However, there was also the case of another Hungarian priest who was granted asylum and had spent more than two decades inside a United States Embassy compound in Budapest since he was unable to get safe passage outside the Embassy compound for settlement in the United States.

Based on both international law and practice, the Bruneian, French and Swiss authorities can be said to have acted perfectly within their sovereign rights to return the Indonesians to the custody of the Malaysian authorities in Kuala Lumpur.

Non-refoulement

A more controversial issue in the situation is whether Malaysia arguably violates international law in apparently sending back to Indonesia those Indonesians who have already been determined by the UNHCR office in Kuala Lumpur as refugees. The principle of *non-refoulement*, mentioned above is stated in the 1951 Convention on Refugee and Displaced Persons. Malaysia is not a party to the Convention and therefore ordinarily is not bound by it. However, it has been claimed by some international lawyers and virtually all refugee-activists that the principle of *non-refoulement* has now become customary international law and that particular provision of the Refugee Convention should 'bind' even non-parties to the Refugee Convention such as Malaysia.

It would be 'sitting on the fence' but it would perhaps not be wrong to state that perhaps the metaphorical jury is still 'out' on the technical or legal issue of whether or not the principle of *non-refoulement* has become customary international law. Many countries including some, who are state parties to the Refugee Convention, such as the United States, have been alleged to have violated the *non-refoulement* principle.[3]

What if some or all of the applications for 'asylum' of the Indonesians in the US Embassy compound are accepted by the United States? It is unlikely that the United States itself will accept them as refugees for 'resettlement' in the United States. If the Indonesians' 'applications' are accepted it is perhaps more likely that they would be handed over to the UNHCR in Kuala Lumpur.

If the UNHCR also concurs that those who were inside the US Embassy are refugees whose lives or freedoms would be endangered if they were sent back to the 'territories or frontiers that they came from', then it should ensure that all proper protection be accorded to them so that *refoulement* of these refugees does not take place.

In the intricate web of the 'triangular' relationships and political equations of the three countries (Indonesia, Malaysia and the United States) which are involved in this 'refugee' incident, genuine Indonesian refugees would, it is hoped, not become 'political footballs'. Instead they should be accorded the minimum protections which are based both on legal and humanitarian principles.

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References

1. *Colombia v Peru* , ICJ Reports 1950, p. 266.
2. For an account of events concerning the treacherous arrest, trial and execution of Imre Nagy see (1957-58) 11 *Keesings Contemporary Archives*, pp.15667–15669, 16231–16232.
3. For a decision by the Supreme Court of the United States, that the acts of the United States coast guard in interdicting the Haitian boat people in the High Seas and sending them back to Haiti did not amount to a violation of the 'non-refouler' principle, see *Sale* v *Haitian CTRS Council Inc*, 509 US 155 (1993).

Postscript

On 28 July 1998 the author confirmed by phone with Mr James Warren, Information Officer at the United States Embassy in Kuala Lumpur that the eight Achenese refugees are still inside the United States Embassy Compound in Kuala Lumpur. They have been there since 10 April 1998 and have been given temporary protection and provided with food, shelter and medical treatment by the authorities of the United States Embassy in Kuala Lumpur, obviously with the acquiescence of and authorisation from the Department of State in Washington DC. (To pursue further and in context the theme raised earlier as to whether an Embassy compound is a suitable or advisable place for seeking asylum, it seems that the eight Achenese in this case — in contrast to the 14 others who had unsuccessfully sought protection in Embassy premises elsewhere in Kuala Lumpur — have taken a calculated and, so far, not counter-productive risk. And the United States authorities deserve credit for their humanitarian act in providing temporary protection and sustenance to the refugees.)

According to Warren, the eight Achenese — as well as the 14 who had been expelled from the Bruneian, French and Swiss diplomatic premises — had already been determined by the UNHCR as being entitled to protection as refugees which would include the principle of non-refoulement. Warren stated that the UNHCR is currently liaising with possible 'third countries' which might be willing to take the eight Achenese refugees for resettlement.

If and when third party resettlement is found for the Achenese refugees by the UNHCR, one surmises that they will have to be taken out of the United States Embassy compound (presumably in a vehicle belonging to the UNHCR) to an airport or other point of departure in Malaysia. It is hoped that if and when this occurs Malaysian authorities will not interfere in the process by arresting and sending them back to Indonesia as they had apparently done with the 14 others (see above). Such 'non-interference' with the UNHCR process by the Malaysian authorities is perhaps an 'irreducible minimum obligation' required of Malaysia under international law. **MZ**

INSURANCE

'I'm sorry, your policy doesn't cover that'

DAVID NIVEN discusses some exclusion clauses in insurance contracts.

