NEW CITY CHAMBERS

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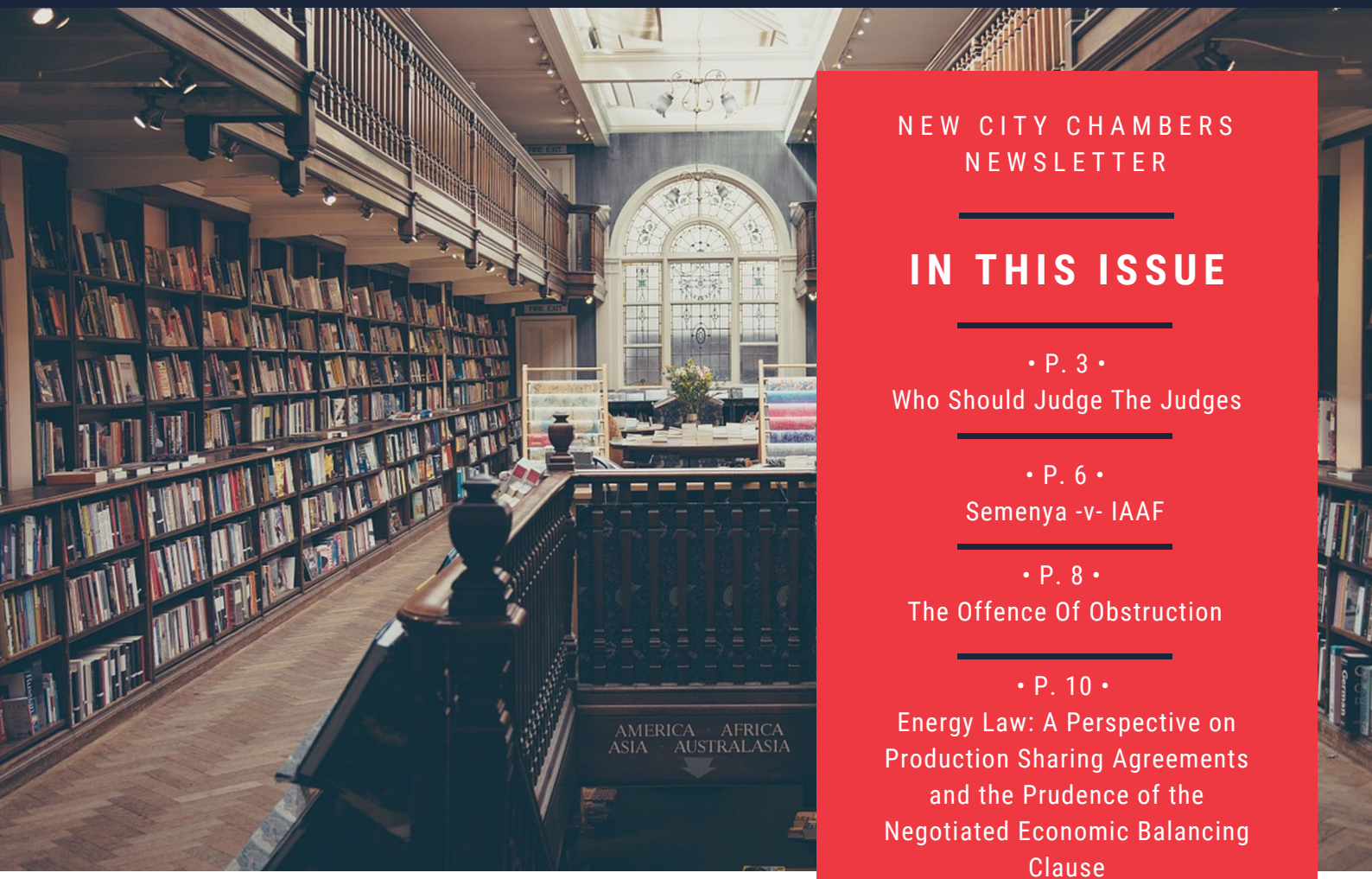

NEW CITY CHAMBERS NEWSLETTER

IN THIS ISSUE

THE FOURTH EDITION

EDITED BY PETRA RICHARDS

New City Chambers is a boutique law chambers located in downtown Port-of-Spain, minutes walk away from the courts.

Welcome to the fourth edition of the Chamber's Newsletter, Chamber Reading.

NEW CITY CHAMBERS

CHAMBER READING

We aim to provide an easy to read, yet informative, newsletter which broadly covers some of the areas we have been active in, within recent times.

Chambers was formed in 2017 to provide a client focused, research driven approach to the practice of law. We have grown from strength to strength serving a broad range of clientele, which includes other professional service providers to lay persons in a variety of contentious and non-contentious areas.

