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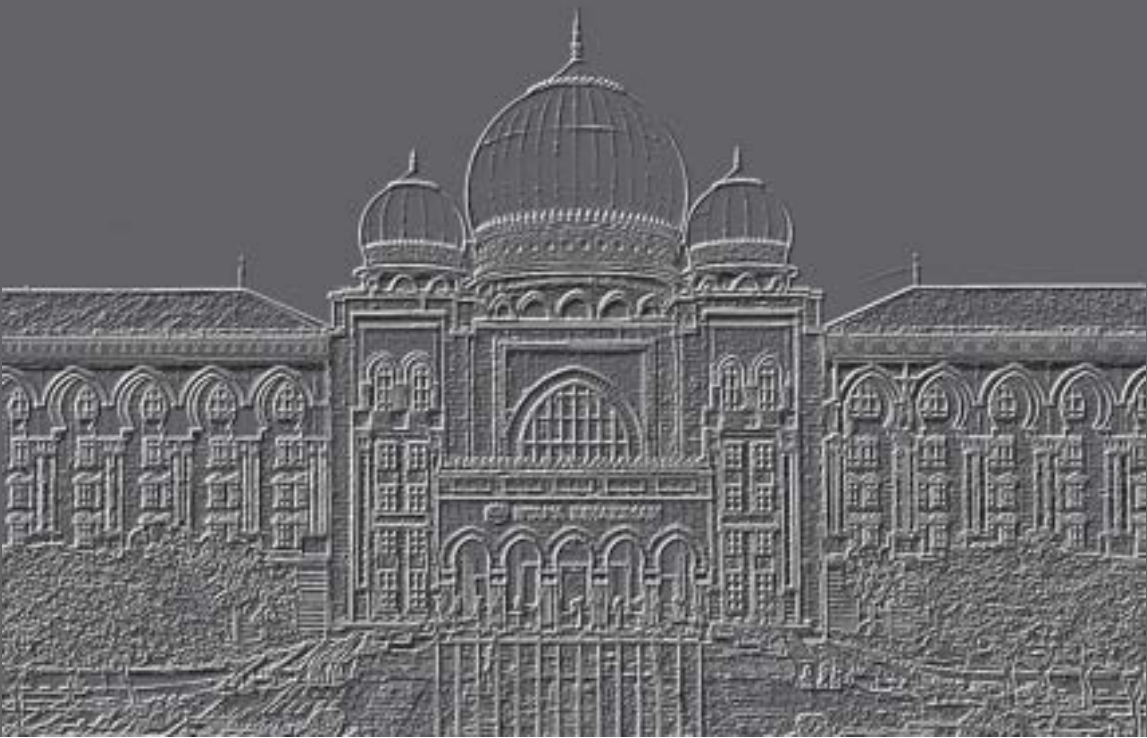

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PREFACE

It is indeed a privilege for us to present the first issue of the *Journal of the Malaysian Judiciary* for 2023, which offers a generous selection of legal compositions from several jurisdictions. On behalf of the Editorial Committee, I write a short introduction to these excellent legal essays.

This issue commences with the annual address by The Right Honourable The Chief Justice of Malaysia, Tengku Maimun binti Tuan Mat, delivered on the occasion of the Opening of the Legal Year ceremony, to mark the commencement of our legal year. This year's address highlighted, amongst others, the importance of upholding judicial independence, a topical issue that received wide attention over the past year. The Honourable Chief Justice emphasised the importance of timely and coherent judgments, which promote transparency in the decision-making process, and so establish and maintain long term public trust. Her Ladyship also spoke on constitutional supremacy and the importance of adherence to the judicial oath in defending the Federal Constitution. These themes came together to underscore the importance of the Rule of Law, making the address indispensable reading.

In like vein we are privileged to present the keynote address of Yang Mulia Tunku Zain Al-'Abidin at the launch of Taylor's University's Impact Lab on Peace, Justice and Strong Institutions. In explaining these epic themes of peace, justice and the critical importance of strong institutions, YM Tunku Zain takes us on a journey through the history of our country, spanning the origins of these concepts from the 14th century to the present day. What makes for riveting reading in this unique essay is how YM Tunku Zain communicates the importance of these foundational elements to ensure the continued success and harmony of our nation and its people.

On a transnational note, we are grateful to The Honourable the Chief Justice Sundaresh Menon of the Supreme Court of Singapore for his address at the 4th Standing International Forum of Commercial Courts (SIFoCC) in October 2022. The speech addresses the need to develop and sustain a transnational system of commercial justice given the extent to which trade today is transnational. His Lordship's speech postulates the components of such a transnational system, homing in on the importance of convergence in terms of both procedural and substantive law, explaining how this may be achieved. The far-sightedness, prescience and the depth to which this theme is explored makes for essential reading to comprehend how commercial law will potentially unfold in a global arena.

