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SURROGACY IN MALAYSIA

An insight into the taboo topic of infertility, highlighting the legality of surrogacy contracts that are often shrouded in secrecy

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Excerpts from the closing keynote address by Steven Thiru, President of the Malaysian Bar, at the Bar of England & Wales's Annual Bar and Young Bar Conference 2016

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KUALA LUMPUR

EDITOR'S NOTES

Much have changed since the publication of our first newsletter in 2005. As George Bernard Shaw said, "*Progress is impossible without change, and those who cannot change their minds cannot change anything*". We believe that change is the only path to progress. Earlier this year, the firm redesigned our website and it now has a more contemporary template with mobile friendly features to cater for the rise in digital reading on mobile devices. The thematic change has transcended our various publications, including this 2016 issue of the Legal Nexus.

In this issue, we feature articles on matters that do not always receive the desired attention and limelight. Goh Siu Lin deals with the controversial topic of infertility, highlighting the legality of surrogacy contracts that are, more often than not, shrouded in secrecy. Just as Vietnam opens its doors to commercial surrogacy in January 2016 and while India contemplates closing it, the article "The Potential Risks of Surrogacy Arrangements in Malaysia" provides a meditative view on surrogacy issues in the Malaysian context.

Elsewhere in the newsletter, Tania Edwards spells out the top 10 things you need to know about the firm's tax department while Hoh Kiat Ching, Navini Rajikumara and Nina Lai chronicle Bank Negara's latest Banking Supervision Courses, MEF's Industrial Relations Conference 2016 and IPBA's 26th Annual Meeting & Conference respectively.

This revamped Legal Nexus is intended to create a better knowledge-sharing platform for you, our readers. The thematic layout change reflects this vision. We hope that you enjoy the read as much as we took pleasure in sharing it with you.

Sincerely,

Steven Thiru

Editor-In-Chief

Editorial Committee

Ivan Ho Yue Chan
Goh Siu Lin
Hoh Kiat Ching
Tharmy Ramalingam
Tan Gian Chung
David Dinesh Mathew

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ANNOUNCEMENTS

The firm is pleased to announce the elevation of seven partners with effect from 1st January, 2016. We congratulate the following Partners who have been promoted as General Partners, and Senior Associates who have been admitted to the partnership.

New General Partners

Lam Ko Luen

B.Comm. LL.B., Monash University, FCIArb, FMIArb

Ko Luen joined the firm in 1996 as an associate until 2000. He was subsequently admitted to the Sarawak Bar in 2001 and re-joined the firm as a partner in 2005. He specializes in the areas of International & Domestic Arbitration, Building & Construction Contract Disputes and General & Civil Litigation. He has appeared as counsel in court, arbitration and adjudication hearings. Ko Luen also sits as arbitrator and adjudicator in proceedings involving commercial, construction, energy and infrastructure disputes.

Sudharsanan Thillainathan

B.Comm. LL.B., Monash University; LL.M. (LSE), Dip Arb, FCIArb, FMIArb

Sudhar joined the firm in 1997 as an associate and was elevated to a partner in 2004. His main practice areas are Civil, Corporate & Insurance Litigation with a focus on complex commercial and corporate disputes and fraud. Sudhar also has an active International & Domestic Arbitration practice as counsel, arbitrator and adjudicator involving commercial, construction, energy and infrastructure disputes. His practice areas also cover Tax and Competition Law.

Chan Kok Keong

LL.B. (Hons) (Leicester), C.L.P.

Kok Keong joined the firm in 1998 as an associate and was elevated to a partner in 2004. He specializes in the areas of Banking & Finance Litigation and regularly acts for financial institutions and corporations in cases of recovery (conventional and Islamic financing), enforcement and security realisation (land, shares and maritime vessels) and insolvency practice (company liquidation, bankruptcies and receiverships). When not litigating cases, he also speaks at conferences/in-house events & conducts legal workshops.

New Partners

Samuel Tan Lih Yau

LL.B. (Hons) (Cardiff), C.L.P.

Samuel joined the firm in August 2006 as a pupil. He was admitted as an associate in August 2007 and subsequently became a partner in January 2016. His area of practice is in civil and commercial litigation with an emphasis on banking and finance litigation (conventional and Islamic). Samuel also represents financial institutions as counsel in both trial and apex courts.

Tanya-Marie Lopez

LL.B. (Hons) (Manchester), Barrister-at-Law (Lincoln), LL.M. (Malaya)

Tanya was called to the Malaysian Bar in 2008 and joined the firm as an Associate in the same year. She was admitted as a Partner in January 2016. Tanya's areas of practice are in general and civil litigation with an emphasis on medical negligence. Tanya regularly appears at all levels of the Malaysian courts, listing an appearance before a special panel of the Federal Court as one of her more notable career highlights.

Victoria Loi Tien Fen

LL.B. (Hons) (King's College London), LL.M. (NUS), C.L.P., Dip Arb, MMIArb, FCIArb

Victoria joined the firm as a pupil and was admitted as an associate in 2008. She subsequently became a Partner in January 2016. Victoria's main areas of practice are building, construction and engineering, arbitration, and general litigation. She possesses a diverse portfolio of experience in dispute resolution, and also advises clients on matters relating to arbitration, construction, contract and tort.

Mehala Marimuthoo

LL.B. (Hons) (London), C.L.P.

Mehala was called to the Malaysian Bar in 2003 and joined the firm as an associate in 2011. She was admitted as a Partner in January 2016. She is primarily engaged in employment litigation, advising on various issues relating to dismissal, recruitment & employment policies and M&A amongst others. Mehala's other areas of practice include administrative law, general litigation and more recently, land reference.

APPOINTMENT & ELECTIONS

iPAM Appointment

Yoong Sin Min has been re-elected as a Council Member of the Insolvency Practitioners Association of Malaysia (iPAM). iPAM is a non-government and non-profit organisation with its membership comprising of professionals engaged in insolvency practice and insolvency related work, as well as those with an interest in insolvency. The Association lobbies for legislative reform and development of the relevant Malaysian laws, practices, education and examination in the areas of insolvency, receivership and liquidation, business restructuring and turnaround management.

Insolvency Practitioners Association of Malaysia
(Persatuan Pengamal Insolvensi Malaysia)

Elections of the Malaysian Bar

Steven Thiru has been re-elected as the President of the Malaysian Bar on 14th March 2016 after the 70th Annual General Meeting of the Malaysian Bar for the 2016/2017 term.

Election to the Kuala Lumpur Bar Committee (KLBC)

Goh Siu Lin has been appointed the Honorary Secretary of the KLBC pursuant to Section 70(6) of the Legal Profession Act 1976 for the 2016/2017 term during the Kuala Lumpur Bar Annual General Meeting on 25th February, 2016.

AWARDS & ACCOLADES

Leading Publications	Awards & Accolades
Legal 500 (2016 Edition)	**Top-Tier Firm** in 3 practice areas: • Dispute Resolution • Intellectual Property • Islamic Finance *"The 'excellent' Shook Lin & Bok 'goes the extra mile' for clients from a broad range of industries, notably banking, insurance and engineering."* **Recommended** in 4 practice areas: • Banking & Finance • Corporate and M&A • Labour and Employment • Real Estate and Construction 3 lawyers listed in the elite "**Leading Lawyers"** list: • **Lai Wing Yong** (Banking & Finance) • **Patricia David Saini** (Corporate and M&A) • **Michael Soo** (Intellectual Property)
Chambers & Partners (2017 Edition)	2 lawyers listed in **Band 1**: • **Michael Soo** (Intellectual Property) • **Jalalullail Othman** (Islamic Finance) **Ranked in Chambers** under 6 categories: • Banking & Finance (Band 2) • Banking & Finance: Debt Capital Markets (Band 2) *"Respected practice adroitly handling a wide variety of conventional and Islamic financing and debt matters."* • Dispute Resolution (Band 2) *"Recognised for its strong banking practice, in addition to its work in the fields of insurance, shipping and general commercial litigation. Its depth of experience makes it an attractive choice for several financial institutions and service providers."* • Employment & Industrial Relations (Band 2) *"Respected department known for its dedicated bench and for handling both advisory and contentious employment and labour matters"* • Intellectual Property (Band 2) *"Well-established firm, respected in the field for its handling of litigious matters, including significant patent and trade mark disputes, to High Court and Court of Appeal levels."* • Corporate/M&A (Band 4) *"Long-standing market player with a good reputation for its work advising on foreign investment into the Malaysian market."*

AWARDS & ACCOLADES

<table>
<tr><th>Leading Publications</th><th>Awards & Accolades</th></tr>
<tr><td>Asialaw Profiles (2017 Edition)</td><td>Outstanding in Construction & Real Estate

Highly Recommended under 4 categories:
• Banking & Finance
• Dispute Resolution & Litigation
• Restructuring & Insolvency
• Labour & Employment

Recommended for Corporate/M&A, Energy & Natural Resources, Insurance, IT, Telco & Media, Project & Infrastructure, Taxation and Financial Services Regulatory.

“Shook Lin & Bok provides clear and concise advice and a high quality of work with minimal work backs,” says one client. The firm is regularly involved in major deals and projects in Malaysia and is well versed in all aspects of construction and engineering work.”