Our latest addition to Chambers is Mr. Jason Jones. Mr. Jones is a UK Commonwealth Scholar and co-founder of the 'Association of Caribbean Students for Equal Access to the Legal Profession' (ACSEAL) with established networks and Chapters in 7 countries across the English-speaking Caribbean.

We hope you enjoy our fourth edition of Chamber Reading.

New City Chambers Team

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WHO SHOULD JUDGE THE JUDGES

BY MATTHEW GAYLE

Described as a "formidable advocate", Matthew's work encompasses a variety of civil litigation and some criminal defence.

While Matthew accepts work in a broad range of areas, many of Matthew's cases have a constitutional and/or administrative law dimension. He has appeared as counsel in a number of recent important cases including

Isioma Loveth Eze v The AG

Markarchbald v the Trinidad and Tobago Defence Force

Jimdar Caterers v The BIR

Climate Control Limited v CG Construction Limited.

Keith Look Loy v TTFA (#1&2)

JADCO v Briana Williams (Jamaica)

In 2012, I delivered a paper entitled "Quis custodiet ipos custodes?" loosely translated "who judges the judges?" to a Multidisciplinary Research Conference out of the University of Birmingham, England while working out of the University College London's Constitution Unit on the Politics of Judicial Independence Project run by Professor Robert Hazell.

This article is written against the backdrop of the meeting of the Law Association of Trinidad and Trinidad and Tobago meeting Friday 27th September 2019 to discuss the possibility of Judicially Reviewing the Prime Minster of Trinidad and Tobago's decision not to invoke **section 137** of the **Constitution of The Republic of Trinidad and Tobago**. This is the first of the three-stage process set out in the Constitution for the removal of a senior judicial officer, in this case, the Chief Justice.

Here, I consider that the more poignant question is "who should Judge the Judges?" and submit the answer is dependent on the circumstances.

One thing is clear, the Chief Justice must not resign, nor should the Prime Minister invoke **section 137**. To the Law Association, while it is right that the Association let the view of its membership be known to the public at large, far more important root and branch issues require the level of zealous action now seemingly dominating the Association's day-to-day: decades long pre-trial detention; continuing professional education for lawyers, and access to

justice for the poor and under privileged to name three.

In court, the question of assessing the Judge's fairness and frankly suitability to hear cases assigned toher is in the first instance assessed by the Judge herself, with the assistance of the Attorneys-at-Law for the parties. It is generally accepted throughout the region's court's that the English law standard (**Porter -and- Magill** test) is to be applied to determine whether the "fair-minded and informed observer would conclude that there was a real possibility that the tribunal had been biased". If the answer is affirmative, the Judge must go.

In practice this means that challenges to the Judge are usually brought to her attention by the lawyers, who then seek to persuade the judge concerned as to why the judicial officer as to why the fair-minded and informed observer would deem recusal necessary or not as the case may be. Thereafter the usual appeals to the court of appeal and Judicial Committee of the Privy Council follow.

But the question about the Chief Justice does not arise in the context of his Judging; more fundamentally, the question is whether he is fit to hold the office of the Head of the Judiciary.

In other words, is he fit to be the Administrative head of the Judiciary in the Republic?

In this sense, in law, the decision falls to the Prime Minister to decide whether the Chief Justice is fit to hold office. Locally and regionally, there have been a number of examples the political actors attempting to influence the decision to 'impeach' Judges using this procedure. In this sense, the **section 137** procedure is susceptible to the Prime Minister being more keen to invoke proceedings against a Judge who she considers to be more aligned to his way of thinking. The inverse is also true.

Clearly the decision to invoke **section 137** must remain open to challenge by Judicial Review Proceedings. This remains an essential safeguard against a tyrannical Judge being protected by nepotism and cronyism.

It goes without saying, no question has been raised by any of Country's best legal minds to suggest that the Chief Justice is not a competent Court of Appeal Judge. Quite the opposite and he has spent numerous years as a High Court Judge, Court of Appeal Judge and now the country's longest serving post-independence Chief Justice.

The Chief Justice has presided over significant improvements in the system judicial system in the Republic. Introduction and development of the Civil Proceedings Rules and associated strives in alternative dispute resolution; increased certainty in terms of legal fees in contentious matters for users of the court; online probate searches; introduction of criminal proceedings rules and Criminal Court Masters; the Children' Court immediately spring to mind.

Is there more work to be done? Clearly.

Have all the new initiatives been seamless and issue free ab initio? No.

It is my thesis however, that Independence of the Judiciary and its corollary security of

tenure, being paramount, require that the Honourable Chief Justice not heed calls to resign. The fact that the Law Association's recommendation to the Prime Minister to commence proceedings is only part of the story.