The second contribution from the Honourable Chief Justice is her Ladyship's address at the National Symposium on Islamic Banking and Finance which explores Malaysia's role in the Islamic Banking and Finance (IBF) industry and its most recent developments, which promise optimistic outcomes to the industry, while ensuring that principles such as *hifz al mal* or the preservation of wealth are adhered to. This principle encompasses encouragement to generate, accumulate, preserve as well as distribute wealth in a just and fair manner. Her Ladyship touched on the approach of the courts in relation to adjudication in this area of the law and provides a comprehensive study of the current legal framework.

From Australia, we are delighted to publish a legal treatise on comparative common law by Justice Mark Leeming, Judge of Appeal of the Supreme Court of New South Wales. As described by the author himself, this highly articulate paper compares four aspects of equitable principles in Australia and the United Kingdom. It explores how two of the four aspects have diverged and two others have converged in these two jurisdictions. Justice Leeming explores how such divergences in the law might well arise, from the law itself, advocacy and the nature of judgment writing. In his conclusion he highlights Lord Neuberger's suggestion from *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250, that it is desirable that all jurisdictions learn from each other with a view, at least, to harmonising the development of the common law around the world.

Justice Lee Swee Seng of the Court of Appeal, whose reputation precedes him in the area of construction law, favours us in this issue with a paper on the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"). It is a revised version of the keynote address he delivered for the CIPAA Conference Day. Justice Lee traces the history of CIPAA from its infancy in 2014, particularly when he was the Construction Court judge, and the manner in which CIPAA has evolved through the years. This legal exposition provides a comprehensive and educational account of most aspects of the law relating to CIPAA as it presently stands and comprises essential reading.

From India, we are privileged to publish a distinctive and contemporary legal essay by Justice Anish Dayal of the High Court of Delhi which provides a panoramic perspective of the immense impact judicial review has had in transforming the governance of sports in India. What was once a hallowed and insulated area which barred oversight by any governmental or judicial body was confronted by a constitutional judicial review challenge which, as skilfully described, altered the regulation and governance of sports in the nation. The story of how sports succumbed through the law to generate a transparent, effective and competent form of sports governance makes for intriguing/captivating reading.

Justice Mariette Peters of the High Court of Malaya affords us a thought-provoking and fascinating article on polygraph examinations and their

use in court. Her Ladyship's legal essay examines the legal implications of polygraph examinations and the admissibility of their results in a court of law. Commencing with the historical importance of the search for the truth, the article explores the use of polygraph examination in other jurisdictions before focusing on its use and application, in considerable depth, in Malaysia. It provides a far-reaching assessment and analysis of the law in this regard and is of relevance to trial and appellate judges alike.

Addressing the inevitable and ever-increasing importance of digital technology in our lives, Justice Adlin Abdul Majid of the High Court of Malaya, provides us with a fascinating legal essay on how the concept of the rule of law operates in the new digital ecosystem. Her Ladyship examines the conflicting priorities arising from the implementation of laws in this new field, with an emphasis on the Malaysian experience. The inherent divergences present in the offline world as compared to the digital ecosystem are explored, as are the conflicting considerations arising from the implementation and enforcement of laws in cyberspace, culminating in the fascinating question of whether it is possible to regulate the diverse environment of cyberspace.

I have contributed a short article on the influence of Western jurisprudence in Asian jurisdictions, which is a revised version of a speech delivered at the International Bar Association's Asia Pacific Regional Forum. I sought to explore the evolution of the influence of Western jurisprudence in Malaysia in particular, and the trends of development as former colonies found their respective paths.

On behalf of the Editorial Committee, I express our collective hope that you will enjoy this varied collection of legal essays.

On behalf of the Editorial Committee
Nallini Pathmanathan

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Judicial Independence and the Rule of Law*

by

The Right Honourable The Chief Justice of Malaysia,
Tun Tengku Maimun binti Tuan Mat

[1] May I express my heartfelt gratitude to all of you for attending this ceremony which marks the beginning of our legal year. Your presence is an expression of your support for the administration of justice.

[2] Before I begin, allow me to first thank the recently retired President of the Court of Appeal, Tan Sri Rohana binti Yusuf and Chief Judge of Malaya, Tan Sri Azahar bin Mohamed for their service to the Judiciary. I wish them both a very happy retirement. Likewise, to all judges who retired last year. I would also like to congratulate each and every judge and judicial commissioner who was elevated in the past year. I hope that you can keep up the good work.

