.

# Intellectual Property News

### Industrial Designs

The Industrial Designs Registration Office (IRDO) has issued a circular in the middle of 2005 stating that, on the advice of the Attorney General's Chambers, designs registered under the UK Registered Designs Act 1949 would not be allowed to be extended beyond three five-year terms under the Malaysian Industrial Designs Act 1996. The circular, which contradicted the announcement made by the then secretary general and director general of the Malaysian Intellectual Property Office at a dialogue with practitioners held on 27th March 2004, has caused a lot of uncertainty and anxiety amongst practitioners and owners of UK registered designs.

However, in a recent High Court decision, *Shachihata Incorporated & 18 Ors v. Registrar of Industrial Designs & Intellectual Property Corporation of Malaysia* delivered in December 2005, it was ruled that industrial designs registered under the UK Act before the Malaysian Industrial Designs Act came into effect on 1st September 1999 may be extended for the 4th and 5th periods of five years each. There is no indication that the IDRO would appeal against the decision, and further action from the AG's Chambers is awaited to make the necessary amendments to the Malaysian Industrial Designs Act and/or Industrial Designs Regulations 1999 (such as the amount of filing fees for the 4th and 5th periods).

# Case Updates

## Arbitration

### Convention on recognition of foreign arbitral awards

Despite the fact of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ("the Convention Act") having been repealed by section 51 of the new Arbitration Act 2005, the case of *Sri Lanka Cricket (formerly known as Board of Control for Cricket in Sri Lanka) v. World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd)* is an interesting case as it dealt with the interpretation of section 2 (2) of the Convention Act by the Court of Appeal for the first time after twenty one years since the Act was enacted by the Parliament to give effect to the New York Convention.

Arbitration proceedings were conducted in Singapore and three awards were made in favour of the plaintiff. The plaintiff sought to enforce the awards in Malaysia. The plaintiff's application for leave to enforce the awards was premised upon section 27 of the Arbitration Act 1952 (now repealed) and the Convention Act (now repealed).

The defendant opposed the application. The High Court Judge held for the plaintiff and granted leave to enforce the awards as well as entered judgment in terms of the awards against the defendant.

The defendant appealed to the Court of Appeal. The main issue raised for consideration by the Court of Appeal was whether or not the absence of Gazette Notification as stated in section 2 (2) of the Convention Act prevents the enforcement of the arbitral awards made in the present case.

Section 2 (2) of the Convention Act provides as follows:

> " The Yang di-Pertuan Agong may, by order in the *Gazette,* declare that any State specified in the order is a party to the New York Convention, and that order shall, while in force, be conclusive evidence that that State is a party to the said Convention."

The Court of Appeal allowed the appeal and set aside the judgment of the High Court Judge. The Court of Appeal made the following findings:

- The requirement of gazetting a country as a party to the Convention must have been intended by the Parliament to be mandatory in effect
- Section 2 (2) is not merely evidential in nature
- The purpose of the Convention Act is to give effect to the New York Convention subject to certain conditions. One of the steps that Parliament intended that the Executive should take to give the Convention Act efficacy is to issue a Gazette Notification declaring one or more countries as a party or as parties to the Convention and it

is that intention which the Court of Appeal is giving effect to

- The plaintiff in this case is not left without remedy. It could have the award registered as a judgment in the Singapore High Court and then seek registration of that judgment in Malaysia pursuant to the Reciprocal Enforcement of Judgments Act 1958.

The plaintiff has filed an application for leave to appeal to the Federal Court.

## Banking

**Islamic facilities: Rebate on unearned profit**

In *Affin Bank Berhad v. Zulkifli Abdullah* [2006] 1 CLJ 438, the Plaintiff bank claimed for the full balance of the sale price under an Islamic facility based on Islamic Syariah principles, (granted by the bank to its customer to finance the latter's purchase of a house), against its defaulting customer, without a rebate on the profit agreed for the full tenure of the facility, which was unearned because of the early termination of the facility. The High Court held that the bank was not entitled to claim the full sale price, and had to give a rebate on the unearned profit.

In Malaysia, Islamic financing facilities based on Islamic law principles have been growing parallel to conventional banking loan facilities. The charging of interest for a loan, or usury is prohibited in Islam. Islam prohibits the use of money as a commodity of exchange i.e., the lending of money and the charging of a price for its use.

However, money may legitimately be used as a medium for the exchange of an underlying commodity. On account of this, Islamic landed property financing in Malaysia commonly takes the structure of what is know as Al-Bai Bitaman Ajil (BBA) facility, i.e. a credit sale, whereby the customer sells the property it purchased, to the bank for a cash sum paid by the bank to the customer (or alternatively the contract by the customer to buy the property from the third party vendor is novated to the bank who becomes substituted as the purchaser). The property is immediately resold back by the bank to the customer at a higher price which incorporates the bank's profit on the sale, payable by the customer to the bank by monthly instalments over a fixed period of time.

The cash flow mirrors that of a conventional banking loan with interest charged, and in that manner affords financing to the customer for the purchase. The customer charges the property to the bank by way of security for the purchase price payable by it to the bank.

In *Zulkifli Abdullah*, the bank granted a BBA facility to the customer, who was initially its employee. The bank by way of novation, purchased the house from the third party vendor and paid the balance of the purchase price in the sum of RM346,000, which was therefore the amount of the facility originally.

