Regional Shipping

Shipping Law Updates

The Shipping Law Updates is a publication by our Regional Shipping Group which marshals legal expertise, industry insight, and commercial acumen in the fields of maritime and trade from the diverse talent pool of specialist lawyers at the Rajah & Tann Asia offices. The publication provides a snapshot of the key legal, regulatory, case law and industry developments in the region that have an impact on the shipping industry and your operations.

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Introduction

In this issue, we consider the occurrence of supply disruptions in commodities trading and the contractual remedies available to affected parties along the supply chain – specifically, we take a look at the example of the Indonesia oil export ban earlier this year and the options available under the Palm Oil Refiners Association of Malaysia contracts. On the topic of international trade, we also examine the relationship between the sale contract, the carriage contract and the financing arrangements in the context of a recent judgment of Malaysia's apex court in *Malayan Banking Berhad v Punjab National Bank* [2022] 4 MLJ 758 (Federal Court).

Moving on to topics involving vessels and crew, we discuss the statutory regimes for the payment of compensation to employees for workplace injury and how it interacts with private settlements, against the backdrop of the recent Singapore High Court decision involving a crewmember aboard a vessel in *M.T.M. Ship Management Pte Ltd v Devaswarupa & 3 Ors* [2022] SGHC 178. We also take a look at the Bombay High Court's decision *The Swedish Club v V8 Pool Inc. and Other.* (Commercial Appeal Nos. 108 and 111 of 2021), which considered whether crew wages incurred post-arrest could be ranked as Sheriff's (or marshal's) expenses, and whether recoupment of such wages and Maritime Labour Convention expenditure by a P & I club are also to be treated as Sheriff's expenses.

Malaysia: Supply Disruptions in Commodities Trading – How Do PORAM Contracts Address Export Bans?

Introduction

The world of commodities trading has seen several major events of supply disruption over the years, ranging from export bans to oil strikes to pandemics. 2022 saw the addition of another such event – Indonesia's palm oil export ban.

Indonesia banned the export of all palm oil derivatives from 28 April 2022 to 23 May 2022. As the world's biggest edible oils shipper, Indonesia's ban meant that monthly supplies of 300,000 to 325,000 tonnes of palm oil (about 60% of global supply) were taken off global markets. The action shocked global markets with the swiftness of its implementation and the breadth of its coverage.

The ban also raised the question of the contractual remedies and avenues available to affected parties along the supply chain. In this regard, standard-form Palm Oil Refiners Association of Malaysia ("**PORAM**") contracts often govern the relevant commercial relationships. This article thus looks at the effect of supply disruptions on parties who have contracted on PORAM contracts and the options available to them following the Indonesian palm oil ban.

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Obligations under PORAM Contracts – An Overview

CIF Contracts – In a *Cost, Insurance and Freight ("**CIF**") Contract*, the seller can ship the goods itself or allocate to the sale contract goods which are already afloat. The option of which method to adopt usually rests with the seller. Consequently, if one method of performance becomes impossible, the contract is normally *not discharged* as the seller is usually under a duty to adopt the alternative. The seller is excused from performance only when he is able to plead illegality as a defence or rely on *force majeure* or prohibition provisions (both explained below) to discharge the contract.

FOB Contracts – In a *Free on Board ("**FOB**") Contract*, it is the buyer's duty to nominate the ship, and it is the seller's duty to put the goods on board for account of the buyer. Just as in a CIF sale, the seller is excused from performance only if he is able to plead illegality or rely on *force majeure* or prohibition provisions.

The Prohibition Clause in PORAM Contracts

Perhaps the clause most relevant in the PORAM contract to the present situation might be the clause titled "*Prohibition*". This clause is included in all PORAM standard-form contracts for overseas sales.

- The clause states that a prohibition of export during the contract period by the Government of the country of origin where the port of shipment is situated shall be deemed by both parties to apply to the contract, and to the extent that the prohibition prevents fulfilment of the contract, the contract shall be extended by 30 days.

- If shipment proves impossible even during the extended period, the contract (or any unfulfilled part thereof) shall be cancelled.

The thinking behind the clause appears to be that export prohibitions in the palm oil industry are not unheard of, but that a temporary prohibition lasting less than 30 days should not *in itself* be allowed to derail the contract.