The Prime Minister must only invoke section 137 in the gravest of circumstances. In the UK, following a recent decision of the Divisional Court, newspapers branded some of that countries judges "Enemies ofthe people" following one of the most controversial court decisions in living memory. Had a popular poll been taken of the British public of those judges following that decision been determinative, the judges would've been toast. This week, the Supreme Court crafted a route to reviewing parliamentary proceedings. Respectfully, far more far reaching, long lasting and systemic than any of the negative steps the Chief Justice has been criticized for.

But well-respected political conventions govern the official criticism that sitting judges receive. The political actors respect the rule that the judges are to be spared that breed of public criticism. Their fitness to Judge is measured in terms of the critique they receive from higher courts.

It cannot be that Judges are subject to the requirement that they must have the confidence of the local bar and without it they must resign and/or be impeached. In fact, the Law Association, by so ferociously attacking the Chief Justice only risk damaging the office and its own credibility in tandem. If they were to succeed in implementing the section 137 procedures, serious damage will have been done to the independence of the judiciary and security of tenure – the building blocks which protect citizens from the whims and fancy of the politicians.

Instead of focusing on impeachment proceedings, the Law Association, I humbly suggest that the Law Association ought properly to be working with the Chief Justice and his office, to work on ways and means to improve the nation's judiciary

The office concentrates significant ceremonial, administrative and legal duties in one office holder. The best administrative leader of the Judiciary may not be the best ceremonial leader of the judiciary. The best legal mind may not be the best administrator of a huge and complex institution of the state. Furthermore, institutions generally function better when there is a tension of power at the top of the organization.

I stop short of suggesting that Judges ought to judge judges, but the presence of a strong President of the Court of Appeal (the recognized 'legal' head of the judiciary), a President of the High Court (recognized administrative leader of the judiciary) and a ceremonial leader in the office of Chief Justice working in concert would, I submit, present a far more satisfactory and self-regulating institution. In such a system, one must consider that if two of the leadership trinity recommend impeachment proceedings, the circumstances would indeed of the gravest nature and the Prime Minister would immediately heed any call without further.

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SEMENYA -V- IAAF

BY DR. EMIR CROWNE

One of the region's leading experts in Intellectual Property and Sports Law, Dr. Crowne is a Tenant at New City Chambers in Port-of-Spain, and the Founder of Crowne Sports Law, an international sports litigation practice.

He is a Barrister, Attorney-at-Law and Intellectual Property Agent with a wide-ranging and extensive practice in the following areas: Administrative Law, Complex Litigation & Dispute Resolution, Constitutional Law, Contracts (Drafting & Negotiation), Corporate/Commercial Law, Human Rights, Intellectual Property, International Trust Law, Labour Law (Union Side), Professional Discipline, Sports & Entertainment Law, Telecommunications Law and Technology Law.

On May 1st, 2019 the Swiss-based Court of Arbitration for Sport ("CAS") released the long-awaited decision in Semenya v IAAF. Well, almost. The 165 page ruling is yet to be publicly disclosed, CAS instead opting to release a summary of the findings while the full decision is redacted to remove confidential items. In it, CAS noted that the Panel comprising Annabelle Bennett, Hugh L. Fraser and Hans Nater unanimously found the IAAF Eligibility Regulations for Female Classification (Athletes with Differences of Sex Development) (the "DSD Regulations") to be discriminatory. However, a mojority of the panel found that "such discrimination is a necessary, reasonable and proportionate means of achieving the IAAF's aim of preserving the integrity of female athletics...".

Put simply, the DSD Regulations mandate that female athletes with naturally elevated levels of testosterone reduce their testosterone level to less than five (5) nanomoles per litre. The reduction, according to the IAAF, can be achieved through oral medication.

Like rule changes in any sport (cricket bring a notable example), the DSD regulations - which only apply to female athletes competing in the 400m to 1-mile events at international competitions - are presented as being 'formally' neutral. Substantively, however, the regulations target Caster Semenya and Francine Niyonsaba: two black women.

In my view it is dangerous intrusion into personalautonomy and bodily integrity for any sporting body to regulate the natural physiology and biochemistry of an athlete. Calling it a 'slippery slope' would be too kind. It is a sharp cliff.

If we start with regulating women's testosterone, do we then move on to athletes with naturally elevated creatine levels or red blood cell counts? Do we pass a rule banning children with scoliosis from competing due to health and safety concerns? I'm certain that the IAAF, or any other well-meaning sporting body, could find "scientific" evidence to demonstrate the possible harm to a child's development if they were allowed to train and compete with scoliosis.