[3] Speaking of appointments, I am reminded of my own as Chief Justice in May of 2019. I, myself, am set to retire in 2025, insya Allah. It means that I have served one-half of my tenure. As I prepare to deliver the opening of the legal year speech this year, I recall my tenure thus far and the hopes I have for my remaining half. This occasion is thus an important one for the Judiciary, as it provides me with the opportunity to say a few words about the work we undertake and the operation of the law which affects our legal and judicial community.

[4] In this speech, I shall focus on two main areas that pertain to the administration of justice in Malaysia:

(i) firstly, unity in upholding judicial independence and the Rule of Law; and

(ii) secondly, resilience in defending constitutional supremacy.

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* Speech by The Right Honourable The Chief Justice of Malaysia on the occasion of the Opening of the Legal Year 2023, Monday, January 9, 2023 at the Putrajaya International Convention Centre.

Unity in upholding judicial independence and the rule of law

[5] As any new legal year begins, my thoughts turn to the principles at the heart of our legal system – in particular, judicial independence and the rule of law. These are not just ideals, but are the core principles of our judicial and legal system which protect the public from harm and guarantee the principle of equity for all that underpins confidence in our Judiciary. Judicial independence acquires greater significance in times of political, social, and economic upheaval. As the great philosopher Montesquieu once said, "[i]t is necessary from the very nature of things that power should be a check to power." In this nation, where a keen instinct for justice is woven into the very fabric of our beloved country, it is important that the law is tested and seen by the people themselves to be serving their greatest good so that domestic legal order is assured.

[6] When I took office, I swore to uphold the rule of law and to defend the independence of the Judiciary – it is a promise that I take extremely seriously. This important occasion serves as a reminder of the unwavering commitment of the courts to do right fearlessly.

[7] In the past year, the subject of judicial independence in our nation has drawn a fair amount of attention through critical observations and comments made against judgments of the courts and judges themselves.

[8] In the course of the legal system, cases with overtly political overtones will invariably find their way to the courts. Judges who preside over such cases are frequently subjected to a great deal of intense scrutiny in the media, especially social media. The decisions that they make in such cases are almost always criticised by members of various political parties and by members of the general public.

[9] I recognise the constitutional right of every citizen to criticise the Judiciary and to test the correctness of its judgments through due process. Indeed, judges should be aware of public opinion, but they are not bound by it. Healthy attention and constructive comments towards the Judiciary and its work are always to be welcomed as they help us to reflect on our work, improve to the best of our abilities and competence, and also remind us of the utmost importance of upholding judicial independence to maintain the rule of law. Thus, the criticisms that we receive should not result in disharmony between the Judiciary and members of the Bar, any political alliance, or the general public,

but rather, it should solidify and augment our determination to be even more united in upholding the independence of the Judiciary and the rule of law.

[10] In this regard, when comments are not based on objective facts and rational arguments, let alone legally reasoned substantiations, but rather on surmises, political stances or improper considerations, they are of no value to the advancement of the rule of law nor do they help us to be united in upholding judicial independence.

[11] The acceptance of the courts' judgments by the litigants and by the public at large hinges, in part, upon the transparency with which the courts demonstrate in deciding cases.

[12] Only with transparency in its proceedings may the Judiciary be able to earn and keep residual long-term public trust. In my opinion, a key component of transparency is accessibility. Lord Bingham in his book *The Rule of Law* cautioned that:

> The length, elaboration and prolixity of some common law judgments … can in themselves have the effect of making the law to some extent inaccessible.[1]

[13] I would like to use this platform to remind my brother and sister judges again to ensure that your grounds of judgment are clear, coherent and concise, because the target audience covers every possible sector. It is of utmost importance that our judgments be easily understood by the public as their impact in shaping the law of the nation is long-lasting. Not only that, the judgments we write reflect our competence and diligence in carrying out the duties of our office.

[14] The grounds of judgment written by judges can be accessed online by the public. Such ease of access, I hope, translates into better comprehension of the judicial function. In this regard, I urge members of the public to read judgments in their entirety before forming an opinion and subjecting the Judiciary to any form of vilification.

[15] At the same time, I would reiterate that judges should make decisions and write judgments premised on the law and not on the notion of wanting to seek popularity. We write to keep the public abreast of the judicial function and not to seek validation from the

1 Tom Bingham, *The Rule of Law* (UK: Penguin, 2010), pp 42–43.

public or from any other quarters. If a judge decides a case premised on anything other than the law and/or facts, then he makes a decision that is not sound in law. And in which case, the judge fails to uphold judicial independence and the rule of law.