The customer subsequently left the bank's employment and having defaulted in payment under the facility, obtained the bank's agreement to restructure the facility. The revised or restructured *bank purchase price* was RM394,172.06 which was therefore the revised facility amount. The bank had sold back the house to the customer, *at the bank sale price*, which under the restricted facility, was revised to RM992,363.40, payable by instalments over 25 years.

The customer again defaulted after making a few payments. The bank commenced separate legal proceedings, for recovery of the debt, and for sale of the house charged as security. The sum claimed by the bank was the full balance of the bank sale price, i.e., RM992,363.40 less RM33,454.19 paid by the customer, totalling RM958,909.21.

What is immediately striking is the amount of the claim, viz, less than three years into the facility, the revised facility of RM394,172.06, had mushroomed into a claim for a debt of RM958,909.21 i.e. more than doubled. The reason obviously was the fact that the sale price included the bank's profit on the transaction which was envisaged to be earned over the 25 years tenure of the facility, but which was now claimed by the bank immediately upon the default by the customer a short while into the facility.

In contrast, in a conventional banking facility, the borrower upon default will be required to pay only the amount remaining outstanding on the loan together with accrued interest at the point it settles the debt, and not the unearned interest for the entire tenure of the original loan.

By the terms of the facility, it was provided that upon the customer's default, the full balance of sale price shall become immediately due and payable. It appears that the facility provided that bank may give a rebate on the unearned profit at its discretion.

Despite the terms of the facility, the Judge held that the bank was not entitled to the full balance of the sale price claimed of RM958,909.21 effectively holding that the bank had to give a rebate on unearned profit. The amount the bank was allowed to recover was the sum of RM582,626.80, which was derived as the sum of, the revised facility amount or bank purchase price of RM394,172.06 plus profit at the agreed profit rate of 9% per annum calculated up to judgment date, less payments made, with further profit accruing at the profit rate until full payment.

The stated reasoning for the decision was that the full selling price claimed incorporated the bank's profit margin envisaged for the entire tenure of the facility. As the facility was prematurely terminated before the expiry of the tenure, the bank was not entitled to the unearned portion of the full profit. To do so contradicts the principle of BBA. (However, it is implicit that the bank was entitled to continue to charge profit at the profit rate on the outstanding debt until full payment is made).

No doubt, the judge was appealing to the sense of justice and fairness in his decision, bearing in mind the harshness of a claim for the full selling price. However, in view of the fact that the terms of the facility allowed the bank to claim the full selling price, the issue arises whether the judge was rewriting the contract for the parties and was right to do so.

The Judge's decision can be supported by legal principle even though the basis in legal principle may not have been fully articulated in the judgment. The decision is supportable on the following grounds. Firstly, Section 75 of the Malaysian Contracts Act codified in a modified form the common law concept of penalty in liquidated damages, and provides that where parties have agreed on a sum as liquidated damages for breach of contract, the innocent party may nevertheless be entitled to recover no more than reasonable compensation as damages. The stipulation for payment of the full selling price may be viewed as a penalty, and on that basis the court has justification to confine the bank to its actual loss, i.e. the earned profit only.

Secondly, English law has developed a body of rules called "equity" intended to mitigate the harshness of common law. In some circumstances in contracts, the court have also appealed to equitable considerations to temper perceived unfairness in contracts. This may underpin an additional basis for the decision, particularly so in the context, of Islamic financing, where by its nature as being grounded in Islamic principles, considerations of fairness and justice play a more significant role.

The substantial growth of Islamic banking is attributable in part to its attractiveness as a comparable if not better alternative to conventional banking, and its appeal has extended to those who are non Muslims. The right to claim the full profit without rebate on a customer's default, would be an obvious element that would derogate from the appeal of Islamic banking in comparison with conventional banking, and would be detrimental to the long term development of the industry. The implications of the decision should be judged from that perspective.

**Whether civil suit for payment of debt may be taken concurrently**

In *Tan Kong Min v. Malaysian National Insurance Sdn. Bhd.* [2005] CLJ 825, the Federal Court construed the terms of the National Land Code Charge over landed property in that case, as requiring that a civil suit for payment/recovery of loan debt secured by the Charge, may only be commenced after recourse is had first, to the realization/sale of the landed property, and only if the proceeds turn out to be insufficient to settle the debt in full.

There the bank granted a housing loan to the borrower, for the purchase of a house. The borrower defaulted in payments, and the bank initially commenced action to sell the house charged by the borrower to the bank as security. The proceeds were insufficient to settle the debt in full, and the bank thereafter commenced a civil suit/action for payment of the balance.

It appears that in the case, there was only the document creating the Charge, and no separate loan agreement.

Clause 7 of the terms of the Charge (referred to as the Annexure to the Charge) provided as follows:

"7. If the amount realized by the lender on a sale of the said land under the provisions of the National Land Code ……. is less than the amount due to the lender… the chargor shall pay the lender the difference between the amount due and the amount so realized…"

The primary issue raised for determination by the Federal Court was whether the suit for payment of the debt was time barred by statutory limitation. Firstly, the court had to determine whether Section 6 of the Limitation Act 1953 applied to the action, or whether Section 21 applied instead.

