Jurisk!

A publication of Bar Council Risk Management Committee

Legal Practice *Management*

Maritime *Law*

DECEMBER 2023

Vol. 18 Issue 1

Risk Management Committee 2023/2024

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Chairperson's *Message*

Dear Members of the Malaysian Bar,

I hope this message finds you in good health and high spirits.

As legal practitioners, we must never become too complacent when it comes to implementing risk management in our line of work. At the heart of our profession lies the need to manage risks effectively, safeguard the interests of our clients, and uphold the principles of justice. As the legal industry continues to evolve, we face new challenges that demand even better risk management strategies and improved best practices.

In this edition of our newsletter, we have curated a series of insightful articles by experienced practitioners and professionals in their respective fields. The articles aim to shed light on key areas of risks to be considered and offer practical guidance that will be beneficial to Members.

This edition of *Jurisk!* will focus on two areas of practice, namely legal practice management and shipping law.

The Bar Council has always advocated effective legal practice management that encompasses a wide range of critical elements as it is vital for the running of a successful law firm. These articles delve into key topics relating to legal practice management and offer integral takeaways and guidance that are essential for legal professionals who are seeking to enhance their practice management skills while ensuring compliance with industry standards. Informative articles for lawyers aspiring to establish their own practice or join a partnership are also featured in this section.

The second section of our newsletter will offer invaluable knowledge on the legal and commercial considerations involved in ship sale and shipbuilding as well as provide a general introduction to the field. As the shipping industry plays an essential role in global trade, a comprehensive understanding of the subject matter is critical for professionals working in the industry.

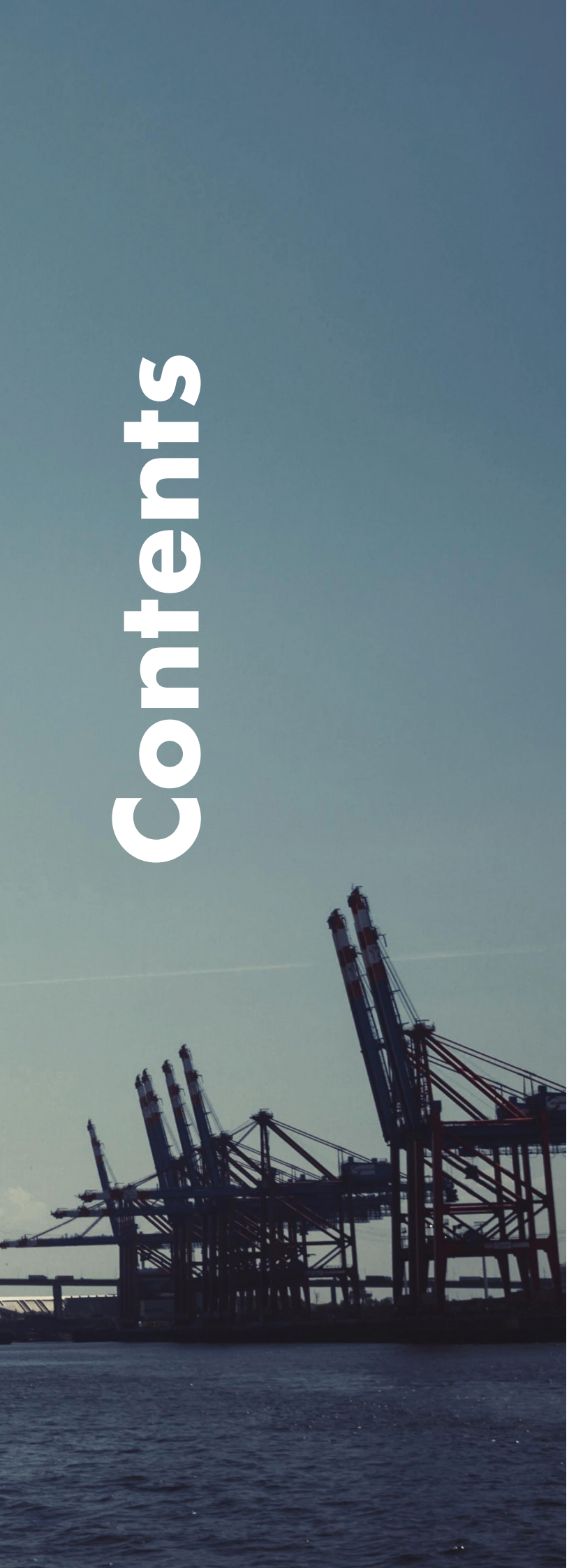
The Bar Council Risk Management ("RM") Committee will continue on its quest to raise awareness of risk management for the benefit of Members of the Malaysian Bar. We encourage you to attend our curated risk management talks and read our monthly newsletter, *I-RiskSpot,* and *Jurisk!,* which contain updates on risk management for the legal profession. While risk management is now under the responsibility of the RM Committee, it would not be possible without the strong foundations that have been previously laid down by the Bar Council Professional Indemnity Insurance ("PII") Committee. As such, we would like to extend our heartfelt gratitude to the PII Committee for their invaluable contributions over the years.

We welcome any feedback on our risk management initiatives. Please let us know what else we can bring to you, or if you would like to contribute to any of our risk management initiatives, feel free to email us at pirm@malaysianbar.org.my.

In the meantime, remain vigilant and keep fighting the good fight.

Thank you.

Arthur Wang
Chairperson
Bar Council Risk Management Committee 2023/2024



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Legal Practice *Management*

For lawyers who are managing a legal practice (or have plans to do so or will be appointed to assume the post), in this section you will find articles about how you can plan and establish a functioning organisational framework model for your practice. Learn how to manage client accounts, deal with potential emergency contingencies and create a safe environment in the office. And if the desire or need arises, you can read about the essential steps to take when closing your law firm.

Planning *For Your* Law Practice

by ***Mohd Shukri Zulkipli****, Advocate and Solicitor of the High Court of Malaya*

So, you have decided to start your own law practice. By now, you may have some idea of how to manage a law practice – monthly overheads ie rent, staffing, salaries, office upkeep, expenses and above all, getting clients. You are probably aware or have heard from the experience of others the dos and don'ts when it comes to managing a law practice. Perhaps, the most important aspect in managing a law practice is the ability to financially maintain the law practice and ensure that income meets expenses. While you may have these in mind, there are other aspects which are worth considering in planning your law firm's journey.

(1) Adaptability is the key. Utilise technology, revolutionize your practice. Maximise the use of artificial intelligence. For example, you can dictate directly to your computer to save time typing and losing that train of thoughts.

(2) Quote your fee reasonably bearing in mind the amount of time that will be spent, manpower involved and experience that is put in the work for the client. With this, any uncertainty in the client's mind on your professional fee can be swept aside effectively. They know how much will be spent towards your service, without the risk of having to pay up more in the future.

(3) Avoid accepting a brief without upfront payment or you might end up doing work for free. It is good practice to have clear and precise terms of your service before taking up the work. For courts matters, if the client is unable to make payment after repeated reminders, consider discharging yourself from acting further.

    Remember, the proper way to get out of this situation is by obtaining a formal discharge. Do not take any action that may backfire since you still owe a duty to comply with the Court's direction. Hence, do not purposely omit to file an affidavit or submission as the consequence can lead to a cause of action against you.

(4) While it may be argued that legal knowledge *per se* is not a factor of financial strength, a lawyer who is starting up ought not to take this lightly. After all, clients will only engage a lawyer who can get the work done and this is where legal skills prove to be crucial. In essence, build up the financial strength of the law practice through client confidence, and there is only one way to do it – brush up on legal skills. Impress your client in court, not in a café.

    That being said, allocate a portion of your capital, or monthly income to set up a library. This will be your tool of trade. A few books on contract law and company law are good enough for a start. As your law practice grows, the library should follow. Don't forget to include budget for books in your monthly target, or you can work out a policy of one book per file, paid out of disbursement. Consider online subscription of law journals that comes with attractive packages to negotiate for. These will keep you on top of your practice.

    Do not hesitate in buying books. Don't think twice. It is an investment and indeed, a real one. It enables you to advice client properly, which in turn grow confidence and enhance your reputation. Once you have that, clients will come. Knowledge in specific areas of law helps practitioners to plan, strategize and manoeuvre a file practically and economically. Certain legal arguments can only be gained through research.

Be that as it may, it always depends on our perspective and the situation that we face. Managing a law practice is not just about making sure you can make ends meet. It's also about making sure the law practice grows and prosper along with your legal career.

Organisational **Framework Model**

by ***Haadii Rahman b Safian****, Chief Operating Officer in a Law Firm*

Introduction

A legal firm is a professional entity that offers legal services comprising solutions to various legal conundrums within the needs of an organisation or the society, formed by one or more lawyers to engage in the practice of law. Also known as a professional entity, a legal firm possesses a similar structure to a regular business entity which conducts important operational processes, namely:

(1) Finance;
(2) Administration;
(3) Human resource;
(4) Corporate; and
(5) Customer relationship management ("CRM").

Excluding the case management for clients, not all firms have a separate entity to manage these operational processes. The business operations of small- to medium-sized firms, on average, is conducted by the lawyers themselves or with at least two support staff members. Additionally, implementing a hybrid mode of working is seen to be appropriate considering the business size and it is also an effective way to manage potential risk of financial constraints, especially for a newly launched legal firm.

The Risks

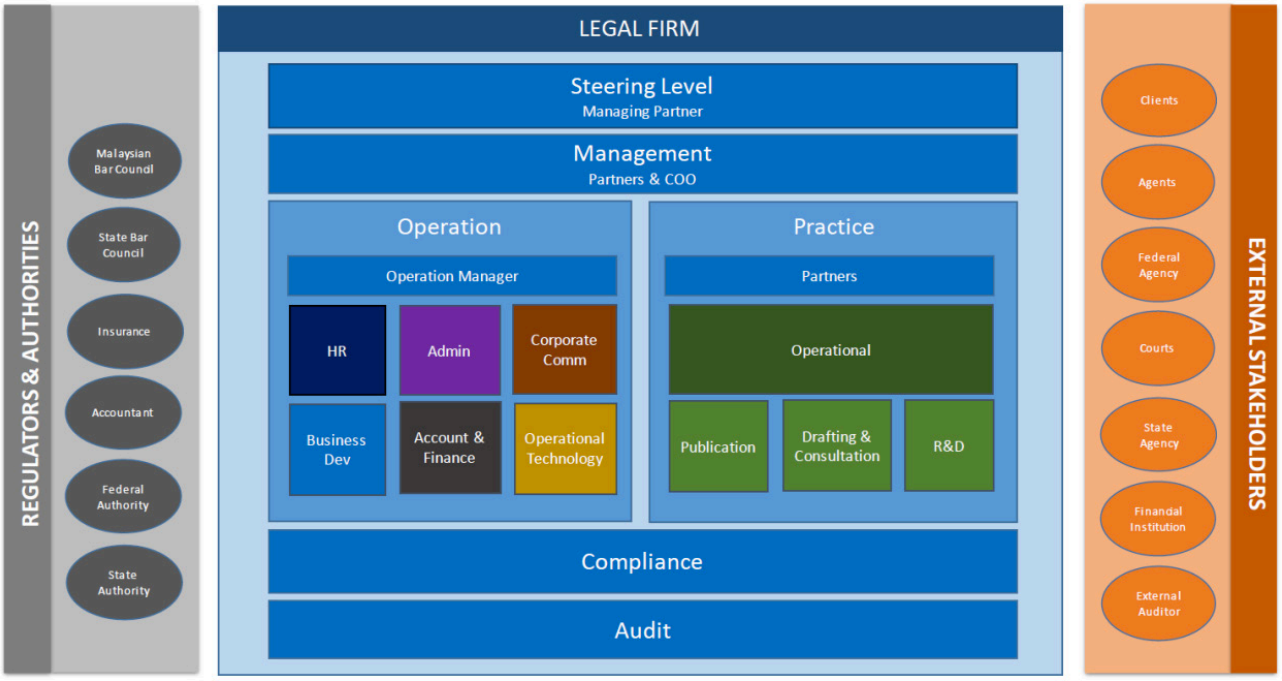
The dependency on one multitasking staff member is a huge risk and must be smartly managed by the owner of the legal firm. The functionality of each operational unit mentioned above must be well understood and recognised so that the operation and case management can become objectified and more balanced. An imbalance in the operation will impede the case executions which may lead to a decline in the legal firm's reputation in the current market.

In legal practice involving real estate transactions, the client accounts and financial management are vital to ensure the case transactions are conducted securely. As reporting institutions to the national bank of Malaysia, Bank Negara Malaysia ("BNM"), legal firms are obliged to adhere to the procedures of the Anti-Money Laundering/Countering Financing of Terrorism ("AML/CFT") policies to prevent the risk of getting involved with illegal money laundering transactions or terrorist activities. This process requires careful attention because any operational leakage in AML/CFT compliance may lead to the authorities taking strict actions towards the legal firm.