“The team is responsive, meets deadlines and provides invaluable advice,” says one client. “We obtain a good level of service from the firm. They handle our case proactively and their response time is very satisfactory,” adds another client.”</td></tr>
<tr><td>IFLR1000 (2017 Edition)</td><td>TIER 1 for Banking & Finance

Ranked in IFLR1000 under 3 more areas of practice:
• Capital Markets
• Infrastructure
• M&A

“Shook Lin & Bok has one of Malaysia’s leading finance practices and therefore it is no surprise to find it once again in Tier 1 in this ranking. The firm also has strong practices in the capital markets and M&A areas.”

5 lawyers listed in the elite “Leading Lawyers” list:
• Patricia David Saini (Capital Markets, M&A)
• Jalalullail Othman (Banking)
• Ivan Ho (M&A)
• Hoh Kiat Ching (Banking)
• Lam Ko Luen (Energy and Infrastructure, Disputes)</td></tr>
<tr><td>Expert Guides (2016 Edition)</td><td>Jalalullail Othman named “Best of the Best” in Islamic Finance

Patricia David Saini nominated under the category “Women in Business Law”

Sudharsanan Thillainathan named as one of the “Rising Stars” in 2016

Nominated as experts in 6 practice areas: Corporate Governance, M&A, Patent, Construction, Islamic Finance, Trade Marks and Banking.</td></tr>
</table>

ARTICLES

The Potential Risks of Surrogacy Arrangements in Malaysia

By Goh Siu Lin
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This article was first published in the Family Law News Newsletter of the International Bar Association Legal Practice Division, Special Edition on International Surrogacy, Volume 8 Number 1, October 2015.

The Malaysian government has, in recent years, identified the health tourism industry, including reproductive treatment, as one of the national key economic areas for promotion by the Malaysian Healthcare Tourism Council[1] for increasing revenue for the country.

Here in Malaysia, modern medical reproductive technologies have become readily available to assist couples with infertility issues. The cost of such treatment is low compared to neighbouring countries. The medical tourism boom has resulted in the mushrooming of local fertility clinics offering reproductive medicine, fertility treatment (eg, artificial insemination (AI), in vitro fertilisation (IVF), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), intracytoplasmic sperm injection (ICSI)) in our big cities. However, there is a lack of proper legislation and the reproductive industry is woefully unregulated.

In the context of surrogacy, as infertility is perceived as a social stigma, not many couples are willing to come forward to share their experiences. Unsurprisingly, there is a lack of publicly available statistics on the surrogacy industry, be it commercial or altruistic.

In 2006, the Malaysian Medical Association produced guidelines for assisted reproduction and on the subject of surrogacy, there is only one paragraph, which is reproduced in full below.

'12. SURROGACY

In a surrogate arrangement a woman agrees to become pregnant and bear a child for another person/persons and to surrender it at birth. The above practice is not acceptable to most of the major religions in this country. Such a surrogate pregnancy can also potentially lead to many legal dilemmas for the persons involved'.

Malaysian Medical Council (MMC) guidelines also state that the use of assisted reproductive technology (ART)[3] is a prohibited practice and ethically unacceptable for unmarried couples. Malaysia does not recognise same-sex marriages.

In 2009, the Health Ministry initiated the proposed Assisted Reproductive Technology Technique Services Act to address issues such as surrogacy, sperm and egg banking and sperm donation in consultation with various stakeholders, including religious groups, non-governmental organisations, doctors and government ministries.

Although no legislation is yet in place, the Standards for Assisted Reproductive Technology (ART) provides some guidance on the 'minimum standards required for any ART facility operating in Malaysia'. The other act of relevance is the Human Tissues Act 1974, which was based on the United Kingdom Human Tissues Act 1961.[4] However, the Human Tissues Act 1974 does not deal with human reproductive technologies, licensing of ART centres or with the manner of storage/disposal of gametes or embryos with the attendant moral, ethical and psychological issues.

In Malaysia, any proposed ART statute would need to consider the added complexity of the dual legal system for Muslims and non-Muslims. This is because personal law (family law) for Muslims is governed by Sharia law, whereas non-Muslims are governed by civil law.[5]

Apart from this, for those professing the Islamic and Catholic faith, involvement of third parties in the reproductive process in a legally binding marriage of a couple is prohibited. In Islam, there is the added dimension of potential confusion caused to inheritance laws, which require the determination of a bloodline for inheritance rights. The National Council of Islamic Religious Affairs, on 12 June 2008, issued a fatwa prohibiting surrogacy[6] for Muslims.

This article's focus will be on the civil law surrogacy position vis-à-vis non-Muslims.

Surrogacy and non-Muslims

In Malaysia, any surrogacy arrangement relating to the status of a child born as a result of a surrogacy arrangement remains unclear and there have been no reported Malaysian cases on surrogacy arrangements. A child

who is born under a surrogacy agreement in Malaysia where the parties are non-Muslims would be governed by existing Malaysian legislation.

A commissioning couple engaging a surrogate who is implanted with third-party sperm and ova may be faced with some of the following issues:

- Which mother is legally recognised under the law – the mother who donates the ova or the surrogate?
- What is the status of the resulting child born?
- Are surrogacy agreements enforceable?

Married Malaysian surrogate

A surrogate mother who is married[7] is considered to be the legal mother of the child and her husband, the father of the child, based on section 112 of the Evidence Act 1950,[8] which provides:

'The fact that any person was born during the continuance of a valid marriage between his mother and any man… shall be conclusive proof that he is the legitimate son of that man'.

This results in favour of the surrogate mother who decides to keep the child. The present laws provide her with sufficient recognition and protection of her rights as a mother over that child whose citizenship would follow the surrogate's husband.

Unmarried Malaysian surrogate

In the second scenario of an unmarried Malaysian surrogate mother, the child born is illegitimate. The surrogate holds sole guardianship and custodial rights and the child's citizenship would follow hers.[9] The commissioning father as the biological father is not vested with any rights over the child.

Adoption

However, if the surrogate mother is willing to give up the child, the commissioning parents (and natural father) may then adopt the child. Section 2 of the Adoption Act 1952 provides that:

'"Father" in relation to an illegitimate child means the natural father'.

In a proposed adoption, the written consent of the surrogate mother is required and the child and proposed adoptive parents must be ordinarily resident in West Malaysia.[10] Payment or reward in consideration of the adoption of the child is forbidden under section 6(c) of the Adoption Act 1952.

Hence, the fees to be paid to the mother of a child to be given up for adoption are limited to pregnancy and birth-related medical expenses. Any sums paid for the child that are not sanctioned by the court may jeopardise the prospects of any proposed adoption.

Based on the above, for a commissioning couple to acquire legal rights over the child born out of surrogacy, an adoption order is required. However, an adoption order would not automatically confer Malaysian citizenship upon the resulting child.

Citizenship

A child born in Malaysia to a surrogate who is stateless, would likewise inherit her statelessness. This legal dimension of the child's citizenship requires consideration. In the case of Malaysian commissioning parents, an application for citizenship may be made for the child under Article 15A of the Federal Constitution. However, this is at the discretion of the Malaysian Home Minister, to be exercised based on certain guiding factors.[11]

Non-Malaysian commissioning parents would need to ascertain the legal position for citizenship in their respective home countries to avoid the citizenship quandary as illustrated by the Indian experience of the *Baby Manji* case.[12]

The child's birth certificate

There have been instances of commissioning parents acting in concert with the surrogate to falsify the registration and birth of the child to reflect the commissioning parents' name (instead of the surrogate mother's). In Malaysia, this is a criminal act under section 466 of the Penal Code that carries a maximum seven -year prison sentence or fine.

Legality of surrogacy agreements

Any surrogacy agreement made between the commissioning parents and the surrogate mother may be rendered void for being against public policy under section 24(e) of the Contracts Act 1950, which provides that, 'the court regards it as immoral, or opposed to public policy… Every agreement of which the object or consideration is unlawful is void'.

The issue has yet to be tested in the local courts. As it stands, the

law leans in favour of the surrogate who would be under no contractual obligation to hand over the baby to the commissioning parents. Thus, any claim for damages by the commissioning parents for breach of a surrogacy contract for expenses incurred would have poor prospects of success. There is every likelihood that the Malaysian courts may adopt the reasoning used in *Baby M*[13] to strike down the surrogacy contract where the surrogate mother had formed a psychological tie to the baby and chose not to honour the agreement. The court in Baby M found the said agreement to be against public policy saying:

'This is the sale of a child, or at the very least, the sale of a mother's right to her child... Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here'.

Possible maintenance claims by a surrogate mother

In the event a surrogacy contract is held unenforceable by the commissioning parents, there remains the possibility of a surrogate mother seeking maintenance of the child against the commissioning father, relying on section 3(2) of the Married Women and Children (Maintenance) Act 1950, which provides:

'If any person neglects or refuses to maintain an illegitimate child of his which is unable to maintain itself, a court upon due proof thereof, may order such person to make such monthly allowance, as the court deems reasonable.'

This provision was considered in ***Koh Lai Kiow v Low Nam Hui [2005] 3 CLJ 139***, where the court held that a mother would need to prove by extrinsic evidence (eg, DNA testing) that the father is the biological father of the child. Once established, the father could be ordered to pay a reasonable sum of maintenance depending on the facts of each case.