It would all be done in "good faith" with commendable goal of protecting the rights of the child. (Goodbye Usain Bolt circa 2001-2004).

So where does this leave us?

Despite its laudatory name, the "Court" of Arbitration for Sport is not a Court. It is a private arbitration body. Decisions of CAS are appealable to the Swiss Federal Tribunal. Appeals are generally limited to breaches of procedural fairness, natural justice or public policy (which includes a prohibition against discrimination). That prohibition (against discrimination) is said to be limited to instances involving "sex, race, health condition, sexual preference, religion, nationality or political opinions". The DSD Regulations directly discriminate on the basis of health condition, and substantively discriminate on the basis of sex and race. If appealed, I am unsure how such regulations could be upheld.

In sum, the DSD Regulations directly discriminate on the basis of health, indirectly discriminate on the basis of sex, indirectly discriminate on the basis of race and directly intrude into a athlete's life, liberty and security of the person. It is a terrible policy tainted with illegality that must be struck down.

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THE OFFENCE OF OBSTRUCTION

BY CRYSTAL PAUL

Crystal Paul is a recent graduate of Hugh Wooding Law School and winner of the 2018 Anand Ramlogan SC Prize for best performance by a student from Trinidad and Tobago.

She has appeared in a variety of Courts in Trinidad, from the Court of Appeal through to sports tribunals. The current holder of a Bachelor of Laws Degree (Hons) from the University of the West Indies, Crystal also graduated on the Principal's Roll of Honour from the Hugh Wooding Law School.

Within recent years, there has been an upsurge in the amount of persons that have been charged with obstructing a police officer in the execution of his duty. Many police officers complain that they encounter a lot of resistance from the public while attempting to carry out their duties.

The offence of Obstruction was articulated in **section 59 of the Police Service Act** which states as follows:-
"A person who assaults, obstructs, or resists a police officer in the execution of his duty, or aids or incites another person so to assault, obstruct, or resist a police officer or a person assisting the police officer in the execution of his duty, is liable on summary conviction to a fine of ten thousand dollars and to imprisonment for two years."

It must further be noted that a police officer may arrest without a warrant any person who obstructs a police officer while in the execution of his duty pursuant to **section 46 (1)(c) of the Act.**

The courts have sought to define the term obstruction in a very broad way. Obstruction according to **Rice v. Conolly [1966] 2 QB 414**, cited in the Court of Appeal Case of **Waylon Jennings v. Police Corporal Roger Reid** is "the doing of any act which made it more difficult for the police to carry out their duties."

The case of **Hinchcliffe v Sheldon [1955] 1 WLR 1207** highlights that in determining whether or

not a defendant was guilty of an offence of obstruction, the magistrate ought to be satisfied that the prosecution had proven that there was an obstruction of a constable, that the constable was at the time acting in the execution of his duty and finally, that the person obstructing did so wilfully.

Thus, there is a subjective element that ought to be considered. There must be an intention to bring about a state of affairs which, objectively regarded, amount to an obstruction. Whether or not the person has deliberately or intentionally prevented the police officer from executing his duties is an issue to be decided based on a proper examination of the facts of the case.

Different acts may amount to an obstruction. It may be the physical act of pushing the police officer from arresting an individual, standing between the officer and the person he intends to speak with or arrest,denying the officer in possession of a warrant entry onto premises, blocking the road in which officers have to pass, and may even include words spoken, such as providing false names and address to officers or as in the case of **Waylon Jennings, supra**, making threatening statements to the officer. In **Jennings**, the appellant made the following statements to Cpl Reid in a loud tone: Know what you doing. One phone call from me, my aunt is a Superintendent and my brother is a police officer. I could deal with you" and "Lock them up and see" which the court regarded as evidence of an intention to obstruct.

Further, as per **section 59 of the Act**, if a person incites (which can include instructing) another person to obstruct a police officer in the exercise of his duties, an offence has also been committed.

Therefore, members of the public and attorneys must appreciate the consequences of failing to allow a police officer to execute his duties. Since the court gives a broad interpretation of the word "obstruction" for the purpose of the Act, virtually any act can be classified as obstruction once the intention is present.

In that regard, once a police officer has identified himself as such and has made a lawful request, it is far better to comply with the officer's request. If there is a belief that the officer acted ultra vires, the law affords persons the aggrieved party the ability to bring a claim for wrongful arrest, malicious prosecution and false imprisonment.

Further, the burden is always on the prosecution to prove its case beyond a reasonable doubt in criminal proceedings. To do this, the police officer will have to adduce evidence to substantiate the charge or charges. Therefore, if a defendant believes that the officer has no right or authority to do a particular thing, he would have an opportunity to present his case before the court.