In 2020, the entire world was shaken by the COVID-19 pandemic which, on average, paralysed almost all operations in the government and private sectors globally. This indeterminate factor is a risk that all business entities may have to face. At the same time, the rapid development of technology and fierce competitions in the current market is causing the competitiveness and proficiency of the legal firm staff to be indispensable. Failure to cope with the technology usage as well as inefficient management will invite the risk of paralysing the legal firm operation.

Framework

An organizational framework is an idea that illustrates the structured organisation of a legal firm that comprises all the basic components and operation cores. This framework can be a basic guide or reference to the process of formation, development or progress of a legal firm.



The diagram above illustrates the organizational framework model for a legal firm. This model portrays the organizational structure of a firm and other entities involved as supervisory bodies, enforcers, and business agents in the legal service market. This model promotes four main ideas as follows:

(1) A legal firm should include a top management unit acting as a 'policy maker';
(2) A legal firm should include a management unit acting as a 'supervisory body';
(3) A legal firm should have separate operation and legal service hierarchies; and
(4) A legal firm should include an 'audit and compliance' segment that is not tied to the operation, legal service, and management hierarchy.

A legal firm should include a top management hierarchy as the "policy maker" who will set a well-defined vision, mission, and business direction. Clear objectives in the form of key performance indicators ("KPIs") or business targets are the basis of the work that will be planned by this group. This top management consisting of the Managing Partner(s) or Founding Partner(s) shall set practical business targets which are flexible and time-framed according to the situation. However, amending the business targets or business KPIs frequently may slow down the tasks that have been initially planned.

Moreover, having a management hierarchy as the 'supervisory body' can help the legal firm crystalise their mission and vision, as well as achieve business targets or KPIs set by the top management. As the principal unit overseeing operational and legal services, the process of monitoring the work is crucial to ensure that all strategies are implemented with discipline and follow the standard operating procedures ("SOPs") within the stipulated timeframe. The management team plays an important role in balancing the needs of the operational and legal services while ensuring task collaboration runs smoothly.

A legal firm should also include a separate operational hierarchy and legal services hierarchy so that the development of the organisation can run more rapidly and smoothly. Human Resource, under the operational hierarchy, will administer activities such as recruitment, interviews, procurement, salary management, performance management, human capital development, and discipline management. Office hardware and software management, mailing, stationery, messenger and courier services, and Occupational Safety and Health Administration ("OSHA") can be consolidated and supervised by the Administration unit. Next, all financial transactions involving procurement, case transactions, cheque management, petty cash management, and tax management should be supervised by the Finance unit.

In order to ensure that the firm's branding and marketing aspects run efficiently, the establishment of a Business Development unit will be a great help especially using the latest digital marketing techniques.

The Corporate Communication unit is the unit responsible for ensuring that Sijil Annual and Practising Certificate ("SAPC") renewal processes and Professional Indemnity Insurance ("PII") run smoothly. In addition, the panelship application involving corporate clients will be carried out by this unit. This communication unit also acts as an intermediary between the firm and its staff as well as with external parties while making certain the communication quality is properly maintained.

To ensure that all operations are equipped with appropriate software and hardware technology, an Operational Technology unit should be introduced. Apart from performing as a unit that maintains the firm's technology needs, Operational Technology is also a unit that will oversee all third-party software used by the firm to guarantee the security of client data transactions and to prevent data leakage from occurring. This unit will also provide appropriate training and content to ensure that the staff have the necessary computer and technology skills in line with the current operational requirements.

As for the legal service hierarchy consisting of Partners and lawyers, their main focus will be directed towards case management in addition to continuous learning of the practice area offered by the firm. With this model, legal firms will be able to produce many inhouse experts in various legal fields. Sub-practice development can also take place easily. The various expertise formed through this model will provide an added value to the firm as well as improve the skillset of every lawyer involved. For a legal firm, a competent lawyer is a very valuable asset.

Lastly, based on this organizational framework model, a legal firm should include an 'audit and compliance' unit that is not tied to the operational, legal service or management hierarchies to guarantee quality service and high integrity values. Stability will be achieved if every operational process is implemented according to the regulations and compliance outlined by the top management and authorities. With the existence of this unit, operational activities will mature more easily and any weaknesses can be fixed quickly.

Conclusion

Every organisation must evolve to ensure its business structure stays solid while being able to compete in the local and global market. For a legal firm, a clear and mature structural framework will be able to help in the operational management planning in the long term. Communication is the key to the continuity of operations; and a dynamic workforce along with a strong organizational structure are capable of driving the growth and performance of the legal firm.

Legal Fees – *To Be Pre-Agreed or Not? That is the Question.*

by ***Loong Sheng Li***

First and foremost, let's get something straight – claims against your legal practice over a dispute solely on legal fees (in most general situations) are excluded under the Malaysian Bar professional indemnity insurance. The said exclusion is expressly provided under Clause 32 (n) of the 2023 Certificate of Insurance[1] or such other similar wordings in the COI of previous years.

With that said, we stress on why it is imperative for a legal firm to cover its bases in relation to solicitor-client cost ie your professional legal fees. Many disputes between lawyers and clients are over money. There is certainly a common experience amongst lawyers when it comes to the collection of fees and how tedious it may be at times. A worse scenario however would be a lawsuit against the firm by a disgruntled client for the return of legal fees paid.

We set out below examples of disputes on legal fees which have occurred between a lawyer and their client:-

A. Lawyer X acted for a buyer in regard to a sale of property. The buyer paid a sale deposit to the seller but the sale agreement later fell through. The deposit was refunded by the seller to Lawyer X for onward transmission to the buyer. Lawyer X deducted their legal fees from the deposit amount before refunding the balance to the buyer. The buyer now sues Lawyer X for the return of the deducted deposit amount ie their legal fees.

B. A client appointed Lawyer Y to represent them in an appeal matter. Lawyer Y thereafter appointed a senior counsel to conduct the hearing of the appeal, unbeknownst to the client. Upon conclusion of the appeal, the client refused to pay the legal fees as it included the senior counsel's fees. Lawyer Y was subsequently sued by the senior counsel for unpaid legal fees.

On both of the above scenarios, Lawyers X and Y made a claim under their professional indemnity insurance but their claims were denied pursuant to the legal fees exclusion clause mentioned above.

What steps may a lawyer take to reduce the risk of legal fees disputes/claims, and in any event, safeguard their position?

It goes back to basics – communication regarding legal fees with the client should be clear and ought to be reduce to writing eg a written fee agreement. A written fee agreement should generally include whether a retainer is required (and its amount, if so), the hourly fees of lawyers/support staffs who may work on the case, and payment terms. It is also good practice for a lawyer to provide their client, at a preliminary stage, with a general range of legal fees applicable to the case so as to avoid any surprises later. Similarly, a breakdown of fees and disbursements involved as the case progresses would be helpful for the client.

Although discussions on fees may be verbal or over text messages, a lawyer should make a point of confirming the agreed terms in an email or letter to the client. The same applies to any fee amendments agreed upon subsequently. Lest we forget, a written contract/ document takes precedence over a verbal statement. With such practice management, a lawyer will have in hand a record for reference which may be used to avoid or resolve any fee dispute with the client.

Best Practice Tips

- ✓ Itemise your billable time – use a billing system which keeps a detailed record of each item of work done.
- ✓ Have an honest and realistic conversation with your client about the potential cost of their case.
- ✓ Be careful with multi-billing – adjust your time cost accordingly if a case is delegated amongst multiple lawyers/ paralegals.
- ✓ Keep the communication flowing – any change in strategy or circumstances which may increase fees should be highlighted to the client sooner than later.

[1] Clause 32(n) of the 2023 Certificate of Insurance

What You Can *and* Cannot Do *with Your* Client Accounts

by ***Randy Emanuel Dias****, Officer, Bar Council Professional Indemnity Insurance and Risk Management Department*

In the course of the retainers with their clients, lawyers often receive monies intended for other than fees such as for payments to a third party, payments pending the outcome of certain events, and as the stakeholders sum. Due to the varying purpose of the money, it is important for lawyers to be able to separate the money according to its purposes.

When handling money received from the client or on behalf of the client, the lawyer will have to use a client account to hold the money. This money must be kept separate from the office account that holds the firm's money. The two accounts have different purposes and rules of management, and these rules are to be observed strictly.

In so far as the client account is concerned, ordinarily, the firm would open the client account when commencing operations with the approval of the Bar Council. Lawyers must notify the Bar Council within one month of opening or closing a client account[1]. The obligation to maintain the client account and subsequently to provide the accountant's reports in respect of the accounts (including for branch offices maintained by the firm) rests with the firm's partners or the sole proprietors.

Whilst there may be various types of client accounts, this article will focus on the mixed/pool client account, which is the most common type of client account maintained by a majority of law firms and one that generally holds money for more than one client of the firm.

So how does the firm identify money belonging to their clients?

A client's money is defined as "money held or received by a solicitor on account of a person for whom he is acting in relation to the holding or receipt of such money either as a solicitor or in connection with his practice as a solicitor, agent, bailee, stakeholder, or in any other capacity and includes solicitor trust money but does not include money to which the only person entitled is the solicitor himself or, in the case of a firm of solicitors, one or more of the partners in the firm[2]." Client's money does not include fees payable to the lawyer unless the fees have become payable. On the other hand, if monies are paid to account for fees but no work has been done yet, then the sum paid would still be considered as the client's money and may then be credited into the client account until the fees become due and payable.

A client account is a bank account set up solely for the client's money and need not be opened until the client's money is received. To manage the account, only the following persons may be made signatories to client account[3]:

(1) An advocate and solicitor practising as a sole proprietor;
(2) A partner or partners of a firm of solicitors;

[1] Rule 13 of Solicitor's Account Rules 1990

[2] Rule 2 of Solicitor's Account Rules 1990
[3] Rule 7A of Solicitor's Account Rules 1990

(3) A legal assistant expressly authorised by person(s) mentioned in (1) or (2) above.

There is no limit to the number of client accounts that may be set up[4]. It is sufficient for a firm to set up just one client account to retain all of its clients' money. It is however advisable for the firm to not set up several accounts if there is no sound justification for it.

The following are monies payable into a client account[5]:

(1) Client's money, inclusive of trust money and the category of monies described under Rule 2 of the Solicitor's Account Rules 1990;
(2) Lawyer's money to open and maintain the account, to avoid unintentionally using the client's monies;
(3) Money to replace any sum mistakenly or accidentally withdrawn from the account;
(4) Money that cannot be split (eg where a single cheque is given for payment of fees to the lawyer and payment for disbursements. Here, the payment is made into the client account first and then the amount due to the office account is transferred thereafter[6]);
(5) Cheques Receipt/Payment;
(6) Paying-in Slips; and
(7) Payment Vouchers.

No other money shall be paid into the client account.

A solicitor receiving monies payable into the client account is duty bound to deposit the money into the account without delay[7]. However, the following are exceptions when the monies received from the client or on behalf of the client may not be deposited in the client account[8]:

(1) money required to be paid to a third party immediately upon receipt;
(2) money that the client has requested need not be paid into the client account;
(3) money received for reimbursement to the lawyer; or
(4) money received to discharge a debt owed to the lawyer.

On the other hand, only the following money may be withdrawn from the mixed/pool client account[9]:

(1) In the case of client's money—
    (a) money required for a payment to or on behalf of the client;
    (b) money required for the execution of a trust;

    (c) money required for reimbursement to the lawyer or to be paid to the lawyer to discharge of a debt due to the lawyer;
    (d) money drawn on the client's authority; and
    (e) money required for solicitor's fees after the lawyer has sent a bill to their client for completed legal work;
(2) Solicitor's money necessary to open or maintain the client account;
(3) Money from single cheques or drafts received that the solicitor is entitled to split; and
(4) Money paid into the account by accident or mistake.

As for withdrawing funds from the client account, a lawyer may withdraw the funds either by a cheque drawn in favour of the solicitor or by a transfer to a bank account in the solicitor's name that isn't a client account. No money can be withdrawn from a client account by cash cheque or a bearer cheque except for payments of disbursements. Money in a client account cannot be drawn by an automated teller machine, telephone banking service or online banking service (except for purposes approved by the Bar Council)[10].

A lawyer must always be careful when dealing with the money in the client account, especially when issuing cheques from the client account. If there are insufficient funds in the client account, the lawyer could end up facing disciplinary proceedings that could result in either:

(1) a heavy fine; or
(2) suspension from practice; or
(3) being struck off the Roll of Advocates and Solicitors.