One of the principal grounds for rejecting insurance claims is that the claim is not covered by the terms of the policy, or is specifically excluded. When considering this issue it is important for insurers to be mindful of the limitations imposed by the *Insurance Contracts Act 1984 (Cth)* on an insurer's ability to reject such a claim.

Interpreting the policy

Of course, the fundamental issue for any insurer is to determine whether the terms and conditions of the policy encompass the claim the insured is seeking to make. A central principle in interpreting a clause in a policy is that the intention of the insurer and the insured as set out in the contract is to be given effect. In general, evidence derived from sources outside the contract, sometimes known as parole, external or extrinsic evidence is usually not relevant to interpreting the clause. A statement made by the insurer which is not contained in the policy may be a misrepresentation for which compensation is payable if that statement is untrue, and induced the insured (or anyone relying on it) to enter into the contract.

The other important rule governing the interpretation of insurance policies is known as the *Contra Proferentum Rule*. Under this rule, if a clause has an ambiguous meaning then it will be interpreted in the least favourable way to the person who clause. This will invariably be the insurer in all standard insurance policies. A similar rule exists under s.23 of the *Insurance Contracts Act 1984* which provides that where an insurance proposal contains an ambiguous question which a reasonable person in the circumstances could have understood another way, then the question will be interpreted as if that other meaning were correct.

Case study

A recent illustration of the principles contained in the Contra Proferentum rule occurred in a case before the Claims Review Panel. The insured was an invalid who was confined to a motorised wheelchair. This was normally housed in the insured's home and became the subject of the insurance dispute when the wheelchair was stolen from the premises. The insured made a claim on his insurer for the cost of the wheelchair under the terms of his home and contents insurance. The insurer rejected the claim on the basis that the wheelchair was not covered by the policy as it fell within an exclusion clause which stated that the cover would not extend to theft of a motor vehicle from the insured's premises. The insurer claimed that as the wheelchair was a motorised unit for transportation it constituted a motor vehicle within the terms of the policy.

The Panel decided the dispute on the basis that it was ambiguous whether or not the term 'motor vehicle' applied to the wheelchair. On one hand it accepted that the insurer's definition was possible, but it equally accepted that the wheelchair was not registered as a motor vehicle, nor did it fall within the definition of a motor vehicle under motor vehicle registration laws. Given the choice of interpretations, the panel was bound to accept the interpretation that favoured the insured.

Exclusion clauses

The *Insurance Contracts Act* provides two significant remedies relating to the situation where a claim is refused on the basis of an exclusion clause or some act by the insured after the contract has been entered into.

Section 54 of the Act provides that where an insurer rejects an insurance claim on the basis of some act of the insured or some other person that occurred after the insurance contract was entered into, the insurer may only refuse the claim to the same degree as the insurer has been prejudiced by the act in contravention of the policy. This provision is often useful where a claim has been rejected on the basis that the insured failed to comply with a condition of the policy.

Case study

The insured's motor vehicle insurance policy stated that the insurer excluded liability for any damage to the vehicle when it was not in a roadworthy condition. At the time the insured entered into the contract of insurance the tyres on the vehicle were in a roadworthy state and had the required amount of tread. Sometime thereafter the condition of the tyres deteriorated to an unroadworthy state. At this time the insured was involved in a collision where the insured vehicle was damaged by being struck from behind whilst stationary at a red light. In this instance the insurer could not deny liability on the basis that the vehicle was in an unroadworthy state. The poor condition of the tyres had not prejudiced the insurer as they had no part in causing the accident to occur.

On the other hand if the circumstances of the claim involved damage to the vehicle due to striking a tree after the insured had skidded off the road, then the poor state of the tyres may be relevant to the accident and so allow the insurer to exclude the claim.

The second important set of provisions are ss.46 and 47 of the *Insurance Contracts Act*. Section 46 provides that a clause which purports to exclude liability for a defect or imperfection in the insured goods will not be effective where the insured was unaware of the defect, and the circumstances are such that a reasonable person would have also been unaware of the defect. Therefore, if a person had taken out insurance over their home which was to later suffer structural damage, the insurer would not be able to avoid liability if it was subsequently found that the structural damage had been caused by some hidden defect in the building, such as the use of poor materials when the house had been built, unless it could be shown that the insured was aware, or should reasonably have been aware, of this defect.

Section 47 is a similar provision relating to the common occurrence of insurance companies endeavouring to avoid liability for pre-existing illness under sickness and accident insurance policies. The provision states that where at the time the contract was entered into the insured was not aware of, and could not reasonably have been aware of, an illness or disability, then the claim for that illness or disability under a contract of insurance cannot be avoided on the basis of an exclusion for that pre-existing illness or disability. This provision is very useful in consumer credit insurance disputes. It is important to note this provision is not available in disputes about health insurance as this is one of the few forms of insurance not covered by the *Insurance Contracts Act*.

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