If the surrogate mother is a non Malaysian and delivers the baby in Malaysia

This course of action should be approached with extreme caution. Due to the lack of a regulatory body to oversee surrogacy arrangements, this may open the floodgates to commercial exploitation of marginalised foreign women. In Malaysia, the provisions of the Anti-Trafficking in Persons Act 2007, needs to be considered in the context of foreign surrogates being flown into the country by commissioning parents.

Section 12 of the Anti-Trafficking in Persons Act 2007 states:

'Any person, who traffics in persons not being a child, for the purpose of exploitation, shall on conviction, be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to fine' .

Section 2 defines 'exploitation' as 'all forms of sexual exploitation, *forced labour or services*, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs.' 'Trafficking in persons' is defined as 'all actions involved in *acquiring or maintaining the labour or services of a person through coercion,* and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act'.

The other relevant provisions are sections 13 to 19 of the Anti-Trafficking in Persons Act 2007. There are additional legal pitfalls for commissioning parents to avoid contravening, inter alia, that:

- the foreign surrogate is not a trafficked person;
- they have not been coerced to provide surrogacy services. Studies have indicated that economics is the primary motivation and surrogates come from lower class women of colour[14]; or
- they have not been coerced to travel to Malaysia.

The surrogate must not travel using fraudulent travel/identity documents.[15] Breaches of the Anti-Trafficking in Persons Act 2007 attract severe penalties, which include heavy prison terms and substantial fines. Section 16 of the said act also provides that the consent of the trafficked person is not a defence under a prosecution under the act. As addressed in the earlier paragraphs, any child born in Malaysia of a foreign surrogate mother would inherit her nationality (if she is unmarried).

Conclusion

Approximately 15 per cent of the Malaysian population[16] are unable to have children. A Sin Chew Daily news item dated 12 July 2009 referred to a United Nations report, stating that the country's fertility rate had dropped from 3.6 babies per couple in 1990 to 2.6 babies. The article quoted the Health Minister Liow Tiong Lai who said: 'Many of the couples will

remain childless unless they are helped using the 'assisted reproductive technology' technique', Liow said between 10 and 15 per cent of childless couples in the country, aged between 30 and 40, had fertility problems (AFP).'[17]

Due to the benefits that it offers to infertile couples, ART technology and surrogacy are permanent features of the Malaysian medical landscape. Regrettably, the Malaysian legal position for surrogacy arrangements remains rudimentary. Comprehensive legislation is needed to keep abreast of the progress of modern reproductive technology to address the myriad complex issues. These issues include, inter alia, the legal status of the commissioning couple, the surrogate, the resulting child, the gamete donors, sex selection, storage/disposal of spare embryos, remedies for breakdown in the surrogacy arrangement, refusal of commissioning parents to take the child if born with disabilities, the possibility of death of one or both of the commissioning parents and/or unsuccessful outcomes.

The human aspect should not be forgotten as the pregnancy results in an intimate psychological bonding between the surrogate and the child. In many other countries (eg, Australia), where altruistic surrogacy is permitted, criminal background checks, psychological assessment and counseling are a mandatory and integral part of the process for the commissioning parents and the surrogate (and her partner).

Malaysia has yet to take any firm position vis-à-vis commercial and/or altruistic surrogacy. This is in stark contrast with neighbouring Thailand, which has, since 30 July 2015,[18] banned commercial surrogacy for foreigners and same-sex couples under the Protection of Children Born from Assisted Reproductive Technologies Act. This development arose from the controversial Baby Gammy case,[19] where an Australian commissioning couple had abandoned one twin born with a hole in the heart and Down's syndrome while taking the normal baby girl. The commissioning father, David Farnell, was also reportedly a child sex abuser.

Clearly, inaction can no longer be an option. The Malaysian government is urged to resume legislative efforts for comprehensive regulation and consistent monitoring of reproductive medicine practices in the areas of IVF/surrogacy procedures and biomedical/embryo research in order to provide certainty as to the rights and obligations of parties to a surrogacy. Non-legislation creates a dangerous legal lacuna in which the rights of the commissioning parents, surrogate and the resulting child remain unprotected, leading to potentially devastating outcomes for the parties concerned.

Footnotes

[1] 'Malaysia expands health tourism and plans laws on fertility treatment' Middle East Healthcare Intelligence (13 March 2011).

[2] 'Assisted Reproduction' The Malaysian Medical Council MMC Guideline 003/2006.

[3] Prepared by Standards for ART Laboratories Working Committee, Medical Development Division, Ministry of Health dated October 2012.

[4] Fadilah Abd Rahman 'Regulating Embryo Research: United Kingdom as a model and the position of Islam in Malaysia' (2012) 1 LNS(A) lxi.

[5] The Law Reform (Marriage and Divorce) Act of 1976.

[6] See www.e-fatwa.gov.my/fatwa-kebangsaan/hukummenggunakan-kaedah-khidmat-ibu-tumpang-surrogatemotherhood-untuk-mendapatkan: 'The 80th Muzakarah (Conference) of the Fatwa Committee National Council of Islamic Religious Affairs Malaysia held on on 1st–3rd February 2008 has discussed on the ruling obtaining the service of surrogate mother to have a child. The Committee has decided that surrogacy is forbidden in Islam even if the sperm and ovum were taken from a married couple as this will bring genetic confusion to the unborn baby'.

[7] Section 87 of the Law Reform (Marriage and Divorce) Act 1976 – definition of child.

[8] The Evidence Act 1950 applies to Muslims and non-Muslims.

[9] Article 14(1)(b) of the Federal Constitution.

[10] Section 4(3) of the Adoption Act 1952.

[11] M Navin citizenship case in the Court of Appeal reported on 29 July 2015, available at: http://my.news.qa2p.global.media.yahoo.com/court-dismisses-ministry-appealdeny-101614618.html and Hansard Parliamentary Debates dated 31 January 1962 at p 4528 where it is stated that the law 'gives the Government discretion to register a person under the age of 21 as a citizen, if the Government thinks that there are grounds for registering such persons as citizens. I cannot, of course, state here the circumstances. If the Government thinks that a child probably has no parents here, or who obviously has attachment to the country, in such a case possibly the Government will register him as a citizen. This is merely to give discretion to the Government in cases of hardship and in cases where Government thinks that it is in the interest of the child and the country that the child be registered as a citizen. It is a new one'.

[12] Baby Manji Yamada v Union of India (UOI) and Another (2008) 13 SCC 518.

[13] In the Matter of Baby M 217 N J Super Ch 313.

[14] Jay R Combs, 'Stopping the Baby-Trade: Affirming the Value of Human Life Through the Invalidation of Surrogacy Contracts' (1999) 29 N M L R 407.

[15] Section 18 of the Anti-Trafficking in Persons Act 2007.

[16] Estimated at 27 million as at 2009.

[17] Sin Chew Daily online news item dated 12 July 2009 available at: www.mysinchew.com/node/27091#sthash.rIA0MuPM.dpuf.

[18] Available at: www.bangkokpost.com/news/general/638264/law-banning-commercial-surrogacy-takeseffect.

[19] Available at: www.theguardian.com/world/2014/aug/07/gammy-child-protection-officers-contact-australian-couple.

10 Things You Need to Know About SLB's Tax Department

By Tania Kat-Lin Edward
tania.edward@shooklin.com.my

Q1:

What is the SLB Tax Department all about?

The tax department was set up to help you prevent and cure tax problems. Our tax team consists of lawyers who are professionally trained in tax, commerce and law to provide practical advisory services which help you prevent those time-consuming disputes on revenue.

Where tax disputes do arise, we readily assist by understanding and analysing the factual scenario, advising on the plausible legal course of action and representing the taxpayer in dealing with the relevant parties involved.

We have represented taxpayers on a wide range of tax issues at all levels of the Malaysian court system, from trial courts to the apex courts.

a) <u>Prevention of tax problems</u>

The reality is that it is seldom sufficient to advise or litigate on tax law in isolation. As General & Civil Litigation lawyers, we are strategic thinkers who take a broad view when it comes to tax problems.

This in turn equips us to provide clear, focused and practical advice, which, in so far as possible, avoids time-consuming disputes with the Revenue.

b) <u>Cure of tax problems</u>

When a taxpayer faces problems with the Revenue, we are ever ready to help with our fervour for problem-solving and enthusiasm in litigation where it is the right course of action for the taxpayer. We then help the taxpayer in all dealings with the Revenue.

As General & Civil Litigation lawyers, we are involved in an extensive variety of civil disputes. This enables us to integrate our knowledge of law in these areas with tax law in a way that makes them together, applicable to the tax issues at hand.

Q2:

Who are the members of the tax department?

Our tax department employs 15 experts consisting of partners, legal assistants and full time support staff. The department is headed by Steven Thiru, who is assisted by Deputy Head T. Sudhar.

The tax team has earned qualifications such as Diploma in International Commercial Arbitration (CIArb), Bachelors of Law (LL.B), Bachelors of Commerce (Accounting & Finance), and Masters of Law (LL.M). The diversity in qualifications and backgrounds enable us to provide more holistic advice and competent representation through an integration of knowledge.

Q3:

What is the history behind the tax department?

Our tax department has been representing taxpayers in appeals to the Malaysian apex court since 1982 and has been involved in significant Federal Court decisions such as: -

a) Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corp & Ors [2015] 6 MLJ 612

b) Lembaga Minyak Sawit Malaysia v. Arunamari Plantations Sdn Bhd & Ors and another appeal [2015] 4 MLJ 701

c) Positive Vision Labuan Ltd & others v. KPHDN (Federal Court Civil Appeal No. 01(f) -11-03/2015(W))

Q4:

What areas of tax do you practice in?