With heightened emotions, it may seem that obstructing the police officer because he "is wrong" is the appropriate course of action in the moment. However, such conduct further aggravates the situation and may unfortunately result in an assault and/or several arrests rather than the one or two arrests that the police officers had initially intended to make.

Additionally, it would mean that persons now have to attend court to defend a charge of obstruction, secure bail, possibly incur legal fees and so forth which could have all been avoided.

Thus, persons must be alive to the fact that you may have to lose a battle to win the war.

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ENERGY LAW: A PERSPECTIVE ON PRODUCTION SHARING AGREEMENTS AND THE PRUDENCE OF THE NEGOTIATED ECONOMIC BALANCING CLAUSE

BY JASON JONES

Jason Jones brings a dynamic, prolific professional background to legal practice.

His more than a decade of experience in Trinidad and Tobago's Financial, Construction, and Education sectors give a more nuanced view on cases that benefit his clients greatly.

He is a UK Commonwealth Scholar and co-founder of the 'Association of Caribbean Students for Equal Access to the Legal Profession' (ACSEAL) with established networks and Chapters in 7 countries across the English-Speaking Caribbean.

All countries drafting Production Sharing Agreements (PSA) should include negotiated economic balancing (NEB) clauses, despite the fact that several successful hydrocarbon provinces (for instance, the UK and Norway) currently do not include such clauses.

The justification for this imperative comes not from the assurance that NEB clauses will avoid problems in the future; but in the mere fact that it may. PSAs are negotiated on the presumption

of International Uncertainty; and so, not all of its content and clauses are justified solely on the assurance of what 'will' happen. The normative position regarding NEB clause inclusion, however, is based on the following cumulative factors: international arbitration case law; the role of the State in mitigating risk at a socially efficient cost; the burgeoning pace of unconventional energy development; volatility of the global hydrocarbon market; and increased public participation in energy affairs and the political process.

The Scottish philosopher, David Hume, coined what is referred to as the 'is-ought' problem. This problem alludes to the naturalistic fallacy- whereby one reductively infers a connection between the imperative 'ought' and the merely descriptive 'is', without sufficient logical steps to reconcile both. Hume found that an 'ought to' position can not be justified solely by positing the 'what is' position. Therefore, it is this basic epistemological principle embedded in Hume's Law that provides the framework to analyse the normative query of whether NEB clauses 'should' be included in PSAs. Notable reference to what 'is' the current approach by host-Governments, fulfil a mere contributory role to the normative query rather than an absolutely determinative one.

THE 'IS' POSITION

In PSAs, the interests of the foreign investor and host-Government often converge. The International Oil Company (IOC) is motivated by a desire to maximise profits, while host-Governments are driven by revenue maximisation and the achievement of other State objectives. From the outset, IOCs are generally interested in risk mitigation measures to restrain the exercise of the host-Government's sovereign legislative prerogative, and some States remain amenable to these measures in order to attract foreign investment. The Negotiated Economic Balancing (NEB) clause is- one of three types of stabilisation clauses included in PSAs - intended to link *ex post* unilateral alterations of the contractual terms by the State to an obligation to renegotiate, so as to restore the PSAs original economic equilibrium. The NEB clause, in many respects has replaced the classic stabilisation 'freezing' clause which is aimed predominantly at stabilising the regulatory framework of the contract itself.

A 2009 study found that that freezing clauses were still included in modern investment contracts in Sub-Saharan Africa, Eastern and Southern Europe, Central Asia, the Middle East and North Africa. The inclusion of freezing clauses means that each investment is governed by a separate legal regime, thereby placing onerous burdens on administrative agencies to keep up. These complexities are exacerbated by the fact that many developing countries already face resource scarcity, institutionalised corruption, and difficulty in monitoring and inspection procedures. Freezing clauses are not generally featured in contracts with OECD countries.

In some OECD-contracts, NEB clauses addressing specific regulatory risks prevail. The scope of applicability is usually restricted to discriminatory regulation; while security, safety, and environmental legislation are un-negotiable. OECD-countries such as Norway, UK, Canada, Australia and the USA are considered to provide relatively static, inflexible fiscal regimes and therefore include no stabilisation provisions in hydrocarbon contracts.

There are also several non-OECD States that do not include freezing or NEB clauses in their contracts due to their geological advantages (proven reservoirs); these include Indonesia, Nigeria and Saudi Arabia. Guarantees to attract investors in the form of stabilisation clauses are considered unnecessary to such host-Governments. Another large group of non-OECD countries remain eager to attract IOCs and employ NEB clauses into their PSAs. These States include Tanzania, Peru, Bolivia, and Ecuador.

