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INFOLINE

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Developing legal aid

Great scheme, poor human resources

A proposal by the Attorney-General of Malaysia to make community service in the Government Legal Aid Bureau mandatory for all law graduates or those newly admitted to the Bar has highlighted a severe shortage of manpower resources in cases requiring legal aid.

Attorney-General Datuk Abdul Gani Patail referred to insufficient representation for those charged with capital offences and instances of juveniles being remanded for very long periods, urging lawyers to 'consider less on just dollars and cents' (*The Star*, 26 July 2002).

The comments of the Attorney-General should make members of the Bar flinch: He said, 'We are dignified people but we should serve the people and the public, particularly in the rural areas, in the interest of justice.' A nice way of challenging the dignity that lawyers who belong to an honourable profession claim to possess.

The Bar Council has its own Legal Aid Scheme that complements the Government Legal Aid Bureau in its functions. Officially launched in 1983, the Legal Aid Scheme is funded entirely by every member of the Malaysian Bar by the payment of a small annual subscription. Apart from the lawyers who volunteer their services at the Centres, all pupils-in-chambers are required to participate in a minimum 14-day legal aid programme. Todate, Legal Aid Centres have been set up in all states in the Peninsula under the umbrella of the Bar Council National Legal Aid Committee (NLAC).

Through these Legal Aid Centres, free legal advice and representation are given to those who cannot afford to pay for legal services after satisfying a means test. These include those who do not have a lawyer to represent them in criminal cases and victims of human rights violations. A substantial portion of legal representation deals with criminal law, followed by the traditional areas of family law, labour law, land law and syariah law. A dock brief programme has been introduced to train pupils-in-chambers in the area of criminal representation in Court, and more conscious attention has been given to the development of programmes in rural places. In addition, a Juvenile Sub-Committee has been set up under the NLAC in response to the increasing number of juvenile cases requiring legal aid.

The Centres also promote legal literacy and awareness in their respective states. Law awareness campaigns are publicised and held regularly throughout the year. As part of its outreach programme, the Penang Legal Aid Centre has started a pioneer mobile legal aid clinic on wheels (MOBILAC). This has enabled legal aid to expand to rural areas and improve accessibility to legal aid in general. The mobile clinic is funded entirely by donations from well-wishes and funds raised by the Penang Legal Aid Centre.

The activities of the Centres are conducted on both an independent basis and, in some areas, jointly with other Government Ministries and non-governmental organisations. Some Centres have held joint legal aid clinics with the Government Legal Aid Bureau on a regular basis.

At each Centre, work is effectively streamlined into various specialised projects and sub-committees. For example, the activities of the Kuala Lumpur Legal Aid Centre are carried out via a Legal Aid Centre Clinic, Dock Brief Programme, LAC/AWAM Legal Information Service Clinic, LAC Migrant Worker Clinic, Legal Awareness Programme, Legal Awareness (Orientation Programme), Sungai Buloh Prison Clinic, Bar Council Legal Aid Centre Kuala Lumpur/Pink Triangle Foundations Legal Information Service Clinic, Kajang Women Prison Clinic, Audit and Quality Control Committee, Skills Development Sub-Committee, Juvenile Remand Home Programme, and Syariah Clinic.

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There is always plenty of work to be done by volunteers at the Centres. Applicants for legal aid are interviewed and given legal representation or legal advice. Workshops and training sessions are held, police reports are lodged where necessary, letters are drafted to government departments, complaints are filed on behalf of clients at the Labour and Industrial Relations Department, negotiations are held with employers in wage disputes – these are but just a few of the ongoing services provided by the Centres.

The Legal Aid Scheme has been relatively successful in terms of the various areas for which it has established a working programme and from the general satisfaction of clients it has serviced. However, according to yearly reports, the planning of strategies and activities carried out by the Centres are constantly plagued by inadequate human resources. While pupils-in-chambers form a steady workforce alongside a relatively regular team of volunteer lawyers, the entire Scheme has received a sorry response from lawyers in general. Meanwhile, the number of clients is rising steadily.

Statistics show clearly that states with negligible or nominal availability of manpower have been seriously hampered in their efforts to deliver services effectively. Each year, the level of participation by volunteer lawyers has remained an issue, with Centres straining the resources of its committed but limited pool of volunteers. Only a minority strive to pursue the statutory objective of the majority. Although steps could be taken within the Scheme to organise more motivational campaigns to attract more volunteer lawyers, when push comes to shove one hand simply cannot clap without the other.

Following the comment of the Attorney-General, the Bar Council issued a press statement (*Infoline*, November 2002) stating it was open to discussions with the Attorney-General's Chambers and other relevant Ministers on the matter. The Council met the Attorney-General on 13 December 2002 and discussed, among other things, how the Bar Council Legal Aid Scheme and the Government Legal Aid Bureau could work together in applying and increasing resources to cater to the public need as best as possible.

But until any programmes are conceived of, discussed and implemented by all the relevant parties, it will be extremely disappointing if the organisational and policy progress achieved so far by the Bar Council Legal Aid Scheme continues to be impeded by the lack of human resources.

The dignity of the legal profession is never measured in terms of merely paying an annual subscription but by the conduct of lawyers themselves. Perhaps too many have forgotten that dignity is earned through striving for the benefit of both the rich and impecunious public in the interests of justice, not the bank account.

The coming National Legal Aid Conference to be held in Johor Bahru on 10 January 2003 should address this.

Pekeliling Pendaftar Bil 3/2002

Teste Kepada Writ (Pindaan)

Adalah saya diarah untuk memaklumkan bahawa mulai 3 Disember 2002 pengakusaksian untuk Writ of Summons yang difailkan dalam Mahkamah Tinggi Malaya hendaklah dikeluarkan atas nama YAA Hakim Besar Malaya seperti berikut:

'YANG AMAT ARIF DATO' HAIDAR BIN MOHAMED NOOR, D.M.P.N., J.S.M., D.J.N., HAKIM BESAR MALAYA ATAS NAMA DAN BAGI PIHAK SERI PADUKA BAGINDA YANG DI-PERTUAN AGONG'.

Dengan ini Pekeliling Pendaftar Bil 2/2002 adalah dibatalkan.

Sekian. Terima kasih.

'BERKHIDMAT UNTUK NEGARA'
Saya yang menurut perintah,
Mohamad Zabidin bin Mohd Diah
Pendaftar
Mahkamah Tinggi Malaya Kuala Lumpur

All statements were issued by Mr Mah Weng Kwai, Chairman of the Bar Council, unless stated otherwise

Responses to call for death sentence for child rapists

9 December 2002

The Bar Council views with grave concern the call for the imposition of the death sentence for child rape cases. No doubt, the crimes of incest and rape are very serious offences, and heavy sentences, commensurate with the gravity of the offences committed, must be meted out to offenders of such crimes. However, the Bar Council is opposed to the death penalty being imposed.

While the government's main rationale for introducing the death penalty is to deter would-be criminals, there is no empirical evidence that capital punishment has had such a positive deterrent effect. Arguably, there has been no significant reduction of crimes for which the death penalty is mandatory, such as murder, drug trafficking and crimes under the Internal Security Act. Apart from this, at the dawn of the 21st century the death penalty is considered by most civilised nations as a cruel, barbaric and inhuman punishment and it has since been abolished by many countries.

While the death penalty itself may be an adequate reflection of society's abhorrence towards rapes of children, the penalty will have serious repercussions on efforts to prosecute and prevent the incidence of such crimes, protect rape survivors, and reduce further victimisation of the survivors under the legal process. As the prosecution of rapists depends on the existence of a complaint by a rape victim, the death penalty may discourage victims from reporting the matter especially when the perpetrator is a member of the family. In addition, rapists themselves may be encouraged to murder their victims to avoid being caught.

Rather than impose a death sentence, the Bar Council is of the view that reforms should be sought to increase the length of prison sentences for child rapists and allow for men of 50 years of age and above to be whipped. Current law prohibits men in this age category from being whipped, which releases many rapists from the full consequences of the law. Prosecutors may be encouraged to push for heavier sentences for rape and incest, including consecutive jail terms, as being an alternative to the death penalty. In addition, we should consider ways to encourage children to report rapes, educate parents, the public and the police, provide psychiatric help for both victim and perpetrator, improve methods of investigation as well as introduce new methods of securing forensic evidence.

While the sentence for child rapists must reflect the seriousness of the crime, reforms in rape law must seek to ensure that the severity of the punishment does not cripple efforts to prevent the occurrence of such crimes.

Discharging firearms: more exacting standards required of police

12 December 2002

The Bar Council views with grave concern the prevalence and manner in which police officers have discharged their firearms, most of which result in deaths, and calls for more exacting standards to be employed in dealing with issues arising out of such shootings.

The Bar Council recognises the role of the police force in maintaining law and order and preserving peace and security in Malaysia. It further appreciates that in order to fulfil this role, police officers should be permitted to exercise their powers in the way they have been trained without fear of the consequences of their actions thereby avoiding unfortunate compromises on their part. This, however, does not mean that police officers are not to be accountable for their actions.

In connection with this, the Bar Council respectfully differs with the recent High Court decision in the case of *Tony Ak Beliang v Public Prosecutor* in that it validates the use of firearms by police officers in questionable circumstances. Secondly, it also effectively concludes that a trained police officer acting in an official capacity with an un-holstered weapon is to act no differently from a layperson when confronted with an apparently dangerous situation. Both are entitled to react with only self-preservation in mind. However, police officers have been trained to use firearms effectively, the layperson is not. Police officers have voluntarily assumed certain risks and have been trained to deal with those risks, but the layperson has not. Shooting to kill by the police cannot be treated as being an acceptable way to deal with those risks. Thirdly, the decision effectively validates the use of extreme force by police officers in questionable circumstances when more accountability is required of them.

The Bar Council as such calls upon the Government and the Royal Malaysia Police to consider each and every discharge of a firearm by a police officer in the course of his/her duties as a serious and significant event, and an anomaly until otherwise explained. To this end, the Bar Council also calls upon the Government and the Royal Malaysia Police to put in place transparent and effective measures to deal with the discharge of firearms by police officers.

Penetapan Tempoh Rehat Mahkamah Persekutuan Tahun 2003

PADA menjalankan kuasa yang diberikan oleh Kaedah 3 Kaedah-Kaedah Mahkamah Kehakiman (Mahkamah Persekutuan (Rehat) 1996 [PU (A) 150/96], maka dengan ini saya menetapkan bahawa tempoh rehat bagi Mahkamah Persekutuan bagi tahun Kalendar 2003 ialah:

(a) Mulai hari Isnin, 26 Mei 2003 sehingga Sabtu, 7 Jun 2003; dan
(b) Mulai hari Isnin, 15 Disember 2003 sehingga Rabu, 31 Disember 2003.

Bertarikh 25 November 2002.

Tun Mohamed Dzaiddin Bin Haji Abdullah
Ketua Hakim Negara
Mahkamah Persekutuan Malaysia

The Recent Amendments to the Standard Form of Sale and Purchase Agreements for Housing Developers – Some Suggestions

A Kanesalingam *

The standard sale and purchase agreement for licensed housing development projects was amended on 1 December 2002 by the Housing Development (Control and Licensing) (Amendment) Regulations 2002[1].

An important amendment appears to satisfy the purchaser's complaints of delay in obtaining the right to occupy houses for the reason that the certificate of fitness for occupation is issued late.

Under the old regulations, although vacant possession of the house is delivered to the purchaser, the purchaser is legally not permitted to occupy the house until the certificate of fitness for occupation is issued.

Under the new amendment, 12.5% of the purchase price is withheld until the developer produces not only the usual architect's certificate of practical completion but also a letter from the local authority stating that Form E under the Uniform Building By-Laws has been submitted to the Local Authority and that it has been 'checked and accepted by the Local Authority'.

This is provided for in clause 24(2)(b) and item 3 of the Third Schedule in the new standard sale and purchase agreement for land and building (Schedule G).

The remaining 7.5% of the purchase price is also tied to this provision because the 2.5% to be released on issuance of separate title and execution of transfer and the deposit of money with stakeholders are dependent on payment of the balance purchase price and delivery of vacant possession. The result is that 20% of the purchase price will be withheld until the local authority issues its 'checked and accepted' letter.