We practice in all areas of tax and are equipped to deal with any area of tax no matter how unusual. The following are just some areas of tax that we encounter more frequently: -

- Tax litigation;
- Corporate taxation;
- Personal taxation;
- Employment taxation;
- Goods and Services Tax (GST);
- Real Property Gains Tax (RPGT);
- Labuan Offshore Tax Planning;
- Stamp duty;
- International tax; and
- Tax audits and investigations.

Q5:

Who are your clients ?

Our clients vary from individuals and professional advisers, to SMEs and international conglomerates. We have individuals, businesses and professional advisers as our clients. As always, we strive to keep our client's best interests at heart and the cases cited above are instances of us keeping to this promise (see Question 3).

As you can see in the list above, our list of cases range from our representation of government-linked bodies to a class action by oil palm producers.

Q6:

What professional bodies are you affiliated with?

To name a few, we are affiliated with the Chartered Tax Institute of Malaysia (CTIM) and the Malaysian Institute of Accountants (MIA).

Q7:

How do you maintain the standards of your work?

The tax team is encouraged to continuously learn and improve their knowledge and skill sets by taking up professional courses. We also believe in learning vicariously through participating in numerous conferences, workshops and seminars both as delegates and as speakers in order to better understand and relate to the people we work with.

Q8:

What else do you do besides tax litigation and advisory?

We share our knowledge through a multitude of platforms! We contribute articles and case updates in the Tax Guardian. We also share our knowledge on tax laws by giving talks on a wide variety of topics, from exemption orders to annual reviews of tax cases.

Q9:

Any significant work you have done in the past 12 months?

Yes of course! In the past year, we have represented the Lembaga Pembangunan Industry Pembinaan Malaysia (CIDB) in the Federal Court in a landmark case which established that taxing statutes like all other statutes must be given a purposive interpretation to fulfill the objective of the statute, unless the circumstances demand otherwise. The value of the matter is RM10 million.

Our team had also acted for a pool of taxpayers recently, appearing before the Federal Court to challenge the constitutionality of the taxing statute. This was the first time the issue of discriminatory tax was raised before and decided by the Malaysian courts.

Q10:

How do we know we can get quality advice from you?

The initiatives we take, above and beyond those already mentioned, ensure that we are up to date with the latest developments in Malaysian tax law and also give us valuable insight on issues faced by taxpayers in Malaysia.

We are more than happy to meet people who are keen to learn about tax or are seeking a tax solution. So do feel free to drop by and pay us a visit for a friendly meeting or a cup of coffee.

QUESTIONS?

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Raising the Bar: Innovation & Global Opportunity for a Forward Thinking Profession

By Steven Thiru
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Excerpts from the closing keynote address by Steven Thiru, President of the Malaysian Bar, at Bar of England & Wales's Annual Bar and Young Bar Conference 2016 in London, first published on the Malaysian Bar website on 21st October 2016.

The President of the Malaysian Bar and a senior partner of the firm, Steven Thiru, addressed the Bar of England & Wales at the close of the Annual Bar and Young Bar Conference 2016 held in Westminster Park Plaza, London on the 15th of October this year.

The speech covered multiple focus areas affecting the legal profession globally, including the effects of Brexit on the feasibility and effectiveness of regionalism, and the independence of the Bar.

Excerpts of the speech on specialization in legal practice, the waves of change within the legal fraternity brought about by technological advances, and the importance of professional duties and ethical values which are of particular relevance to continuous professional development are as follows: -

Reflections on the Conference and the Way Forward

I wish to congratulate the organisers on this very successful and thought-provoking conference. The theme — *"Raising the Bar: Innovation and Global Opportunity for a Forward-Thinking Profession"* — brings to the fore the unceasing tensions faced by the Bar due to economic, political, and internal pressures. It is a theme that has global resonance in this age of borderless legal services. The underlying challenge for the profession to venture out of comfort zones and to confront new challenges in the law, without undermining or forfeiting core values, is clearly the intended backdrop.

The scope of this conference has offered a platform for discourse on the need for the profession to be future-proof whilst embracing available opportunities. In this regard, the 18 specialist sessions covered a whole host of issues that the modern legal profession wrestles with on a daily basis. The spectre of distinct specialism is implicit. The days when legal practitioners could do a bit of everything, or confine themselves to their own areas of practice, are no more. The need to specialise, and the worldwide trend towards increased specialisation, is a very real challenge for all legal professionals.

Lord Neuberger recently spoke of the tendency towards the so-called silos within the profession as a result of increased specialisation and of "*... the risk of producing lawyers with a rather narrow focus, and the law becoming incoherent and complicated.*" A related concern is one of over-specialisation or sub-specialisation. It has been said that lawyers must "*...keep an eye on the overall unity of the law,...*" to overcome the risk of conceptual differences that are unsound in law. However, specialisation is inevitable and undeniably invaluable. Today, it is certainly the result of the ever-growing volume and complexity of the law in almost all fields.

There is abundant legal specialisation in academia, which has arguably contributed to better trained lawyers. Further, dedicated law reports and journals are replete, and that has had a significant impact on all areas of legal practice. In almost all Commonwealth jurisdictions, specialist courts have been created in areas such as intellectual property and environmental law, and for specific criminal offences involving corruption and cybercrimes. Thus, the wave of specialisation and the demand for specialist practitioners will continue unabated. It nevertheless is necessary to be alive to concerns over the quality of lawyering, and to guard against haphazard developments in the law, which would ultimately be counter-productive to the administration of justice.

...

I now come to the other sub-plenary session concerning the digital courts. The advent of electronic court systems has changed the face of our profession. The move towards modernising the delivery of access to justice by the courts, through the innovative use of technology has yielded dividends as well as challenges. The expeditious and systematic disposal of cases, and the enhanced organisation and working practices of the courts, cannot be denied. The Bar and the judiciary has had to rapidly adapt to these changes. While these innovations should not be feared, we must approach them with due care and attention, in the public interest.

The Malaysian Judiciary embarked on our very own e-Court project in 2010, and it was ominously announced by the then-Chief Justice, echoing the Borg of Star Trek, that "*resistance is futile*". The e-filing system was introduced, together with a case-and-queue management system, to track and manage the scheduling of cases, and a court recording and transcription system that provides for real-time recording of proceedings. This has resulted in a marked reduction of the backlog of cases. Delays and adjournments are no longer a common thing in our courts.

The significant impact that innovative technology has had, and continues to have, on the legal profession is crucial. Earlier this year, Professor Richard Susskind, the renowned legal futurologist, postulated that the legal profession has five years to reinvent itself, in light of the "*massive technological advances*" set to reshape legal practice. Professor Susskind foresees a bleak future for lawyers who are not prepared to reinvent themselves.

Technology is certainly changing the way we practise law, and we are looking at a heavily computerised future. Innovations such as artificial intelligence that will be able to diagnose and respond to clients' legal problems, discovery software that will reduce time and cost, as well as data analytics that could analyse factual patterns, may well shake the current pillars of the legal profession, and possibly cause the displacement of lawyers. We must not be oblivious to these disruptions that are fast engulfing us, and we must be prepared to handle them.

I next turn to the Young Bar Conference, which looked at the challenges faced by young barristers in the developing legal world. It is indeed commendable that there was a dedicated session to deal with the concerns, and even anxieties, of young lawyers. It was Oscar Wilde who said, "*The old believe everything; the middle-aged suspect everything; the young know everything*."

Be that as it may, it is the duty of the Bar to ensure that the new entrants to the profession are equally, if not more robustly, equipped to meet the aspirations of the rapidly evolving profession. The legendary Indian lawyer Motilal Setalvad once lamented, "*The profession has as a whole undoubtedly expanded and gathered very able recruits… But it has lost the ideals of public service which it once possessed and is almost wholly centred on self-advancement. Standards of professional conduct have woefully fallen* …" We fail in our duty if we permit the next generation of the Bar to fall short of the impeccable standards and quality that we have inherited, and if we allow the hallowed ideals of the legal profession to be lost or diluted.

The Malaysian Bar has recently implemented a staggered mandatory Continuing Professional Development ("CPD") scheme, which commenced with the first group comprising our pupils in chambers and Members up to five years in practice. The scheme is intended to extend to the whole Bar in the near future. For the purposes of the scheme, we have provided access to immersion training on basic and practical aspects of the law at a subsidised rate, as well as established an online training platform called "CPD on Demand" that enables access to online training videos. We have also just launched a free subscription-based online magazine called "Legal Craft & Such" done in collaboration with Thomson Reuters, which will give access to all things CPD.

The Young Bar must also keep alive the spirit of *pro bono* provision of legal services for the vulnerable and marginalised in society, and answer our calling to be the voice for the voiceless. This is in the best traditions of the Bar, and is a vital aspect of access to justice and the upholding of the rule of law. In this connection, many young Members of the Malaysian Bar participate in our Government-funded legal aid scheme, known as the National Legal Aid Foundation, for the legal representation of accused persons

in criminal matters. Our lawyers are paid a nominal sum for their services. It is notable that between April 2012 and December 2015, a total of 535,986 cases had been undertaken, which is a remarkable average of 142,903 cases per year, or 11,908 cases per month! The scheme complements the Malaysian Bar's proud pioneering and self-funded legal aid services for all legal matters established in 1983.