In practical terms, sellers who are affected by a supply disruption such as the Indonesia ban should:

- Firstly, determine if the standard-form clause remains applicable to their contract and has not been otherwise amended or curtailed by the text of the contract (read as a whole) or by bespoke clauses added to the contract or the context within which the contract was agreed.

- Secondly, if the clause remains standing, it seems likely that the ban will qualify as a prohibition of export that prevents performance of the contract. This is provided of course that it is a term of the contract that the palm oil should come from a source in Indonesia.

- Thirdly, sellers should notify buyers as soon as possible that they intend to rely on the clause, providing reasons for doing so.

- Fourthly, sellers should mention when the 30-day extension expires.

- Lastly, at the conclusion of the 30-day extension, sellers should re-assess the situation to determine if the contract can be fulfilled or if it should be cancelled.

If the prohibition clause cannot be relied on, sellers may attempt to argue that the ban constitutes a *force majeure* event (as understood within the *force majeure* clause), and which also provides a mechanism for cancelling the contract. This mechanism, however, varies greatly depending on the version of the PORAM contract adopted by the parties.

Conclusion

The PORAM contracts appear well-suited to deal with incidents of export prohibitions, and this is testimony to the far-sightedness of the drafters of the contracts. It remains, however, up to sellers to take timely steps to ensure compliance with the provisions of the contract to take advantage of the protection afforded by the "prohibition" clause.

Clive Navin Selvapandian, Partner from Christopher & Lee Ong's Shipping & International Trade Practice, is both a member of the Malaysian Bar's Shipping and Admiralty Law Committee and the Treasurer of the International Malaysian Society of Maritime Law.

Further Information

For more information, click here to read our Legal Update.

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Malaysia: Holy Trinity of Commercial Trade – The Sale Contract, the Carriage Contract and the Financing Arrangments

Introduction

Letters of credit are important tools in international trade, through which banks have placed themselves as intermediaries between sellers and buyers. Sellers have the security of looking to a bank for payment, provided that the *documents* evidencing the sale are in order, while buyers have the satisfaction of knowing that payment will be made only once the goods are in the hands of a carrier for transportation to the buyer.

It is estimated that up to 15% of all international trade today, totalling over US$1 trillion per year, is financed by letters of credit. It is further estimated that almost all these credits are subject to the *Uniform Customs and Practice for Documentary Credits* ("**UCP**").

This article will examine the relationship between the sale contract, the carriage contract and the financing arrangements. This examination will be done in the context of a recent judgment of Malaysia's apex court in *Malayan Banking Berhad v Punjab National Bank* [2022] 4 MLJ 758 (Federal Court).

The Facts

The Sellers sold 250 metric tons of copper wire to the Buyers for US$1.9 million. The sale was financed by an irrevocable letter of credit ("**LC**") with Punjab National Bank ("**Punjab Bank**") acting as the issuing bank. The LC was governed by the UCP 600 and it allowed for negotiation by any bank in Malaysia.

The documents that had to be presented under the LC included a *"Full set signed clean on board ocean bill of lading"*. Further, the LC stipulated at Field 47B Para G that : *"Short form, blank back, stale, freight forwarder, house of bill of lading is not acceptable, charter party bill of lading is acceptable"*.

The Sellers presented the documents specified in the LC to Maybank Banking Berhad ("**Maybank**"), which acted as the nominated bank. Upon satisfying itself that the documents were in order, Maybank paid the Sellers the US$1.9 million purchase price. Maybank then presented the documents to Punjab Bank, seeking reimbursement of the US$1.9 million.

Punjab Bank, however, concluded that the presentation was not in compliance with the terms of the LC and refused to reimburse Maybank, arguing that the bill of lading presented was a *"freight forwarder bill of lading"* and thus allegedly did not meet the requirement stipulated at Field 47B Para G.

Maybank then initiated proceedings against Punjab Bank seeking reimbursement of the US$1.9 million on the basis that the bill of lading indeed complied with the requirements of the LC.

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Decision of the Federal Court

The Federal Court held that Maybank was entitled to reimbursement and that the bill of lading was in fact in compliance with the requirements of the LC.

Notice of Refusal

Punjab Bank took the position that the issuing bank need not issue a notice of its refusal (pursuant to Article 16 of the UCP ("**Article 16**")) to negotiate the LC if there was a fundamental breach of the LC, and that the non-production of an ocean bill of lading amounted to such fundamental breach rather than a mere discrepancy.