The general account for the difference in stabilisation approaches in PSAs between OECD and non-OECD States is believed to be the lower risk of legislative changes in OECD countries relative to non-OECD countries. Commentators suggest other complementary factors such as: drafting experience and training; market conditions; investor's prior experience in the State; and distinct industry practices.

John Gotanda (2003) noted several possible drawbacks associated with the inclusion of NEB clauses in PSAs: Firstly, NEB clauses may increase the overall transaction cost of the PSA; Secondly, a degree of uncertainty might be interjected into the PSA; Thirdly, NEB clauses present no legal obligation to agree and can lead to arbitration. In such instances, it is possible for an arbitral tribunal to decline any exercise of jurisdiction over the dispute; Fourthly, if trigger events are within the control of the host-Government, there is a possibility for deliberate manipulation by States to their advantage; and Fifthly, in the event of arbitration, there is a chance of the tribunal re-writing the PSA terms beyond the original parameters intended by the parties.

Most of the foregoing drawbacks, however, can be averted through explicit and strategic drafting techniques. The following sections would illustrate that the transaction costs associated with the inclusion of NEB clauses are insignificant when compared to the possible risks and cost exposure associated with State liability when NEB clauses are excluded.

AVOIDING LEGAL PROBLEMS: STABILISATION ENFORCEABILITY

FREEZING CLAUSES

Freezing clauses involve a commitment by the host-Government not to alter the regulatory framework governing the PSA. The binding nature of Freezing clauses have been upheld in *AGIP v Congo, Revere Cooper v OPIC, and Kuwait v Aminoil.* While the authority of these cases is limited to breaches of State commitments not to nationalise (direct expropriation) rather than not to regulate, the overall benefit derived by host-Governments including freezing clauses in PSAs are nonetheless considered socially inefficient vis-à-vis its associated costs. The host-Government's promise of regulatory stability reduces flexibility and increases the cost of raising social (human rights) and environmental standards in line with emerging international law. By favouring less costly regulatory measures to the foreign investor, it is considered that the State may trigger tensions between its commercial obligations and socio-political obligations.

REGULATORY TAKING (INDIRECT EXPROPRIATION)

States may also incur liability for subsequent regulatory changes affecting the IOC, in the absence of any explicit stabilisation clause or overt expropriation. However, international case law requires a demanding threshold to establish liability and warrant compensation. Pope and Talbot v Canada ruled that 'regulatory taking' occurs only when a 'substantial deprivation' of property rights rendering an investor unable to 'use, enjoy or dispose of property' is found. Under this strand of international law, changes in the legislation can lead to State liability only it results in a 'radical deprivation' of property rights amounting to indirect expropriation.

FAIR AND EQUITABLE TREATMENT (FET)

In the absence of direct or indirect 'expropriation' and explicit freezing or NEB clauses, States may be held liable for ex-post regulatory changes which 'interfere' with the IOCs investment. Deliberate acts by the State, acting in its sovereign rather than commercial capacity, to directly interfere with the terms PSA (such as a decree cancelling the PSA or concession) might give rise to liability for breach of customary international law against arbitrariness, violations of due process and breach of the fair and equitable treatment obligation (FET).

The most significant development of the law, however, concerns sovereign State measures not deliberately intended to 'expropriate' or 'interfere' with PSAs or concessions, but are measures of general applicability taken for public purpose (social and environmental objectives). The traditional position has been that States would incur no liability for disadvantages experienced by IOCs party to PSAs when those harms resulted from changes in the law of general applicability.

Recent Investor-State arbitrations, however, have shifted to trigger State liability when laws enacted for public purpose modifies or interferes with a specific contractual (PSA) commitment. Interestingly, tribunals have found binding commitments to emanate not only from the four corners of the contract, but also from statements made by government officials, provisions in general laws, and 'legitimate expectations' of investors. Glamis Gold v USA found that promises of stability can be 'quasi-contractual'. In Parkerings v Lithuania, the tribunal stated that 'implicit assurances' or representations could establish an enforceable commitment regarding stability of the legal framework, unless a 'stabilisation clause' explicitly stated otherwise. The 2012 decision in Occidental Petroleum Corp v Ecuador found 'statements by representatives of state-owned enterprises' sufficient to establish an 'inferred commitment of regulatory stability'. In that case, the State's liability was held to exceed $2.3 billion USD. The tribunals based their decisions on a breach of FET requirement, which was deemed a minimum standard of customary law.

In *Enron v Argentina*, the tribunal ruled that the regulatory regime enforced at the time of the contract was made part of the terms offered by the State to the investor and that 'under the emerging standard of fair and equitable treatment in international law', the investor had a 'legitimate expectation' of regulatory stability.