The Young Bar will have its own share of existing and new challenges. One challenge, that transcends time, is that of the commercialisation of legal practice. It is "*undeniable that as the practice of law and the world of commerce have increased in complexity and sophistication, so too have challenges to professional ethics*." The advent of mega-firms, the all-consuming billable hours, the rise of litigation funding and the attendant relaxation or abolition of the rules against maintenance and champerty, patently expose the conflict between professional duties and the pursuit of profit.

The Young Bar must ensure that professional duties and ethical values are not sacrificed on the altar of fiscal yield. Lord Bingham's reminder that lawyers should be professionals of unquestionable integrity, probity and trustworthiness, and "who could be trusted to the ends of the earth" is without qualification and indeed timeless, for all of us at the Bar.

EVENTS & HAPPENINGS 2016

LEFT: *Farewell party for SLB's Long-Service Staff (from left): Gloria Cheong (accountant), En. Bohari (administrative clerk), Shenny Choo (secretary)*

RIGHT: *As a part of Shook Lin & Bok's internal continuing legal education initiative, the firm was honoured to have Prof. Khawar Qureshi QC (pic), author of the Legal Handbook on "Public International Law before the English Courts", present a talk on the same subject to our lawyers on 18th April 2016.*

Maybank and Shook Lin & Bok came together to organise a sharing session at Menara Maybank with the participation of Maybank's personnel and SLB's partners, Jalalullail Othman, Yoong Sin Min and Hoh Kiat Ching on 5th October 2016.

SLB's partners, Sudharsanan Thillainathan (Deputy President, MIArb) & Lam Ko Luen (Immediate Past President, MIArb) led an in-depth discussion on recent cases in arbitration & adjudication during the 3rd Annual Law Review hosted by the Malaysian Institute of Arbitrators (MIArb) at the auditorium of KLRCA on May 19, 2016.

SEMINARS

BNM's 12th & 13th Banking Supervision Courses

By Hoh Kiat Ching
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The Human Capital Development Centre of Bank Negara Malaysia ("BNM") organises banking supervision courses, which are specially tailored for new supervisors in the Bank Supervision Departments.

Shook Lin & Bok has been privileged to have been a part of BNM's initiative in the past years. This year, our partners, Jal Othman (Head, Islamic Finance), Hoh Kiat Ching and Lau Kee Sern were invited again by BNM to facilitate part of the 12th and 13th Banking Supervision Courses, which took place in April and August 2016 respectively.

Jal and Kiat Ching kicked off by conducting 2 sessions on collateral and security. Following an introduction to the types of financing available in the financial market and the financing documentation involved, Jal and Kiat Ching gave an overview of the common terms found in the principal instrument, and the different types of security a financial institution may obtain. The participants further explored security over land, in the form of charges over land under the National Land Code 1965 and liens protected by lien holder's caveats.

Kee Sern then introduced bankruptcy and foreclosure proceedings to the participants, by providing an overview of the proceedings from the act of bankruptcy to discharge and annulment. The procedures involved in commencing and prosecuting a bankruptcy action, the effect and consequences of a receiving order and an adjudication order ("**ROAO**") made against an individual, and the circumstances in applying for and obtaining a discharge or annulment of the ROAO, were elaborated upon.

Jal Othman presenting on the topic of 'Introduction to the Common Types & Forms of Collateral/Security'

Lau Kee Sern animatedly presenting on the topics of bankruptcy & foreclosure proceedings.

In respect of foreclosure proceedings, Kee Sern explained the fundamental differences between rights ad rem and rights in rem, or colloquially, personal rights and real rights. He also covered the procedures involved in applying for and/or conducting an auction sale at the High Court and the land office, as well as auction sale of property which has yet to be issued with any document of title.

Our partners enjoyed interacting with the participants at both Courses, addressing questions from the participants and posing their own in return, and with lively discussion on hypothetical facts.

MEF Industrial Relations Conference 2016

By Navini Rajikumara
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An overview of the speech given by SLB's Head of Labour & Industrial Dispute Department — Romesh Abraham on "Breach of Confidential Information" during the annual MEF Industrial Relations Conference held on the 25th & 26th July 2016.

The two competing rights when dealing with confidential information in the employment context are the right of the employer to ensure that confidential information, acquired in the course of employment, is adequately protected and conversely, the right of the employee not to be prevented from legitimately engaging in a new trade or occupation upon cessation of employment.

In ***Dynacast (Melaka) Sdn Bhd & 2 Others v. Vision Cast Sdn Bhd*** [2016] 6 CLJ 176, the Federal Court had occasion to review the relevant principles on a claim by an employer in seeking to restrain a former employee from utilizing information/data which the employer claimed constituted a breach of the employment contract. In dismissing the appeal and upholding the decision of the Court of Appeal ([2014] 8 CLJ 884), the Federal Court held, inter alia, that the employer had not been able to show that the items sought to be protected had the necessary quality of "confidence" nor that such information was in the possession of the ex-employee and had been disseminated to the detriment of the employer. Further, the employer's claim did not identify nor particularize the specific confidential information which was sought to be protected and which, it was alleged, had been misused.

Following this decision, the employer should, in claims of a similar nature, be able to prove the "confidential" nature of the information sought to be protected, notwithstanding provisions in the employment contract to that effect. If the said information is not exclusive to the employer, and it is in an "open market" situation where there is more than one ground for such information to be sourced, then there cannot be protection. Further, if the claim fails to identify with sufficient detail the precise confidential information sought to be protected and if the information was from within the general fund of the ex-employee's own knowledge, exposure and experience, then a claim of breach of fiduciary duty or confidentiality will be unsuccessful.

Romesh Abraham was invited by the Malaysian Employers Federation (MEF) to speak on the topic of "Breach of Confidential Information" in the Industrial Relations Conference 2016 held at the Holiday Villa, Subang.

Dynacast also highlights Section 28 of the Contracts Act, 1950, which concerns the prohibition against restraint of trade. The section provides that "Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void." The application of Section 28 of the Contracts Acts does not permit any exceptions save for those expressly provided for in the section itself i.e. with regard to the sale of goodwill and specific partnership situations.

The decision in ***Dynacast*** highlights the importance of the need to ensure that full particulars in relation to a claim for "confidential information" are pleaded and also proved at trial for such a claim to be successfully brought by the employer.

CONFERENCES

IPBA 26th Annual Meeting & Conference

By Nina Lai
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An overview of the presentation given by SLB's Head of Building, Construction & Engineering Department, Lam Ko Luen on the latest development in Malaysian construction law during the 26th IPBA Meeting and Conference 2016 held in Kuala Lumpur.

On 14th April 2016, Lam Ko Luen presented a talk on *"Latest Developments in Construction Law – Around the World in 90 Minutes - Malaysia"* at the 26th Inter-Pacific Bar Association (IPBA) Meeting and Conference held at the Kuala Lumpur Convention Centre. The speakers at this session, moderated by Alfred Wu from Hong Kong, included Mirella Lechna from Poland, Keith Phillips from the USA and Dr Christopher Boog from Singapore.

With the Construction Industry Payment and Adjudication Act 2012 ("**CIPAA**") being the "hot topic" in the Malaysian construction industry, Ko Luen decided to offer a little sneak peek into statutory adjudication in Malaysia to the delegates and guests.

Ko Luen kicked off his part of the session by explaining the background which led to the implementation of CIPAA and its objectives. He explained that with the coming into effect of CIPAA, one of the major changes to the construction industry is the abolishment of conditional payment which was done in order to further the objective of CIPAA, i.e. to improve cash flow in the industry.

Another interesting addition is the

inclusion of default provisions in absence of payment terms in the contract which include, *inter alia*, right to progress payments, frequency of progress payments and due date for payments.

Further, to ensure uniform application (barring several exceptions), CIPAA provides for compulsory dispute resolution and it applies even in absence of prior agreement by disputing parties. Albeit so, CIPAA does not preclude concurrent dispute resolution, therefore parties are permitted to commence arbitration or court proceedings concurrently with adjudication.

Being a "receiving party" friendly legislation and in ensuring the unpaid party does not go without recourse and be seriously prejudiced, Ko Luen explained that statutory adjudication under CIPAA will take approximately 105 working days from the issuance of a Payment Claim up to the issuance of an Adjudication Decision which offers an interim but binding finality to the aggrieved unpaid party.

Before his session was over, Ko Luen provided an overview of recent case law which discussed the application of CIPAA, i.e. the retrospective application of CIPAA (***UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor and another case*** [2015] 11 MLJ 4), the absence of certification of a progress or interim claim not precluding the commencement of adjudication proceedings (***Bina Puri Construction Sdn. Bhd. v. Hing Nyit Enterprise Sdn. Bhd***_[2015] 8 CLJ 728), the Court's minimal interference approach with regards to challenges to an adjudicator's jurisdiction (***UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor and another case*** [2015] 11 MLJ 499), the Court's slow approach towards staying adjudication decisions (***Subang Skypark Sdn Bhd v. Arcradius Sdn Bhd*** [2015] 11 MLJ 818) and the Court's slow approach towards setting aside adjudication decisions (***ACFM Engineering & Construction Sdn. Bhd. v. Esstar Vision Sdn. Bhd. & Another case*** [2015] 1 LNS 756). It was indeed a very insightful session, to say the least.