The Court rejected this position, holding that the language of Article 16 is unequivocal in requiring a notice to be issued by the issuing bank if it refuses to negotiate the LC. The reason for the refusal to negotiate is irrelevant; nothing in the terms of the LC draws a distinction between a discrepancy and a fundamental breach.

Type of Bill of Lading to be Presented

Punjab Bank said that the bills were issued and signed by a freight forwarder, Diffreight Agencies (M) Sdn Bhd ("**Diffreight Agencies**"). The bills were therefore *"freight forwarder bill[s] of lading"* and thus did not meet the requirement at Field 47B Para G.

The Court, however, said that the bills of lading did not show that they were issued and signed by a freight forwarder as they were signed by Diffreight Agencies (M) Sdn Bhd *"as agent on behalf of the carrier Diffreight."* In any event, the fact that the bills of lading were signed by Diffreight Agencies on behalf of the carrier Diffreight indicated that the bills of lading were indeed ocean bills of lading.

The Court also took note of the role of banks when faced with a presentation of documents in a letter of credit transaction in that whereas banks hold themselves out as experts in handling documents, they hold out no expertise in the handling of goods or in the underlying factual situations. Indeed, Article 5 of the UCP provides: *"Banks deal with documents and not with goods, services or performance to which the documents may relate".* This gels with the requirement in Article 14(a) of the UCP, concerning the standard for examination of documents, that banks must *"determine, on the basis of documents alone, whether or not the documents appear on their face to constitute complying presentation."*

Manner of Negotiation of Documents

Punjab Bank's third complaint was that Maybank should not have paid the Sellers prior to seeking reimbursement from Punjab Bank.

The Federal Court dismissed this argument by holding that nothing in Article 7(c) of the UCP (which sets out the obligations of the issuing bank in the face of a complying presentation) requires this. The Court held that *"the precise manner of negotiation of the documents must be a matter for the negotiating bank."* In other words, the nominated bank is free to effect payment prior to making a *'complying presentation'* to the issuing bank.

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Practical Advice for Banks

In light of the issues that arose in the decision, it might be prudent for banks involved in letter of credit transactions to bear in mind the following points:

- Banks must be able to determine promptly if the documents presented under the letter of credit are in compliance with the terms of the credit. This is so given the *"five banking days"* timeline to determine if a presentation is in compliance and to issue a notice of refusal.
- If the documents are in any way defective, the bank should contemplate seeking an indemnity from the beneficiary prior to paying out. The indemnity should be no wider than necessary and sufficiently clear.
- When facing difficulty in deciding whether to reject or not, the paying bank may pay *"under reserve"*. In other words, if the issuing bank subsequently rejects the documents, repayment of the money can be claimed from the beneficiary (i.e. the seller) since the bank has made its position clear in reserving its rights.
- Banks might also explore the option of seeking clarification from the applicant of the credit (i.e. the buyer). The applicant might be prepared to accept documentation which is technically non-conforming, especially in a rising market.

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Singapore: Compensation for Workplace Injuries – Statutory Regime, Private Settlements, and the Maritime Industry

The Work Injury Compensation Act 2009 ("**WICA 2009**") and its successor, the Work Injury Compensation Act 2019 ("**WICA 2019**"), are statutory regimes providing for the payment of compensation to employees for injury suffered arising out of and in the course of their employment. The WICA 2019 applies to accidents that happen from 1 January 2020 onwards. The WICA 2009 and the WICA 2019 are substantially similar, though the updates in 2019 aim to encourage faster claims processing, fairer compensation and fewer workplace injuries.

Compensation payable under the WICA 2009 or the WICA 2019 is intended to provide an "alternative remedy" to common law damages in Singapore. The recent Singapore High Court decision in *M.T.M. Ship Management Pte Ltd v Devaswarupa & 3 Ors* [2022] SGHC 178 clarifies where private settlements between injured employees and their employers stand between these two remedies under the WICA 2009 regime.

Rajah & Tann Singapore's Ms Tan Tian Hui was appointed as young *amicus curiae* to assist the Court in this decision.