THE 'OUGHT' POSITION

The foregoing cases have suggested the very real transformation attributable to an 'emerging standard of FET'. The cases also suggest a widened range of 'commitments' deemed to constitute enforceable promises. This broad spectrum of 'promissory presumptions' inferred by the international tribunals have accompanied an expanded scope of how they can be breached by States. It therefore represents a significant shift in the scope of actual and potential liability for all countries.

The inclusion of NEB clauses has become a matter of necessity in light of the emerging FET standard so as to: ensure explicit expression of the scope and intent of stabilisation terms to investors; ensure and preserve regulatory flexibility; and maintain equitable relationships, investor interest and global competitiveness. A refusal to include NEB clauses would serve only to further expose the State to the propensity of arbitral tribunals to 'presume promises' into PSAs that host-Governments might not have intended *ab initio*.

Several other factors contribute to the impending 'ought to' imperative upon States to include NEB clauses in their model PSAs:

Firstly, it is socially efficient to include NEB clauses. The transaction costs associated with drafting and negotiating the terms of the NEB clause is justified in light of the exposure to possible compensation if excluded. Secondly, States can no longer contract on the assumption of being able to sustain stable and standardised regulatory frameworks. This is because the price of energy has become more unpredictable and changes in discoveries and alternative technologies are likely to increase in the future. The recent impact of shale oil/gas on the global market is a prime example. Consequently, explicit and unambiguous NEB clauses that clearly exclude social and environmental (public purpose) legislation from stability 'commitments' essential so that host-Governments can better respond to market forces. Thirdly, with the increased role of NGO's and public participation in energy affairs and governance, it can be considered prudent to preserve some degree of legislative flexibility through the inclusion NEB clauses to respond to these socio-political objectives. Since NEB clauses are not intended to restrict regulatory sovereignty, *stricto sensu*, the State can better meet the, sometimes, convergent needs of stakeholders.

The investment climate has changed and so all countries engaging in international investments and PSAs 'should' include NEB clauses not because it 'will' avoid all unforeseen problems, but the risks associated with not doing so far outweighs the costs of its inclusion. With increased uncertainty within the industry, including a clause that affords greater flexibility to cope with those challenges is a reasonable, necessary and normative response.

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LETTER-TO-THE-EDITOR:

ARE MAINTENANCE ORDERS REALLY MEAL TICKETS FOR LIFE?

BY KERRINA SAMDEO

Maintenance orders with the maximum term ”for joint lives” carries with it great uncertainties for both parties to the agreement. Does this mean that the payer must take care of the payee for the rest of his life? Does this mean that the payee is now entitled to a care-free life at the expense of his ex-spouse and that this payment is a guarantee?

Maintenance Orders in relation to marriages are dealt with in the Matrimonial and Proceedings Act Chap 45:51. Either party to a marriage can make an application to the court for a maintenance order during the course of the marriage, upon starting proceedings of ending the marriage and upon divorce, nullity or judicial separation.

However, the focus of this article will be those orders granted on the ending of a marriage. Pursuant to section 24 of the Act, when a decree of divorce, nullity or judicial separation is granted, any time thereafter the court may order on application that the applying party be granted a maintenance order in his/her favour for such a term as may be specified in that order. In exercising its power, the court shall have regard to several factors in deciding the amount to be paid in the periodical payments and for the length of time in which the order is to subsist. Section 27 of the Act states that the Court shall take into consideration the following but not limiting factors:

- the income, earning capacity or financial resources which each party to the marriage has or is likely to have in the foreseeable future;
- financial needs, obligations and responsibilities which each party has or is likely to have in the foreseeable future;
- age of parties and standard of living enjoyed by the parties prior to the breakdown of the marriage and;· contributions each of the parties made to the welfare of the family including looking after the home or caring for the family;
- in the cases of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit which, by dissolution or annulment of the marriage, that party will lose the chance of acquiring.

In exercising these powers, the court will take into consideration the financial position in which the parties would have been in if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

The term shall not last longer than the “maximum term” and the order will last as long as the court sees fit. What is the “maximum term” is defined in section 29 (2)(a) as, in the proceedings for divorce of nullity of marriage, the joint lives of the parties to the marriage or upon the one who the order is in the favour of remarries. The order will cease when either conditions are met, whichever is shorter. The court in exercising its discretion grant an order subsisting for a period of time which falls short of wither of theseconditions specified in the Act, for example, for a period of two years to the date of the order or until the payee qualifies for old age pension.

Family law judges, as one can see, have a wide range of discretion in determining maintenance orders and its duration. Examples of what the court may look at include the qualifications of the payee, whether she can support herself financially and how soon can this possibility materialize when she had been financially taken care of by her husband for the duration of the marriage. The judge in making his decision will consider whether the now ex-wife (OR EX-HUSBAND) can adjust to financial independence without facing undue hardship.