The amendment appears to have been made in good faith but the effect of the amendment is to make the Local Authority an important player.

The architect's certificate of practical completion is no longer acceptable by itself.

While it may be said that the developer can call personally at the local Authority to expedite this process the practical effect is that the local Authority does not itself cause a final inspection to be done until six government departments give their own 'checked and accepted' letter, ie the departments for the essential services specified in by-law 25(1)(b) of the Uniform Building By-Laws. Asking the developer to call on six government departments and the local Authority to expedite this process is a different ball game. The entire bureaucracy becomes involved in the project while it is ongoing.

This relegation of the architect's certificate of practical completion appears to suggest that architects have not been issuing certificates of practical completion quite properly in the past.

Previously, the time period between the architect's certificate of practical completion being issued and the six government departments giving their reports and the Local Authority doing its final inspection and issuing the certificate of fitness for occupation took several months or even several years in some cases.

This delay can perhaps be attributed to the architect's certificate of practical completion having been issued incorrectly or the bureaucratic delays everyone is accustomed to or to both. Usually, it is both.

Perhaps as a result of this amendment developers will comply more stringently with the requirements stipulated by the authorities at the time various approvals for the project is given and architects will be more wary when issuing their certificates.

It is suggested that this amendment is not likely to solve the problem and may be likely to create other problems.

This amendment is a compromise between the build and sell situation and the sell and then build situation. In the build and sell situation the purchasers buy ready made houses. The developer takes a risk because the units may not sell after they are completed.

Developers used to the sell and build situation may be hesitant to commence any new projects if 20% of the purchase price is to be delayed. The purchasers are likely to complain if 80% of their purchase price is paid and the end financier charges them interest and they do not get vacant possession until the Local Authority completes its 'check and accept' process.

The following suggestions are made. Firstly, the principle of administrative law that when a power is exercised deciding questions affecting legal rights the decision once validly made, is an irrevocable legal act and cannot be recalled or revised[2] should be followed. The Local Authority once having given approval for development subject to certain conditions should not after the project has commenced impose some further condition.

Secondly, the scale of fees payable by the developer to the architect must be amended to require a greater portion of the professional fee to be payable only after the 'check and accept' exercise. This may ensure better supervision by the architect before issuance of his certificate.

Thirdly, the time period for completion of the building must be extended from 24 months to 30 months to accommodate this 'check and accept' exercise so that the developer is not made liable to pay compensation during the period the exercise is carried out. If this is not done the developer will end up paying interest to the bridging financier and contractor and compensation to the purchaser all at the same time.

Lastly, section 10 of the Local Government Act 1976 ought to be amended to require Local Councils to be elected by residents in the Local Authority area instead of being appointed by the State so that both Local Councils and government officers in the local area will be answerable to the residents in the area and will act more expeditiously.

I trust that the above comments will be of assistance to the powers that be.

* Advocate & Solicitor, High Court of Malaya.

[1] PU (A) 473/2002.

[2] HWR Wade, Administrative Law, 6th edition, p 254.

Mediation and Alternative Dispute Resolution

*Sundra Rajoo**

Introduction

Although there are no statistics, most of us would accept there are a large number of disputes that never get anywhere near lawyers. It is inevitable that parties will try to turn away from allowing disputes to fester until they mature into a state in which third party interventions become the only available option. It is now common for commercial and government entities to evaluate risks and develop mechanisms for early dispute evaluation and prevention.

Either, the parties resolve the disputes promptly by reaching an agreement on an 'interest basis' rather than a 'rights basis'; or they are nipped in the bud before they can burst into flower. In such circumstances, the parties assess it to be advantageous to implement a solution reflecting elements such as fairness, maintenance of long-term relationships and which of them will feel less pain in taking a hit. These elements have little to do with contractual rights and obligations.

However, when disputes do remain, parties are faced with three quite different types of dispute resolution mechanisms:

1. Litigation in courts;
2. Arbitration, designed to achieve a final and enforceable outcome;
3. Other ADR mechanisms such as mediation, conciliation, mini trials, rent-a-judge, med-arb, dispute resolution board, adjudication and other 'touchy-feely' ways of engaging the intervention of a third party to achieve an agreed settlement between the parties.

All the above three dispute resolution mechanisms are based on resolving mature disputes through the intervention of a third party who has substantial formal or informal authority over the parties. The role of the third party varies in each of the three different mechanisms. The nature and progression of the three processes are different. The parties know that outcome from the first two mechanisms referred to above will necessarily be based on a third party's assessment of their legal rights and obligations.

The courts

The courts generally do a good job when they are brought into play in particular in administering criminal justice and to adjudicate on civil, matrimonial and other rights and obligations of citizens.

However, I believe that the days are gone when the courts are chosen expressly by the parties as their forum for resolving disputes arising out of contract. Over the past decade or so, there has been an increasing trend in Malaysia away from traditional litigation as a means of determining civil and commercial disputes.

It is quite common to see arbitration and other alternative dispute resolution (ADR) forms of dispute resolution being inserted in commercial agreements. This has changed the way lawyers work, changed the changed the way that courts function and changed the way our society deals with legal conflict.

The court's role in resolving disputes usually now arises where the parties have failed to make an express choice of forum in their contract. The courts are therefore a default forum. Conflicts and disputes, for example in the building industry require specialised knowledge and longer hearing times because of the very nature of issues, complexities, technicalities and human behaviour interconnected in the heart of disputes.

Arbitration

The general preference for arbitration in certain industries and international trade has nothing to do with the advantages of speed and cost-saving, which are often emphasised in arbitration textbooks and conferences.

The main reason, I suspect, there are more arbitration clauses inserted in commercial contracts is simply the unwillingness of the parties to litigate in court. The courts do have important supportive and supervisory roles in relation to arbitrations and parties revert to it when absolutely essential.

The other positive feature of arbitration lies in the enforcing of arbitration awards domestically and in foreign jurisdictions (by way of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards). By contrast, it may be difficult to enforce a favourable court judgment in another country, as there are no multilateral treaties covering the reciprocal enforcement of court judgments.

Arbitration will thus always be needed where for one reason or another a final and enforceable outcome is necessary. I have on a number of occasions seen situations where one party needed an award – a final and binding solution imposed by a third party – rather than an agreed compromise settlement or even a consent award.

Often not just money is at stake. Sometimes one party may be bankrupted if it does not achieve a complete victory. Matters of principle, or the positioning of a party in a long-term relationship may be in issue. Sometimes, the management of a party cannot afford to take the responsibility of being a party to a compromise settlement. In such cases, the party may need an official piece of paper, such as an arbitrator's award, before agreeing to contribute to a settlement.

Based on the complaints that I have heard over the years, it would seem to me that what users want out of arbitration is enforceable awards for the price of 'peanuts'. Also, parties want competent arbitrators. They want their arbitrators to have commercial and contractual knowledge

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when the disputes concern technicalities. The prime concern is to get commercial justice.

Parties also want a quick resolution of their disputes and that arbitration awards are rendered within an acceptable time. Given the state of our arbitration regime which is in need of urgent reform based on UNCITRAL model law, it is usual now for arbitration agreements be supplemented by arbitration rules. There is a need for such arbitration rules to be clear and concise and easily understandable by users.

Mediation

While litigation and arbitration will continue to have an essential role, mediation can result in significant savings in both time and legal costs by its participants. In recent years, lawyers have started to appreciate that they are employed to protect their client's interest, not merely to defend their legal rights. This attitude has given impetus to the use of mediation in at least certain kind of cases susceptible to compromise solutions. While mediation clearly has a role to play in resolving civil and commercial disputes, not all mediations lead to a settlement. It has certainly been one of the most important developments in the legal landscape with some great successes and some obvious failures. It begs then the question of what is mediation, when and how it can be used to resolve disputes.

Litigation and arbitration is usually a lengthy and costly experience for the parties. The outcome will generally be 'rights-based' rather than 'interest-based'. The reasons for using mediation as one of the preferred dispute resolution processes are, first, the commercial clientele's disenchantment with the cost and time involved in litigating in court and in arbitration; secondly, a growing feeling amongst parties that 'interest- based' solutions produce better outcomes in the medium or long term than 'rights-based' solutions.

The result is that a number of institutions have been developing their mediation facilities and capabilities with understandable urgency. Many organisations, I understand, are preparing to promote their own sets of mediation rules and offer mediation services. There will be, no doubt, more to come. Most organisations offer negotiation skills training for budding mediators or opportunity for mediators to put letters after their names.

Mediation is now available in the insurance and banking industries through the Insurance Mediation Bureau and the Banking Mediation Bureau set up in 1991 and 1997 respectively under the Companies Act 1965 (Act 125) s 24. The Bar Council States of Malaya established the Malaysian Mediation Council in 1999 to promote mediation and to provide a range of mediation-based services for commercial disputes. Standard form of building contracts such as PAM 1998 Form and CIDB 2000 Form contain mediation clauses as the first or alternative process to help resolve disputes arising from the contract.

The purpose of a mediator is to facilitate the parties in negotiating their own compromise or settlement. Any negotiation, whether facilitated or not, is an exercise in convincing the other party of the relative strengths of one's own position and the equivalent weakness of theirs. Mediators bring useful skills to the bargaining table. In particular, they bring neutrality and a sense of structured informality to the proceedings. They control the process and use various techniques to minimise posturing while encouraging venting such as breaking of deadlocks. They may also receive information that neither side is willing to impart to the other, and then use this information as an element in their strategy to help nudge the parties towards agreement.

In philosophical terms, the law concerns itself with justice and truth, not always with equal weight. In mediation, truth can assume a relative quality, and is often used with economy. The parties understand this and it is a naive mediator who believes that the parties give him the full truth. There are, nevertheless, unwritten rules and understandings, and if these are broken, trust is destroyed to the extent that settlement may become impossible. In adjudicative situations, the procedures and rules of evidence diminish this concern.

On the other hand, a suggestion that parties try mediation to settle the dispute can sometimes be perceived as a sign of weakness. Accordingly the parties may be reluctant to even suggest that the mediation be used to try to resolve their differences. Despite all of the publicity that mediation has attracted, it is still a relatively new idea. Few lawyers, clients, etc have actually been through the mediation process. This can lead to some lawyers and clients alike being very suspicious of what is involved in mediation. As a result, they may be reluctant to even give it a try. In my personal experience, it is clients who have already been through a successful mediation who are most keen proponents of it.

Reviewing the way mediation is developing in Malaysia, my tentative and anecdotal conclusions are judges do not necessarily make good mediators. Their approach tends to be 'rights-based'. I would think that litigation lawyers maybe out of their depth when representing clients in mediations. The reason that many lawyers do not negotiate well in a dispute resolution context is because historically it has not been their job. In negotiation sessions, they are often operating outside their comfort zones as circumscribed by their background and training. Perhaps, professionally trained mediators can do better than average because of the skills they bring to the process.

Mediation, in my opinion, is far from the universal cure for all ills that its evangelical exponents would have us believe. Keen disciples of mediation perhaps have overstated its importance, advocating it as the panacea for the resolution of all disputes and maintaining that it renders other forms of dispute resolution redundant. Equally, sceptics attack mediation as naive, simplistic and a waste of time.

The truth lies somewhere in between. It is undeniable that awareness of mediation has dramatically increased and its utilisation has grown significantly. I accept that, like arbitration, mediation has a genuine and valuable place in the armoury of available dispute resolution mechanisms. There are times when it is appropriate and instances when it should not be used.

I am of the view that where a properly trained mediator can produce a result that adds value for the parties at a fraction of the costs of an adversarial process designed to achieve a 'rights-based' solution. The key question that we need to ask ourselves is why mediation can work when the parties have been unable to settle the dispute themselves?

The mediation process

I see mediation as a supercharged negotiation. The parties extend the negotiation between themselves assisted by an independent mediator with a view of reaching a mutually satisfactory settlement. The mediator is appointed when the parties' private negotiation comes to a deadlock. Mediation is a voluntary and non-binding process. The mediator has no power to render a decision or to force the parties to accept a settlement.