CASE NOTES

Case notes are summaries of significant recent cases across a range of practice areas.

Contributors: Yoong Sin Min, Michael Soo, Sudharsanan Thillainathan, Gregory V. Das

Banking

FLH ICT Services Sdn Bhd & Anor v. Malaysian Debt Ventures Berhad
[Court of Appeal Civil Appeal No. W-02 (MUA)(W)-704-04/2014]

The Islamic banking industry faced a bit of a setback when on 13.11.2015 the Court of Appeal ruled that a Bai Al-Inah Facility was not Shariah-compliant and therefore overturned the High Court judgment granted in favour of Malaysia Debt Ventures Berhad for the debt due from one FLH ICT Services Sdn Bhd under that Facility. The Court of Appeal had indicated to the financier that its "remedy is elsewhere and not under the Bai Al-Inah financing system". The dispute arose from certain documentation deficiencies. The Court of Appeal had granted such decision despite there being no dispute over the disbursement of monies by the financier to the customer and the fact that objections were made to the raising of the same as the issue was not raised in the customer's pleadings.

This opened up a new front of vulnerability in relation to Islamic financing, as the civil court has taken upon itself to rule that an Islamic facility was not Shariah-compliant and therefore the financier could not recover the debt.

Shook Lin and Bok was appointed to take over conduct of this matter to apply to the Federal Court for leave to appeal. On 18.7.2016, the Federal Court granted leave to Malaysia Debt Ventures Berhad to appeal, on three issues. These are: -

1. Whether the Court of Appeal could consider whether the Agreements entered into between parties for the granting of an Islamic facility were not Shariah compliant, when such issue had neither been pleaded nor canvassed at the trial and where objections to the raising of the same had been made in the Court of Appeal?

2. Where a borrower/customer has accepted an Islamic financing facility and admits using monies thereunder but the Court subsequently finds the financing agreement to be non-Shariah compliant, whether the Court ought to have ordered the repayment of the principal amount of moneys disbursed to the customer pursuant to:-

    - its inherent jurisdiction to render justice to the parties; and/or
    - Section 66 of the Contracts Act, 1950; and/or
    - the principle that a party ought not to be unjustly enriched; and/or
    - the Islamic fundamental principle that a debt must be repaid?

3. Whether a civil court can hold that an Agreement entered into between parties for the granting of an Islamic facility was not Shariah compliant, without referring to the Shariah Advisory Council pursuant to Section 56(1) of the Central Bank of Malaysia Act 2009?

When granting leave to appeal, the Federal Court had acknowledged that these issues would be important for the Islamic banking industry.

Islamic financing institutions have faced issues where the financing documentation is less than perfect and challenges have been mounted by defaulting customers to the validity of such documents and therefore the financing itself. The High Courts and the Court of Appeal have attempted to resolve such disputes by, inter alia, recognising that if there was no denial that monies have been disbursed by the financier to the customer, such monies ought to be repaid, or, in some instances, by referring the issue in dispute to the Shariah Advisory Council ("**the SAC**") as provided for by Section 56 (1) of the Central Bank of Malaysia Act, 2009. Upon receiving the views of the SAC, the Court would then resolve the issue in dispute as guided by the SAC's findings.

It is timely now for the apex Court to resolve the issue as to how a civil court is to deal with disputes over whether an Islamic financing is Shariah-compliant or not.

The hearing date for the Federal Court appeal has not been fixed yet. We will post an update on the matter in the near future.

Our Ms Yoong Sin Min and Ms Choo Kuei Yee are the lawyers handling this matter.

NGV Tech Sdn Bhd & Anor v Ramsstech Ltd & Ors [2015] MLJU 671

What happens when a financier finances a shipbuilding company and that company goes bust, with vessels which are largely but not fully built left lying in its dockyard? Who has priority to those vessels - the financier who has a debenture charge or the purchaser who has paid part of the construction cost?

The case of **NGV Tech Sdn Bhd & Anor v Ramsstech Ltd & Ors [2015] MLJU 671** was one where such question was posed in a tussle over a vessel.

In that case, a dispute arose between a foreign purchaser of a vessel and Malayan Banking Berhad ("**the Bank**") who had financed the shipbuilding business of the shipbuilder.

The shipbuilder company was in financial difficulty and had already been ordered to be wound up. The Bank appointed a Receiver and Manager ("**R&M**") over the shipbuilder as well as issued a notice of crystallization of its floating charge over the assets of the shipbuilder, in accordance with the terms of the debentures obtained by the Bank as security. The R&M began taking steps to dispose of vessels in the shipbuilder's dockyard, some of which were not completely built.

Unknown to the Bank and the R&M, an Iranian company had, prior to the Bank's notice of crystallization of floating charge, entered into a shipbuilding contract with the shipbuilder for the purchase and completion of a vessel that had already been partially constructed prior to such contract. The vessel was initially registered in the shipbuilder's name but subsequently it was transferred to the name of the purchaser's trustee company without the knowledge of the Bank or the R&M. Both the Bank and the R&M then launched an action against the purchaser and the trustee company for the vessel to be registered back into the shipbuilder's name.

The Defendants counterclaimed for possession of the vessel as well as for validation of the registration to the trustee company's name, as it had been effected after the winding up petition was presented against the shipbuilder.

There was no initial fixed charge over the vessel. The Bank had to rely on the crystallisation of its floating charge into a fixed charge, over the vessel. To ensure the Bank's priority to the Vessel, the Plaintiffs did not rely on the notice of crystallization of the floating charge for the creation of a fixed charge over the vessel, as chronologically this appeared to be subsequent to certain alleged documents executed between the Defendants and NGV. Instead, the Plaintiffs relied on the automatic crystallization of the floating charge into a fixed charge, at the time when the shipbuilding contract between the shipbuilder and the purchaser had been entered without the Bank's consent.

After a full trial, the High Court considered various issues and in a lengthy well-reasoned judgment, found inter alia, that:

1. the floating charge had by the terms of the debentures automatically crystallised into a fixed charge when NGV entered into the shipbuilding contract with the purchaser without the Bank's prior consent and therefore Maybank had priority to the vessel;

2. the Defendants failed to prove payment of the full purchase price of the vessel and thus were not beneficial owners of the same nor have they shown their bona fides which would entitle them to a validation of the transfer of the vessel to the trustee's name.

The High Court allowed the Plaintiffs' claim and dismissed the counterclaim.

On the Defendants' appeal, the Court of Appeal dismissed the same as the Court of Appeal agreed with the findings of the High Court. The Applicants applied for leave to appeal to the Federal Court but such leave was refused by the Federal Court on 28.6.2016.

Our Ms Yoong Sin Min, Mr Chan Kok Keong and Mr Winnou Chung acted for the Plaintiffs.

Arbitration

Government of India v. Petrocon India Limited [2016] 3 MLJ 435

Arbitration – Shift in Seat of Arbitration – Application of Res Judicata and Issue Estoppel in respect of a Foreign Judgment.

The Federal Court in **Government of India v. Petrocon India Limited [2016] 3 MLJ 435** was required to determine the seat of arbitration under a production sharing contract and whether the seat had been shifted to a different venue in accordance with the terms of the contract.

The Government of India ("**GOI**") and Petrocon India Limited ("**Petrocon**") entered into a production sharing contract for the development of petroleum resources in India. There were three other parties to the contract. A series of disputes arose between the GOI and Petrocon which led to the institution of arbitral proceedings.

The preliminary meeting of the arbitration was to be held in Kuala Lumpur in May 2003. However, in view of the outbreak of the SARS epidemic, the arbitral tribunal shifted the venue of the arbitration to Amsterdam, where the preliminary meeting was ultimately held. Subsequent hearings and meetings for the arbitration took place in London. In November 2003, GOI and Petrocon recorded a consent order before the tribunal in London which stated that the seat of the arbitration had shifted to London. In March 2005, the tribunal published a Partial Award in the arbitration wherein it ruled in Petrocon's favour.

GOI filed an application in the Kuala Lumpur High Court to set aside the Partial Award. GOI obtained leave to serve its application upon Petrocon out of the jurisdiction of Malaysia. Petrocon thereafter filed an application to set aside the grant of leave to GOI. The grounds of Petrocon's application was that the Kuala Lumpur High Court did not have jurisdiction to decide upon the case as the seat of arbitration was no longer Kuala Lumpur.

The High Court allowed Petrocon's application and held that the Kuala Lumpur High Court did not have the requisite jurisdiction as the seat of arbitration had shifted from Kuala Lumpur to London. GOI then appealed to the Court of Appeal against the High Court's decision.

Simultaneously, GOI commenced proceedings against Petrocon in India for a declaration that the seat of arbitration was Kuala Lumpur. Petrocon objected to GOI's action on the grounds that the courts in India did not have jurisdiction to determine the matter. The Delhi High Court dismissed Petrocon's objection. Petrocon then filed an appeal to the Supreme Court of India against the Delhi High Court's decision. The Indian Supreme Court allowed Petrocon's appeal and held the seat of arbitration to be Kuala Lumpur.

At around the time of the appeal against the Delhi High Court's decision, Petrocon filed a suit in the High Court of England & Wales to determine the seat of arbitration under the contract. Following the decision of the Indian Supreme Court, GOI filed an injunction against Petrocon in the Delhi High Court to restrain the latter from continuing with its claim in England in the light of the Supreme Court's decision. The Delhi High Court granted the injunction. Petrocon appealed against the Delhi High Court's decision.