[4] Rule 3(2) of Solicitor's Account Rules 1990
[5] Rule 4 of Solicitor's Account Rules 1990
[6] Rule 5 of Solicitor's Account Rules 1990
[7] Rule 3(1) of Solicitor's Account Rules 1990
[8] Rule 9(2) of Solicitor's Account Rules 1990
[9] Rule 7 of Solicitor's Account Rules 1990
[10] Rule 8 of Solicitor's Account Rules 1990

Therefore, it is important to ensure there are funds in the client account and that the cheques from the client have been duly cleared and encashed before authorising withdrawals from the client account. Cheques cannot be issued if the client's funds were depleted and lawyers cannot use other clients' money for a different client (unless prior written consent and instructions have been given by the client for whom the money is held[11]). As for legal fees, lawyers may only transfer money to their office account for fees after they have sent a bill to their client for work completed[12].

Furthermore, lawyers are not allowed to use money from the client account for their firms' purposes or operations. Only funds in the office account can be used for such purposes.

In the same vein, lawyers cannot pay anything other than the client's money into the client account. They are duty bound to withdraw that money immediately upon discovery[13].

In view of the strict regulations on the management of client accounts, it is important that law firms employ a reliable accounting system that ensures that the flow of monies is tracked, recorded, and properly accounted for at any given time and period. The Solicitor's Account Rules 1990 imposes an obligation on lawyers to keep such books and accounts to show all their dealings with clients' money that is held, received or paid by them. When this is done correctly, there are fewer incidents of mistakes and errors, and when they do happen, it is much easier to spot and rectify them.

It is also important to note that law firms are not permitted to operate a general client account in any foreign currency in a local bank, unless the client has given specific written instructions for the same[14]. Alternatively, where a client has requested for a portion of the monies to be kept in foreign currency, the law firm must obtain written instructions from the client before accepting the money. Failure to do so could risk non-compliance, regardless of whether they hold the money in foreign currency or Malaysian Ringgit. Law firms are also prohibited from opening client accounts in offshore banks[15].

Lastly, lawyers are advised to refer to the Solicitors' Account Rules 1990, which provides the necessary guidelines on the management and operations of client accounts in order to avoid potential mistakes or risks of misappropriation of clients' money.

[11] Rule 8 (5) of Solicitor's Account Rules 1990
[12] Rules 7(a)(v) and 8(1)(b) of Solicitor's Account Rules 1990
[13] Rule 6 of Solicitor's Account Rules 1990
[14] Rule 8.02 of the Rules and Rulings of the Bar Council Malaysia
[15] Rule 8.03 of the Rules and Rulings of the Bar Council Malaysia

Business Continuity – *Why Do You Need An Emergency Contingency Plan?*

*by **Mysahra Shawkat**, Assistant Director, Bar Council Professional Indemnity Insurance and Risk Management Department*

One essential activity in developing your risk management plan is to make sure you have an emergency contingency plan. This plan can help you minimise the effects of interruptions to your practice. Some possible causes of interruptions to practice include:

- ✓ Natural disasters such as floods or fires;
- ✓ Interruption to supply of power, fuel, or essential materials;
- ✓ Criminal damage; and
- ✓ An economic crisis.

An emergency situation can catch a law practice unaware. You need to react quickly to minimise financial damage caused by the interruption to practice.

Contingency Checklist

Should the practice experience a partial or total interruption, use this checklist:

- ✓ **Examine your legal responsibilities with a fellow lawyer:** Get their help to interpret employment contracts, leases, contracts of supply, insurance policies, and give advice on your legal options.
- ✓ **Identify all current payments which can be delayed:** Talk to suppliers about deferring payment of invoices temporarily until your practice recommences.
- ✓ **Meet with your bank to discuss restructuring any business or personal loans:** Check if they are willing to delay loan repayments, mortgage payments and the like until your practice is up and running again.
- ✓ **Contact your regular suppliers to advise of your situation:** If possible give them an approximate date when you will resume business. If necessary, work out alternative arrangements.
- ✓ **Contact your leasing/finance company:** Discuss alternate payment arrangements.
- ✓ **Communicate with the landlord:** Make arrangements such as temporarily deferring rental payments with an arrangement negotiated for the practice to catch up with rent once trading resumes.
- ✓ **Contact your clients to advise of your situation:** Give them an approximate date when you will resume business. If necessary, work out alternative arrangements - similar law practices in your network may be able to assist with client services.

How Ready Are You For Business Interruptions?

Some basic questions….

No	Item	Self-assessment
1	Does your office have a working fire alarm or smoke detectors or water sprinklers?	
2	Do you have fire extinguishers in the office? - Are the units sufficient? - When was the last time they were changed?	
3	Do you have an alternative site from which your law practice can operate from in the event your principal worksite is inaccessible?	
4	Do you keep minimal office supplies or stationery (eg firm letterhead) offsite?	
5	Do you have an up-to-date inventory of your office?	
6	If a partner or employee died or left suddenly, what critical information is likely to go with them?	
7	Would other partner(s) or employees be able to take over or close their files, and ensure your client's interests are protected in that time the file is being transferred?	
8	Does your law practice have employees that are in sole possession of critical information (important dates, passwords, file and document locations, etc), vendor information, combination or keys to the safe, accounting information? - Everything entrusted solely to one person can simply vanish! - Before an employee leaves, obtain all keys, devices, external document storage and other proprietary or confidential documents that may have been taken home or used offsite. - Sharing information, formalising certain procedures, and centralising systems like calendars and billing may help mitigate loss.	
9	Do you have at least one laptop with a spare battery?	
10	Can you continue to service your clients without your computers?	
11	Have you ever considered installing a computer program that will be able to undelete/reclaim files that were inadvertently or intentionally erased?	
12	Have you ever tried restoring your backup data? Does it work?	
13	Ever considered a "buddy system" with another lawyer wherein you keep a copy of their critical information and they keep a copy of your critical information?	
14	Are your client records, critical client documents (eg wills, powers of attorney), critical business papers, etc kept in fire/flood proof cabinets or storage vaults?	
15	Is it common for employees to leave client files or documents of active matters on their desks or floor whereas mostly old files/matters are stored safely in (fire/flood proof) cabinets? - The greater the number of critical files/ documents (eg land titles, wills) you have left in the open, the greater your exposure to liability in the event of a disaster.	
16	Does your law practice have a copy of your master diary? If it is an electronic diary, do you back it up daily?	
17	- Do you have a list of court contacts, vendors, banks, opposing counsel, insurance agents, etc to notify of your situation, in the event of an emergency? - It is important that a copy of this list is kept offsite and accessible at all times.	

No	Item	Self-assessment
18	Have you considered taking photos of your office, equipment or furnishing? - Such pictures would come in handy for insurance purposes. - Don't forget to take 'aftermath' photos in the event your law practice suffers damage.	
19	Do you maintain a 'rainy-day' fund? - Such monies would be essential in helping your law practice survive the aftermath of a disaster.	
20	Does your law practice have insurance coverage? If so, what types of insurance has your law practice purchased? - It is important that you have insurance to cover property loss, loss of revenue, reconstruction of records and configuration of computer systems, among others. - Where possible, your insurance should cover restoration of valuable papers and computers/laptops as well. - General liability insurance would cover instances of personal injury that may be the fault of your law practice. - Fidelity bond insurance to cover employee theft is also another type of insurance worth considering.	

Eradicating Harassment and Sexual Harassment *in the* Legal Workplace: Responsibilities and Risks

*by **Harleen Kaur (Leena)**, Advocate and Solicitor of the High Court of Malaya, and **Santhi Latha**, President, Association of Women Lawyers*

Harassment and sexual harassment happens, even in the legal workplace. It is a fact, not an anomaly. It happens regardless of the gender of the perpetrator or the victim/survivor; and it happens regardless of the hierarchy within the organisation.

These instances should not be dismissed as one-off incidents brought upon by stress or pressure at work or from personal life, or an exercise of poor judgment. These are the acts of a *predator who may be embedded within the firm* and who chooses their prey carefully.

The alleged harasser may present themself as humorous, charming, supportive, well-intentioned, helpful, ie the ideal friend/colleague/boss – making it often impossible to believe that the specific individual could have behaved in such a manner. While harassment may be more obvious – taking the form of oral harassment: shouting and the use of verbally abusive language; and physical harassment: throwing things at the victim – sexual harassment is more insidious: subtle behaviour that hints at sexual impropriety such as language laden with sexual innuendo, "accidental" touching and more, that may take place orally, physically, and online.

In instances of sexual harassment, the victim/survivor is often left feeling confused, afraid, and isolated with the nagging fear that they may have misunderstood what has occurred, or that by lodging a formal complaint, they risk retaliation from the alleged perpetrator or the firm, and that they may put their job and reputation at risk in what is a tight knit community. Victims/survivors also often do not report their experiences because they believe that official channels may not take sufficient action.

The Malaysian Bar Perspective

From 20 to 30 July 2020, the Kuala Lumpur Bar Gender, Equality and Diversity Committee launched a Campaign to stop sexual harassment in the workplace. During this campaign, 216 Kuala Lumpur law firms pledged to stop harassment and sexual harassment by adopting and

implementing this policy (https://bit.ly/46csSdw) in their firms.

If your firm does not already have such a policy, consider adopting and implementing this in your firm. The template is generic and can easily be modified to suit the specific circumstances of your workplace.

Further, as announced in Circular No 485/2021 | Sexual Harassment and Applicable Ruling of the Bar Council (dated 13 Dec 2021), the Bar Council passed Ruling 14.29 which states:

"14.29. Sexual Harassment Constitutes Misconduct Under Section 94(3) of The Act:

(1) Any act of sexual harassment by an Advocate and Solicitor or a pupil in a professional capacity or in a professional setting amounts to misconduct.

(2) Sexual harassment means any unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, made directly or indirectly at a person or physically communicated in person or through the use of any medium or physical conduct, which a reasonable person would consider to be offensive or humiliating or a threat to their well-being or comfort."

The Employer Perspective

As employers, we owe a duty of care to every employee within the firm to ensure that they work in a safe and conducive environment. Key factors that are considered by the victim/survivor when deciding whether to lodge a complaint of harassment or sexual harassment include:

(1) An individual evaluation of the trustworthiness of the firm. The focus is on whether the firm will take the complaint seriously, and whether appropriate sanctions will be imposed after a finding of harassment or sexual harassment is established. The firm/employer should expect to contend with a conflict of interest between empowering the victim/survivor on the one hand and protecting against litigation on the other.

It is critical when creating a harassment/sexual harassment free environment, to:

(a) have documented policies and processes with timelines;

(b) appoint impartial investigators and decision makers, should the need arise;

(c) be aware of sensitivities in the treatment of the affected parties throughout the process;

(d) ensure there is available protection against retaliation from either party; and

(e) be aware of perceived fairness of outcomes.

Please see the Kuala Lumpur Bar Committee's policy for a recommended step-by-step procedure.

(2) Understand the firm culture on harassment and sexual harassment, ie the norms around sexist behaviour – for example, so-called sexual banter, bullying, adherence to gender stereotypes, and the informal actions of leadership within the firm. Such firm culture may perpetuate or normalise different forms of harassment, and an awareness of this is a critical step to remove/limit such behaviour.

The firm culture highlights how complainants can expect to be treated when they report, and whether they are likely to receive support within the firm. This is crucial. Colleagues depend on each other, and positive relationships help foster a sense of belonging and promote wellbeing. A failure by the firm to manage such complaints effectively and professionally can have immediate and long-term negative implications on the firm and its lawyers, not just within the legal community but amongst clients and other stakeholders as well.

(3) The firm set-up is also relevant, and factors like the gender composition of the firm and firm hierarchy matter.

As an employer or partner in your firm, the steps mentioned above can be implemented – at almost zero cost – to safeguard against harassment and sexual harassment. Ignoring the possibility that harassment or sexual harassment can occur in your legal workplace is impractical, because should an incident occur, not

having the necessary procedures in place could result in chaos.

The impact of allegations of harassment or sexual harassment in any workplace is not minor and it will not go away, as such legal firms should:

(1) implement clear **policies against harassment and sexual harassment**;
(2) install and execute an effective and structured **reporting mechanism** that is confidential; and
(3) rely on the Bar Council's Peer Support Network ("**PSN**") to assist the survivor in such situations.

Your goal: to have a grievance mechanism in place to handle complaints of harassment or sexual harassment. This does not have to be complicated but must be clear, transparent, and confidential (to the alleged perpetrator and victim/survivor). From a risk management perspective, this is critical.

Professional Indemnity Insurance only provides cover to lawyers/firms in relation to the work or service they provide so any liability that may arise from complaints of harassment or sexual harassment will have to be borne by the firm.