It would indeed be unfair that the more financially stable party be ordered to support the weaker party for the rest of their lives. An order which caters to this may create a sense of entitlement and laziness in the payee. Having that source of income “guaranteed” for the rest of your life will cease one’s desire to find financial independence.

Further, such order may have a detrimental effect on the payor wanting to “move on” from the marriage. Having to take care of your ex-wife certainly would not sit right with a new wife now would it?

Instead payees should be encouraged to seek financial independence where so capable and have this “meal-ticket for life” attitude come to an end.

That being said, it is understandable that a payee in these situations may have been so accustomed to their spouse supporting them financially through their entire marriage that it may be difficult to adjust. Following their divorce, it is of course difficult for the financially weaker spouse to be immediately able to stand on his/her own two feet without any kind of support at least for a period of time.

Judges will take into consideration many factors in making their decision. When was the last time the spouse worked? In absence of years of work experience, what are the possibilities of finding a job? Is the person even qualified to find a job which may support his/her basic needs?

Where there has been an order granted that the ex-spouse to pay to another for life and there have been a change in circumstances since the Court granted the order, the payee or payor

may make an application under section 39 (2)(a) to vary or even revoke the order pursuant section 31(1) which grants the Court such a power. This allows for the possibilities of the payments to increase or decrease or cease depending on the circumstances of each case.

The English Courts have recently been more robust in its decision of allowing the financially weaker party to be supported for life. In the case of Mills v Mills [2018] UKSC 38 the ex-spouse spouse was awarded capital to enable purchase of a home but due to unwise transactions she so developed a need to pay rent. The court declined to increase her spousal maintenance even though the ex-husband was financially capable of doing so as at the time of the application the ex-husband was remarried and living with his new wife and their nine-year old son. The original maintenance order however, subsisted.

The notion of the meal-ticket exists where monthly payments for life are ordered and the payor is unable to sufficiently prove to the court that the payments should cease. However, it is necessary to recognize that the courts are willing to vary such orders and stop the dependency where the payee can be deemed to be able to provide for oneself.

LETTER-TO-THE-EDITOR:

THE IMPORTANCE OF PARALEGALS AND LEGAL CLERKS

BY DWAYNE JACOB

In Trinidad and Tobago Attorneys-at-law have a tremendous task at their jobs, battling the Magistrate's court, High court and sometimes dealing with non-contentious matters such as Probate and Conveyancing. It's a tough job and that's just a small percentage of what they do on a daily basis. There is no doubt that these attorneys need some sort of assistance in their every day work lives.

Paralegals or legal assistants have become such a regular part of law offices all over the country and all over the world that it's difficult to imagine it without them. Lawyers themselves would probably not know how to handle their caseloads without paralegals helping them gather research, getting the facts of a case, interviewing witnesses, writing reports and filing briefs and legal documents in court.

Despite the rising demand of paralegals which does not seem to show signs of slowing based on recent government projections in the next few years, it might be interesting to note that the paralegal profession itself is quite new. It has only been in existence for a little over four decades.

As more and more people from all socioeconomic classes began to flock to obtain legal services simultaneously, the cost of complex procedures skyrocketed. This led to the proposal to have educated non-lawyers to take care of certain aspects of legal work that only lawyers used to be able to do. Most of them were experienced legal secretaries who got more training about the law. They were then called by various names including legal assistant, legal technician, lay assistant, paralegal assistant and paralegal.

So in the future, when you see attorneys perfcting their cases, bringing in the clientele and getting their jobs done in a timely manner, you know that paralegals have an important role to play in such events.

LETTER-TO-THE-EDITOR:

IS THE TTPS ABOVE THE CITIZENS?

BY CONCERNED CITIZEN

If we continue to give way to one of them we should give way to all of them, no matter the situation.

It has been observed, shared and discussed by many I have interacted with, that the Trinidad and Tobago Police Service (hereinafter referred to as TTPS) act and is allowed to act as though they are above the law as well as above the other citizens.

On numerous occasions I have noticed that the TTPS abuse their power to evade traffic and traffic lights, casually use the shoulder as well as drive down the middle of the highway lanes, "down the white line" with no apparent emergency or urgency.

TTPS officers use their uniform and/or occupation as a crutch. They abuse their uniform to avoid lines in banks and food outlets. They incessantly ignore parking restrictions inclusive

of those which stipulate the rules about parking on crosswalks and distances from corners and/or fire hydrants, as I have observed.

I believe that if, as their mandate says, they are to enforce all laws and regulations with which they are charged, **just as civilians,** they should be held accountable for these major and/or minor infractions.

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