Section 6 provides that the limitation period for actions founded in contract or tort is 6 years from the date the cause of action accrued, whereas Section 21 provides that the limitation period for actions to recover money secured by a mortgage or charge on land or personal property (or to enforce the mortgage or charge), shall be 12 years from the date the right to receive the money accrued.

The Court held that Section 21 applied rather than Section 6, and therefore the limitation period was 12 years rather than 6 years. Secondly, the Court had to determine when the cause of action for the suit for payment of the debt, accrued.

The court, stating that the only terms binding the parties were in the Charge document, and construing the terms of Clause 7 thereof, was of the view that by the terms of Clause 7, the personal liability of the borrower/chargor to pay the debt, can be determined only after, and arises only after, the property had been sold. Clause 7 provides that the chargor shall pay the difference between the amount of the debt and the amount of the sale proceeds, which can be determined only after the property is sold.

Therefore, the cause of action for recovery of the debt, and the bank's right to sue for payment, accrues only after the property has been sold first. In the case, the action was brought within limitation period of 12 years after the property had been sold and therefore was not time barred.

In arriving at its construction of Clause 7, the court referred to the decision of the High Court in *Hong Kong & Shanghai Banking Corp Ltd. v. Wan Mohd bin Wan Ngah* [1991] 3 MLJ 119. In that case, it appears that the only agreement between the bank and the borrower was a charge document as well, which contained a clause in the same terms as Clause 7 in *Tan Kong Min*.

The court there construed the said clause in a similar manner. However the Judge in that case had referred to various earlier decisions which involved in addition to a land charge, guarantees provided by guarantors. The decision in those cases was that the lender was not required to realize the security first before suing the borrower and guarantors of the debt.

It may be assumed that almost invariably the terms of guarantees provide that action for payment against guarantors may be taken concurrently or simultaneously with, and need not be after, action for realization of the security. The Judge in *Wan Mohd Wan Ngah*, distinguished those cases on the ground of the guarantees in those cases, and accepted that where there are guarantees, civil suit for payment may be taken concurrently.

Conceptually, the decision in *Tan Kong Min* seems to be inconsistent with the inherent nature of, and established position in relation to, security for debts, at common law.

Firstly, a security for a debt is a secondary and ancillary obligation to the debt, which is the primary obligation. The security cannot be realized unless there is a primary debt due. It would be inconsistent with that basic premise, to hold that the primary debt becomes due only after the security is realized. If the debt is not due, the security cannot be realisable.

Secondly, it is established at common law that resort to the security is optional for a lender. A security is just that, it provides added comfort to the lender, but the lender is not obligated to realize the security, and may choose to realize it before, concurrently with or after, a civil suit for payment, or not at all.

The existence of a provision such as Clause 7 should not affect the position. The provision, perhaps not felicitously worded, should not mean that the personal liability of the chargor for the debt (at least in the case of a first party chargor, i.e. the borrower itself, as contrasted with a third party chargor), is limited to the difference between the debt and sale proceeds. At any rate, it should not be construed as requiring that the personal liability for the debt arises only after the security is sold. To do so is contrary to the nature of a security and the position at common law, as adverted to earlier. The provision merely affirms that the chargor is liable for the balance of the debt should there be a shortfall.

It is noted that many charge documents contain a general covenant by the chargor to pay the whole debt and, a provision that civil action for payment of debt may be taken concurrently with action for sale of security. In addition, there is usually a separate loan agreement between the borrower and the lender containing similar terms. In such cases, it should be clear that the cause of action for payment of debt arises immediately upon default or upon demand, and there is no requirement to have recourse first to the security before commencing civil recovery of the debt.

### Overdraft facility for bridging finance: *Mae Perkayuan* distinguished

As in the case of *Bank Bumiputra Malaysia Bhd v. Sal Enterprise Sdn. Bhd.* [2005] 4 CLJ 277, reported in the 4th Quarter 2005 issue of the newsletter, the Court of Appeal has in *Lim Chee Holdings Sdn. Bhd. v. RHB Bank Bhd* [2005] 6 MJL 497 also distinguished the decision of the Court of Appeal in *Bank Bumiputra Malaysia Bhd v. Mae Perkayuan Sdn. Bhd*. [1993] 2 MLJ 76.

In *Lim Chee Holdings* the borrower in 1985, secured from the bank a bridging loan in the form of an overdraft facility in the sum of RM1 million and end-financing facilities of RM 2 million. The facilities were to finance the development of a housing project by the borrower. Subsequently, the borrower defaulted in payment under the facility. However the bank agreed to restructure the repayment terms in 1997.

Notwithstanding that, the borrower's financial position continued to be poor and the project was eventually abandoned in 1990. In 1991, the Tabung Projek Perumahan Terbengakai (TPPT) granted the borrower a soft loan for the purpose of reviving the project. Works resumed but the project was not a complete success. The borrower blamed it on the attitude of the bank, in particular on the disbursement of the bridging loan. The borrower filed two actions against the bank, alleging the bank had breached the terms of the bridging loan. This actions were dismissed by the High Court, which allowed the bank's counterclaim for the outstanding sum under the loan. The borrower appealed to the Court of Appeal, contending that the judge erred in not finding that the bank had breached the terms of the loan in delaying or failing to release the balance of the loan.