Factual Background

The facts of the case are straightforward. The Employee was a seafarer who passed away on board his serving vessel. Pursuant to the terms of the Employee's employment contract, the Employer paid the Employee's next-of-kin an agreed compensation amount of US$144,000 (the "**Settlement Sum**"). This sum represented the amount which the Employer was required under the employment terms to maintain by way of personal accident insurance coverage for seamen, such as the Employee. In consideration for payment of the Settlement Sum, the Employee's next-of-kin executed the usual release and discharge documents in the Employer's favour.

Despite receipt of the Settlement Sum, the Employee's next-of-kin lodged a claim with the Commissioner for compensation under the WICA 2009. The Commissioner for Labour issued a Notice of Assessment and later, a Certificate of Order ordering the Employer to pay the Employee's next-of-kin compensation of approximately US$139,000 (the "**Certificate Sum**").

In this appeal to the Singapore High Court, the Court was asked to consider the novel and important question of whether the Commissioner has the power under the WICA regime to take into account settlement payments when assessing the amount of compensation payable.

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Decision of the High Court

The High Court's decision is in the context of compensation paid by an employer to a deceased employee's next-of-kin under the WICA 2009. The Court held that where compensation is paid pursuant to a private settlement, the Commissioner is entitled but not obligated to take such payments into account for the purposes of computing compensation under the WICA 2009 regime.

The Commissioner may take such settlement payments into account if he/she considers it "fair and reasonable" to do so on the facts of the case. The High Court did not lay down any hard and fast rules delimiting the Commissioner's discretion under the WICA 2009 regime to decide on what would be fair and reasonable in any case. Nevertheless, the Court provided the following guidelines:

(1) The WICA 2009 regime does not aim to give injured employees (or their beneficiaries) double compensation in relation to the same injury.

(2) As an example of when an employer may be required to pay compensation under the WICA 2009 regime in addition to privately agreed settlement sums: If the facts of a case indicate that the settlement payment received by an employee was intended by the employer to be independent of any compensation received by the employee under the WICA 2009 regime, the Commissioner might decide to exclude such a payment from consideration.

In the light of the foregoing, the High Court found that the effect of payment of the Settlement Sum in this case was to reduce the amount of compensation payable by the Employer to nil. It was considered fair and reasonable to give the Employer credit for the Settlement Sum already paid because the Settlement Sum in fact exceeded the compensation that the Commissioner had assessed to be payable by the Employer. Further, the available evidence did not suggest that the Settlement Sum was intended to be paid to the Employee's next-of-kin independent of any claim brought under the WICA 2009 regime. The Court found that the intention of the provisions in the Employee's employment contract requiring payment of the Settlement Sum was simply to ensure *minimum* compensation obtained by an employee (or his beneficiaries) in the event of an injury.

Finally, the High Court also noted that the provisions in the WICA 2009 and the WICA 2019 are not the same. While the Court observed that the position regarding the effect of private settlement agreements should be similar under the WICA 2019, this point was left open in the judgment as it did not have to be decided.

Concluding Remarks

This decision serves to caution employers and their insurers to exercise circumspection when making private, *ex gratia* payments to injured employees or their families following a workplace injury incident.

Parties should also be aware of the alternative of payments under the relevant WICA regime either pursuant to a Certificate of Order requiring payment of an assessed amount, or pursuant to a settlement agreement entered between the employer and employee (or his next-of-kin) and which is recorded by the Commissioner as an order.

To err on the side of caution, employers and insurers are advised to ensure that private settlement payments are always made against clearly drafted agreements which should make clear that payments are not being made independent of any claim brought or to be brought under the WICA 2009 or the WICA 2019.

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Singapore: Recoverability of Wage Payments Made to Seafarers by a P&I Club as Sheriff's Expenses – A Landmark Decision in India

Introduction

The status of crew wages incurred post-arrest and a Protection & Indemnity Club's ("**P&I Club**") correlative right of recovery of crew wages disbursed, and sustenance provisions it supplies pursuant to the Maritime Labour Convention ("**MLC**"), has been the subject of limited judicial enunciation over the years. In the recent decision of *The Swedish Club v V8 Pool Inc. and Other.* (Commercial Appeal Nos. 108 and 111 of 2021), the Bombay High Court was given the opportunity to pronounce upon whether crew wages incurred post-arrest could be ranked as Sheriff's (or marshal's) expenses. The judgment also considered whether recoupment of such wages and MLC expenditure by a P&I club, in this case

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The Swedish Club ("**Club**"), are also to be treated as Sheriff's expenses by virtue of subrogation to all "top-drawer" recovery.