While mediation might be regarded as simply requiring common sense, the mediator has to have certain skills and techniques. Henry Brown and Arthur

Marriott in their book, *ADR Principles and Practice* summarised the mediator's skills as listening, observing non-verbal communications, helping parties to hear, questioning, summarising, acknowledging, mutualising, re-framing, managing conflict and venting emotions, managing the process, lateral thinking, encouraging a problem-solving mode, centring, being silent and constructive facilitation.

It is usual is for the mediator to first explain at a joint meeting of the parties, the nature and format of the process, with appropriate reference to its confidential and non-binding features. The parties and the mediator can then agree on the procedure to be employed. Each party then presents its own case with a view to identifying the issues in dispute. The mediator afterwards conducts a series of private, confidential meetings with each party, sometimes called 'caucuses', in which he works with each party to analyse its case and develop options for settlement. This process continues until either a settlement is reached and it is apparent that a settlement cannot be reached.

The difficulty of the mediator's task is directly proportional to the number of persons involved and the diversity of their interests. He must not expose the weakness of one party's case in the presence of the other. If no settlement is reached, statements made during the mediation proceedings are inadmissible as evidence in any subsequent arbitration or litigation. The mediator's role is to clarify the issues and help the parties narrow their differences, keeping the exchanges focused and orderly.

The mediator must separate the people from the problem, focus on interests, not positions, invent options for mutual gains and insist on objective criteria. The emphasis is to distinguish between the apparent problem and the underlying problem. For example, a dispute about a late payment can really be caused by tension over slow or shoddy service. The focus on rights and obligations are often not the best pointer to an interest-based outcome to a dispute between the parties.

All negotiations go through stages. Mediation through its informal and flexible process allows the compression of the stages on negotiation, with overall savings of costs. Most mediations operate within a definite timeframe and it is quite common for a mediation session to be productively concluded in a day or less.

When is a mediation considered successful

A mediation, if successful, results in a resolution by an agreement of the parties. It may not be a 'correct' decision or a decision according to the law but the resolution will in general be fair because the parties have consented to it. Some of us may be troubled about the fairness of mediation where there is a significant power imbalance between the parties. While this may be sometimes be a problem, the fundamental position remains that a mediation is only settled if both parties consent. Generally, the procedure is fair.

Therefore, the most common method used to gauge the success of mediation is the settlement rate. This is usually described as a percentage of cases subjected to a mediation process. Measurement of timing of settlement earlier or later in the litigation process further refines the definition of success. However, the argument against such a method of measurement is that the parties would have settled anyway without mediation. Again this is easier to say but rather hard to measure.

My view is that the real test is in the saving in legal costs, court time and resources *vis a vis* the quality of justice achieved resulting in the parties' satisfaction. Anecdotal evidence suggests that there is dissatisfaction with litigation. On the other hand, mediation scheme can be considered successful if it reduces time taken to dispose of cases, decreases costs to litigants, results in a high proportion of cases completely or partially settled with the parties and lawyers expressing satisfaction with the process.

The criterion of success also involves the enforcement of the settlement. Here mediation is at a disadvantage to litigation and arbitration. A court judgment is immediately enforceable by levying execution process. An arbitral award is in a similar position through the court leave process to enforce the award as a judgment. However, a settlement arrived at in mediation is in a different position. If a party refuses to carry out the settlement, it will probably be necessary to commence action on the settlement agreement, to obtain judgment and then to levy the execution process.

This places mediation in an inferior position to arbitration and litigation. However, experience perhaps suggests that parties who have mediated a settlement of their dispute tend to voluntarily carry out the terms of a settlement and that enforcement, in terms of format enforcement procedures, is rarely necessary. Some mediation rules for example, that of the Singapore Mediation Centre provide that once the parties have reached a settlement, the mediator will be appointed as an arbitrator to record a consent award which is enforceable summarily.

Reasons why mediation works

Based on my experience, I see at least six reasons why mediation works:

First, mediation provides a safe environment for negotiation between the parties or their lawyers that may otherwise not take place at all. Parties are from time to time advised that the making of any reasonable settlement offer will be taken as a sign of weakness or will be abused as the starting point for the next round of negotiation. The mediator by controlling and directing the communications can avoid unproductive discussions and ensure that proposals will be communicated only if there is likely prospect of settlement.

Secondly, the mediator can fill in the gaps in the parties' negotiation skills. This may assist them in avoiding the unnecessary use of hard bargaining tactics and emphasis on differences. The parties are kept focused on productive discussion by exploring areas of common ground and options for settlement.

Thirdly, mediation creates a unique atmosphere for the parties' decision-makers to meet with the express purpose of discussing settlement. It thus provides an opportunity that may otherwise be unavailable for the decision-makers to focus their entire attention on reaching a settlement without any distraction from other business.

Fourthly, each party can present its case uninterrupted in a favourable manner it desires during the mediation session. Either party is allowed to convey its feelings and emotions on issues and facts, thereby providing the other side with the unfiltered version of its case. In these circumstances, settlement proposals can be more realistically considered.

Fifthly, the mediator's personal skills enhance the flow of information, resulting in a realistic communication of the parties' cases and their respective prospects of success in arbitration or litigation. For mediation to work, the parties must be cooperative and ready to move competitively, be well prepared but flexible.

Finally, mediation makes possible creative settlements. For example an existing

dispute may be resolved on the basis which includes an agreement to enter into a new commercial relationship. This gives mediation a flexibility not available in litigation or arbitration. A judge or arbitrator can only resolve a dispute by determining existing rights. It is no function of the judge or arbitrator to suggest or require that new rights or arrangement be created.

Why Mediation Fails

There are some pitfalls and obstacles external to the dispute itself can cause mediation to fail. They are external in the sense that they are more connected with the mentality and knowledge of the parties than with the issues in disputes.

Mediation does not work if either or both of the parties lack one or a combination of the following:

1. Authority to settle;
2. Preparation for understanding and assessing the merits of the case;
3. Preparation for and knowing enough about the nature and process of mediation;
4. Undistracted attention in presenting its own case and listening to the other's case;
5. Realistic views on the prospects of success of its own case and the other side's case, or both;
6. Good faith.

The lack of settlement authority can result in the mediation to fail. However, the lack of authority may not be accidental as it is a well-accepted and effective negotiation tactic. Such a tactic may take several forms. Indeed it maybe tool for testing the depth of the other side's water.

Another common ingredient of failed mediation is lack of preparation. This means that the parties or their representatives did not know enough in advance about their own case to enable full consideration to be given to a settlement. Thorough advance preparation is an essential element to achieving a good result from mediation. Key documents must be gathered and understood. Important witnesses must be interviewed. Applicable law needs to be researched and analysed.

Another category of failure arises when parties have not familiarised themselves with the nature and processes of mediation. For mediation to be successful, it is essential that parties be prepared. It is necessary for the parties to plan, allot time and put in effort particularly that mediation maybe something new to them. The representatives of the parties have an important role to play throughout the mediation session in being advocates, witnesses, solution generators and as sources of authority, expertise, technical knowledge, accountability, empathy and credibility. They must, for example, appreciate the power of a well-timed apology and of an acknowledgement of the other side's feelings, interests and views.

During the mediation session, the representatives hear allegations and attacks that naturally aggravate hostilities, and should be knowledgeable enough about the mediation process to understand that dealing with the emotional aspects of the controversy is a necessary prelude to reaching settlement. It is part of the mediation process to allow the parties to vent their feelings, emotions and frustrations. Thus, the representatives should actively participate and exhibit the attributes of full settlement authority, accountability for their commercial interests and absence of direct involvement in the matters leading to the controversy. It is a precondition that the parties understand the mediator's role, and of the distinction between facilitated negotiation and a third-party decision before formulating plans, strategies and interest priorities.

The parties in a mediation session should be focused towards productive negotiation. It is not uncommon that after the mediator has explained the mediation process, the advocates for each party give aggressive and inflammatory statements in the opening meeting. The advocates will still speak strongly in favour of their case in front of the other party in private caucuses. Yet, an advocate may ask privately with the mediator to bring influence to bear on the other party in the hope that it would become more realistic. An advocate may therefore run the risk of destroying a party's confidence on the impartiality of the mediator by asking him to take a position contrary to the advocate's own. More importantly, it may hinder the realistic communication of the merits of the party's case and, further its prospect of success.

Parties must enter a mediation in good faith. Chances of a successful mediation will be poisoned if there is malice and bad faith. Bad faith can be discerned when there are unexplained delays in commencing and proceeding with the negotiation, refusal to agree on even trivial matters, rigid and non-negotiable positions, failure to respond to proposals, and a shifting position just when agreement was in sight. The result was predictable: no settlement could be expected.

The choice of the mediator is also important. There would be a high probability that a mediation would succeed if the parties choose their own mediator instead of being assigned one by the court or an appointing body.

Mediation Checklist

It will be useful to run through the checklist set out below to see if the dispute is amenable for resolution by mediation. There is a higher chance of the matter being resolved by way of mediation if there are more affirmative answers to the questions:

1. Do both sides want actual or potential business relationships between them to continue?
2. Do the representatives of both sides have the necessary authority and confidence?
3. Are the representatives confident their superiors will not criticise them if they move towards settlement?
4. Do the parties have any previous experience of mediation?
5. Are the parties sufficiently familiar with, and realistic about, all the facts or merits of the dispute, as exhibited in their presentations?
6. Are the parties genuinely interested in a speedy, inexpensive or business-oriented compromise, and do they believe that the other side is also so interested?
7. Are there no interests of multiple parties involved?
8. Are there no barriers to communication between senior management?
9. Is there no divergence of interests that the parties are pursuing, apart from the dispute being mediated?
10. Are the issues sensitive, involving senior management, disclosure of trade secrets or sensitive documents, so as to render confidentiality a prime consideration?

11. Are there no issues of high technology or complicated facts?

12. Are the core issues factual but not turning on the credibility of witnesses?

13. Do the parties wish to retain control of the outcome?

14. Is the dispute one from which a substantial number of pending or potential claims will stem, so that publicity will increase the incidence of such claims?

15. Do the parties believe that the chance of winning in litigation or arbitration is unknown or uncertain?

16. Have the facts in the dispute been sufficiently developed?

Is Mediation Worthwhile when Compelled

It has been suggested that the courts and government should force disputants to pay for and attend compulsory mediation. In such a circumstance, the key question is what is the value of compulsory mediation to the litigants and disputants?

In my own view, there maybe some benefit in forcing parties to meet and discuss their dispute. The best result could be a settlement mutually agreed upon. The worst result could be that parties do not settle. They had incurred additional costs and unnecessary delay. The matter proceeds to arbitration or court.

It has been argued that compulsory mediation, if ordered frequently, has the potential to erode respect for the rule of law. However, I have not sighted any research on this. However, it is important not to presume that all or most matters should be referred to mediation. Each case has to be considered on its own merits.

Combining Mediation and Arbitration

Perhaps, it may even to attractive to combine mediation and arbitration as in the med/arb concept by which both mediation and arbitration is agreed upon as the means by which parties intend to resolve their dispute. Typically, one person is appointed both to mediate and, if the mediation fails, to arbitrate the dispute. The med/arb concept is attractive primarily because the parties, at least in the early stages of a dispute, do not want to engage in a time-consuming, costly and often frustrating adversarial arbitration or litigation.

The thought of mixing mediation and arbitration, with one person playing the role of both mediator and arbitrator, may send shudders through many lawyers. The main difficulty is in a mediation, as trust builds, risks are taken and cards are laid on the table in attempts to close the gap. With a mediator, while there is considerable attempted mutual manipulation, the same process of risk taking and position adjustment usually takes place in caucus. The relationship of trust between the parties and mediator would be altered if the parties perceived that the mediator would become adjudicative and make use of the knowledge gained.

A med/arb process raises questions of bias, real or perceived, in the minds of the parties. It maybe unsettling to the parties to think of what the other side might have said, and what influence that might have on the mediator turned arbitrator. On the other hand, the mediator turned arbitrator may be faced with the dilemma on how may reliance, if any, can be placed on what is said in caucus meetings when some very frank comments might be made, when the other party may have no opportunity to rebut what is said, or to shed other light on them, or put them in a different context.