The Court of Appeal, noting that an appellate court should be slow to interfere with findings of fact by a trial court, unless clearly erroneous, found no reason to overturn the High Court's decision. The borrower had defaulted in payment, and the bank was not in breach in declining to release the balance of the loan.

What is noteworthy is that the borrower sought to rely on the case of *Mae Perkayuan,* in which the Court of Appeal there found that on the facts of the case, there was no obligation on the borrower to pay interest or instalments, during the bridging period between the commencement of constructions and receipt of proceeds of sale to purchasers, and the bank had breached the contract by terminating the facility for non payment of interest by the borrower during the bridging period. The Court distinguished *Mae Perkayuan* on its facts, and held that in the present case, the borrower was obligated to make payments during the bridging period, and having defaulted in payment, the bank was entitled to recall the facility.

## Intellectual Property

In *Toyo Ink Mfg Co, Ltd v Registrar of Companies,* the plaintiffs, Toyo Ink Mfg Co Ltd and Toyochem Corporation Berhad, filed an appeal with the High Court against a decision of the Registrar of Companies under Section 11(10) of the Companies Act 1965 refusing to order Toyo Ink Group Berhad to change its name. The plaintiffs also sought declaratory relief.

The plaintiffs' main argument was that the name 'Toyo Ink Group Berhad' was undesirable within the meaning of Section 22(1) of the Act. The first named plaintiff and its associated and subsidiary companies are collectively known as Toyo Ink Group. The plaintiffs contended that

Toyo Ink Group Berhad's name was confusingly and/or deceptively similar to that of Toyo Ink Mfg Co Ltd, and implied an association with the latter and with the Toyo Ink Group of companies. The plaintiffs adduced evidence of actual confusion arising from the use of the name Toyo Ink Group Berhad.

The plaintiffs claimed that the Toyo Ink name and mark were distinctive of their business, and that they had acquired reputation and goodwill in the name and mark both in Malaysia and abroad in respect of printing inks, among other things. Since Toyo Ink Group Berhad was in direct competition with the plaintiffs in the market for the manufacture and sale of printing inks, the confusion and/or deception caused inconvenience to the plaintiffs and loss and damage to their reputation and goodwill.

However, the court dismissed the plaintiffs' appeal on the following grounds, among others:

- The second defendant's name, Toyo Ink Group Berhad, was not identical or similar to the plaintiffs' names.
- The plaintiffs had failed to show that the words 'Toyo', 'Ink' and 'Group' are not commonly used as trade names in Malaysia.
- A subsidiary of the second defendant, Toyo Ink Sdn Bhd, had been using the 'Toyo' mark since 1979 without any objection from the plaintiffs.
- The first plaintiff was registered in Japan. The Malaysian Registrar of Companies does not have jurisdiction on the registration of foreign companies in their own countries, and need not be aware of the existence of foreign companies with names identical to those of companies registered with the Malaysian Registry of Companies.
- The name 'Toyo' has not been gazetted as a prohibited name under the Minister's Direction in Government *Gazette* 716/97 dated January 30 1997 and *Government Gazette* (Amended) dated October 11 2001.
- The plaintiffs are known as the Toyochem Group in Malaysia. The plaintiffs should have registered the name 'Toyo Ink' and not 'Toyochem' at the Malaysian Registry of Companies.

## Recent developments in Intellectual Property Law in Malaysia

*Summary of paper presented by Michael Soo at the 3rd Annual Asia Law & Practice, Asia Pacific In House Counsel Summit, Hong Kong, 15th and 16th March 2006*

**Incorporation of the Intellectual Property Corporation of Malaysia**

Growing awareness of the need for intellectual property management has led to an increase in demand for services required for the legal protection of intellectual property in Malaysia. In response to this demand, the Intellectual Property Corporation of Malaysia (now know as Malaysian Intellectual Property Office) was incorporated on 3rd March 2003 by virtue of the Intellectual Property Corporation of Malaysia Act 2002 in order to enhance expertise and to establish a more efficient and effective administration for the IP system in Malaysia, besides assisting the Government of Malaysia in its regulatory functions and in assuming a bigger role in respect of IP in the international arena.

Acts Under the Administration of the Corporation are:-

Intellectual Property Corporation of Malaysia Act 2002
Trade Marks Act 1976
Patents Act 1983
Copyright Act 1987
Industrial Designs Act 1996
Layout Designs and Integrated Circuit Act 2000
Geographical Indications Act 2000

**Malaysia's Membership in International Treaties**

In addition to the above, Malaysia became a party to the Paris Convention for the Protection of Industrial Property on 1st January 1989 and Berne Convention for the Protection of Literary and Artistic Works on 1st October 1990. Amendments have been made in the Trade Marks Act and the Copyright Act to bring the law in line with Malaysia's obligations under the international treaties.

**Trade Marks Law: Well Known Marks**

After amendments of Trade Marks Act in 1994 and 1998, right of priority under Convention (section 70) is now provided for and well-known marks (section 14 (1) (d) & (e) and section 70B (1)) are now recognised for protection under the Act. Provisions have also been enacted for border measures to protect trade marks rights against cross-border incidence of infringement (sections 70C-70P).