The judgment provides greater clarity on the treatment of such wages, as well as guidance on the actions that should be taken by the relevant parties post-arrest in the event of an abandonment. These principles may also be applicable and of relevance to other Commonwealth jurisdictions.

Rajah & Tann Singapore LLP ("**R&T**") was heartened by the opportunity to act alongside the Club's Hong Kong offices, and to formulate legal submissions in conjunction with its Bombay counsel team. The Club was advised by Kendall Tan and Yip Li Ming from the Shipping & International Trade Practice.

Brief Facts

The Vessel was arrested on 22 December 2020 pursuant to an order of the Bombay High Court. The Club was the former P&I insurer of the Vessel, and the MLC insurer.

On 7 January 2021, the crew of the Vessel alerted the Club of the developing crisis, in that the salaries were overdue and food and water were fast running out.

On 21 January 2021, to facilitate timely humanitarian intervention, the Club applied to the Admiralty Division of the Bombay High Court ("**Bombay Admiralty Court**") for leave to make certain payments in respect of maintenance of the Vessel and crew, and that all payments in respect of the crew were to be treated as Sheriff's expenses. The crew members had themselves also concurrently filed another application asking that their accrued wages be treated as Sheriff's expenses. Both applications were initially disallowed by the Bombay Admiralty Court.

Holding of the Court

Both the Club and the crew members appealed against the Bombay Admiralty Court's decision. In a landmark judgment, the Bombay High Court (Commercial Appeal Division) ("**Bombay Appellate Court**") allowed the appeals brought by the Club and the crew. The Club was thereby successful in recovering the payment of wages it made and provisions supplied to the crew as Sheriff's expenses.

In allowing the appeals, the Bombay Appellate Court took a pragmatic approach to the treatment of crew wages paid post-arrest in the event of a vessel being abandoned. The court recognised that crew members aboard a vessel, many of whom are foreigners to the jurisdiction, cannot be expected to expeditiously approach the Sheriff. Likewise, it is unrealistic to expect the Sheriff to file reports on its own accord in every such case. Importantly, the paramount consideration, in determining whether a Sheriff's report is required for wages to be classified as Sheriff's expenses, is the well-being of the crew members and the safety and/or preservation of the vessel.

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The decision significantly concluded that crew wages accrued post-arrest could be recovered as Sheriff's expenses without putting the crew or the MLC insurer to the trouble of filing a suit and proving their claims. The Bombay Appellate Court further considered the nature of the Club's obligations under the MLC and whether such obligations enabled payments for crew wages post-arrest to be classified as Sheriff's expenses. The court pertinently noted that the obligation placed by the MLC on the Club was a humanitarian one and gave the Club the right to stand in the shoes of the crew by subrogation or assignment and/or any other mode of transfer and claim any amounts paid for wages post-arrest.

Concluding Words

The Bombay Appellate Court's decision will be of immense benefit to MLC insurers and seafarers alike, in the India context, should the vessels on which they serve be arrested. The principles espoused by the Bombay Appellate Court will hopefully offer guidance elsewhere to this familiar predicament to stranded seafarers in other Commonwealth jurisdictions.

The decision is also invaluable in its enunciation of a set of judicial guidelines that should be adopted in the event that a vessel and those on board are neglected or otherwise abandoned by the vessel owner in an arrest scenario.

Further Information

For more information, click here to read our Legal Update.

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Our Indonesian office, **Assegaf Hamzah & Partners**, is the largest domestic law firm in Indonesia, with two offices including one in the shipping hub of Surabaya. Led by seasoned practitioners, we are widely recognised as a leading full service maritime and shipping firm providing advice on all aspects of shipping law, regulatory matters, and related arbitration work.

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Consistently ranked as a leading firm in shipping work by independent legal directories, the Vietnam office, **Rajah & Tann LCT Lawyers**, boasts capabilities in both contentious and non-contentious work. The firm's leading dispute resolution practice is particularly active in wet shipping matters, covering areas such as vessel arrests, salvage, collisions and cargo damage claims.

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Christopher & Lee Ong, our Malaysia office, is consistently recognised as a leading shipping firm and best known for our expertise in handling a full range of services extending to collisions and other casualties, cargo disputes, marine insurance claims, ship arrests, as well as ship finance.