While it may seem cumbersome, there is the potential of using a different mediator in mediating first and if the mediation fails, using a different arbitrator to arbitrate. Even if arbitration proceedings have commenced, mediation can be allowed at some point during the arbitration so that some issues are mediated and arbitrate others. If the mediation is unsuccessful, then arbitrate the unresolved issues.

Conclusion

Where speed and the containment of costs are important then mediation has much to offer. Mediation works for most disputes but not for all disputes. It fares well in the maintenance of relationships, harmony and confidentiality. It brings the parties together physically and requires them to negotiate with each other. If they are then able to agree on the terms of a settlement, they will be in a much more harmonious position than disputants who have gone through a litigation or arbitration process and been subject to a judgment or award.

The mediation movement will hopefully lead to an early resolution of disputes with less escalation to the extreme, lengthy and expensive processes of arbitration and litigation. I support the movement to provide in rules for the court administration for directing cases into the most appropriate mode of dispute resolution or adjudication.

NOTICE TO ALL MEMBERS OF THE BAR

Bar Council e-mail communications

The Bar Council is in the midst of updating its database of members' information in order to improve its communications to members of the Bar via e-mail. Urgent Circulars have been e-mailed to members from time to time but a considerable number of e-mails have been undeliverable due to the following reasons: user quota exceeded, user unreachable, unknown user, unknown host or domain. All members are therefore strongly urged to e-mail the Council immediately at council@malaysianbar.org.my with an update of your **e-mail address** and **telephone number**.

Postings for employment

Firms who wish to advertise for employment opportunities are advised to download a standard form from http://www.malaysianbar.org.my/employment/adv.rtf. Fill in the respective fields where applicable. Then send the completed form as an **attachment via e-mail** to council@malaysianbar.org.my using the subject title 'Advertisement' or 'Employment Opportunities'. **Please do not write in via ordinary mail/ by hand/fax** – this is to avoid potential errors which may arise in the process of re-entering your data manually for publication.

Should Foreign Lawyers be given Right of Practice in Malaysia: Are We Ready for Full Entry or Joint Law Ventures?

(Two papers presented at the 11th Malaysian Law Conference, 8 – 10 November 2001, Renaissance Hotel, Kuala Lumpur.)

Paper by ***Cecil Abraham*** *

What is globalisation?

Kenichi Omhae, a Management Consultant and leading writer on business, who has authored the book 'The Borderless World', defines globalisation in the following terms:

> *'On a political map, the boundaries between countries are as clear as ever. But on a competitive map, a map showing the real flows of financial activity, those boundaries have largely disappeared.'*
>
> *'"Global citizenship" is no longer just a phrase in the lexicon of futurologists. It is every bit as real and concrete as measurable changes in GNP or trade flows.'*

Professor John Gray of the London School of Economics, a much-quoted thinker on globalisation was asked recently whether globalisation was doomed and his answer was:

> *'The entire view of the world that supported the markets' faith in globalisation has melted down … Led by the United States, the world's richest states have acted on the assumption that people everywhere want to live as they do. As a result, they failed to recognise the deadly mixture of emotions – cultural resentment, the sense of injustice and a genuine rejection of western modernity – that lies behind the attacks on New York and Washington … The ideal of a universal civilisation is a recipe for unending conflict, and it is time it was given up.'*

The British Prime Minister, Tony Blair, speaking recently at the 2001 Labour Party Conference expressed his views in the following graphic manner:

> *'The critics will say: but how can the world be a community? Nations act in their own self-interest. Of course they do. But what is the lesson of the financial markets, climate change, international terrorism, nuclear proliferation or world trade? It is that our self-interest and our mutual interests are today inextricably woven together.*
>
> *This is the politics of globalistion.*
>
> *I realise why people protest against globalisation.*
>
> *We watch aspects of it with trepidation. We feel powerless, as if we were now pushed to and fro by forces far beyond our control.*
>
> *But there's a risk that political leaders, faced with street demonstrations, pander to the argument rather than answer it. The demonstrators are right to say there's injustice, poverty, environmental degradation.*
>
> *But globalisation is a fact and, by and large, it is driven by people.*
>
> *Not just in finance, but in communication, in technology, increasingly in culture, in recreation. In the world of the internet, information technology and TV, there will be globalisation. And in trade, the problem is not there's too much of it; on the contrary there's too little of it.*
>
> *The issue is not how to stop globalisation.*
>
> *The issue is how we use the power of community to combine it with justice. If globalisation works only for the benefit of the few, then it will fail and will deserve to fail. But if we follow the principles that have served us so well at home – that power, wealth and opportunity must be in the hands of the many, not the few – if we make that our guiding light for the global economy, then it will be a force for good and an international movement that we should take pride in leading.*
>
> *Because the alternative to globalisation is isolation.*
>
> *Confronted by the reality, round the world, nations are instinctively drawing together. In Quebec, all the countries of North and South American deciding to make one huge free trade area, rivalling Europe. In Asia, ASEAN. In Europe, the most integrated grouping of all, we are now 15 nations. Another 12 countries negotiating to join, the more beyond that.'*

Despite what Malaysian politicians and some members of the Malaysian legal profession may think, I am firmly of the view that globalisation cannot be arrested in its march. Those who hold this view are perhaps behaving like the proverbial ostrich.

How does globalisation relate to the Malaysian legal profession?

The borderless world has given a new meaning to business and legal transactions. They are now increasingly international in nature and this has given birth to a new type of law firm known as the 'global law firm'. The global law firm employs lawyers of different nationalities under one roof. The clients not only have higher demands, but are frequently involved in cross-border transactions which encompass the laws of many countries. Malaysian law firms todate have not, with one or two exceptions, taken any positive steps to becoming global law firms. Malaysian law firms are beginning to awake from their slumber and are attempting to embrace globalisation with all its advantages and disadvantages, depending on which view you subscribe.

* Managing Partner, Shearn Delamore & Co, October 2001.

The World Trade Organisation (WTO) and the General Agreement on Trade and Service (GATS) have been instrumental in ensuring that the liberalisation goals of globalisation is achieved. Where Malaysia is concerned, its commitment under GATS is to progressively liberalise local services inclusive of the legal services. Malaysia is set to comply with the WTO rules by 2003.

What is the position under the Legal Profession Act 1976 and what is the Bar Council's position?

The position under the Legal Profession Act 1976

I shall deal with this from a historic perspective. The previous Advocates & Solicitors Ordinance of 1948 disallowed foreign lawyers into Malaysia and this stance is also reflected in the Legal Profession Act of 1976. However, in February 1999, the Malaysian Government resurrected Part IIA of the Legal Profession Act 1976 by bringing into force Section 28A of Part IIA, which empowers the Attorney-General to issue licences to foreign lawyers. The requirements in Section 28A are very strict. For example, law firms intending to engage foreign lawyers must prove that they had been unsuccessful in hiring locals with similar qualifications. In addition, the applicant must have at least seven years of experience and should possess specialist knowledge of foreign law. However, foreign lawyers may practise offshore law in Labuan. This appears to be the government's response to the requirements of WTO and GATS. It is public knowledge that the Attorney-General has received enquiries from a number of foreign law firms, though todate, no licences have been issued.

Therefore, it will be noticed that the Malaysian legal regime is very much a protectionist regime and the question really is, should Malaysian permit foreign lawyers to practise in an unrestricted manner in Malaysia or should there be restrictions and if so, what should be the nature of such restrictions?

The position of the Bar Council

The Bar Council, which is the body set up under the Legal Profession Act 1976, to exercise discipline and generally administer the legal profession in this country, has taken the view that foreign lawyers should not be permitted to practise in Malaysia and that Malaysian lawyers are more than adequately qualified to deal with the legal problems that arise in this country.

I can do no better than quote the then President of the Bar Council, Mr RR Chelvarajah, who in 1999 attacked foreign firms for exploiting and manipulating the legal system. He claimed that foreign practitioners had entered the Malaysian legal market through accountancy firms and by using local law firms when working on presumably Malaysian legal matters. He further stated in a circular dated 15 October 1999: 'There have been numerous complaints by lawyers and the public regarding this but the council is unable to act at the moment as the claims are not readily substantiated.'

Further, when speaking to a Singapore newspaper, *The Straits Times*, Mr Chelvarajah went on record to say, 'Some gain access on the pretext that they are only doing consultation work but later engage in actual legal work. We also believe some of these lawyers are operating from hotels via computer lap tops.'

Is there a change in the position of the Bar Council?

However, in the year 2001, the Bar Council did invite a number of law firms who would be directly affected by the entry of foreign lawyers into Malaysia, to address this issue. The law firms in question have submitted various memoranda to the Bar Council. The views of the various law firms vary from firm to firm. However, there is a common thread running through the proposals and they could be summarised as follows:

What is the consensus among the law firms?

There is consensus that foreign lawyers should be allowed admission but with certain limitations.

What is the nature of the consensus?

A sampling of views indicate that the firms agree:

(a) That such an admission of foreign lawyers is inevitable and that the Bar Council should take a pro-active role in determining the process of 'opening up' and setting down its conditions;
(b) That the admission of foreign lawyers should be in a structured environment;
(c) That the admission of foreign lawyers be subjected to certain caveats and the Singaporean model of Joint Law Venture or Formal Alliances is recommended.

Are they in favour of joint ventures, informal alliances or formal alliances?

The general consensus is that they are in favour of formal alliances or joint ventures.

What should be the restrictions and areas of practice?

There seems to be some general consensus but the main areas where practice of foreign law should be confined to, are:

(a) Cross-border transactions;
(b) Cutting-edge financial products for the following areas governed by foreign law: Islamic financial markets, international and cross-border financial transactions;
(c) International Capital Markets, Asset Securitisation, Structured Finance;
(d) Project finance;
(e) Off shore financing;
(f) International Alternative Dispute Resolution.

Should there be a time limit?

There is no consensus on this issue but one of the firms says that the formal alliance should be for not less than five years. Another firm takes the view that it should be a licence which can be renewed annually or biannually while others take the view that there should be no time limit.

What is the type of control that the Bar Council should have and the benefits of such?

One view is that a board should be set up to filter admissions to foreign lawyers and grant licences. The Board may comprise the Attorney-General, the Bar Council and representatives of the legal profession from Sabah and Sarawak.

The others take the view that the Bar Council should have control only over discipline whereas admission should be a matter of government policy.

Miscellaneous matters

There is also suggestion that there should also be provision of guidelines for the training of Malaysian lawyers based on the number of licences provided to the foreign lawyers. The Malaysian lawyers should be trained abroad. There is also suggestion that there should be reciprocity.

Devices used by Foreign Firms to circumvent the Legal Profession Act 1976

It is timely that the Bar Council has begun to address this problem and the reason for this is obvious. There are already attempts by foreign law firms to get round the strict provisions of the Legal Profession Act 1976. These devices are pretty well-known in the legal market and the Bar Council and the authorities appear to be powerless to prohibit such practices. What are these practices?

(a) Foreign firms have incorporated Malaysian companies to provide trade mark and patent registration services, which, in Malaysia, is performed presently by Malaysian Advocates and Solicitors, Trade Mark and Patent Agents.
(b) Foreign law firms have established 'branches' by employing Malaysian Advocates and Solicitors. These offices are controlled by the foreign law firm's head office and some work, if not all, is done abroad. It is also not uncommon for the foreign lawyers sometimes to appear in negotiations in Malaysia, or even work out of their branches.
(c) A number of foreign firms specialising in shipping, insurance and re-insurance work permit their lawyers to visit Malaysian corporations and give advice on work that can be done by Malaysian Advocates and Solicitors.
(d) A number of firms are employing foreign lawyers as consultants. They may have a work permit but are not qualified persons within the meaning of the Legal Profession Act 1976.
(e) There have been set up a number of companies by foreigners providing support services, so-called, to the construction industry but doing the work of lawyers in the areas of construction law, eg arbitration.

What has the Bar Council done to prevent this development?

The Bar Council's standard answer is that they can only act on a complaint. The Malaysian corporations who use foreign lawyers are not going to complain. The Malaysian lawyers who collaborate with these foreign lawyers are also not going to complain. The practice will continue unabated and the Bar Council appears to be powerless to act.