Subsequently, the Court of Appeal in Malaysia affirmed the Kuala Lumpur High Court's decision and held the seat of the arbitration to be London.

In January 2013, by the consent of parties, Petrocon's appeal against the Delhi High Court's decision on the grant of the injunction to GOI was disposed of on agreed terms. Further, Petrocon subsequently withdrew its claim in England and agreed to the binding decision of the Indian Supreme Court.

Thereafter, GOI was granted leave to appeal to the Federal Court of Malaysia against the Court of Appeal's decision (that held London to be the seat of arbitration). The Federal Court unanimously dismissed GOI's appeal and affirmed the finding that the seat of arbitration had shifted to London.

First, the Federal Court held Kuala Lumpur to be the original seat of the arbitration. It was observed

that the parties to the contract had named Kuala Lumpur to be the "*venue of … arbitration proceedings*", but did not expressly identify the 'seat of the arbitration'. In this regard, the word "venue" in the arbitration clause was interpreted to mean "seat" and, consequentially, Kuala Lumpur was held to be the seat of the arbitration.

However, the Federal Court proceeded to find that the arbitral seat had shifted to London from Kuala Lumpur. This was in view of the consent order recorded before the arbitral tribunal in London in November 2003. It was held that this shift in seat was effected in compliance with the arbitration clause which allowed for a change in the arbitral seat as follows: "*The venue of … arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia …*" (emphasis added).

Further, it was held that the contractual provision that provided for the amendment of the terms of the contract did not apply to a change of the arbitral seat. The specific amendment procedure under the contract required an amendment to the terms of the contract to be effected by way of "an instrument in writing signed by all the Parties…" However, the Federal Court held that as the governing law under the arbitration agreement was the laws of England, Section 7 of the English Arbitration Act 1996 would apply. Section 7 required an arbitration agreement/clause to be treated as a distinct agreement from the underlying contract. Therefore, it was decided that the specific amendment procedure was of no application to the arbitration clause (which allowed for a change in the seat of arbitration by way of a mere agreement between parties).

Lastly, the Federal Court was required to decide on whether Petrocon was precluded by issue estoppel and *res judicata* (which are the principles that prevent a party from litigating the same matter twice) from contending that the seat of arbitration had shifted away from Kuala Lumpur as the said matter had been previously determined by the Indian Supreme Court. It was observed that the Indian Supreme Court's remarks on the issue of jurisdiction were "*strictly confined to the issue of jurisdiction of the Delhi High Court…*"

Arifin Zakaria CJ held that since the Supreme Court had ruled that the Delhi High Court lacked the jurisdiction to entertain GOI's petition in the Indian proceedings, "it was no longer necessary for the Indian Supreme Court to delve into the issue of the seat of arbitration". Accordingly, it was decided that "*whatever ruling … made by the Indian Supreme Court on that [seat of arbitration] issue … do not have the effect of barring the Respondent from re-agitating the issue before the Malaysian Court.*"

Far East Holdings Bhd. & Another v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang [2015] 8 CLJ 58

Arbitration – Section 42 of the Arbitration Act 2005 – Challenging an arbitrator's decision on the interpretation of a commercial agreement and the validity of the allotment of shares.

In **Far East Holdings Bhd. & Another v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang [2015] 8 CLJ 58**, the Court of Appeal was invited to decide upon the sustainability of an arbitrator's interpretation of a commercial agreement and the findings related thereto on the propriety of an allotment of shares to a majority shareholder of a company.

The Majlis Ugama Islam Dan Adat Resam Melayu Pahang ("**MUIP**") required an independent source of funds to discharge its functions pursuant to the Administration of Islamic Law Enactment 1991. In this regard, the State Government of Pahang approved the alienation of an 11,000 acre plot of land ("**the land**") to MUIP for the latter's use to generate the funds required.

MUIP intended to develop the land into an oil palm estate. MUIP therefore entered into discussions with Far East Holdings Bhd. ("**FEH**"). The discussions resulted in an agreement between MUIP, FEH and Kampung Aur Oil Palm (Co) Sdn. Bhd. ("**KAOP**"), which was a wholly owned subsidiary of FEH ("**the said agreement**"). Pursuant to the said agreement, KAOP incorporated Madah Perkasa Sdn. Bhd. to develop the land into an oil palm estate. Subsequently, pursuant to the said agreement, KAOP allotted in excess of 8 million of its shares to MUIP in consideration for the transfer of the land. This led to MUIP having a 33% shareholding in KAOP, with FEH owning the 67% remainder of the shareholding in KAOP.

Under the said agreement, MUIP was entitled to exercise two options to acquire additional shares in MUIP. The first option allowed MUIP to acquire 16% of

FEH's shares in KAOP and the second option entitled MUIP to the acquisition of a further 11% of FEH's shares in KAOP. Next, FEH advanced a RM22.09 million loan to KAOP to finance the project under the said agreement. Subsequently, the Board of KAOP agreed to the increase of the share capital of KAOP to 50 million shares and, further, to the allotment of 22 million additional shares in KAOP to FEH ("**the impugned allotment of shares**").

The impugned allotment of shares led to the institution of a suit by MUIP to challenge the said allotment on the grounds that it diluted MUIP's shareholding in KAOP and, further, that it was violative of the said agreement. The suit was stayed in view of a clause under the said agreement that required the dispute to be referred to arbitration.

MUIP then commenced arbitral proceedings against FEH and KAOP in respect of the impugned allotment of shares. The arbitrator allowed MUIP's claim and struck down the said allotment, ordered FEH to pay MUIP an excess of RM77 million in damages (for loss of dividends up to 2010) and ordered the payment of pre-arbitral award interest at 4% per annum and post-arbitral award interest at 4% per annum.

FEH and KAOP then applied under section 42 of the Arbitration Act 2005 to challenge the arbitral award. Moreover, MUIP applied to register the award.

The High Court dismissed the section 42 application in part by upholding the arbitral award, but setting aside the arbitrator's award of pre and post award interest. The High Court also allowed MUIP's application to register the award. FEH and KAOP then appealed against the decisions of the High Court and the Court of Appeal unanimously dismissed the appeals.

On appeal, FEH and KAOP argued that the arbitrator erroneously found that the said agreement contemplated that MUIP would ultimately acquire 60% of the shares of KAOP and that the impugned allotment of shares was contrary to the intent of the agreement. FEH and KAOP argued that MUIP had nothing more than two options that entitled it to 60% of the shares of KAOP, which would only come into effect upon the exercise of the said options. It was also argued that the said agreement did not preclude them from increasing the share capital of KAOP and therefore the impugned allotment of shares was valid.

In dismissing the appeal, the Court of Appeal held that the arbitrator's decision on the substantive issues was premised on findings of fact derived from the evidence tendered at the arbitration. These findings, it was observed, were neither perverse nor manifestly unlawful to warrant interference.

The Court of Appeal then observed that the arbitrator had correctly interpreted the said agreement by applying the "business common sense approach" of contractual interpretation. It was held that the parties intended that MUIP would own 60% of the shares in KAOP after the two options had been exercised and, further, that it was not within the contemplation of the parties that there would be changes to the share capital of KAOP pending the exercise of the options. Therefore, the Court held that any changes to the share capital of KAOP, particularly changes that were adverse to one of the contracting parties, required the consent of the parties to the contract, which was not obtained in the present case.

Moreover, the Court of Appeal held that the right of FEH and KAOP to increase their authorized and paid up capital had to be circumscribed by the legal and contractual obligations that they had with third parties (i.e. with MUIP under the said agreement).

Lastly, the High Court's decision to set aside the arbitrator's award of pre and post award interest was upheld. The Court of Appeal held that the arbitrator had acted in excess of his jurisdiction by awarding pre-award interest as the Arbitration Act 2005 does not provide for the award of the same. Further, Aziah Ali JCA impugned the award of post-award interest as MUIP did not expressly pray for the award of such interest in its pleadings.

Intellectual Property

New World Hotel Management (BVI) Limited v. YTL Hotels and Properties Sdn. Bhd.
[Kuala Lumpur High Court Originating Summons No. 24IP-37-08 / 2015]

The Defendant is the proprietor of Trade Mark Registration No. 09021432 for "CARLYLE" ("**Defendant's Registered Mark**") in class 43 in respect of "cafe, snack bar, self-service restaurants, cocktail lounge, lounge, hotels, restaurants; all included in class 43" ("**Defendant's registration**").

The Plaintiff applied to expunge the Defendant's registration from the Register of Trade Marks under Section 45(1)(a) of the Trade Marks Act 1976 ("**the Act**") on the basis that it was an entry made without sufficient cause and / or is an entry wrongfully remaining on the Register of Trade Marks; and Section 46(1) (b) of the Act for non-use of the Defendant's Registered Mark for a continuous period of 3 years up to 1 month before the date of the Plaintiff's application.

In support of its application, the Plaintiff adduced an investigation report via an affidavit affirmed by an officer of the Plaintiff instead of via an affidavit affirmed by the private investigator.

Further, the investigation report adduced by the Plaintiff showed that the private investigator had made enquiries on the use of the Defendant's Registered Mark only twice approximately 9 months before commencement of the action.