Firms that have a clear reporting mechanism in place, as opposed a vague, "*my door is always open*" approach would be on firmer footing toward ensuring a harassment-free workplace.

We recommend that with every new hire, the induction includes highlighting the grievance procedure and that any complaint received (whether about harassment, sexual harassment, or other issues) will be treated confidentially and investigated in a fair, respectful and timely manner.

The Malaysian Bar's Peer Support Network

There are varying degrees and forms of harassment and sexual harassment, and this is a complex arena often filled with "he said, she said, they said" allegations that will impact negatively on the firm and all its personnel. The current landscape is *perpetrator-focused,* ie the law and procedure are wholly focused on the rights and liabilities of the alleged perpetrator, and what should or should not be done. This leaves little room for the victim/survivor's voice, save and except in the role of complainant.

The PSN was created taking this into consideration. It is a network consisting of members of the legal fraternity who have been trained to offer confidential support and guidance so the complainant can follow through with the different options available, including:

- Complaint to employer;
- Complaint to Advocates & Solicitors Disciplinary Board;
- Making a police report and following through on a criminal complaint; and
- Filing a civil suit against the alleged perpetrator, and possibly the employer.

If you are aware of any victim/survivor who has suffered harassment or sexual harassment in the legal workplace, you may refer them to the PSN. This starts with the simple process of the victim/survivor lodging written feedback. The documentation to do this is accessible either through the Malaysian Bar website (www.malaysianbar.org.my) or the respective State Bar websites.

The Malaysian Bar will continue to train Case Handlers ("CH") for the PSN – there are currently 18 CHs ready to assist victims/survivors on their journey to seek redress. The CH training encompasses completing two online programmes and 7 hours of actual training.

The eradication of harassment and sexual harassment in the legal workplace is critical. These issues are not gender issues; and they are certainly not about lawyers who cannot take the "heat". It is no longer acceptable to say, "This happened to me, and I survived, (and it has made me a better lawyer) so there is no issue". Eradicating harassment and sexual harassment is about building and maintaining a culture of respect within the legal profession. It is about not accepting conduct that threatens, demeans, belittles, disrespects and physically, emotionally, and psychologically harms people who work within the legal profession. We are, after all, lawyers and we set the benchmark of what is acceptable conduct, and harassment or sexual harassment in any context is never acceptable conduct.

Essential Steps *When Closing* Your Law Firm

by ***Shafiq Sobri***

There could be various reasons to close a law practice or law firm. Maybe you are a sole practitioner joining another law practice as a partner or have decided to cease practice to become an in-house legal officer or maybe you have decided it's time to retire. Whatever the reason is, closing your law firm must be done properly and strategically. It may seem simple, but you need to be wary of issues concerning your clients' interests – past and present – to ensure that they are not prejudiced.

It may be a long and daunting process especially if you have a lot of active files in the law firm prior to the closure. It is hoped that these tips may be of assistance to plan a proper closure of your law firm.

(1) Comply with the Bar Council Rules and Rulings on Cessation of Practice

Chapter 13 of the Bar Council's Rules and Rulings prescribes the rules in relation to cessation of practice. Ensure that your law firm's closure complies with the rules and rulings concerning:

(a) Your intentions to change status of practise;
(b) Your intention to close the law firm;
(c) Your clients' accounts; and
(d) Your client's documents.

(2) Set a closing date

Setting a closing date will depend on several factors such as the number of active files, progress of the files, outstanding tasks, and deadlines (such as court dates). It is advisable to set a realistic closing date to ensure that all matters have been attended to and sorted before the targeted closing date.

> ***Practice tip***
>
> Having a checklist of items or tasks that you need to attend will be a good start. Planning a firm's closure involves a lot of work and keeping a checklist will keep you organised and ensure that you do not miss any step along the way.

Prepare an inventory of all files together with status, so you do not miss any dates or next action. An inventory will also help you to categorise files which you need to collect or follow up on payment, or to label as inactive. Once categorisation is done, you can then prioritize files according to the files' deadlines based on your timeline to close the law firm, and files that you may need to get clients' consent to transfer to another lawyer/law firm to take over.

To avoid potential conflicts in the future, it is advisable that you refrain from consulting new or potential clients once you have set a closing date.

(3) File management

Ensure that your files retention or disposal policy comply with the Personal Data Protection Act 2010 and Chapter 18 of the Bar Council's Rules and Rulings. For closed files, review the file's individual file closure checklist to see if there are issues pending before making a decision on the file. If you have not prepared any individual file closure checklist, use the suggested guidelines available on the Praktis website (https://www.praktis.com.my/practical-tools/checklists/firm-management-checklists). Keep copies of the individual checklist for future reference.

Since you are closing the firm, you definitely want to reduce storage cost as much as possible. However, considering the limitation period for your client to make a claim against you, do consider prudent methods to retain your files until such time after the limitation period has passed and the minimum requirement to comply under Chapter 18 of the Bar Council's Rules and Rulings.

Practice tips

Keep hard copies of important documents relating to the file, such as client's instructions and approved drafts. If you intend to keep your documents in soft copy format to reduce storage costs, remember not to misplace the external drive/thumb drive/server. Regularly check stored documents to make sure that they are still intact.

Note: As at 10 June 2021, Bar Council has yet to make a decision on the use of cloud storage.

(4) Communicate with your clients – past and present

Ensure that all clients – past and present – are properly informed about the law firm's closure. Be it by way of letter or email, include the relevant information such as the closure date, the status of their file(s) and the procedure to transfer their file(s) to another lawyer/law firm. Where applicable, include information such as:

(a) Immediate action/instruction and its deadline;
(b) Limitation dates;
(c) Billing information; and
(d) Status of their original documents.

Give clients time to find a new lawyer to take over their file(s), and help in the transmission of the physical file(s) from your office to the new lawyer.

Record a date to follow up with clients for their consent to transfer the file or for their new lawyer to take over or file a Notice of Change of Solicitors / Notice of Discharge, where necessary.

Practice tips

While there could be many reasons for closing your firm, who knows there are also reasons for you to re-open the firm in the future. Maintaining a good and professional relationship with your clients amid the closure is key to a client's trust and confidence. They could be your clients again in the future!

(5) Close all your accounts

Take note that you must close all your client accounts within two months of cessation or closure of the law firm, unless an extended period is approved by the Bar Council. Provide your final accountant's report to the Bar Council within six months of your cessation or closure of law firm. Make sure to appoint an auditor to prepare an audited report of your client accounts for this purpose.

Prior to closing of the client accounts, law firm must discharge their duties which include:

(a) The return of money to the client;
(b) The transfer of money to another legal firm as instructed by the client;
(c) The transfer of money to the Bar Council if necessary; and
(d) Remitting unclaimed money to the Unclaimed Moneys Management Division of the Accountant General's Department of Malaysia.

Apart from your bank accounts, ensure that all your office utilities and subscriptions (eg online references) accounts are closed.

(6) Lastly, your Professional Indemnity Insurance

You can have a peace of mind knowing that the Master Policy under the Professional Indemnity Insurance ("PII") Scheme will continue to provide cover to you and the law firm in the event of a claim. The cover under the PII policy is for claims arising from an act whilst your law firm was in practice provided it was closed in compliance with the Bar Council's Rules and Rulings, subject to all terms and conditions under the policy.

Maritime *Law*

Interested in getting started in the field of maritime legal practice but still unsure about whether to take the plunge? Read our introductory article on maritime law in Malaysia! In this section, we have also included articles on the key points and terms in agreements related to ship sales and ship building for those who wish to sharpen their knowledge in these areas.

Maritime Law Legal Practice *in Malaysia*

*by **Clive Navin Selvapandian**, Advocate and Solicitor of the High Court of Malaya*

What kind of work does it involve?

It typically involves disputes such as:

- Cargo disputes (where cargo transported has been damaged *en route* or short-delivered, misdelivered, or not delivered at all);
- Ship-collision disputes (where two or more ships have collided at sea causing damage to each other, or to port or harbour structures);
- Ship-arrest proceedings (where the right of the claimant to have his claim secured is disputed);
- Charterparty or bill of lading fights (where the terms of the charter or bill of lading are fought over);
- Disputes with authorities (where a vessel is detained and subject to criminal proceedings because she anchored without the permission of authorities, polluted the environment, transferred bunkers without complying to the rules, etc).

Some divide shipping disputes work into two groups: 'wet' and 'dry' shipping. *Wet shipping* refers to disputes that occur at sea: ship collision, salvage and towage claims, oil pollution, etc.

Dry shipping refers to work that is contractual: disputes over the terms of a bill of lading or charter party, etc.

Indeed, some English lawyers market themselves as practising only 'dry' or 'wet' shipping; such is the breadth and depth of practice in the English market that specialises in one of these is sufficient to build a practice. But I don't see that breadth of work in Malaysia. So, a typical Malaysian maritime lawyer does both.

Where are these disputes heard?

The bulk of disputes are heard at the Admiralty Court at Kuala Lumpur.

Although, depending on where the events leading to the dispute occurred or the amount of money fought over, it can also be heard in courts throughout Peninsular Malaysia.

Occasionally, some of the parties would opt for arbitrations, and as lawyers we can still represent them.

Is there a corporate-side or a non-dispute side to a maritime law practice?

Yes, there is. Practitioners in this area advise on:

- Shipbuilding contracts (this includes the contract between the shipyard and the shipowner, the financing arrangements with the banks and the guarantees and assignments pertaining to the shipbuilding contract);
- Ship mortgages (the registration of ships at registries, negotiating terms of a mortgage and the discharging of mortgages, etc);
- Ship sale agreements;
- The restructuring of ship-owning companies during times of economic downturn;
- Financing sale in the commodity (oil, cocoa, grains) trades;
- Sanctions, trade agreements and licenses for the export or import of items.

Are there lawyers who have both a contentious and non-contentious/ advisory shipping practice?

Not that I know of.

The legal profession in Malaysia is still broadly divided into disputes and corporate lawyers.

Although I don't see why there can't be shipping lawyers who can take up both contentious and non-contentious work. These lawyers would then have the most comprehensive view of the industry; they will truly be 'one-stop shipping lawyers'.

Does the work spill over into non-shipping disputes?

It does. It can touch on:

- Insurance disputes (disputes on whether the insured is entitled to recover under the terms of the policy; whether the insurer is compelled to pay-out);
- Insolvency claims (what happens when a ship-owning company is a creditor to a party under judicial management or in the midst of being wound-up); and,
- General commercial disputes over guarantees, indemnities, bills of exchange, letters of credit, etc.

Who are the clients?

Insurers, Protection & Indemnity Clubs, shipowners, cargo-owners, cargo-carriers, foreign law firms, banks, shipyards, etc. Rare is the case where the client is an individual.

Most disputes are subrogated claims with instructions received from insurers (sometimes through foreign lawyers or claims correspondents) to act in the name of the insured.

Are there peculiar characteristics of a maritime law practice?

I don't know if these are characteristics peculiar to a maritime practice. But my guess is that a maritime law practice is more cross-jurisdictional than most other practices, especially as shipping clients are inclined to forum-shop.

And there is greater propensity for foreign clients to be involved. This is given the international nature of shipping.

What this means in practice is that:

- You are often working with foreign lawyers to compare the pros and cons of starting (or defending) claims in different countries (given the differences in the law applicable in these countries) and you are often asked how a judgment from a different jurisdiction might be enforced in Malaysia;
- You aim to have a working understanding of maritime practice in other countries (especially neighbouring ones);
- You almost never see your client in person (instructions and communication is by email).

Also given that ships are mobile objects, shipping lawyers are expected to have their law at their fingertips to be prepared for urgent court applications.

You often seek to arrest vessels before they leave Malaysian waters, to inspect the logs of a ship right after an oil spill or get a statement from the Master right after a collision.

Additionally given that there is no rich seam of jurisprudence on maritime law locally, you should be on the lookout for laws in other countries that might be somewhat relevant to the Malaysian scene and fill in gaps in the Malaysian jurisprudence.

Does one need to have taken maritime law subjects at university to practise?

You don't need to have taken maritime law subjects to practise maritime law. Sometimes not having formal training can be an advantage in that you are compelled to question everything and not accept received wisdom. But it does mean that you have to take the extra effort to learn the law.

Those who have read maritime law subjects often have an overall picture of how the different pieces and parties to a dispute fit together. Their academic knowledge also means that they have an idea of how new legal developments fit into the existing jurisprudence.

If you are thinking of reading maritime law subjects, the most relevant might be:

- Admiralty law: Here you learn all about ship-arrest and tonnage-limitation proceedings, things peculiar to a maritime law practice.