What should the Bar Council do?

The Bar Council should take the initiative in this area to lead a constructive discussion with law firms who are directly affected by this phenomenon rather than leave the initiative to the Government or the Attorney-General.

The Bar Council should engage in a constructive dialogue with the Malaysian law firms directly affected by globalisation which by definition must mean the large and medium-sized law firms practising in the areas of Mergers & Acquisitions, Capital Markets, International Alternative Dispute Resolution, Intellectual Property and other Cross-Border Work.

This type of work affects, at a rough guess, about 10% of the approximately 10,000 lawyers who practise in Malaysia, ie about 1,000 lawyers.

Their needs and aspirations are different from the other 9,000 lawyers and the Bar Council must address these problems constructively to ascertain if:
(a) There should be a free market solution;
(b) Joint-ventures with foreign law firms should be permitted; or
(c) Strategic alliances should be permitted.

There is a view that there should be a referendum held among the legal profession to ascertain their views. The relevant papers for such a referendum have already been despatched. This, in my view, will be an exercise in futility, as:
(a) Not all the lawyers will vote;
(b) The aspirations and ambitions of a sole practitioner in Kedah is very different from that of a 50 person practice in Kuala Lumpur, which provides a full legal service.

I am of the view that if the Bar Council takes the position that a referendum is the only way to ascertain the position within the profession, then the forces in the affected law firms may decide their next course of action unilaterally of the Bar Council. This is not a development that is to be encouraged. Hence it is imperative that the Bar Council exercises control over these issues by engaging in constructive dialogues such as the present one.

How is the interest of the other 90% of the Legal Profession protected?

I am mindful of the fact that the Bar Council represents all the 10,000 lawyers in the country and has to look after the interest of every member and not only those who want to embrace globalisation and form joint ventures or formal alliances. The majority have to be protected if amendments are to be made to the Legal Profession Act or legislation introduced to permit foreign law firms to be involved in the Malaysian legal scene. The majority can easily be protected in view of the restrictions in the areas of practice that is being proposed. Malaysian lawyers can continue to practise in the areas of civil and criminal litigation without hindrance. They would still be able to practise any other non-contentious areas such as conveyancing, retail banking, intellectual property, industrial relations, family law, syariah law, Malaysian company law and Malaysian commercial law matters, to name a few. The foreign alliances and joint ventures will not take this market share of the vast majority of the Malaysian lawyers. However the vast majority have to be satisfied that any move to amend the legislation and permit foreign law firms to operate in Malaysia, is not detrimental to them.

What is happening among our Asean neighbours?

In neighbouring Singapore there was commissioned a report by the Singapore Legal Review Services Committee, which decided that if Singapore was to be a financial centre to rival Hong Kong, the market for commercial legal services would need to be liberalised. Hence, following this report, the Legal Profession (Amendment) Act 2000 was passed on 17 January 2000 to allow for the formation of Joint Law Ventures and Formal Alliances. The Attorney-General's Chambers became the issuing body of the Joint Law Venture and Formal Alliance licences.

Joint Law Ventures are more closely knit than Formal Alliances. Further, the scope of practising Singapore law for a Formal Alliance is narrower. In a Formal Alliance, a foreign lawyer may prepare all documents in a transaction involving the laws of more than one country, but any legal opinion relating to Singapore law must be given by a Singapore lawyer who has in force a practising certificate. The Joint Law Venture, on the other hand, allows foreign lawyers to practice Singapore law in respect of corporate, financial and banking work.

Initially, the government only wanted to issue five Joint Law Venture licences. This was extended after the Attorney-General's Chambers received nine applications as at the closing date of 15 July 2000. Towards the end of the day, seven Joint Law Venture licences and two Formal Alliance licences were awarded.

When announcing the Singapore law firms that have been granted the Joint Law Venture licences, the Attorney-General said that it marked the beginning of a new era for the Singaporean legal sector. Further, he also said that the firms would now be able to provide their clients with a 'one-stop shop' for cross border transactions. Indeed, some commentators are already naming the Joint Law Venture firms 'The Singapore Magic Circle'.

There exists in Hong Kong, Thailand and Indonesia, various regimes by which foreign law firms are allowed to practise. However, I do not propose in this paper to discuss the types of alliances. The Philippines, like Malaysia, takes the view that

foreign lawyers should not be permitted to practise within their jurisdiction.

What should the Malaysian Legal Profession do?

I feel that there is a need for the Bar Council, the Attorney-General's Chambers the Ministry of International Trade and the Minister of Law in the Prime Minister's Department, to set up a committee urgently to address this issue and perhaps come up with a report with recommendations, bearing in mind that Malaysia is not in the same category as Hong Kong and Singapore. We are not a financial centre. However, there is still an interest in Malaysia by foreign law firms especially in the type of first tier work.

I am also of the view that if this issue is not addressed urgently, then foreign law firms together with their Malaysian partners, would resort to the devices which I have referred to earlier or alternatively, think of new ways to ride a horse and carriage through the Legal Profession Act 1976. Furthermore, it is equally possible that some Malaysian law firms may decide to take the route that is presently available to them in s 28A and apply for licences for their foreign partners. There has to be concerted action by the Bar Council and the concerned law firms in bringing about this important change to the Malaysian legal scene.

I might add that the Bar Council has taken some concrete steps in trying to deal with this problem. However, it needs to also involve other parties such as the Attorney-General's Chambers and Government.

Conclusion

Malaysia, being a member of the World Trade Organisation ('WTO'), has to subscribe to the ideals of globalisation. It is also a fact that we would have to open our legal services at some stage to foreign lawyers. However, we should be prepared for such an eventuality so that our own lawyers would be equipped to compete with the rest of the world. We will be left behind if we do not change. The world environment including the legal environment, has changed. The practice of law has become an international business with firms competing internationally due to their global connections and transnational clients and advanced legal technology. The world has changed and Malaysia must adapt. Otherwise we would be left behind while the rest of the world marches on. I therefore urge the authorities and the Bar Council to address this issue of globalisation and the changes that it brings so that we, as a legal community, can continue to practise within the new legal framework which takes into account the advent of globalisation.

Paper by ***Davinder Singh SC*** * [1]

Introduction

In August 2000, Singapore took a big step towards the liberalisation of its legal market. Licences were granted to seven of the eight foreign law firms which applied to practise in Singapore under the new provisions of the Legal Profession Act ('LPA')[2]. A year has passed since the licences were granted. In this paper, I shall explore the rationale behind the Singapore government's decision to allow partial entry of foreign lawyers into the Singapore legal market and the impact of this decision.

I do not pretend to appreciate all the concerns and pressures faced by the Malaysian legal profession. I am therefore hardly in any position to answer the question posed in the topic. But I hope to share with you the motivation of the Singapore government behind, and the experiences of the Singapore legal profession arising from, liberalisation. I hope that this exercise will help you when you come to decide on which path you wish to traverse.

Ultimately, it is for Malaysia to decide whether it is in the interests of the country and its people to open up the arena. The decision to change, if made, should be preceded by a will and determination on the part of all concerned to accept a change in the status quo, and to make the new regime work.

The Singapore experiment

Foreign law firms in Singapore prior to liberalisation

Even before the opening of the Singapore law market to foreign law firms, foreign law firms were permitted to practise foreign law in Singapore.

Since 1980, Singapore has allowed foreign lawyers to supply legal services in foreign law in Singapore[3]. This policy arose after the Asian Dollar Market was created in Singapore in 1968[4]. Many foreign bankers complained that Singapore did not have sufficient expertise in what they termed 'international financial laws', meaning English law or New York law, which traditionally governed offshore borrowings in US Dollars. In May 1981, the Singapore government allowed foreign banks in Singapore to bring in their lawyers from New York, London or Hong Kong to provide legal services for Asian Dollar bonds, loan syndications and other offshore transactions.

The Singapore government allowed foreign law firms to apply to the Attorney-General to set up law firms in Singapore to practice foreign law. To encourage a diversity of foreign law firms, approvals were given to foreign law firms from countries outside USA and England[5].

Prior to the amendments to the LPA in 2000, foreign law firms were not subject to a formal regulatory regime[6]. In particular, the LPA[7] did not apply to foreign lawyers. There was no requirement for approved foreign law firms to employ Singapore lawyers. There was also no restriction on foreign law firms who wished to employ or accept as partners, Singapore lawyers to practice foreign law[8]. At the time, foreign law firms were not permitted to practice Singapore law[9]. They were also not permitted to hire Singapore lawyers to practice Singapore law[10]. With the amendments to the LPA in 2000, some of these conditions have been changed. This will be dealt with below.

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* Chief Executive Officer of Drew & Napier LLC.

[1] This paper was prepared with the assistance of Ms Lim Lei Theng, Associate Director, Drew & Napier LLC.

[2] Legal Profession Act (Cap 161) 2000 Rev Ed ('LPA'). The new provisions are ss 130A to 130J which were inserted into the LPA via Act No 4 of 2000.

[3] Legal Services Review Committee Report, 1999 (hereinafter, 'LSRC Report'), p 11.

[4] LSRC Report, ibid, p 35, n 22.

[5] LSRC Report, supra note 3, Annex C, Foreign Lawyers – Conditions of Practice (As at 1.12.1997) pp 159 – 161.

[6] Ibid, paragraph 5.

[7] Supra note 2.

[8] Supra note 5, paragraphs 15 and 16.

[9] LSRC Report, supra note 3, page 12.

[10] This arises from the effect of the provisions in the Legal Profession Act which bar a solicitor from applying for a practising certificate unless he is or is about to be employed by a solicitor or a firm of solicitors in practice in Singapore: s 25, Legal Profession Act 1997, Rev Ed. See also, LSRC Report, supra note 3, p 32, n 4 and n 6. There was one exception. In the mid-1980s, Freshfields was granted permission to hire Singapore lawyers to practice Singapore law.

As of December 1997, there were more than 60 offshore law firms in Singapore from over 15 jurisdictions[11], including many top ranking firms from London and New York, providing a full range of legal services for banking and financial institutions.

The motivation behind partial liberalisation

The initiative for liberalising the Singapore legal market was the Singapore government's. In 1997, the government set up a multi-sectoral committee headed by the Attorney General with the following terms of reference:

> '*to review Singapore's strategic legal needs in the financial sector, and the conditions under which foreign law firms and foreign lawyers could be allowed to operate in Singapore, so as to ensure Singapore's competitiveness in financial services.*'[12].

The primary objective behind this move was to better position Singapore as a financial centre, particularly as competing hubs were rapidly developing in the region.

The Report of the Legal Services Review Committee ('LSRC')[13] was submitted to the government in June 1999. It was the result of consultations with foreign financial institutions, offshore law firms in Singapore, local banks, corporations, stockbroking houses, government-linked companies, insurance houses and local law firms.

In its Report, the LSRC noted that Singapore, Hong Kong and Tokyo were the premier regional financial centres in Asia in today's global financial landscape[14]. It attributed this to the fact that, among other things, international banking and financial institutions had located their regional headquarters or branches in these cities to supply the financial and investment needs of the region.

As the LSRC noted, financial services are provided within a legal framework. Legal services are indispensable to the creation, adaptation and distribution of financial products[15]. The views of the LSRC on the importance of the legal services sector in enhancing a regional financial centre are best reflected in the following extract from the LSRC Report:

> '*Legal services are a support service for the financial sector. Lawyers follow their clients and clients follow the business. Financial services generate legal services and not vice versa. A high quality and competitive legal services sector enhances the competitiveness of a financial centre. A weak legal services sector can impede the growth of a financial centre as it tends to restrict the development and adaptation of a full range of financial products, and leads to delays in the execution of these products. Absent a strong legal services sector, banking and financial institutions might find it more convenient to locate their regional or branch offices in another financial centre. However, the quality of the legal services sector per se does not draw in financial services from other financial centres. Hence, the legal services sector plays an important contributory role in enhancing competitiveness in financial services, but does not drive it.*'

Although the LSRC considered a strong legal services sector to be an essential part of the infrastructure of a regional financial centre, it acknowledged that it was only a necessary support service.