[16] Last year, attempts to intimidate or otherwise exert improper pressure on judges presiding over public interest cases are becoming more obvious. These attempts are a direct affront to the rule of law and judicial independence. They certainly deserve condemnation and indeed many have spoken out against them in strong terms. It is very mischievous for anyone to try to tarnish the image of the courts and bring it into disrepute through unfair, biased and often times unenlightened criticism simply because they happen to not like particular decisions.

[17] In matters which appear before it for determination, the Judiciary relies on the legal profession to provide the relevant facts and context before it can perform its adjudicative role. Lawyers therefore have a crucial role to play in maintaining confidence and stability in the legal system. It is imperative for lawyers to cultivate qualities which inspire confidence and trust, such as integrity, independence, intellectual rigour, a strong sense of public duty and commitment to justice, observance of their duties to the courts, as well as unity in upholding the independence of the Judiciary and the rule of law in this country.

[18] Taking our criminal justice system as an example: the courts are not the only ones dispensing justice. The Judiciary is assisted by the prosecution, namely, the Attorney General's Chambers, and also by the Bar. Each body has a different but no less important responsibility to maintain the highest professional standards where life and liberty are at stake. Criminal liability will continue to be determined in accordance with the applicable law and the strength of the evidence presented before the court. Those who are proven guilty will be convicted and those not so proven will be acquitted. Convicted accused persons will be meted with punishments that their crimes deserve, no more and no less. This is our job as judges, and we are determined to discharge our duty without regard to any threats that are made to deter us from it.

[19] The point I am trying to make here, as I have on many occasions before, is that judicial independence will not be compromised so long as cases are decided without fear or favour, without ill will or motive, without any external or internal pressure and without regard to personalities. As long as every judge remains committed to these

principles, and united in applying these maxims, I am confident that judicial independence will be upheld.

Resilience in defending constitutional supremacy

[20] The justice system involves complex inter-relationships between the three branches of the government, i.e. the Legislature, the Executive and the Judiciary. This separation of powers is not a mere promulgation of a doctrine. It is clearly embedded and enshrined in the supreme law of the land, i.e. our Federal Constitution.

[21] The Judiciary, being a separate entity, keeps away from politics and maintains a relationship with the other two bodies on the basis of non-interference, unless their actions or omissions constitute an infringement of the citizens' rights or the Federal Constitution. Such a relationship is one of mutual respect for each other's existence and responsibilities. In this regard, the Judiciary must remain resilient and steadfast in its firm footing as an independent institution that dispenses justice as well as defends the supremacy of our Federal Constitution.

[22] Judges take an oath in which they swear to carry out their responsibilities to the best of their abilities and to protect, preserve and defend the Constitution. Because of this oath, judges are required to cast aside their own feelings and opinions – regardless of whether they are racial, religious, or political – in favour of upholding the Federal Constitution. At key junctures throughout history, it has been the responsibility of the Judiciary in its position as an independent institution of the government to protect and defend the Constitution, and to rise to the occasion when necessary.

[23] Any self-imposed reluctance, whether conscious or otherwise, to rule against the state when the law so requires or to hold laws passed by the Legislature to be unconstitutional must be deleted from the judicial mind. In particular, this means that no political or other personal considerations of the judge can be entertained in the judicial decisionmaking process.

[24] The law is ever evolving. Lords Reed and Hodge, giving the leading judgment in *Test Claimants in the Franked Investment Income Group Litigation v HMRC (No. 2)*,[2] recognised that:

2 [2020] UKSC 47.

> … thinking about the law evolves over time. Developments in judicial thinking, in particular, do not take place in a vacuum. Judgments are the culmination of an evolution of opinion within a wider legal community, to which practitioners, universities, legal journals and the judiciary all contribute. And it is not only judges who are influenced by that evolving body of opinion.[3]

[25] The courts have dealt with and will continue to face challenging questions of law and principles in many interesting areas. As far as constitutional litigation is concerned, the court's judgments will no doubt continue to spur controversial debate. In a free society, such debate is to be expected. Indeed, reasoned debate and even better, well-reasoned legal discourse should be welcomed as they play a constructive role in the development of jurisprudence. That development can only take place gradually with the passage of time. Reasoned debate aside, there should be some consistency in the seminal decisions coming from our courts, especially the apex court.

[26] I have had the occasion to state, last year, that to me, there are no liberal or conservative judges, only legally coherent or incoherent judgments.