- The carriage of goods by sea: This concerns bills of lading, charterparties, sea waybills, etc.
- International trade: The workings of CIF (cost, insurance and freight) and FOB (free on board) contracts, letters of credit and the way the Incoterms aid trade.

Are there particular skills needed to practice maritime law?

Knowing how to swim? This might come in handy during those ship-arrest duties when you board a vessel.

On a serious note, I think the skills are really indistinguishable from any sort of civil litigation: the patience to analyse documents, knowing one's law thoroughly and keeping up with developments in the industry.

What is a typical day for a maritime lawyer?

They say that warfare is, "Interminable boredom punctuated by moments of terror."

Practising maritime law is perhaps the interminable analysing of documents punctuated by bouts of advocacy.

For me, I go through documents to arrange them chronologically, fashion a cause of action or a defence and advise clients on the merits of their claim. It is a lot of paperwork.

Occasionally, these disputes end up in court or in arbitration and I get a chance to get on my feet. So, I am not in court as often as my colleagues who practice, say, criminal law, constitutional law or even corporate litigation.

The fact that most claims are subrogated also means that shipping lawyers are often instructed to seek settlements (even when there is a dispute) as insurers tend to shy away from litigation.

What is your advice to aspiring maritime law practitioners?

A person contemplating a maritime law practice should perhaps:

- Be interested in the international trade scene (a ship stuck in the Suez Canal? A dip in the price of commodities? Larger ships being built in China?);
- Be interested in international disputes and public international law (eg a fight over the ownership of the Spratlys);
- Understand that this is an area of law that take years to master – don't give up!

I stumbled upon it by accident after applying to a vacancy for a maritime lawyer that did not require experience. Since then, I learnt to love the practice of maritime law along the way.

Key Points in Drafting a Ship Sale Agreement (Part I)

by ***Jeremy M Joseph****, Advocate and Solicitor of the High Court of Malaya, and* ***Daniel Tan Zheng Wen****, Pupil-in-Chambers*

Introduction

Globally, around 1,200 seagoing vessels are sold and purchased yearly.[1] In terms of bulk carriers and tanker ships, approximately 1,100 or so were sold during the first three quarters of 2022.[2] From January 2019 until recently, cargo ship sales peaked around June 2021 in which almost 70 cargo ship sales were seen.[3]

Although cargo ship sales dropped recently, sale and purchase activity "*remained strong*" in the first half of 2022 and "*above historical averages*".[4] As of today, Mediterranean Shipping Co has bought the most second-hand container ships.[5]

Apart from typical commercial vessels, superyachts are also attractive to the shipping market. A total of 887 transactions of superyachts took place in 2021.[6] This was a 77% increase from the previous year and exceeded two times the figure in 2019.[7] In 2022, the number of superyachts on order reached a historical high.[8]

Other ships are also sold in the market. These include roll-on/roll-off ships, passenger ships, offshore vessels, fishing vessels, speciality vessels, high-speed crafts, and dredgers. Ship sales are commonplace in the Malaysian market as well.

A ship sale agreement is an agreement which records all the main terms and details relating to the sale of a ship[9] as agreed between the contracting parties. A standard form of the ship sale agreement is known as a "Memorandum of Agreement." There are many standard forms already available in the shipping market. The Standard Forms include the Norwegian Sale Form (which has two versions, namely "Saleform 1993" and "Saleform 2012"), Nipponsale[10], Singapore Ship Sale Form[11] and Shipsale 22.

The Norwegian Sale Form is the most commonly used standard form for ship sale and purchase. The Nipponsale is typically used for the Japanese shipping market whereas the Singapore Ship Sale Form is occasionally used in the Asian shipping market. In April 2022, the Baltic and International Maritime Council ("BIMCO") released its ship sale form, known as the "Shipsale 22". The Shipsale 22 is a more modern agreement. It retains the necessary familiarity for users transitioning from other forms used for buying and selling ships. To reflect modern practice, it includes provisions such as the option for a virtual documentary closing and electronic signature of the contract, both of which are in response to the COVID-19 pandemic.

These standard forms are not one-size-fits-all in nature. In many cases, modifications will be needed to adapt the standard form to the particular circumstances of the transaction in question.

This article is divided into two parts. The purpose of this article is to highlight some of the key points which

[1] https://www.freightwaves.com/news/ship-values-are-soaring-amid-second-hand-sales-frenzy
[2] https://www.hellenicshippingnews.com/records-could-be-broken-in-the-sp-market-during-2022/
[3] https://globalmaritimehub.com/container-ship-sales-continue-to-impress.html
[4] https://globalmaritimehub.com/container-ship-sales-continue-to-impress.html
[5] https://alphaliner.axsmarine.com/PublicTop100/
[6] https://www.bloomberg.com/news/articles/2022-02-01/superyacht-sales-jumped-77-last-year-as-inventories-shrank
[7] https://www.bloomberg.com/news/articles/2022-02-01/superyacht-sales-jumped-77-last-year-as-inventories-shrank
[8] https://elitetraveler.com/cars-jets-and-yachts/yachts/yacht-industry-2022
[9] The ship concerned is typically a second-hand ship.
[10] Nipponsale 1999
[11] Singapore Ship Sale Form 2011

may be useful to a lawyer or legally trained person in drafting a ship sale agreement.

Key differences between the Standard Forms

In this Part of the article, the key differences between the Saleform 1993 and Saleform 2012 as well as the Saleform 2012 and the Shipsale 22 are set out.

Saleform 1993 and Saleform 2012

(1) Deposit

The Saleform 1993 pre-determines the deposit at 10% of the total purchase price. But the Saleform 2012 provides flexibility to the parties to determine the amount of the deposit.

(2) Notice of Readiness

The Saleform 1993 requires, among others, the ship to be "*in every respect*" physically ready for delivery as a precondition for the seller's tender of the Notice of Readiness ("NOR"). However, the words "*in every respect*" are not found in the equivalent provision under the Saleform 2012.

(3) Payment

The Saleform 1993 provides for two separate clauses for payment of "deposit" and "purchase price"[12] whereas the Saleform 2012 consolidates the payment of "deposit" and "balance of the purchase price" in one clause.

(4) Underwater Inspection and Drydocking

The Saleform 2012 provides an option to the buyers to arrange for an underwater inspection and the buyer is to declare the option latest nine days before the ship's intended date of readiness for delivery. This is not found in the Saleform 1993.

Alternatively, if the buyer opts for inspection by way of drydocking, and the underwater parts of the vessel are found broken, damaged or defective that affects the vessel's class, the sellers are to bear the costs for the repair, and the costs and expenses in connection with putting the vessel in and taking her out of the drydock. This is also absent in the Saleform 1993.

(5) Cancelling Date

If the buyers have been informed that the vessel will not be ready for delivery by the agreed Cancelling Date, the time frame for Buyers to accept or reject a new Cancelling Date has been reduced from seven running days (as per the Saleform 1993) to 3 banking days (as per the Saleform 2012).

Saleform 2012 and Shipsale 22

(1) Documentary Closing

This is a new provision in the Shipsale 22 which provides for an option for documentary closing to be held virtually. The same is not found in the Saleform 2012.

(2) Electronic Signature

Unlike the Saleform 2012, the parties are allowed to electronically sign the Shipsale 22 and any documents to be signed in connection with the Shipsale 22.

(3) Sanctions and Anti-corruption

As opposed to the Saleform 2012, the Shipsale 22 contains a sanction and anti-corruption clause.

(4) Confidentiality

Although there is no confidentiality clause in the Saleform 2012, parties generally amend the same to include such a clause in practice. By contrast, the Shipsale 22 has already in place a confidentiality clause.

Conclusion

As can be seen above, there are several key differences between the standard forms of ship sale agreements. The differences between the Saleform 2012 and Shipsale 22 are particularly noteworthy given the introduction of certain terms in the latter which are designed to, among others, address the practical hurdles brought by the Covid-19 pandemic to transactional parties. Therefore, the Shipsale 22 may be a good choice for parties who prefer modern practices in response to the pandemic. That said, the standard forms are distinct in their own ways. In this respect, parties should be well aware of the key differences before choosing which best govern their nature of transactions.

[12] These two separate clauses have caused confusion on whether the deposit is released as part payment of the purchase price, and consequently, the buyer is only required to pay the balance of the purchase price instead of the purchase price in total. See *The "Aktor"* [2008] 2 Lloyd's Rep 246.

Key Points in Drafting a Ship Sale Agreement (Part II)

*by **Jeremy M Joseph**, Advocate and Solicitor of the High Court of Malaya, and **Daniel Tan Zheng Wen**, Pupil-in-Chambers*

Introduction

This Part of the Article discusses the salient terms that are advised to be present in a Ship Sale Agreement.

Parties do not need to draft the terms from scratch since there are many standard forms of Ship Sale Agreement in the shipping market which already contain the terms. Therefore, in the first instance, parties would usually refer to the standard forms. Parties would then decide which form ought to govern their transaction before entering into negotiations of the terms contained in there. The negotiations are usually conducted between the buyer/buyer's brokers and the seller's brokers. They may also be conducted between the buyer and the seller directly.

Salient terms in a Ship Sale Agreement

The nature of a ship sale transaction may vary from case to case but the principal terms in the transaction are as follows:

(1) Description of the Ship
(2) The Parties
(3) Payment of Deposit and Balance Purchase Price
(4) Inspections
(5) Time and Place of Delivery and Notices
(6) Spares, bunkers and other Items
(7) Documentation
(8) Encumbrances
(9) Condition on Delivery
(10) Events of Default and their Effects on the Agreement
(11) Dispute Resolution
(12) Entire Agreement

Description of the ship

In general, the ship is described by reference to the following aspects: her name, her International Maritime Organisation ("IMO") number, Classification Society, class notation, year of build, the identity of the shipbuilder, flag, place of registration and gross and/or net tonnages.

(1) Name of ship

A Malaysian ship shall only be described by the name by which she is for the time being registered.[1] The buyer should pay attention to the ship's name and its spelling but it is good practice that the buyer cross-checks the name against other descriptive details, particularly the IMO number.

(2) IMO number

Buyers should check the veracity of the IMO number of the ship before a sale transaction as a ship's IMO number may be tampered with for purposes of evading public administrative sanctions, although such cases are rare.

(3) Classification Society and Class Notation

The buyer must obtain a classification certificate from the Seller during the negotiation stages to ascertain the safety and reliability of the ship. Classification descriptions of a ship when she is initially delivered and entered with her Classification Society may change throughout the ship's life. For instance, they may change due to modifications to the ship or changes

[1] Section 19(1) Merchant Shipping Ordinance 1952

in her business. Therefore, the seller should ensure the accuracy of the class description. If doubted by the Seller, it may be prudent for the seller to restrict the description to the name of the ship's Classification Society.

(4) Year of Build

Buyer should refer to the transcript and certificate of the Malaysian Registry or the shipbuilder's certificate to ascertain the year of build. However, a certificate of Registry and the shipbuilder's certificate may not be conclusive proof of the year of build.[2] Where necessary, the buyer should look behind the register and a shipbuilder's certificate to confirm the year of build.[3]

To clarify the ship's age, the parties may, instead of the "year of build" provision, opt for a provision specifying both the date of completion of building work and the date of delivery to her original owner by the shipyard.

(5) Identity of Shipbuilder

Buyers should refer to the transcript and certificate of the Malaysian Registry. Where a ship has undergone a substantial structural change or refit, the buyer should enquire about and include in the agreement the identity of the builder which conducted these works.

(6) Flag and Place of Registration

Buyer should refer to the Certificate of Malaysian Registry and conduct a Ship Search at the Marine Registry. The seller must state the information as at the time when the ship is delivered to the buyer. Before agreeing, the buyer should enquire whether the ship is bareboat registered. This is because, if so, the flag of the flag state with whom the ship is bareboat registered will prevail over the flag of the flag state with whom the ship is originally registered. In such situations, it is good practice to state both the original and subsequent flag.

(7) Gross and/or Net Tonnage

Buyer should refer to the Certificate of Malaysian Registry or Ship Transcript. Depending on the type of agreement, the parties must state the gross tonnage and/or the net tonnage.[4]

The parties

(1) Seller

The buyer is advised to ensure that the seller is the sole registered owner of the ship because in the event a claim is brought against a non-owning seller, the latter may not have sufficient assets to satisfy the claim. The buyer should also ensure that the seller can pass full and good title in the ship as ownership may be shared between two or more parties.

At the initial stage, the buyer's advisors should conduct due diligence on the corporate structure of the seller trading as a company since the seller, if proven to be liable for breach of contract, is protected under the doctrine of separate legal personality.[5] Therefore, it would be prudent for the buyer to negotiate for some form of collateral for the performance of the seller's obligations[6] if the seller is a company, more so if the company is a one-ship-one company.