Whether a mark is considered well-known in Malaysia is "uncharted territory" in Malaysia as there is as yet any reported case on it. The relevant factors that would be taken into account include the degree of knowledge and recognition of the mark in the relevant sector of the public; the duration, extent and geographical area of the use of the mark; and the value associated with the mark (see Regulation 13B, Trade Marks Regulations 1997).

It is also interesting to note that in the Originating Motion filed in 1998, Faiza Tamby Chik J. *Thrifty Rent-A-Car System Inc v Thrifty Rent-A-Car Sdn Bhd [2004] 7 MLJ 567* gave judgment in favour of the Appellant company based on world wide reputation enjoyed by the Appellant company.

The High Court held in the case that allowing the registration to remain on the Register in the name of the Respondent would amount to passing off. This case was filed before the coming into force of the amendments to the Trade Marks Act providing for recognition of world wide reputation of marks in the determination of a mark for registration and in the grant of an injunction to restrain against an infringement of a well-known mark. As the decision was in respect of an action under the common law passing off and not infringement under the Trade Marks Act, it would appear that even in the development of common law, there has been much cognisance taken by the Court in respect of recent developments in technology which affects the spread of the reputation of a mark.

**Trade Description**

Trade Descriptions (Original Labels) Order 2002 provides for goods specified in the First Schedule of the said Order to be affixed with an original label. The goods are:- (i) Compact Disc Audio (ii) Compact Disc Video (iii) Compact Disc Read Only Memory (iv) Compact Disc Interactive (v) Mini Disc (vi) Laser Disc (vii) Audio casette (viii) Video casette (ix) Compact Disk-photo (x) Digital Versatile Disk and Other device for data storage in digital format to be read by laser or other means. The label comprises of:- (i) national emblem (ii) serial number (iii) the word 'original' and 'tulen' (iv) the words 'KPDN&HEP' (v) the logo of the Ministry of Domestic Trade and Consumer Affairs (vi) hidden security features; in order to enable consumers to distinguish original goods from copyright breach materials.

**Copyright Law : Recent Amendments**

The Copyright Act has been amended in line with Malaysia's obligations under the Berne Convention and also to take into account WIPO Copyrights Treaty. Technological development has been taken into account and moral rights of the performers are also now provided for in the Copyright Act.

Amendment to the Copyright Act has also been made in order to enhance the role of the Copyright Tribunal in respect copyright licensing, especially in the event of a dispute.

In addition to the above, enforcement power of the Assistant Controller in the Copyright Act has also been enlarged in order that he may execute an arrest without a warrant for offence under the said Act. The penalty provision, both in the form of a fine and imprisonment, has been increased.

**Patent Law : Recent Amendments**

As for the Patents Act, amendments had been made in respect of the validity period of a patent. Previously a patent is valid for 15 years from the date of its grant. Now a patent is valid for 20 years from the application date of the said patent. (section 35(1)). However, there are exceptions provided under section 35(1B) and (1C) of Act which purports to deal with the period of transition when the amendment come into force. Section 35 (1B) states that where a patent application was filed before 1st August 2001, and was pending on that date, the duration of the patent granted on that application shall be twenty years from the date of filing or fifteen years from the date of grant, whichever is longer. Section 35 (1C) states that the duration of a patent granted before 1st August 2001 and still in force on that date shall be twenty years from the date of filing or fifteen years from the date of grant whichever is longer.

The Malaysian Intellectual Property Office (MyIPO) has not, until now, allowed a third party to inspect and obtain copies of any documents other than the granted patent specification, unless the patent owner gives written consent. This is despite the provisions in sections 33 and

34(1) of the Patents Act, which allow any party to inspect and obtain extracts of granted patent files. The position taken by MyIPO is that any communication between the applicant and MyIPO, other than the granted specification, should remain confidential, even after grant of the patent.

**Patent Law : Recent Court Decision on Interpretation of the Patents Act 1983**

Recently a challenge to this was made in the High Court in the case of *Patrick A/L M.G. Mirandah v Ketua Pengarah Perbadanan Harta Intelek Malaysia*. The applicant, argued that the written consent of the patent owner would only be required for pending patent applications on grounds of confidentiality, but not for granted patents. The fact that the patent had been duly granted showed that the element of confidentiality no longer existed and therefore a third party should be entitled to inspect the file at the Registry and to obtain the case history and any relevant extracts. It was also argued that if Parliament intended to restrict public access only to the granted specification, then the restriction would have been specified in the Patents Act.

On principles of statutory interpretation, it was submitted that if a statute is clear and unambiguous, a literal interpretation should be taken of the words in the statute. In this case section 34(1) of the Patents Act clearly provides that a patent file can be inspected and extracts can be obtained as soon as the patent application proceeds to grant. Based on these submissions the Court granted the application.

This is a positive development as far as the Malaysian patent regime is concerned, because in any litigation concerning the granted patent, the prosecution history can now be brought up to show whether concessions were made by the applicant to MyIPO, which will be a factor that the court will take into account in construing the claims.