The Defendant contended that the investigation report adduced by the Plaintiff was inadmissible on the basis that it is hearsay; and that the Plaintiff had failed to discharge its burden of proof in establishing non-use of the Defendant's Registered Mark by the Defendant for a continuous period of 3 years up to 1 month before the date of the application.

The High Court dismissed the Plaintiff's application to expunge the Defendant's registered "CARLYLE" mark on the basis that the Plaintiff had failed to discharge the burden of proof of establishing non-use of the Defendant's Registered Mark by the Defendant for a continuous period of 3 years up to 1 month before the date of the application.

The High Court also found that the investigation report adduced by the Plaintiff was inadmissible by reason of it being hearsay as the Plaintiff failed to adduce the investigation via an affidavit affirmed by the maker of the report.

Syarikat Faiza Sdn Bhd & Anor v. Faiz Rice Sdn Bhd & Anor
[High Court Civil Suit Nos. WA-22IP-09-03/2016 & WA-22IP-13-03/2016]

Syarikat Faiza Sdn. Bhd. and Faiza Bawumi Binti Sayed Ahmad ("**the Plaintiffs**") filed actions against Faiz Rice Sdn. Bhd ("**the 1st Defendant**") and its Managing Director, Fikri Bin Abu Bakar ("**the 2nd Defendant**") ("**the Defendants**") for the alleged infringement of its "FAIZA" trade-marks, passing-off, infringement of the Plaintiffs' copyright in the Plaintiffs' packaging and "FAIZA" logo, and unlawful interference with the Plaintiffs' trade and business.

In response, the Defendants counter-claimed for, inter alia, declarations of non-infringement and for the expungement of the "FAIZA" marks on the basis that such marks have been entered into the Register of Trade Marks without sufficient cause and / or are entries wrongfully remaining on the Register of Trade Marks as the "FAIZA" marks are derived from the Plaintiff's Rice Packages, copyright for which is owned by Fikri Bin Abu Bakar, the 2nd Defendant.

Interlocutory Injunction

The Plaintiffs also applied for an interlocutory injunction to restrain the Defendants from infringing the Plaintiffs' rights in the "FAIZA" trademarks and copyright in the Plaintiffs' packaging and "FAIZA" logo pending the disposal of trial of these actions.

The Defendants opposed the Plaintiffs' application for interlocutory injunction and contended that the Plaintiffs have failed to show that this is an appropriate case for an interlocutory injunction to be granted. Further, the Defendants submitted they should be allowed to carry on its business instead of being impeded by the grant of an interlocutory injunction in view of the far reaching, serious and irreparably damaging effects an interlocutory injunction would have on the Defendants.

The Court agreed with the Defendants and dismissed the Plaintiffs' application for interlocutory injunction pending the disposal of trial with costs.

SOCIAL & SPORTS

SLB Badminton Tournament 2016

The SLB Badminton Tournament 2016 got off to a rousing start on 8.4.2016. There were 4 teams that participated – the Partners, the Staff, the Associates and the Pupils. In the preliminary group stages, each team played each other and was scored on the total number of sets won in each tie (which constituted 5 games in total – men's singles, women's singles, men's doubles, women's doubles and mixed doubles).

This made each tie very exciting indeed, as it was theoretically possible for a team to lose a tie 2-3 and yet score more points than the team that actually won the tie! The tournament was eagerly anticipated by all and sundry, since there were rumours circulating that a new staff in the IT Department, Mohd Hakim was an accomplished badminton player. Pundits also eagerly anticipated watching team Associates's Lum Kok Kiong in the tournament, as he is a KL Bar badminton star and those who had watched him play in the past had waxed lyrical of his abilities.

ALL SMILES — Representatives from the Partners team and the Associates team smiling for the camera post-match.

On 8.4.2016, the Staff and the Pupils clashed in the opening fixture, with the Staff delivering a crushing defeat to team Pupils with a 4-1 scoreline. Mohd Hakim led from the front with a scintillating performance on the night, inspiring his team mates to an easy victory over the hapless Pupils. In a replay of the final match of the last edition of the badminton tournament, the Partners and Associates clashed in the other tie that went right down the wire, with the Partners ultimately edging the Associates in a 3-2 victory. The undoubted talisman for the Partners was Jal Othman who rose to the occasion, putting his younger opponents to shame with his silky strokes and admirable court coverage.

The Associates, despite this setback, came back like wounded lions and the Pupils were their victims in the next tie between both teams on 29.4.2016. The Pupils, who seemed out of sorts in their opening tie, did not go down tamely this time. They gave the Associates a scare, but in the end, the Associates simply had more firepower in their arsenal and eased to a narrow 3-2 victory, staving off a spirited comeback led by Marissa Gomez of the Pupils, who impressed with her deft foot-work and acute finishing. In the subsequent tie that the Partners would no doubt like to quickly forget, team Staff outclassed the Partners, winning 5-0.

Although aware of the drubbing that the Partners received at the hands of the Staff, team Associates were not overawed and took the fight to the Staff. In a stunning upset, the Associates defeated the Staff in a narrow 3-2 victory, thus cementing their place as genuine title contenders. Lum Kok Kiong played a starring role in this tie and his opponents simply had no an-swer to his stinging baseline smashes. In the final tie of the group stages on 27.5.2016, the Partners clashed with team Pupils, both teams looking to redeem themselves after an insipid start to the tournament. The Partners, buoyed by the gritty performances of Tharmy Ramalingam, and Ng Hooi Huang, restored order with a narrow 3-2 victory. The Pupils, al-though defeated, acquitted them-selves admirably indeed.

In the semi-final tally, the Staff won the group stages with a total of 24 points, edging second placed team Associates who ended up with 19 points. The revival of team Partners ultimately came a little too late, as they only managed a third place

finish on 13 points. Team Pupils were the also rans, managing only 11 points.

On 8.10.2016, the Staff have taken the Championship after a bruising encounter with the Associates at the Finals held at the Lee Chong Wei Sports Arena.

WINNERS! — Staff team proudly posed for the camera after a glorious win.

The Associates were unfortunately weakened by the shock pull out of their star singles player Lum Kok Kiong, who had unfortunately contracted influenza. The men's doubles tie pit the fancied Azmi Johan-Faizzul pairing against Hadi Mukhlis-Michael Anthony for the Associates. The staff pairing proved too strong in the end. Marianne Loh impressed as always, winning her women's singles tie with ease. The Associates, unfortunately, crumbled in the women's doubles (Pui Mun-Liza against Chia Leng-Yap Chiu Wan) and mixed doubles (Lydia-Azemi Md Diah against Emily Khaw-Voon Yan Sin) ties as well, eventually succumbing to an overall 1-4 defeat at the hands of the triumphant Staff team.

In the end, all the teams played their ties with admirable sportsmanship and truly put their best foot forward in each game that was played. They should all be justifiably proud. As tennis star Jim Courier once aptly put – "*Sportsmanship for me is when a guy walks off the court and you really can't tell whether he won or lost, because he carries himself with pride either way*".

EVENTS & HAPPENINGS 2016

LEFT: *Michael Soo, Head of SLB's Intellectual Property, Information Technology and Licensing Department and Riccardo G. Cajola (Cajola & Associati, Italy), moderated a session entitled, "How to Manage Multi-Jurisdictional Trademark Disputes in the Asia Pacific Rim" during the recent Inter-Pacific Bar Association 26th Annual Meeting and Conference in Kuala Lumpur which was held from 13 – 16th April, 2016 .*

RIGHT: *Karen Kaur, Partner in the Corporate Department was a panel speaker at a session entitled "Funds Offering in Asia and Passporting of Prospectuses Approved by Authorities in One Country by Another Country" at the Inter-Pacific Bar Association 26th Annual Meeting and Conference held in Kuala Lumpur from 13th – 16th April, 2016.*

Steve Thiru (left) presenting a token of appreciation to The Right Honourable Justice Tun Arifin Zakaria, Chief Justice of Malaysia.

A flagship event of the Malaysian Bar — the International Malaysia Law Conference (IMLC) 2016 was held from the 21st—23rd September 2016 at The Royale Chulan Kuala Lumpur. The President of the Malaysian Bar and a Partner of the firm, Steven Thiru gave the welcome note for the IMLC 2016 with its theme "Challenges of an ASEAN Community: Rule of Law, Business, and Being People-Oriented". Several of our partners were actively involved in this year's IMLC: -

Plenary Session 5

Ivan Ho and Lau Kee Sern jointly spoke on the topic of "Companies Act 2016", highlighting the key areas of changes introduced under the recently passed Companies Bill 2015. Special focus was placed on Corporate Voluntary Arrangement and Judicial Management with a comparative analysis of these remedies which are available in the United Kingdom and Singapore respectively.

Breakout Session 1

Goh Siu Lin moderated a Breakout Session on International Law & Human Rights where discussions on the topic of "The Hague Convention on the Civil Aspects of International Child Abduction: Beacon of Light in the Dark Tunnel" unfolded to reveal concerns and challenges faced by non-Hague Convention countries when embroiled in complexities surrounding matters related to child abduction.

Breakout Session 4

Jal Othman spoke in the Breakout Session on Business Law which explored the topic of "ASEAN Integration: Creating Islamic Finance Opportunities" and discussed at length, the question of whether the legal community is prepared for Syariah-compliant financial services of the future.

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