(2) Buyer

The buyer will generally be a special-purpose company for the mere purpose of owning the ship. In this regard, a seller may doubt the financial health of the buyer. To protect its interest, the seller should ensure the agreement duly includes a provision providing for the payment of a deposit within a specified number of days after the contract signature and the establishment of the deposit account.

Payment

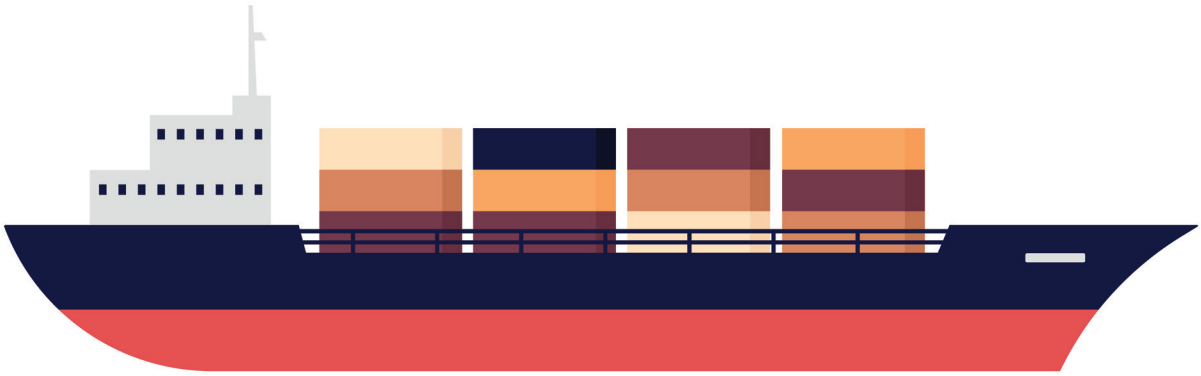
(1) Deposit

The buyer must pay a deposit (equivalent to 10% of the purchase price) to the seller upon the signing of the agreement. Where parties use a standard form and intend to negotiate a deposit amount other than 10%, an amendment to the deposit term would be required. In the rare event that parties waive the requirement of deposit, and a standard form is used, not only do parties need to delete the deposit term but also make consequential deletions and alterations to references of deposit in other terms in the standard form.

Parties may stipulate in the agreement a deposit holder (stakeholder) holds the deposit, failure of which the seller's bank shall undertake the role as the default position. Sale agreements typically provide that the deposit will be held in the joint names of the buyer and

[2] *The Troll Park* [1988] 2 Lloyd's Rep. 423
[3] *ibid.*
[4] For example, the Saleform 2012 prescribes for gross tonnage or net tonnage, whereas the Saleform 1993 prescribes for the gross and net register tonnage.

[5] See *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* [2021] MLJU 393
[6] Such collateral could be a conditional precedent that the seller's ultimate parent is a party to the sale agreement on the ground that the parent would be jointly or jointly and severally liable with the seller for the seller's obligations on predelivery and post-delivery.



the seller to prevent the release of the deposit to a party without the other's consent. Therefore, a buyer should be wary of a term which provides that the deposit is to be paid to an account in the seller's sole name or the deposit is under the latter's exclusive control.

Depending on the term, the deposit is paid immediately after the execution of the agreement or paid within three banking days from the date of the agreement or lodged within three banking days after fulfilment of certain conditions.[7] Buyers should note the difference between "lodge" (which means that the deposit must be received in the deposit account by that time) and "pay" (which means that the deposit is merely remitted by the buyer's bank).

There might be situations where a deposit account cannot be opened timely enough to the extent a party wishes to "exit" the agreement. In this regard, parties could add a provision conferring either party the right to cancel the contract without penalty on its part if, through no breach on its part, the stakeholder has not confirmed that the deposit account is open by a specified date.

(2) Balance Purchase Price

Standard forms generally provide that the balance purchase price is to be paid on delivery of the ship but not later than three banking days after the date that Notice of Readiness ("NOR") is given.[8] The buyer should foresee the risk that the payment is due on a non-business day. To address such risk, the buyer should make sure that the definition of "Banking Days" is drafted sufficiently broadly.

Inspections

(1) Surface/ Afloat Inspection

For example, under clause 4 of Saleform 2012, there are two options for inspections, namely clause 4(a) and clause 4(b)[9], either of which should be deleted by the parties. In the absence of deletion, clause 4(a) shall apply by default. If parties agree to dispense with the inspection, they should delete clause 4 *in toto* and substitute that with a provision that the sale is outright and definite subject only to the terms and conditions of the contract. Any other references to "inspection" should also be replaced with appropriate references.[10]

In the event there is a substantial time lapse between the execution of the agreement/ inspection and delivery of the vessel,[11] the buyer could negotiate for inclusion in the agreement a right to make a formal inspection immediately before delivery to compare the state of the vessel at that time with the state as at the time of the earlier inspection. This simply allows the identification of any deterioration between the two times that goes beyond the "*fair wear and tear*" allowance in the delivery condition clause.[12] This however gives rise to a risk to the seller in that it opens up the possibility of ungenuine claims from the buyer as to the condition of the vessel. To mitigate this risk, the seller could insist with a counter-proposal that both inspections are to be performed and documented by a jointly appointed independent surveyor.

(2) Underwater Inspection

Same as clause 4 of Saleform 2012, clause 6 provides for two options for inspection, ie diver's inspection or drydocking, whereby one of which should be deleted. Where parties fail to do so, clause 6(a) shall apply by default. If parties agree to do away with the diver's inspection or drydocking, the entirety of clause 6 together with the explanatory note thereunder should be deleted.

Clause 6 merely requires an inspection which takes into consideration the time lapse since the last underwater survey was conducted. If the buyer wishes to have a

[7] For example, see Clause 2 of Saleform 2012.
[8] See Clause 3 of Saleform 2012 and Clause 14 of Shipsale 22.
[9] See the sample copy of Saleform 2012 which can be accessed via <https://www.bimco.org/contracts-and-clauses/bimco-contracts/saleform-2012#>
[10] For example, under Clause 11 of Saleform 2012, the phrase "at the time of inspection" is amended to "on the date of the Agreement".
[11] For example, the ship is still serving an existing charter contract.
[12] See Clause 11 of Saleform 2012 and Clause 10 of Shipsale 22.

more rigorous inspection, such as an underwater survey in accordance with class, it should add such a term in the agreement through negotiation.

Time and place of delivery and notices

(1) Time of Delivery

More recent standard forms require parties to state two dates, ie the earliest date on which NOR can be given and the cancelling date.[13] Where parties use the Saleform 1993 which stipulates "expected time of delivery", the buyer is advised to substitute the same with a requirement to specify a date (at Clause 5(b)) before which NOR cannot be given. This is to prevent the seller from giving NOR on a date before the earliest expected time of delivery which may be an element of surprise to the buyer.

(2) Place of Delivery

The location for the delivery of the ship could be a specific anchorage or port, or a place elected by the seller within a specified geographical area. In the event the seller, wishing to avoid domestic sales taxes, seeks to deliver the ship in international waters close to a port within the agreed area, the buyer could negotiate for a term that all additional costs incurred by the buyer in connection with such delivery shall be borne by the seller.

(3) Notice of Readiness

The Saleform 1993 uses the phrase "*in every respect physically ready for delivery*". The words "*in every respect*" could give rise to a risk that a buyer could use certain minor physical defects in the ship as a pretext to reject the vessel (or the validity of the NOR) or to force through a price reduction at the eleventh hour. Therefore, where the Saleform 1993 is in use, sellers should delete the words "*in every respect*". Instead of the deletion in the full interest of the seller, a vigilant buyer would be quick to replace the same with the words "*in all material respects*".

Apart from the physical readiness of the ship, some buyers also want her documents to be ready as a condition precedent for the tender of the NOR. In this regard, the buyer may amend the term to that effect by providing that, before the tender of the NOR, the ship shall be in all material respects physically and *legally* ready save for specified aspects of readiness (such as the removal by the seller of articles excluded from the sale or the discharge of mortgagees over the ship) which shall be completed immediately before or, in the event of a mortgage discharge, upon delivery.[14]

Spares, bunkers and other items

Clause 7 of the Saleform 2012 provides that all spares belonging to the ship at the time of inspection shall be part of the sale. In practice, the buyer would usually make an addition to clause 7 by a term providing that, before execution of the agreement, the seller shall identify (by way of a detailed inventory in writing prepared in the presence of, or otherwise verified by, the buyer's representative) the main spare parts and stores belonging to the ship and clarify whether they are stored on board the ship or otherwise.

Furthermore, Clause 7 obligates the buyer to take over, among others, and pay for the remaining bunkers and unused lubricating and hydraulic oils and greases. The word "remaining" may open up to few possible interpretations where the ship requires bunkering before delivery, for example (1) maximum balance whereby calculation is based on the total amount of bunker in a full tank capacity minus the bunker needed for the period leading up to delivery; and (2) minimum balance whereby calculation is based on the mere amount of bunker needed to allow the ship to reach and remain until delivery. To eliminate such ambiguity, some buyers may, in practice, amend the term to stipulate either maximum or minimum balance.

Documentation

Clause 8 of the Saleform 2012 provides for the types of documentation to be furnished by one party to the other.

Of particular importance is the bill of sale as it is the document that is used to prove and effect the transfer of title in the vessel from the seller to the buyer. There may be a risk that the ship registry does not return any original bill of sale to the buyer after the completion of the registration process. Therefore, it would be prudent for the buyer to negotiate for a term requiring the seller

[13] See Clause 5(a) of Saleform 2012 and Box 14 and 15 of Shipsale 22

[14] This approach is similar to that taken by the Singapore Ship Sale Form in Clause 5(b) thereof.

to furnish an original bill of sale to the buyer, in addition to furnishing the number of originals required by the relevant ship registry in the buyer's nominated flag state.

Another noteworthy document is the protocol of delivery and acceptance that evidences the date and time of the transfer of title and risk in the ship from the seller to the buyer. This document is commonly prepared as a draft at the commencement of the sale transaction and exchanged between the buyer and seller to agree on the format to avoid any dispute on the contents during the closing of the sale.

On some occasions, the seller may stipulate in the protocol that the ship has been delivered in the condition as per the contract and that the seller has performed all its contractual obligations. The buyer should not countenance such words as they may preclude the buyer from suing the seller for contractual defects which come to the buyer's attention upon delivery. Parties are advised to make the protocol neutral on issues of liability.

Encumbrances

It is a common term in an agreement that the sellers warrant that the ship, at the time of delivery, is free from any encumbrances.[15] The word "warrant" may be interpreted as a "warranty" of the contract which in turn does not favour the buyer as, in the event of a breach of the term, the buyer can only affirm the contract (and claim damages), instead of terminating it. Thus, to entitle the buyer to terminate the contract, it should consider negotiating for the term to be amended to a "condition" of the contract.

Condition on delivery

An agreement sets out the ship's condition at delivery.[16] Of particular note is the standard term that the ship shall be delivered and taken over as she was at the time of inspection. Unless negotiated otherwise, this term unquestionably favours the seller as the buyer is not conferred a right to inspect the ship immediately before delivery for purposes of ascertaining whether the ship is in the same condition as she was at the time of the surface inspection. To address the risk of disparity between the condition of the ship upon delivery and at the time of the afloat inspection, the buyer could try to negotiate for a right to inspect the ship immediately

before delivery by paying a mutually agreed fee to the seller as a consideration.

Events of default and their effects on the agreement

(1) Buyer's Default

Generally, the failure of the buyer to lodge the deposit in accordance with the relevant term and to pay the balance purchase price in accordance with the relevant term are the events provided for the buyer's default.[17]

The former gives rise to the seller's right to cancel the Agreement and, depending on the terms of the agreeement, claim compensation for its losses and for all expenses incurred together with interest.[18] In this regard, the seller would be compensated for its actual losses and costs whether these are more or less than the amount of the deposit.

The latter also gives rise to the seller's right to cancel the Agreement and provides for the forfeiture of the deposit in favour of the seller. On top of that, if the deposit is not sufficient to cover the seller's loss, the seller has the right to claim additional compensation for their losses and all expenses incurred together with interest. Despite the forfeiture of the deposit term, the seller should be well advised that it might still be necessary for the seller to prove the actual loss or damage suffered.[19]

[15] See Clause 9 of the Saleform 2012 c.f. Clause 10(d) and 10(e) of Shipsale 22. In addition to "maritime liens", it is good practice for buyers to specify other liens such as possessory liens, statutory liens and statutory possessory liens. Buyers are also advised to specify that the ship is not subject to port state detentions as a ship that is detained by a port would be encumbered by a statutory possessory lien. (see *The "Charger"* [1966] 1 Lloyd's Rep 670; *The "Countess"* [1923] AC 345))

[16] See Clause 11 of Saleform 2012. A similar provision is seen in Clause 10(c) of Shipsale 22.