## Doing Business in Malaysia: Recent Developments

*Summary of paper presented by Jal Othman at the 3rd Annual Asia Law & Practice, Asia Pacific In House Counsel Summit, Hong Kong, 15th and 16th March 2006*

The paper highlighted recent developments in the legal and regulatory framework in Malaysia governing the business community. The following broad topics were dealt with in the paper:

- the 9th Malaysia Plan 2006-2010
- the banking sector
- the corporate sector
- the debt and capital sector
- enforcement and regulation
- the Capital Market Master Plan
- the Financial Market Master Plan

**9th Malaysia Plan 2006-2010**

There was an introduction to the proposed 9th Malaysia Plan 2006-2010 ("9MP") and the matters that were expected to be addressed in the 9MP. Participants were taken through the following areas which were anticipated to be included in the 9MP:

- enhancing the nation's competitiveness
- further liberalization and deregulation of rules and regulations
- expediting implementation and execution of policies
- Malaysia's strategy to engage China and India

**Banking Sector**

In the area of the banking sector, the proposed oversight framework to deal with Credit Rating Agencies and the proposed setting up of the Bond Pricing Agencies were discussed.

The sale of non performing loans and the impact of Basel 2 on the treatment of operational, market and legal risk were touched upon.

**Debt and Capital Sector**

The participants were presented with a snapshot of some of the recent guidelines issued by the Securities Commission. These include guidelines relating to the following matters:

- Real Estate Investment Trust
- Exchange Traded Funds
- Equity Linked Structures
- Structured Products

- Offshore investment by fund managers

**Enforcement and Regulation**
The enforcement and regulation framework will take on a more liberalized and deregulated environment.

There will be a continued drive to blend the statutory regulation with self regulation with emphasis on a governance framework which is more principle based rather than rule based.

There is the added push for more civil sanctions (including damages and compensation) for contravention of statutory provisions.

The formation of the High Level Committee on Enforcement will further facilitate greater collaboration amongst all the enforcement regulators.

**Corporate Sector**
The participants were introduced to one of the more major initiatives for reform – the Corporate Law Reform Programme 2004 (CLRP).

One of the main thrusts of the CLRP was to examine the cost of compliance in doing business.

The continued emphasis on corporate governance as a brand building exercise was highlighted.

The Government's push for speedier approval process is reflected in the introduction by Bursa Malaysia of fast track approvals for certain circulars to be issued to shareholders.

The other matters that were highlighted to the participants include the following:

- the marketing of foreign listed securities in Malaysia
- the investment by Malaysian investors in recognized foreign stock exchanges
- protection for whistle blowers
- best practices for corporate disclosure

**Capital Market Master Plan 2000 – 2010 (CMP)**
The CMP represents a pragmatic programme for further deregulation and liberalization.

The CMP will be implemented in the following 3 stages:

- Stage 1 (2001 -2003): strengthening of domestic capacity and develop strategic and nascent sectors
- Stage 2 (2004 -2005): liberalization of market access
- Stage 3 (2006-2010): enhance international positioning in areas of comparative and competitive advantage

The CMP contains 152 recommendations. Some of the recommendations of the CMP alluded to in the paper are as follows:

- expand the breath of listings on the Malaysian stock exchange to include foreign listings
- foreign equity participation in domestic stockbroking companies
- foreign ownership of domestic unit trust and fund management companies.

**Financial Market Master Plan 2000 – 2010**
The FMP will be implemented in the following 3 stages:

- Stage 1: strengthen domestic capacity
- Stage 2: increase domestic competition
- Stage 3: integration with international markets

Some of the recommendations of the CMP alluded to in the paper are as follows:

- Banking sector : to encourage more strategic alliances
- Insurance : to increase cap on foreign ownership
- Reinsurance : to open up the reinsurance industry fully to foreign competition
- Venture Capital : to enhance the promotion of VC investment opportunities in Malaysia
- Labuan Offshore Financial Centre : to develop an active International Offshore Financial Centre for Malaysia
- International Islamic Financial Market : to promote the development of Islamic Banking and Takaful Business
- To develop and strengthen the Capital Market, E-Commerce and the Ancillary Activities
- To enhance the Labuan International Financial Exchange (LFX)

# Maritime Limitation of Liability in Malaysia

*By Nagarajah Muttiah*

1. English maritime law (including the law of tort, contract and bailment), as administered in England on April 7, 1956, is generally received into West Malaysia, except in the states of Penang and Malacca, which together with East Malaysia apply the maritime law as administered in England at the corresponding period when similar issues or questions arise for determination (*section 5 of the Civil Law Act 1956*), unless in any case other provision is or shall be made by any local written law. Malaysia (both West and East) has no specific Act of Parliament dealing exclusively with admiralty matters, however. To fill that void, English law on Admiralty matters is adopted directly into Malaysia by virtue of *section 24(b) of the Courts of Judicature Act 1964*, which provides that the civil jurisdiction of the High Court shall include the same jurisdiction and authority in relation to matters of admiralty as the High Court of Justice of England has under the United Kingdom's *Supreme Court Act 1981*. It follows therefore that in matters of practice and procedure, as well as substantive law, Malaysian maritime law is primarily English maritime law, supplemented by various relevant local statutes. For instance, in West Malaysia it is the *Merchant Shipping Ordinance 1952* (*MSO 1952*).

   [For the statutory provisions referred to herein, there are corresponding provisions in the statutes applicable to Sabah and Sarawak. For reason of brevity, the corresponding provisions will not be referred to here.]