The recommendations of the LSRC echoed this view. The LSRC said that it was imperative that the legal services sector be adjusted in tandem with the gradual adjustments in the financial sector[16].

The Need

In considering the legal and financial knowledge needed for a financial centre, the LSRC coined the term 'legal software' as a short hand description of:

a. the legal and financial know-how underpinning each financial product;
b. the ability to conceptualise, create and structure products within a legal framework; and
c. the transactional skills to negotiate and execute them.[17]

The LSRC then categorised legal software into three tiers in order of complexity and sophistication[18]. The categorisation can be broadly summarised as follows:

Tier 1 Legal Software – the legal software required for 'cutting edge', Tier 1 financial products such as

- products developed in connection with project finance of infrastructure such as power or telecommunications
- international capital markets
- asset securitisation
- structured finance, including leasing and acquisitions

Tier 2 Legal Software – the legal software required for conventional, Tier 2, financial services such as

- issue and trading of capital market instruments including equities and bonds, swaps, futures and derivatives
- onshore and offshore financing such as syndicated and multi-currency loans
- mergers and acquisitions, takeovers and buyouts
- Singapore law opinions related to Tier 1 financial products

Tier 3 Legal Software – the legal software required for Tier 3 financial services such as

- Singapore law opinions on Tier 2 offshore financial products
- Domestic property mortgage financing, debentures and floating charges
- Conveyancing
- Consumer financing and unsecured loans

In its report, the LSRC noted that the Singapore legal profession needed to develop its Tier 1 legal software[19]. Also, banking and financial institutions had noted in their

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[11] Ibid.
[12] Speech to Parliament by the Minister of State for Law Assoc Prof Ho Peng Kee, at the second reading of the Legal Profession (Amendment) Bill on 17 January 2000, Singapore Parliamentary Reports, Vol 71 Column 736. See also LSRC Report, *supra* note 3, p 1.
[13] LSRC Report, *supra* note 3.
[14] LSRC Report, *supra* note 3, p 4.
[15] *Ibid*, p 32, n 1.
[16] *Ibid*, p 24.
[17] LSRC Report, *supra* note 3, p 8.
[18] *Ibid*, p 9.
[19] *Ibid*, p 16.

comments to the LSRC that the legal services sector could be improved by the provision of one-stop legal services for cross border transactions.

The LSRC also considered the impact of the Euro on the provision of legal services[20]. It was perceived that the emergence of the Euro as an alternative currency for international financing may generate a demand for a new preferred governing law in Euro financing. Since such governing laws would most likely be European, the LSRC found that it was necessary to have a ready supply in Singapore of legal services in European laws.

The LSRC listed the following additional needs:

- To locate more top-ranking offshore law firms in Singapore with Tier 1 legal software
- For Singapore lawyers to provide efficient and effective legal services for the Singapore law segment of cross-border financial transactions
- To intensify collaboration between offshore and Singapore law firms for an efficient and expeditious supply of legal services in cross border financial transactions
- To nurture local legal capability to drive the future developments of the legal sector and ensure its long run competitiveness

The Recommendations

The LSRC recommended, *inter alia*, Joint Ventures and Formal Alliances between Singapore law firms and offshore law firms to fulfill two functions:

1. to facilitate the acquisition by Singapore lawyers of Tier 1 legal software; and
2. to facilitate the efficient and effective delivery of legal services for cross border financial transactions through a one-stop service.

The recommendations of the LSRC were adopted by the Singapore government. The result was the Legal Profession (Amendment) Act No 4 of 2000[21]. At the second reading of the Legal Profession Amendment Bill in January 2000[22], the Minister of State for Law, Associate Professor Ho Peng Kee explained that the Bill gave effect to the Committee's recommendations which

> '*in essence, seek to promote a more vibrant legal services sector through closer collaboration between offshore and Singapore lawyers. The focus is on how to supply legal services more conveniently and efficiently and, at the same time, upgrade the legal expertise of local lawyers.*'[23]

Associate Professor Ho said that the main objective of the opening up of the legal market was

> '*... to ensure that both the local and offshore legal services sector can meet Singapore's strategic legal needs, in the context of ensuring Singapore's competitiveness in financial services, and to upgrade the legal expertise of local lawyers; ... Singapore aims to be a strong financial centre with good legal support services, a major centre for legal and financial services, in the years to come.*'[24]

Associate Professor Ho outlined the following benefits of opening the legal market[25]:

1. The opening of the legal market would bring benefits to players in the financial sector who can obtain '*one-stop service*' for their legal needs in international transactions.
2. Foreign law firms will also bring in legal expertise in other fields such as information and communications technology.
3. Singapore law firms will benefit because:
   a. they will be exposed to the organisational, management and marketing techniques of their offshore partners;
   b. they may gain access to clients of the offshore firms;
   c. they can upgrade their legal expertise in areas of financial work which they otherwise may not be exposed to;
   d. they may use the partnership with offshore firms as a springboard to expand their regional practice; and
   e. there will be greater possibility of expanding the scope of Singapore law as a governing law for regional financial transactions;
4. Offshore law firms will benefit because:
   a. they will have a Singapore law firm to complement their global network of law firms;
   b. they can practise Singapore law;
   c. they can provide a one-stop service which they presently cannot without using a Singapore law firm;
   d. in time, they will be able to induct the best of Singapore's legal talent into their global practice; and
   e. they will feel more at home in Singapore if they are able to work with Singapore lawyers for the same goals.

The mechanics of liberalisation

The Singapore government recognised the urgent need for liberalisation. But as it was in the nature of an experiment, it also wanted to proceed cautiously. The measures introduced in January 2000 were therefore a measured balance.

The LSRC recommended that foreign law firms could enter the Singapore legal market in two ways. First, through formal law alliances ('FLAs') and second, via JLVs[26].

FLAs differ from JLVs in that JLVs are a separate legal entity. Section 130B(2) of the LPA provides that a JLV may be constituted in one of three ways:

a. by a partnership between a foreign law firm and a Singapore law firm;
b. by the incorporation of a company under Singapore law with shares in the company held by a foreign law firm and a Singapore law firm or by their respective nominees; or
c. by any other arrangement or means as may be prescribed.

In contrast, there are no constraints in relation to how an FLA may be constituted[27]. Further, a foreign law firm or a Singapore law firm may apply for

[20] *Ibid*, p 19.
[21] *Supra* note 1.
[22] Singapore Parliamentary Reports, Vol 71.
[23] *Supra* note 12 column 736.
[24] *Supra* note 5 column 378.
[25] *Ibid* columns 737 to 738.
[26] *Supra* note 7.
[27] Section 130D, LPA.

registration of more than one formal alliance and a registered FLA may comprise of more than two constituent law firms[28].

The privileges of a JLV are as follows[29]:

a. to practice in areas of legal practice mutually agreed between the law firms constituting the JLV;
b. foreign lawyers who are employed by or who are partners or directors of the JLV may practice Singapore law upon registration with the Attorney General[30];
c. the JLV may market or publicise itself as a single service provider competent to provide legal services in all areas in which the constituent law firms are qualified to provide; and
d. the JLV can bill its clients as a single law firm.

Provision is made for other privileges to be conferred or prescribed by law.

Under the LPA, with the approval of the Attorney General, foreign lawyers are permitted to advise on Singapore law in finance, banking and corporate matters, but cannot appear in the Courts, or handle conveyancing[31].

The privileges of an FLA are as follows[32]:

a. the FLA may market or publicise itself as a single service provider competent to provide legal services in all areas in which the constituent law firms are qualified to provide;
b. the FLA can bill its clients as a single law firm; and
c. a foreign lawyer who is a partner, director or an employee of a foreign law firm which is part of an FLA may prepare all the documents in a transaction involving the law or regulatory regime of more than one jurisdiction except that any legal opinion relating to Singapore law must be given by a Singapore lawyer who has a practising certificate in force.

Apart from the limitations placed on the manner in which foreign law firms can enter the Singapore scene, the Attorney General's office also declared that only a limited number of licences would be granted to foreign law firms.

Responses to liberalisation

The initial reactions of the legal profession to the liberalisation were mixed. There was a healthy dose of skepticism and anxiety when the LSRC Report was first released. Foreign lawyers were quoted as saying that the JLV structure gave the foreign law firms nothing that they did not already have[33]. Others expressed the concern that the JLV structure meant that a foreign law firm would be tied to one local law firm, therefore cutting it off from valuable referral work from other local firms[34].

The reaction from the local law firms was also mixed. Some Singapore lawyers voiced the concern that the opening of the market would adversely affect small firms[35]. Others were worried that there would be increased competition for the recruitment of fresh graduates who would inevitably be attracted to the higher pay and apparently better prospects offered by JLVs and FLAs.

Some of these views were addressed by the Minister of State for Law at the second reading of the Bill[36]:

> '*…small firms will continue to have a role. I think much has been said about this too. Indeed, out of the 800 law firms in Singapore, about half, 430 are actually sole proprietorships. So despite the fact that the practice of law has become harder - quicker deadlines, greater client expectations - there is still a large number of small firms out there - sole proprietorships, small partnerships - who cater to Singaporeans who need services in contract matters and advice on family law and criminal laws. The point is that Singaporeans need not fear that arising from this opening up, costs will rise so astronomically that they cannot even have access to legal services. This approach really, together with the other amendments on corporatisation, increases the choice for Singapore consumers. We are talking about the mode of delivering legal services. So besides the sole proprietorship, you have got your small partnerships. And indeed even for small partnerships, some of them have created niche practices. Others are larger partnerships. And now there will be law firms in the form of corporations. Then you have got informal law alliances which are existing and soon formal law alliances, and joint ventures. So there is a whole range. Even as there is a whole range of consumers, now there is a whole range of suppliers, and the matching can be done by the market. …*'

Effects of Liberalisation

The effects of liberalisation on the profession were examined in a newspaper report which, interestingly, was published in Malaysia. In an article published in May this year in the *New Straits Times*[37], nine months after the licences were granted to foreign law firms to enter into JLVs, the President of the Singapore Law Society, Mr R Palakrishnan, was reported as saying that although there were initial worries about competition from the smaller and medium sized firms, there had thus far not been a significant negative impact. This was echoed by other lawyers who were reported as saying that the liberalisation had made '*not a whit of difference to them*'.

For the law firms which have entered into JLVs, I can only speak about the experience of Freshfields Drew & Napier. It has been positive. Drew & Napier LLC, which corporatised in 2001, has benefited from access to a wider base of clients and the goodwill accruing from an association with an international name. We now have

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[28] Section 130D(2), LPA.
[29] Section 130B(6), LPA.
[30] Section 130C, LPA.
[31] Section 130C(2), LPA.
[32] Section 130D(6), LPA.
[33] Rich Meyer, 'Singapore's reforms: too little, too late?', *International Financial Law Review*, September 1999, at p 17.
[34] *Ibid.*
[35] *Ibid.*
[36] *Supra* note 5 at column 775.
[37] 'Singapore has taken the bold step of allowing foreign law firms to enter its home turf, and to its good fortune, hasn't come out worse off,' Carolyn Hong, *New Straits Times*, May 2001.

unrestricted access to the latest legal know-how. Our lawyers are regularly sent on three to six month attachments to the international offices of our joint venture partner. They have returned with experience and knowledge which they have had immediate opportunities to apply in the international and cross border transactions they handle. There is much to be learnt from Freshfields' knowledge management model, and we continue to pick up useful tips on the administration of law firms. An immediate benefit of the JLV is that our corporate lawyers are exposed to a larger number of multi-jurisdictional transactions.

At the same time, lawyers practising in areas not directly affected by the liberalisation have also benefited. They too are given the opportunity of attachments, and they pick up the latest techniques in their areas of practice. When they return, they became catalysts for change, and the process over time will, we hope, make us more efficient and effective.

The Singapore government has struck a judicious balance between opening the door so that Singaporeans acquire expertise in Tier 1 work and retaining the status quo in areas where the Singapore Bar needs to develop on its own. Advocacy in the courts remains a preserve of Singapore lawyers, save where Queens' Counsel are admitted. We have cut our ties with the Privy Council and the Singapore courts (like their Malaysian counterparts) having developed a jurisprudence unique to local circumstances. Unlike the benefits of mentorship in relation to Tier 1 work, over-reliance on Queens' Counsel has the adverse effect of cocooning our litigation lawyers. Because Queens' Counsel are not admitted as liberally as in the past, Singapore lawyers are forced to take on complex cases, which in turn hones their written and oral advocacy.