[17] See Clause 13 of Saleform 2012 and Clause 18 of Shipsale 22.

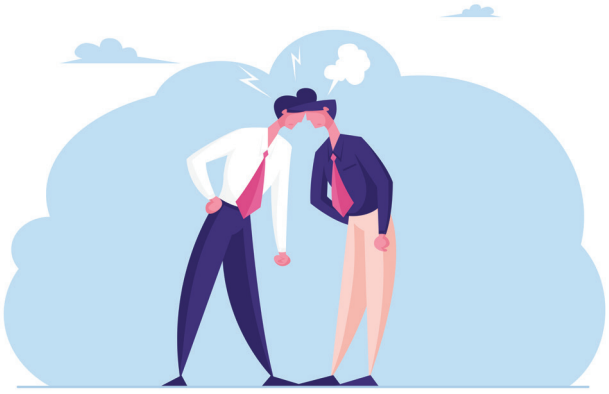
[18] See Clause 13 of Saleform 2012 c.f. Clause 18 of Shipsale 22.

[19] See *Macvilla Sdn. Bhd. v Mervyn Peter Guan Yin Hui & Ors.* [2019] 1 LNS 949 c.f. *Cubic Electronics Sdn. Bhd. v Mars Telecommunications Sdn. Bhd.* [2019] CLJ 723

(2) Seller's Default

It is commonplace that failure to tender NOR per the relevant term and to validly complete a legal transfer by the cancelling date are events of the seller's default entitling, inter alia, the buyer to cancel the agreement.[20]

Taking clause 5(b) of Saleform 2012 which reads "*…When the Vessel is at the place of delivery and physically ready for delivery in accordance with this Agreement, the Sellers shall give the Buyers a written Notice of Readiness for delivery*" as an example of the relevant term, the position is unclear, where the NOR tendered by the seller is invalid (before the cancelling date), as to whether the buyer is entitled to cancel the agreement. The seller could contend that there was no "failure" on its part as it still had the opportunity to tender a fresh NOR until the cancelling date. To prevent the seller from taking advantage of the ambiguity, buyers could stipulate that, in the event of such failure, they shall have the right to terminate "on or before the cancelling date".[21]



Dispute resolution

Parties are at liberty to choose which forum to hear any of their disputes arising out of or in connection with their agreement and the governing law of the agreement. Parties are advised to refer their disputes to an arbitral tribunal instead of a court so that they can take advantage of an arbiter possessing the requisite specialised and technical knowledge relating to the dispute in question.

Certain standard forms of the agreement provide for arbitration in London and for English law to apply as the governing law of the agreement.[22] If London arbitration is not palatable to parties using these standard forms who are based in Malaysia due to logistical considerations, they could replace it with the arbitration in Malaysia (administered by the Asian International Arbitration Centre) or in Singapore (administered by the Singapore Chamber of Maritime Arbitration).[23]

Entire Agreement

Parties are advised to include in the agreement an "Entire Agreement" clause. This is to prevent either party from disputing that the written agreement does not contain all of the terms of the agreement and also to prevent one party from using pre-contractual oral or written statements to add to, subtract from, vary or contradict the written terms.

Conclusion

Drafting terms in a ship sale agreement requires careful thought. In practice, the buyer may rely on the results of class record inspections only on a minimal basis, so he only has limited opportunities to inspect the ship before concluding the contract. To remedy the imbalance between the parties' relationship, the buyer's advisors should be alert to point out the buyer's transactional risks and in turn consider how to effectively eliminate, mitigate or otherwise curb those risks by negotiating for amendments in the interest of the buyer.

[20] See Clause 14 of Saleform 2012 and Clause 19 of Shipsale 22.
[21] See Clause 19(a) of Shipsale 22.
[22] See Clause 16 of Saleform 2012 and Clause 26 of Shipsale 22.
[23] See Clause 15 of Singapore Ship Sale Form 2011.

Key Terms in a **Shipbuilding Contract**

*by **Nagarajah Muttiah**, Advocate and Solicitor of the High Court of Malaya (assisted by **Roshanth James**, Pupil-in-Chambers)*

Introduction

Accounting for around 90% of traded goods, shipping is the lifeblood of world trade. To match global demand, the shipbuilding industry has grown to an estimated USD 132.52 billion in 2021 and is anticipated to grow to USD 175.98 billion by 2027.[1] In the geographical context, Malaysia is at the heart of the shipbuilding industry, neighbouring the sector heavyweights, China and South Korea. However, Malaysia lags behind its competitors. In response, the Government has extended the Malaysian Shipping Masterplan initiative to 2025 in a push to drive the domestic shipbuilding sector forward. Cognisant of possible tailwinds in the near future, this article sets out a succinct guide on the key terms and best practice in shipbuilding contracts.

The Basics

Modern shipbuilding contracts are almost always drafted based on certain pre-existing standard forms. There is no standard form of shipbuilding contract in Malaysia. The choice of form is almost entirely dependent on the identity and domicile of the Builder. In the Asia Pacific region, the most prolific standard form used is the Shipbuilders' Association of Japan 1974 Standard Contract ("SAJ Form"). However, alternate forms such as the "NEWBUILDCON" Standard Newbuilding Contract introduced by the Baltic and International Maritime Council ("BIMCO"), the Association of European Shipbuilders and Shiprepairers' Form ("AWES Form") and the Norwegian Standard Form of Shipbuilding Contract ("Norwegian Form") are also used. These forms provide a standard foundation for parties to negotiate their respective terms and amendments to the standard forms.

Completed ships need to be registered. Article 91 of the United Nations Convention on the Law of the Sea states permits each State to determine their conditions of registration and for flagging. Malaysia signed the Convention in 1982 and ratified the same in 1996. Ship registration in Peninsular Malaysia is governed by the Merchant Shipping Ordinance 1952 ("the Ordinance"). Section 17 of the Ordinance provides that before registration every ship is to be surveyed by a surveyor working under the surveyor-general. For both Malaysian ship registries (Malaysia Ship Registry and Malaysia International Ship Registry), Marine Department Malaysia has authorised numerous Classification Societies to act on behalf of the Government for surveys and classification, including the American Bureau of Shipping ("ABS"), Lloyd's Register of Shipping ("LRS"), Nippon Kaiji Kyokai ("NKK") and Malaysia's own Ship Classification Malaysia ("SCM").

[1] Mordor Intelligence, "Shipbuilding Market - Growth, Trends, Covid-19 Impact, And Forecasts (2023 -2028)"<https://www.mordorintelligence.com/industry-reports/ship-building-market#:~:text=and%20its%20growth%3F-,Ship-building%20Market%20Analysis,shipbuilding%20industry%20in%20several%20countries>(accessed 4.1.2023)

A newbuild's country of registration determines its flag-state. This means the Vessel operates under the law of its flag-state in international waters and can claim privileges from their flag-state. Selecting a flag-state is almost always a purely commercial decision influenced by financial considerations and the intended use of the Vessel. For example, registration in Malaysia entitles a Malaysian shipowner to a statutory 70% income tax exemption.[2] By virtue of the Income Tax (Exemption) (No 7) Order 2022, where a Malaysian shipowner conducts a business of transporting passengers or cargo by sea on a Malaysian ship or letting out on charter their own Malaysian ship, they may be exempt from income tax in respect of income derived from their Malaysian ship(s) for the year of assessment 2021-2023. As such, it is commercially attractive for a newbuilt Vessel intended for use in Malaysian waters to be registered in Malaysia.

In both the SAJ and NEWBUILDCON forms, the default position is for the Purchaser to bear all costs of registration under the chosen flag, which will be stipulated in the shipbuilding contract. Registration is an administrative process. The Purchaser will need to be informed on the requisite documents and procedures required for successful registration in the chosen flag-state. The Builder's obligation is often limited to the duly notarised and legalised delivery of the bill of sale of the Vessel upon which the Purchaser would rely on for registration.

Shipbuilding Contracts: Navigating the Sale of Goods Act 1957

Common law recognises two broad categories of contracts: contracts relating to a supply of a service and contracts relating to the sale and purchase of goods. English courts have long categorised shipbuilding contracts as contracts for the sale of goods.[3] More specifically, shipbuilding contracts are contracts for the sale of *future* goods by description.[4] However, shipbuilding involves both the supply of workmanship to build a Vessel (akin to a construction contract) as well as the sale and purchase of the completed Vessel (akin to a sale of future goods contract). The unique character of shipbuilding contracts was appreciated on two occasions in *Hyundai Heavy Industries Co. Ltd v Papadopoulous and others*[5] and *Stocznia v Latvian Shipping Co*[6], where on both occasions the House of Lords highlighted the similarity of shipbuilding contracts to regular construction contracts.

This hybrid approach has not gained traction in Malaysian courts. In the Malaysian Court of Appeal case of *NGV Tech Sdn Bhd (appointed receiver and manager) (in liquidation) & Anor v Kerajaan Malaysia*[7], arguments in favour of the "hybrid" approach were rejected. The Court of Appeal, speaking through Nallini Pathmanathan JCA (now FCJ), confirmed the applicability of the Malaysian Sale of Goods Act 1957 ("SOGA") to shipbuilding contracts in Peninsular Malaysia, thereby recognising them as contracts for the sale of goods. As the law stands today, whilst there is judicial appreciation of the hybrid characteristics of shipbuilding contracts, they remain fundamentally contracts for the sale of future goods.

Thus, parties must be aware that unless expressly excluded, shipbuilding contracts are subject to the relevant default provisions in SOGA.

Passing of Title

Section 23(1) SOGA:

"Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the Purchaser or by the Purchaser with the assent of the seller, the property in the goods thereupon passes to the Purchaser."

In the absence of an express provision, *NGV Tech Sdn Bhd* confirms that the statutory presumption in section 23(1) SOGA is also generally applicable to shipbuilding contracts. The Court rejected the applicability of section 19 SOGA, which only applies to ascertained goods. Section 23(1) SOGA provides that title passes to the Purchaser where a Vessel is in a deliverable state and is unconditionally appropriated to the shipbuilding contract either by the seller with the Purchaser's consent or vice versa. In *NGV Tech,* the Court agreed that "unconditional appropriation of future goods normally involves their physical delivery to the purchaser."[8] Thus, in practical terms, passes under section 23(1) where the Vessel is completed to the Purchaser's satisfaction and after physical delivery to the Purchaser.

NGV Tech Sdn Bhd was a case of the Builder entering receivership. Whilst the decision of the Court of the Appeal was against the Purchaser, section 23 SOGA reflects common commercial practice. The SAJ form's default provision states title shall pass "only upon delivery and acceptance having been completed as stated above…". The risk of the Builder's liquidation prior to delivery of the Vessel is usually secured by a refund guarantee in favour of the Purchaser in the amount of its pre-delivery instalments and interest thereon.

[2] Section 54A Income Tax Act 1967
[3] *Reid v. Macbeth and Gray* [1904] (HL)
[4] *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75 (AC).
[5] [1980] 2 All ER 29 (HL)
[6] [1998] 1 Lloyd's Rep 609 (HL)
[7] [2017] 2 MLJ 522 (AC)
[8] Ibid [54]

Passing of Risk

Section 26 SOGA:

"Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the Purchaser, but when the property therein is transferred to the Purchaser, the goods are at the Purchaser's risk whether delivery has been made or not:

Provided that where delivery has been delayed through the fault of either Purchaser or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault…"

Where a shipbuilding contract is silent on when risk passes, Section 26 SOGA applies – risk passes with property in the Vessel, irrespective of whether delivery has been completed. This is, commercially, highly undesirable. In almost all shipbuilding contracts and indeed all the standard form contracts, parties will agree for risk to pass only after delivery and acceptance by the Purchaser. The practical reasons for this are twofold: the Vessel will remain at the Builder's premises until valid delivery to the Purchaser and the Builder's insurance will likely mitigate or negate such risk. As such, it is equally common that shipbuilding contracts obligate the Builder to insure the Vessel and all machinery delivered to the shipyard or incorporated into the Vessel.

Sale by description

Section 15 SOGA:

"Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description…"

The contractual description of the Vessel is the key focus of a shipbuilding contract. The key characteristics of a Vessel typically included in its contractual description include its length (overall and between perpendiculars), breadth, propelling machinery, deadweight, trial speed, fuel consumption and so on. Purchasers who undertake a shipbuilding contract will need a Vessel that corresponds to their unique commercial needs. Courts tend to enforce contractual descriptions of materials or methods used in a commercial contract where it is reasonable to do so. For example, in *Rolls-Royce Power Engineering plc v Ricardo Consulting Engineers Ltd*[9], the English High Court held that the words "of first-class quality" meant the services provided would be "to a standard which would not be exceeded by anyone who might actually have been engaged to provide them."