2. One of the specific areas dealt with by the abovementioned *Merchant Shipping Ordinances* is: limitation of shipowner's liability. In West Malaysia, the relevant provision is found in *section 360 of Part IX of the MSO 1952*, which ratified the *International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships 1957* (hereinafter referred to as *1957 Convention*).

3. Before proceeding to deal with limitation of liability, a noteworthy point is that the *Merchant Shipping Ordinances* of West Malaysia and Sarawak also provide for exclusion of liability. In West Malaysia, *section 359 of the MSO 1952* excludes liability of Malaysian shipowners in certain specific cases; provided the losses that were covered in those specific cases were not due to the shipowners' actual fault or privy.

4. Moving on to limitation of liability, in West Malaysia, it is provided in *section 360(1) of the MSO 1952*. This section limits the liability of Malaysian and foreign shipowners for certain cases of loss of life, injury or damage; provided the abovementioned occurrences were not due to the shipowners' actual fault or privy.

5. Once the owner successfully shows that either of the occurrences as set out in *section 360(1)* of the *MSO 1952.*

6. Briefly, *section 360(1) of the MSO 1952* provides that the shipowner shall not be liable to damages beyond the following amounts. In *section 360(1)(aa)* it provides that in respect of loss of life or personal injury, either alone or together with such loss, damage or infringement as is mentioned in *section 360(1) of the MSO 1952*, an aggregate amount not exceeding an amount equivalent to three thousand one hundred gold francs for each ton of the ship's tonnage. Whereas *section 360(1)(bb) of the MSO 1952* provides that in respect of such loss, damage or infringement as is mentioned in *section 360(1) of the MSO 1952*, whether there is in addition loss of life or personal injury or not, an aggregate amount not exceeding an amount equivalent to one thousand gold francs for each ton of the ship's tonnage.

7. In exercise of the powers conferred by *section 360(2)(b)* of the *MSO 1952*, the Ministry of Transport had specified in *section 2 of the Merchant Shipping (Limitation of Liability) (Malaysian Ringgit Equivalent) Order 1993* which was enacted pursuant to *section 360(2)(b)*; that: *a)* RM 629.51 is equivalent to 3100 gold francs and *b)* RM 203.07 is equivalent to 1000 gold francs.

8. In order to ascertain the tonnage of a Malaysian ship, it is provided in *section 360(2)(c) to (h) of the MSO 1952*. The *Merchant Shipping (Tonnage) Regulations 1985.*

9. As for contracts of carriage, where goods are damaged or lost, the

shipowner has another option of limiting his liability under the *Hague Rules Relating to Bills of Lading (hereinafter referred to as "Hague Rules")*. The relevant provision is *Article IV, Rule 5 of the Hague Rules* which states that: "*Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit,…*"

10. In West Malaysia, *The Hague Rules* is appended under the *First Schedule* to the *Carriage of Goods By Sea Act 1950*.

11. On the '£100', it is taken to be the gold value of the sterling pound and not its paper value, as enunciated in the case of *The Rosa S [1989] 1 QB 419*. As for the 'package or unit', it is interpreted as a carton or a unit of storage which would make up for the space in a container; instead of the container itself- as propounded in the case of *The Mormaclynx [1971] 2 Lloyd's Rep 271*.

12. *The Hague Rules* was subsequently amended by *The Hague-Visby Rules*. However, *The Hague-Visby Rules* is yet to be adopted in Malaysia. As such, the current position here is still that of *The Hague Rules*.

**Limitation of liability arising from oil pollution**

13. *Merchant Shipping (Oil Pollution) Act 1994* (hereinafter referred to as *1994 Act*) that implements the provisions of the *International Convention on Civil Liability for Oil Pollution Damage 1969* (hereinafter referred to as the *Civil Liability Convention 1969*), as amended by *Protocol of 1976* specifically provides for civil liability for oil pollution; and limitation of liability for loss or damage caused by oil pollution. The *1994 Act* is applicable to both West Malaysia and Sabah and Sarawak. At the outset, the condition precedent for the *1994 Act* to apply is that: the ships in question must be either: sea-going vessels or any seaborne crafts of any type whatsoever, actually carrying oil in bulk as cargo.

14. If this condition was met, then *section 3 of the 1994 Act* comes into play to spell out the strict liability of the shipowner for any pollution damage caused, as a result of an incident that took place in Malaysia, by oil discharging or escaping from a ship.

15. *Section 4(1) of the 1994 Act* provides for a total exclusion of liability of shipowner if he successfully proved *section 4(1)(a) or (b) or (c)*. *Section 4(1)* provides that the owner of a ship from which oil has been discharged or has escaped shall not incur any liability for pollution damage under *section 3* if he proves that the discharge or escape- *a)* resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; *b)* was wholly caused by an act or omission of a third party, which act or omission was done with intent to cause damage; or *c)* was wholly caused by the negligence or wrongful act of a government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

16. Whereas *section 4(2)* provides that where the owner of a ship from which oil has been discharged or

has escaped proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person.