In the circumstances, liberalisation has helped the Singapore Bar across the spectrum. Corporate lawyers are given the opportunity to learn and to develop personally. The financial and multi-national clients benefit from the depth of the expertise that is now available. Singaporean advocates continue to be given every opportunity to improve their standards (what better way than standing up in court?). Investors who want to have foreign lawyers argue their cases in Singapore can resort to arbitration. Our arbitration laws permit foreign lawyers to argue in Singapore. Medium sized and smaller firms are not prejudiced because their niche practices have not been affected by the JLVs or FLAs.

Malaysia

Under the Malaysian Legal Profession Act[38] ('Malaysian LPA'), the Attorney General is empowered to issue special certificates for admission as advocate and solicitor of the High Court to foreign lawyers who have been practicing for a minimum of seven years[39]. Foreign law firms are not allowed to establish offices in Malaysia.

Just before Singapore amended its LPA to allow the entry of foreign law firms, Malaysia amended its LPA[40] in February 1999[41]. Under the newly inserted ss 28A through 28E, the Attorney General has been given the power to issue special certificates for admission to foreign lawyers who have been practicing for a minimum of seven years.

According to a newspaper report[42], the Malaysian Bar Council opposed this move. Datuk Dr Cyrus Das, the Malaysian Bar Council President at the time, is quoted as saying

> '*The Bar Council expresses its strong protest at bringing into force of the amendments nearly 20 years after the amendments were first enacted by the Parliament.*
>
> *It is highly incongruous that any such measure should now be invoked when the Bar has rapidly increased in size and there are enough lawyers of ability and competence, and who are fearless and independent to undertake any case in court for a client.*'

Later in the same year, the Bar Council was reported to have launched a nationwide hunt for law firms used as 'fronts' for foreign lawyers practicing illegally in Malaysia[43]. The then President of the Malaysian Bar Council, Mr RR Chelvarajah, is reported as saying that the illegal practice of law by unauthorised foreign lawyers was detrimental to the growth of the legal profession. He expressed the very valid view that members of the public would have little redress if problems crop up[44].

These concerns are not ill founded. The use of 'fronts', while offering very little or no protection to the public, offers very little incentive for Malaysian lawyers to develop their skills. Ultimately, the public suffers. The practice of using 'fronts', if it exists, is a crying shame because there are, in Malaysia, many lawyers of ability and competence. Their reputation for being fearless and independent in the courts is legendary.

The issue, however, is not whether liberalisation is good for Malaysia today but whether it will serve the country's interests in the long term. With globalisation and increased competition between countries in the region for the investment dollar, there will be an increasing need to make Malaysia a sexy destination. But equally important is the very important need to keep bright

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[38] Legal Profession Act 1976 (Act 166) ('Malaysian LPA').

[39] Sections 128A to 128E, Malaysian LPA.

[40] Legal Profession Act 1976 (Act 166).

[41] The amendment was effected through the Legal Profession (Amendment) Act 1978 (Act A419/78) which came into effect on 1 February 1999 vide PU (B) 33/99.

[42] 'Foreign lawyers can now practice in KL', *The Straits Times*, 11 February 1999.

[43] 'Foreign lawyers "using" local firms as "fronts"', *The Straits Times*, 27 October 1999.

[44] Prior to liberalisation, foreign lawyers practising in Singapore were not subject to professional discipline under the Legal Profession Act. This lacuna has been filled in respect of JLVs and FLAs by s 130F of the Legal Profession Act which provides that complaints in respect of a foreign lawyer are to be referred to the Attorney General. Section 130F(3) provides that the Attorney General may, if he is of the opinion that there is sufficient reason to do so,

a. cancel or suspend for such period as he may think fit the registration of the foreign lawyer to practise Singapore law;
b. censure the foreign lawyer;
c. order the foreign lawyer to pay a penalty not exceeding $5,000 or such other higher sum as may be prescribed; or
d. make such other order as he thinks fit.

young lawyers in the country. A young, ambitious and intelligent graduate in law has many options and there are no territorial limits to his choices. Apart from the prospect of more exciting work with an international law firm, the rewards are better.

Malaysia needs to keep these people. To do that, it needs to offer them opportunities at home which are almost as, if not equally, attractive as those in the main financial centres. It will not be possible to prevent all the bright ones from practising abroad. But many will return if they know that they will be sufficiently challenged at home.

The title of this conference is '*Malaysia in the 21st Century: Towards a Culture of Integrity, Justice and Knowledge*'. Malaysia has a national vision, Vision 2020, to be a fully developed country by 2020. In his speech to the Malaysian Business Council unveiling Vision 2020[45], Prime Minister Dr Mahathir Mohamad said:

> '*The second leg of our economic objective should be to secure the establishment of a competitive economy. Such an economy must be able to sustain itself over the longer term, must be dynamic, robust and resilient. It must mean, among other things: A diversified and balanced economy with a mature and widely based industrial sector, a modern and mature agriculture sector and an efficient and productive and an equally mature services sector; an economy that is quick on its feet, able to quickly adapt to changing patterns of supply, demand and competition; an economy that is technologically proficient, fully able to adapt, innovate and invent, that is increasingly technology intensive, moving in the direction of higher and higher levels of technology; an economy that has strong and cohesive industrial linkages throughout the system; an economy driven by brain-power, skills and diligence in possession of a wealth of information, with the knowledge of what to do and how to do it; an economy with high and escalating productivity with regard to every factor of production; an entrepreneurial economy that is self-reliant, outward-looking and enterprising; an economy sustained by an exemplary work ethic, quality consciousness and the quest for excellence; an economy characterised by low inflation and a low cost of living; an economy that is subjected to the full discipline and rigour of market forces.*'

Your Prime Minister's vision is impressive. I have no doubt that Malaysia will achieve its goal. He has identified the ingredients for success. But perception is equally important. Malaysia needs to demonstrate to the world that it has the requisite skills across the entire spectrum. Bankers and other investors demand a low cost and more profitable replica of the financial hubs where they are headquartered. They expect services of a quality which they are accustomed to in New York or London. We must recognise that they also want to deal with names familiar to them.

The legal sector must see itself as an integral part of the team which will help Malaysia realise its vision. The Malaysian government can transform all areas of enterprise but if the legal sector chooses to stay where it is, the team cannot be as strong as the opponent, which has got the best players in the game to play for them.

The legal sector will not be worse off if the market is liberalised. Foreign firms which are given the benefits of access must take on a corresponding responsibility to develop legal talent. More importantly, the Malaysian Bar will send a signal that it is has adapted and is fully prepared to innovate and invent. That cannot be but a positive signal to the world of investors.

Liberalisation will also pre-empt impending (but inevitable) changes to international rules. The General Agreement on Trade in Services ('GATS')[46] cannot be ignored. IT calls transparency in professional regulation. Applied to legal services, this means that rules governing admission and conduct of practice must be clear, and any restrictions on access must be objective and justifiable in the public interest[47]. It is only a matter of time before liberalisation and internationalisation will affect the legal and financial services sector. When that occurs, law firms that are already globally positioned, like many top US and European firms, will be best able to ride the crest of the wave. Local firms that have joint ventures or alliances to such firms will stand to gain.

Whether or not the Singapore government had GATS in mind, the advance preparation of its legal services sector for international competition and global work will place Singapore in a better position to take advantage of the increased flow of regional and global trade that members of the World Trade Organisation are working towards.

The Singapore experiment is designed to achieve a long term goal. Change was never going to be easy, but the Singapore government forged ahead. Singapore cannot hold itself out as a financial hub without all pistons firing. Singapore cannot afford for investors to be perplexed about why, when all other sectors are liberalising, the legal industry is not. Initially, it was thought that the change would be extremely difficult, and that the Singapore Bar might drag its feet. However, because of the balance struck by the government, the credibility of the LSRC, and the fact that Singapore lawyers now believe that there is no option but to change to stay in the game, the transition has been smooth and painless.

Conclusion

Singapore has adopted a cautious approach which has resulted in a win-win situation for all concerned. It may well be that we will liberalise even further down the road. Whether that happens will depend on our experience and the compulsions of globalisation. Malaysians must choose its own path.

[45] http://www.smpke.jpm.my/main/vision2020.htm
[46] Annex 1B to the Marrakesh Agreement Establishing the World Trade Organisation, 15 April 1994.
[47] Bernard L. Greer, Jr, 'Professional Regulation and Globalisation : Toward a better balance', *Global Law in Practice*, 1997, J Ross Harper, Ed.

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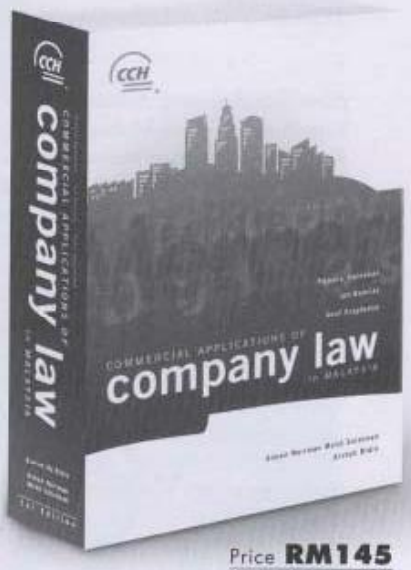

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Gurdial Bakan Singh; 14-3 (3rd Floor), Jalan Sri Hartamas 8, Taman Sri Hartamas, 50480 Kuala Lumpur; Tel: 03-62019526; Fax: 62019527

S. Letchumanan & Associates; No. 71-1 & 73-1, Jalan Intan 4, Bandar Baru, 36000 Teluk Intan, Perak; Tel:-; Fax:-;

Loh & Co; Tel: 03-23000403; Fax: 03-23000420 (Change of tel no. to 8-digit)

Jaffar & Menon; Tel: 03-23811500; Fax: 03-23811505; Email: jfmenon@pd.jaring.my (Change of tel no. to 8-digit)

Branches

Ahmad A. Rashid & Co; No. 104, 1st Floor, Jalan Mayang Pasir, Taman Sri Tunas, 11950 Bayan Baru, Pulau Pinang; Tel: 04-6465804; Fax: 04-6465819

Gan & Asociates; No. 32-1 (1st Floor) Jalan USJ 10/1E, UEP Subang Jaya, 47620 Subang Jaya, Selangor; Tel: 03-56372481; Fax: 03-56372125

Jesvant & Co; No. 11-4, Subang Businss Centre, USJ 9, Jalan USJ 9/5Q, 47620 UEP Subang Jaya, Selangor; Tel: 03-80236589; Fax: 03-80236569

Shahriza Shukor & Co; No. 23 (1st Floor), Jalan Mawar 2, Taman Pekan Baru, 08000 Sungai Petani, Kedah; Tel: 04-4252077; Fax: 04-4258099; Email: ssncosp@tm.net.my

Sim & Partners; No. 47-01, Jalan Permas 9/5, Bandar Baru Permas Jaya, 81750 Masai, Johor; Tel: 07-3885903; Fax: 07-3885900

Suzana Ismail & Partners; No. 875, First Floor, Taman Mewah, 1 ¼ Mile, Jalan Pantai, 71000 Port Dickson, Negeri Sembilan; Tel:-; Fax:-;

New Firms

Badariah Yahya & Co; 1352, 1st Floor, Kompleks Perniagaan Masjid Tanah, 78300 Masjid Tanah, Melaka; Tl:-; Fax:-;

GK Khoo & Co; 2-2-B, Halaman Midlands, 10350 Penang; Tel: 04-2268375

Harcharan & Co; Suite 17-11, 17th Floor, Plaza Permata, Jalan Kampar, 50400 Kuala Lumpur; Tel: 03-40448826; Fax: 03-40446826; Email: jujh14@hotmail.com

Neo & Associates; 25-1, Jalan PJS 11/28B, Bandar Sunway, 46150 Petaling Jaya, Selangor; Tel:-; Fax:-;