As such, it is advised that parties exercise their best judgment and caution when agreeing to the terms of description to avoid any potential dispute.

In shipbuilding contracts, it is common to measure quality performance by performance during trials. Trials typically comprise two parts: dockside trials and sea trials. Dockside trials would include inspections and dockside tests such as establishing the Vessel's lightweight and deadweight, stability tests while sea trials would include assessments of the Vessel's speed, manoeuvrability and general sea-keeping characteristics. Further consideration for the "trials clause" would be the staffing of the Vessel during the trial, the weather conditions permissible for the trial and which party bears the risk of running the trial. The nature of such trials is critical and should always be expressly detailed in the contract.

Common Issues and Contractual Remedies

Delay – *Force Majeure* and Liquidated Damages

In contract law, there are different mechanisms to protect the Purchaser and Builder respectively in the event of delay.

The Builder's position is protected by the inclusion of *force majeure* clauses. In both Malaysian and common law, there is no general doctrine of *force majeure*.[10] Instead, *force majeure* is a contractual construct. Thus, parties must allocate between themselves the precise factual circumstances that will constitute *force majeure* as general clauses will be interpreted restrictively. However, most *force majeure* clauses in shipbuilding contracts run for a certain period only. It is for parties to decide their rights upon termination of the shipbuilding contract due to substantial delay. Furthermore, the Builder will have to show reasonable steps to avoid the impact of, and mitigate, the *force majeure* event.

The Purchaser's interests are protected by the mechanism of liquidated damages in the event of delay. In this regard, the Malaysian position diverges from the English position. In Malaysia, the "no penalty principle" does not apply. Instead, section 75 of the Contracts Act 1950 is applicable to the issue of liquidated damages:

Section 75 of the Contracts Act 1950:

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved

[9] [2004] 2 All ER (Comm) 129 (HC)

[10] *Malaysia Land Properties Sdn Bhd (formerly known as Vintage Fame Sdn Bhd) v Tan Peng Foo* [2014] 1 MLJ 718 (CA); *Channel Island Ferries Ltd v Sea-link UK Ltd* [1988] 1 Lloyd's Rep 323 (CA).

to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

This distinction was the subject of the Federal Court's scrutiny in *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd*.[11] Overturning the previous legal position, the Federal Court held that to enforce a damages clause in Malaysia, by virtue of section 75 of the Contracts Act 1950, only two elements must be fulfilled: there was a breach of contract and the contract contains a damages clause pertaining to that breach. Once these elements are established, the burden shifts to the party in breach to prove the sum stipulated in the damages clause is unreasonable. Should the party in breach fail to do so, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven.[12] The Federal Court further noted that the innocent party bears no burden of proof to show that the damages clause is not excessive as this would undermine the contractual damages clause which serves to "promote business efficacy and minimise litigation".[13] Therefore, it is critical for the Purchaser that a sufficiently clear and coherent liquidated damages clause is included within the shipbuilding contract. Parties should contemplate their damages clauses closely as they will be held to their bargain.

Defects

Following the conduct of the trials, the Purchaser will be permitted a limited period (subject to the contract) to evaluate the results of the trial and elect to accept or reject the Vessel. Where the Purchaser relies on defects in the Vessel to reject the Vessel, notice of the defects relied upon should be provided to the Builder. Thereafter, the Builder is entitled to either remedy the defects raised by the Purchaser or challenge the rejection.[14] It should be emphasised that at this point in the contract (post-trials but pre-delivery), both parties would have invested substantial funds into the realisation of the Vessel and it is in neither party's interests to have the Vessel rejected. In most cases, both parties would seek to cooperate towards achieving delivery.

It is standard for shipbuilding contracts to include builder guarantee clauses, often for 12 months. Even if not expressly stated, this warranty will extend to design defects by the Builder, per *Aktiebolaget Gotaverken v Westminster Corporation of Monrovia*.[15]

[11] [2019] 6 MLJ 15 (FC)
[12] Ibid [70]
[13] Ibid [73]
[14] *Docker v Hyams (No.1)* [1969] 1 Lloyd's Rep 487 (AC).
[15] [1971] 2 Lloyd's Rep 505 (HC)

Should the contract, unusually, be silent as to the quality of the Vessel, section 16(1)(a) SOGA implies a warranty or condition that the Vessel will be fit for a particular purpose. Furthermore, the implied condition that the goods shall be of merchantable condition in section 16(1)(b) SOGA will also apply. It is for the plaintiff (usually the Purchaser) to prove that the implied term has been breached.

Cost increases

It is common for Builders to incur higher costs during the construction process than projected. This may occur due to additional requests by the Purchaser to the Vessel midway through construction or from external factors such as an increase in the cost of procurement of materials such as steel or devaluation of the contractual currency.[16] Whilst unusual, a contract may include provisions that contemplate such events and subsequently outline a contractual mechanism to account for these cost increases. Outside of an express contractual clause, all cost increases are to be borne by the Builder.

Dispute Resolution Clauses

Shipbuilding contracts carry substantial risks for both parties. On one hand, Purchasers are investing substantial funds in the hope of turning a profit in the shortest timespan possible while Builders seek timely delivery to limit potential financial liability. As such, Dispute Resolution Clauses are an essential part of shipbuilding contracts. Parties are strongly advised to have clear positions on matters such as legal costs and potential dispute timelines when negotiating their Dispute Resolution Clauses. For example, in *Nanjing Tianshun Shipbuilding Co. Ltd, Jiangsu Skyrun International Group Co. Ltd v Orchard Tankers Pte Ltd*[17],

[16] *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] QB 705 (HC); *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2)* [1990] 2 Lloyd's Rep 526 (HC).
[17] [2011] EWHC 164 (Comm) (HC)

the English High Court held that the seller's failure to institute arbitration proceedings within the contractual 30-day deadline barred the seller from pursuing their claim in court.

Arbitration and Alternative Dispute Resolution

As a starting point, all the standard Shipbuilding Forms contain arbitration provisions. For example, the SAJ form, by default, provides that all disputes be arbitrated in Tokyo according to the Rules of Maritime Arbitration of the Japan Shipping Exchange while the NEWBUILDCON Form provides that all disputes be arbitrated in London under the standard terms of the London Maritime Arbitrators' Association. These provisions are often the subject of further negotiation by parties on the following points:

(1) The seat of arbitration;

(2) The choice of law and procedure;

(3) The composition of the arbitration tribunal;

(4) The arbitration mechanism (technical or non-technical arbitration); and

(5) The jurisdiction and powers of the tribunal.

A further consideration for parties is the optional inclusion of alternative dispute resolution ("ADR") clauses. Such clauses may incorporate any number of a variety of ADR procedures such as structured negotiation, adjudication, and expert determinations. "Tiered dispute resolution clauses" are also common, whereby parties are obligated to undertake certain preliminary measures (ie negotiations between senior management) before further dispute resolution measures (ie arbitration or litigation) may be taken. Whilst the mere inclusion of an ADR clause into a commercial contract is simple, the Courts require more precise drafting to create an enforceable obligation. In *Holloway v Chancery Mead Ltd*[18], Ramsay J outlined the requirements of a valid ADR clause: ADR clauses must be sufficiently certain to avoid the need for further agreement, the selection process for the ADR provider and the ADR process intended must be clearly defined before parties are held to an obligation to engage in ADR.

Framed in the Malaysian context, the Asian International Arbitration Centre ("AIAC") in Kuala Lumpur would be the primary venue for disputes arising out of shipbuilding contracts, either by arbitration[19] under its AIAC Arbitration Rules 2021 or by mediation under its AIAC Mediation Rules 2018. Whilst parties are at liberty to choose their forum of choice, AIAC remains an attractive option due to its cost, especially when compared to its regional competitors such as the Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre. Another avenue for mediation is at the Malaysian Mediation Centre ("MMC"). MMC is a body established in the year 1999, under the auspices of the Bar Council with the objective of promoting mediation as a means of alternative dispute resolution and to provide a proper avenue for successful dispute resolutions.

Specialist Admiralty Court

Should parties opt for litigation, Malaysia set up a specialist Admiralty Court in Kuala Lumpur in 2010 which allows parties to have specialist Judges adjudicate their dispute. Shipbuilding contracts are recognised as 'maritime contracts' and they fall within the admiralty jurisdiction of the High Court pursuant to section 20(2)(n) of the UK Senior Courts Act 1981, which applies in Malaysia by virtue of sections 23 and 24(b) of the Courts of Judicature Act 1964. A shipbuilder may thus bring in rem proceedings against a vessel to enforce and secure his claims under a shipbuilding contract. Where the shipbuilding contract contains a dispute resolution clause by way of arbitration, such claim may be secured by the arrest of the vessel under the admiralty jurisdiction of the High Court by virtue of section 11 of the Arbitration Act 2005 read together with Admiralty Practice Direction No 1 of 2012.

Conclusion

Growth in the domestic shipbuilding industry is very likely to give rise to new and numerous disputes. However, the law offers primacy to the parties' intention as conveyed by the contract. As such, it is important that proper thought goes into the negotiation process and subsequent drafting of shipbuilding contracts in order to mitigate or avoid any potential disputes. It is equally important, at least in the Malaysian context, to be aware of the abovementioned conditions that may imposed by law in shipbuilding contracts unless expressly excluded by the parties.

[18] [2008] 1 All ER (Comm) 653 (HC)
[19] See generally Arbitration Act 2005

Step Up to Stay Ahead

In the first quarter of 2023, the Bar Council launched the Risk Management Initiative ("Initiative"). The Bar Council appointed Lockton Consulting as the Risk Management Consultant to work together with the Bar Council Risk Management ("RM") Committee to drive the Initiative. The RM Committee will oversee the development, implementation, and execution of this Initiative.

During the State Bar Annual General Meetings in Perak, Selangor, Penang, Kuala Lumpur, Johore, Melaka, Pahang, and Kedah, and at the 77th Annual General Meeting of the Malaysian Bar, the Initiative was introduced to the members in attendance. Additionally, members present could also express their interest in participating in a survey aimed at identifying areas for improvement within law firms.

On 5 Jul 2023, the Bar Council launched the Law Practice Survey as the first part of the Initiative. The survey spanned approximately four weeks, designed to gather input from members regarding their existing risk management practices. This feedback will play a crucial role in aiding Lockton Consulting to develop effective tools that members could integrate into their legal practice. The following month, Lockton began analysing the data collected pursuant to the Law Practice Survey that had been conducted. Subsequent findings have been reported to the RM Committee for further discussion.

The end goal for the Initiative is to develop effective approaches that will help reduce PII claims and may bring stability to the annual PII premiums.

If you would like to make any suggestions or proposals for the Initiative, you may contact the Professional Indemnity Insurance and Risk Management Department at phone at 03-2050 2001 or by email at pirm@malaysianbar.org.my.

CIRCULARS ISSUED FOR ALERTS

The following are circulars issued by the Bar Council Risk Management Committee and Bar Council Professional Indemnity Insurance Committee this year. These circulars were issued specifically for the purpose of informing members of current issues being faced by law practices in Malaysia, the steps that can be taken to avoid these issues, and how they affect the firms' PII coverage.

Circular No 045/2023 | I-Risk Alert | Embezzlements Involving Support Staff

This circular highlighted embezzlements within law firms, orchestrated by key members of support staff. These embezzlements were facilitated by the support staff handling client interactions and financial matters directly, without informing or involving the lawyers. The lawyers' lack of oversight and failure to cross-check their finances allowed the support staff to manipulate client payments, leading to fraudulent transactions.

Circular No 195/2023 | Professional Indemnity Insurance: Did You Know Embezzlement Affects Your PII Cover?

This circular is related to Circular No 045/2023 and it highlights how embezzlement affects PII coverage for Members.

Circular No 141/2023 | I-Risk Alert | Accountant's Reports Prepared by Unqualified Persons

This circular highlighted the discovery of Accountant's Reports submitted by unqualified individuals during the renewal process for Sijil Annual and Practising Certificate applications in 2022. These reports were prepared by an individual who did not meet the qualifications required by the Legal Profession Act 1976 ("LPA") and the Accountant's Report Rules 1990 ("ARR 1990").

Circular No 169/2023 | I-Risk Alert | Exploitation of Sale and Purchase Agreements

This circular highlights the misuse of sale and purchase agreements by clients of law firms to disguise and obtain friendly loans, exploiting lawyers' knowledge in the process. The cases involve clients manipulating the sale and purchase agreements with unusual clauses to facilitate transactions that result in disputes, accusations of fraud, negligence, and breach of stakeholder duty.

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