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Our Cambodian office, **R&T Sok & Heng Law Office**, has a multitude of experience in providing insightful advice in relation to vessel registration, mortgage and ship arrests under the Cambodian law.

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Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law), our Philippines office, offers invaluable insights and case-handling capabilities for International Group P&I Club members in the Philippines maritime labour courts, and regulatory advice for operating specialised vessels particularly for the oil and gas sector in the country.

At **R&T Asia (Thailand) Limited**, we are proud to say our shipping law practice has come of age over the past decade. The practice is active across contentious work including conduct of collision actions in the local courts and security arrest work. It also has a vibrant shipping transactional portfolio that is known amongst Thai shipowners.

Rajah & Tann Myanmar Company Limited has the expertise to advise on a variety of trade-related disputes, regulatory issues and marine casualties, including collisions, berth contacts, groundings, and wreck removal.

Rajah & Tann Shanghai Representative Office is highly adept in both the non-contentious and contentious shipping matters. Our strength in shipping and commodities is backed by institutional clients such as banks (both local and foreign) and an international clientele made up of P&I Clubs, shipowners, charterers and commodity houses.

Find out more about our Regional Shipping Group [here](#).

If you would like to find out how we may assist you, do touch base with us at shippinglaw@rajahtann.com or our Regional Offices below.

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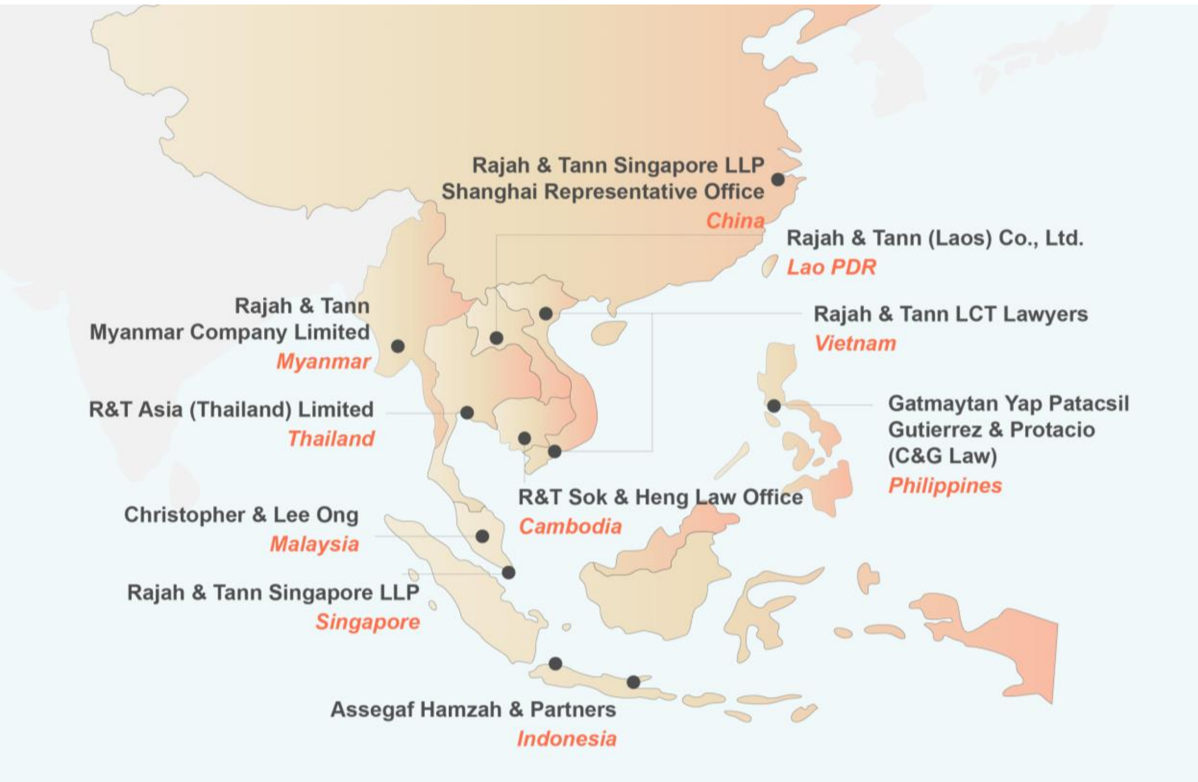

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