17. *Section 6 of the 1994 Act* provides for limitation of liability incurred under *section 3 of the 1994 Act* that will be the focus here. *Section 6(2) of the 1994 Act* provides that the shipowner may only limit his liability under *section 3 of the 1994 Act*, if the incident was caused without his actual fault or privy. The limitation fund as set out in *section 6(1)(b) of the 1994 Act* provides that the shipowner's liability (that is the aggregate of his liabilities under *section 3 of the 1994 Act* in respect of any one incident) shall not exceed one hundred and thirty- three special drawing rights for each ton of the ship's tonnage, provided that this aggregate amount shall not in any event exceed fourteen million special drawing rights.

18. Computation of the Malaysian Ringgit equivalent to special drawing rights is as set out in *Merchant Shipping (Oil Pollution) (Money Conversion) Regulations 1995.* The ship's tonnage shall be the net registered tonnage and as ascertained pursuant to *section 6(3)(a), (b) and (c) of the 1994 Act*.

19. The limitation fund in the *1994 Act* is known as The Fund because it has a legal personality that is capable of assuming rights and obligations and of being a party in legal proceedings before a Court in Malaysia; pursuant to *section 16 of the 1994 Act*. Further, The Fund was established by the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971* (hereinafter referred to as *Fund Convention 1971*), as amended by the *Protocol of 1976*.

20. Since the shipowner's liability is limited by *section 6 of the 1994 Act*, the person suffering from the pollution damage will be able to claim the remaining sum from The Fund pursuant to *section 19(1)(c) of the 1994 Act*. Further, if the shipowner had incurred reasonable expenses as a result of mitigating the pollution damage, he may claim it from The Fund pursuant to *section 19(3) of the 1994 Act*. However, The Fund's liability is limited by *Paragraphs 4, 5 and 6 of Article 4 of the Fund Convention 1971*, as amended by *Article 3 of the Protocol of 1976*.

**Conclusion**

21. The above discussion generally sets out the limitation of liability in Malaysia. It is also noteworthy that limitation of liability as provided respectively in the abovementioned provisions is not an automatic right. This means that the shipowner has to take affirmative steps to invoke limitation; for instance: by pleading it in the defence. Further, it is also an established principle that in relying on the limitation provisions, the shipowner bears the burden to prove that the loss or damage were not due to his actual fault or privy. However, it is to be noted that the *1957 Convention* had been replaced by the *Convention on Limitation of Liability for Maritime Claims 1976* (hereinafter referred to as *1976 Convention*). The *1976 Convention* was subsequently amended by the *Protocol of 1996*. The *1976 Convention* reversed the burden of proof to the victim because the victim must now *"prove that the loss resulted from the shipowner's personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result"*. Since the *1976 Convention* is yet to be ratified in Malaysia, the position here is still that of the *1957 Convention*.

22. Turning to oil pollution, the *Civil Liability Convention 1969* and the *Fund Convention 1971* had already been replaced by the *International Convention on Civil Liability for Oil Pollution Damage 1992* (hereinafter referred to as *Civil Liability Convention 1992*) and the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992* (hereinafter referred to as the *Fund Convention 1992*). In line with this development, a Bill had been drafted to implement both the *Civil Liability Convention 1992* and the *Fund Convention 1992*. This Bill is cited as *Merchant Shipping (Oil Pollution) (Amendment) Act 2005*. However, this Bill is still going through the Parliamentary process in Malaysia. As such, the current position here is still that of the *Civil Liability Convention 1969* and the *Fund Convention 1971*.

Steven Thiru was elected as the Kuala Lumpur Bar Committee representative to the Malaysian Bar Council for the current term at the Annual General Meeting of the Kuala Lumpur Bar Committee on 9 March 2006.

Steven is also currently Chairman of the Continuing Legal Education sub-committee of the Kuala Lumpur Bar Committee. He has previously held positions in the Human Rights, Law Reform, Professional Development and Contempt of Court committees of the Malaysia Bar Council.

A subject of particular current interest to Steven, and which was a primary plank in his election platform, is Continuing Legal Education (CLE). At a time when the Malaysian Bar appears to be on the threshold of adopting a compulsory CLE Programme for its members, in line with developments in other commonwealth jurisdictions, Steven has had a leading role in developing and advancing the Kuala Lumpur Bar Committee's own voluntary CLE programme into a structured and comprehensive programme, which has been well received, and which can be a vanguard and model for the development of a mandatory continuing professional development scheme for the whole Malaysian Bar.

## DIARY

### Papers presented by Shook Lin & Bok at conferences

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| 22-23 August 2005 | The Asia Business Forum Seminar on Land Law<br><br>Hotel Nikko Kuala Lumpur | **Dahlia Lee**<br>Land Security Transactions |
| 25-30 September 2005 | Conference of the International Bar Association<br>Maritime and Aviation Law Section<br><br>Prague Czech Republic | **Nagarajah Muttiah**<br>Recent Developments in Maritime Law in Malaysia |
| 14-15 November 2005 | The Asia Business Forum Seminar on Sucessfully Resolving Disputes in Construction Contracts<br><br>JW Marriot Kuala Lumpur | **Lam Ko Luen**<br>Contractors' Rights in Disputes Arising from Variation Claims |
| 24-25 January 2006 | The Asia Business Forum Seminar on Employment Law and Contracts<br><br>JW Marriot Kuala Lumpur | **Steven Thiru**<br>Breach of Employment Contracts: Implications |
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