Nirmala Sri Raman & Associates; No. 48 (First Floor), Jalan Tunku Hassan, 70000 Seremban, Negeri Sembilan; Tel:-; Fax:-;

Norizan Mahadi & Co; 572, Lorong Cenderawasih 3, Taman Paroi Jaya, 70400 Sremban, Negeri Sembilan; Tel/Fax: 06-6771124;

Raja Samsul & Associates; No. 27, Jalan Lengkok Pandamaran Jaya 99, 42000 Port Klang, Selangor; Tel:-; Fax:-;

Ravichandra Suppiah & Co; Unit A-6, 6th Floor, Excella Business Park, Jalan Ampang Putra, Taman Ampang Hilir, 55100 Kuala Lumpur; Tel:-; Fax:-;

Shahabudin & Co; No. 37, Jalan Limau Besar, Bangsar Park, Bangsar, 59000 Kuala Lumpur; Tel: 03-20936605; Fax: 03-20936604

U.K. Mohan & Associates; Block A3, Unit 932, Leisure Commerce Square, Pusat Dagang Setia Jaya, No. 9, PJS 8/9, 46150 Petaling Jaya, Selangor;

Firms: Change Of Name

G. Pereira & Associates (**Formerly L. Pereira & Associates**)
Kuldip & Company (**Formerly Kuldip & Associates**)
M.W. Lian & Associates merged CY Ngeow & Associates (Practice Under The Name Of **Messrs CY Ngeow & Associates**)
Manjeet Kaur & Associates merged Khor & Associates (Practice Under The Name Of **Messrs Manjeet Kaur & Associates**)
Raja Ismail & Associates merged Amril Ghazaly & Co (Practice Under The Name Of **Messrs Raja Ismail & Amril Ghazaly**)
Razaliah Lim (**Formerly E.S. Lim & Associates**)
Subbiah Rayan And Co (**Formerly Subbiah And Company**)

Members who have ceased practice

Kuala Lumpur		
Haziffli b Md Saad	H/190	31.08.2002
Lok Choon Hong	L/850	30.06.2002
Liza Hanim bt Zainal Abidin	L/758	19.10.2002
Md Fauzi b Othman	M1080	28.02.2002
Nazmin b Mohd Rias	N/782	11.11.2002
Noorhayati bt Abu Bakar	N/874	19.02.2001
Ong Eu Jin	O/194	01.10.2002
Razia bt Fakhruddin	R/320	15.09.2002
Safiah bt Husin	S/627	25.09.2001
Susila Devi a/p Kumarasamy	S/104	03.12.2002
Sharifah Thuraya Albar	S/850	17.07.2002
Salinder kaur a/p Gurcharan Singh	S/1294	04.02.2002
Shireen Sidhu	S/832	01.10.2002
Wang Min Yen	W/420	15.11.2002
Wan Hadita b Mohd Yusof	W/263	01.11.2002
Selangor		
Halimaton Saadiah bt Daud	H/148	01.01.2002
Kutbuddin b Asgar Ali	K/273	01.10.2002
Mohd Syahkirin b Mahpot	M/1184	01.11.2002
Tan Han Seng	T/718	31.07.2002
Selvakumar a/l kanagaratnam	S/1364	01.09.2002
Penang		
Lee Mei Chien	L/671	15.09.2002
Negeri Sembilan		
Adrian Abdul Ghani	A/580	31.10.2002
Chin Choong Sang	C/205	26.11.2002
Johor		
Lai Sheau Wei	L1107	01.03.2001
Pahang		
Rosila bt Che Amatt	R/136	01.11.2002

Commmonwealth Medico-Legal Conference: Perspectives in Tackling Medico-Legal Controversies

Grand Seasons Hotel, Kuala Lumpur

17 – 19 JANUARY 2003

Jointly organised by the Commonwealth Medical Association, the Commonwealth Lawyers Association, the Commonwealth Dental Association and the Royal Commonwealth Society (Malaysian branch). Supported by the Malaysian Medical Association, the Bar Council of Malaysia, Malaysia Dental Association, Medico-Legal Society of Malaysia and the Malaysian Airlines System Berhad. Discusses and challenges current ideas and practices in medical ethics within the Commonwealth countries. Main topics of discussion are 'Unwanted Pregnancy: Medical and Ethical Dimensions', 'Assisted Reproductive Technologies: Boon or Bane', 'Doctors are not God', 'Medical Care for Persons in Detention', 'Contemporary Issues in Risk Management' and 'Healthcare in the Multicultural Commonwealth'. Doctors, lawyers, health administrators, NGOs and journalists are encouraged to attend. Contact Alice Joseph at Tel: 03-4041 1375/8972; Fax: 03-4043 4444; Email: mma@tm.net.my; Website: www.mma.org.my/event/cmlc.htm.

Inter-Pacific Bar Association Conference and Annual Meeting

New Delhi, India

16 - 19 FEBRUARY 2003

For full details and registration forms, visit www.ipbaindia2003.com or e-mail info@ipbaindia2003.com to obtain a brochure.

World Women Lawyers' Conference

Royal Lancaster Hotel, Bayswater, London

30 JUNE - 1 JULY 2003

Organised by the IBA. The content has a balance between learning how women lawyers are contributing in various different ways to public interest work and how they can widen their role in this area. The conference will cover two days of focused working sessions and networking events. Showcase sessions focus on 'The Role of Women in Conflict Resolution' and 'Economic Empowerment of Women'. Working sessions cover an academic forum, insolvency/litigation, employment/immigration law, family law/succession issues, mergers and acquisitions, management, energy law, multi-cultural business negotiations, banking, marketing, in-house counsel and privacy vs public good. For further information, visit www.ibanet.org.

13th Commonwealth Law Conference 2003: Common Law, Common Good, Common Wealth

Melbourne, Australia

13 - 17 APRIL 2003

Organised by the Law Council of Australia; Law Institute Victoria; Commonwealth Lawyers' Association. For further information, visit www.mcigroup.com/commonwealthlaw2003.htm; e-mail: comlaw@mcigroup.com.

41st Annual Congress of AIJA

JW Marriot Hotel, Hong Kong

27 - 31 AUGUST 2003

Organised by Association Internationale des Jeunes Avocats (International Assocation of Young Lawyers), a world leading Association of lawyers under 45 years of age, with a membership of more than 3,000 lawyers from 80 countries. In addition to a seminar concentrating on the legal aspects of doing business in China, the AIJA standing commissions will present the following topics: Covil Litigation and International Arbitration - the enforcement of foreign judgments in Asia; Corporate Acquisition and Joint Venture Commissions - the developments and evolution of public takeovers; Banking and Finance and International Business Law Commissions - venture capital; New Technologies and Intellectual Properties and Telecommunications Commisssions - market liberalisation and regulatory concepts relating to the internet; Anti-trust and Distribution Commissions - horizontal agreements; Labour Law Commission - collective redundancies; Family and Estate Law and Tax Law Commissions - offshore estate planning; Future of the Profession and Human Rights Commissions - multi-disciplinary practices in relation to young lawyers; and Insolvency Law Commission - Enron and beyond. For further information, visit www.icc.com.hk/aija2003; e-mail: aija2003@icc.com.hk; Tel: (852) 2559 9973; Fax: (852) 2547 9528.

COMMONWEALTH LAW CONFERENCE RAPIDLY APPROACHING

Corporate Governance: A 'Challenge' to Corporate Counsel

The countdown to the 13th Commonwealth Law Conference in Melbourne is well underway.

The Chairman of the Organising Committee of the 13th Commonwealth Conference, Mr Mark Woods said today the line-up of some of the world's top legal professionals for the conference, is now being finalised. Amongst the speakers is a leading United States attorney who has advised American presidents and major corporations and played a leadership role in the legal profession through his work for the American Corporate Counsel Association (ACCA).

Mr Woods said the four days of business sessions promised debate and discussion on many of the seminal issues facing lawyers, governments and communities around the world today.

The conference, to be held in Melbourne from 13 – 17 April 2003, is hosted by the national peak body representing Australia's legal profession, the Law Council of Australia and organised by the Law Institute of Victoria. The joint major sponsors are law firm, Freehills and Emirates airline, along with 41 supporting sponsors.

While the bulk of the conference participants will be lawyers from around the Commonwealth, leading US attorney, Mr Bill Lytton, a former adviser to two American Presidents Crime Commissions and a number of major corporations.

Mr Lytton was Deputy Special Counselor to US President Ronald Reagan coordinating Iran-Contra Investigation matters for the President. He continued as a consultant to the Presidential Counsel's office for some time after returning to his law firm and also acted as Special Counsel to President George Bush.

Corporate governance, the foremost issue exercising the minds of management and legal counsel around the world, will be a primary focus for Mr Lytton from his unique perspective, currently as Executive Vice President and General Counsel to giant US conglomerate, Tyco International Ltd.

Mr Lytton is quite emphatic about the role of in-house corporate lawyers, particularly in the current business environment, with unprecedented pressure on the profession worldwide. In effect, he has issued a challenge to lawyers to provide 'ethical leadership' and 'always strive do what is both right ethically and legally for your "client" (company).'

At a time when ethical and corporate governance issues have subsumed many companies globally, Mr Lytton's paper and participatory business session on 'the world of "new" corporate governance requirements' should provoke a great deal of interest from conference participants.

He will also canvass due diligence issues in mergers and acquisitions, what he sees as 'new responsibilities' for corporate counsel, the greater importance of, and respect for, the in-house (legal) functions and structural considerations in corporate law departments.

Conference Registration Brochures are currently in distribution. The brochure and Registration Forms are also posted on the Conference website – http://clc.efirst.com.au

Mr Woods urged delegates to register early and to also secure accommodation at anyone of the excellent hotels listed in the registration brochure.

For further information: Peter Dinham, Tasha Forget, Pacific Strategies, Melbourne, Australia; Tel: 61-3-9662 1953, Fax: 61-3-9663 7310, E-mail: peterd@pacstrat.com.au; tashaf@pacstrat.com.au

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Family Law Court - Are We on Track?

A seminar organised by the Family Law Committee, Bar Council
Bar Council Auditorium, Kuala Lumpur
18 JANUARY 2003, 8:30AM – 5:30PM

Much has been said about establishing family courts nationwide in the recent years. The Bar Council having realized the important role, in which the Family Court plays, had warmly welcomed it when it was first announced.

In year 2000, the Bar Council's Family Law Committee initiated a seminar entitled "The Setting Up of Family Court in Malaysia" whereby international speakers from Singapore, India, Australia, New Zealand and the United States of America were invited to share their countries' experiences in the matter. Local speakers were also invited to share their experiences on Civil and Syariah marriage and divorce legislation.

This year, the Family Law Committee is doing a follow up on the previous seminar, in which the question of "Family Court – Are We on Track?" will be addressed to a panel of distinguished speakers. This seminar aims to remind the participants; mainly from the legal profession and NGOs of their commitment in establishing a family court and to renew their resolve. The seminar will also be discussing the effectiveness of the reconciliation process by the Marriage Tribunal as required by the Law Reform (Marriage & Divorce) Act and the approach taken by the Social Welfare Department in this matter.

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The speakers for the seminar consist of Mr. Geoff Sharp, a commercial mediator and barrister from New Zealand, Mr. George Lim, an experienced family law practitioner from Singapore, YA Dato' James Foong, a High Court Judge formerly from the Family Law Division, representatives from the Social Welfare Department and Marriage Tribunal, Mr. Mark Woods, a family law specialist and child advocate from Australia, Ms. Ivy Josiah from the Women's Aid Organization and last but not least Mr. Kan Weng Hin, a member of the Family Law Committee. The seminar will consist of specific presentations from a mediator, family law practitioner and judicial's perspectives. The seminar will then conclude with a panel discussion whereby all speakers will be given an opportunity to address and discuss the issue together.

There will be a registration fee of RM25 per person. This includes tea, lunch and seminar materials. For those interested, please contact Lim Ka Ea at the Bar Council secretariat for further information and registration. Tel: 2691 1366, ext. 127 or email: kaea.lim@malaysianbar.org.my.