[27] The context in which I shared my aforesaid views was based on the fact that judges in Malaysia are bound by numerous principles and canons. A judge, in applying his or her judicial mind, merely has to follow these principles by applying them fairly to the facts of any given case. A judge who does that is not a "liberal" judge; just as a judge who does not do that is not a "conservative" judge.

[28] As for those who believe that judges are "judicial activists" or "judicial supremacists" for the reason that the Judiciary has nullified legislation or executive acts, I would like to bring to your attention the notion of constitutional supremacy. In this regard, I would like to quote from Tun Suffian who in his book said as follows:[4]

> If Parliament is not supreme and its laws may be invalidated by the courts, are the courts then supreme? The answer is yes and no – the courts are supreme in some ways but not in others. They are supreme in the sense that they have the right – indeed the duty – to invalidate

3 Ibid, at [178].

4 Tun Mohamed Suffian Hashim, *An Introduction to the Constitution of Malaysia*, 3rd edn (Pacifica Publications, 2007), p 18.

> Acts enacted outside Parliament's power, or Acts that are within Parliament's power but inconsistent with the Constitution. But they are not supreme as regards Acts that are within Parliament's power and are consistent with the Constitution. The court's duty then is quite clear; they must apply the law in those Acts without question, irrespective of their private view and prejudice.

[29] Those are Tun Suffian's words and not mine. In fact, and with respect, I do not completely agree with the learned Tun Suffian. In my humble view, courts or judges are never supreme. At all times, it is the Federal Constitution that reigns supreme and judges are merely its faithful adherents and proponents who ensure that the Federal Constitution retains its supreme stature. Where any law or executive act contradicts the Federal Constitution, it is for judges, as the only interpreters of the Federal Constitution – as dictated by constitutional design – to act to enforce its terms. Otherwise, the Federal Constitution is nothing more than a toothless tiger and its pages become nothing more than a repository of pretty words.

[30] It is for this reason that the entire corpus on constitutional law both here in Malaysia and in other parts of the world have in common the idea that a constitution, being a living and organic document, cannot be interpreted literally. It must be read as a living document. This does not mean that judges can add their own colour and flavour to its words but that judges must interpret its terms, especially the terms on fundamental liberties, broadly.

[31] Ultimately, judges in this country are appointed and not elected, for a reason. Elected officials usually act based on how the public perceives them with a view to getting re-elected. This is why laws can sometimes take generations to change. Judges on the other hand do not answer to and are not bogged down by political will. Judges decide cases without having to worry about political consequences but should only have regard to what is legally correct which in turn should inspire public confidence in the Judiciary.

[32] In my view, it is better that a judicial decision is unpopular but sound in law and fair on the justice of the case than for it to be popular but decided based on an ulterior motive to meet a certain extraneous objective. The former unpopular decision stands the test of time while the latter crumbles to dust at the earliest opportunity but not before wreaking havoc along the way. This, history has taught us well and we ought to learn from it rather than foolishly repeat it.

[33] The law has come a long way because of the manner in which cases are now being argued. Lawyers and litigants alike are now placing lesser reliance on foreign and incongruous constitutional principles derived from the United Kingdom or India and are instead placing greater reliance on our own Federal Constitution and our own constitutional jurisprudence. We, as judges too are therefore developing our own thinking on these long-present but newly articulated concepts.

[34] We understand that our role is limited to invalidating legislation or executive acts in appropriate cases and nothing more. Judges cannot and do not trespass into the domain of the Executive or the Legislative branches of the government. But, if and when these powerful bodies overstep the powers granted to them by the Federal Constitution, it is for the Judiciary to say so and that is the extent to which the courts can act. We are purely arbiters and not policymakers nor directors. Simply put, we can invalidate legislation or executive acts using prerogative writs or declarations but we cannot impose our own decisions in place of those of the Legislature or the Executive. That is the basis of separation of powers.

[35] Some may argue that the Judiciary appears to be stronger than before judging by the nature of the constitutional decisions that have been handed down of late. I would state that the Judiciary has been consistent by applying the newly developing constitutional jurisprudence in line with the spirit and dictates of the Federal Constitution foremost of which is Article 4(1).

[36] The most prominent example of this is ouster clauses. Prior to this, arguments to overcome ouster clauses were premised on English law and the decision of the United Kingdom House of Lords in *Anisminic Ltd v The Foreign Compensation Commission & Anor*.[5] It was only recently in cases like *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor*[6] that ouster clauses were constitutionally challenged using arguments never before considered and were finally settled by the Federal Court in two decisions rendered last year declaring them unconstitutional.[7]

5 [1969] 2 AC 147.

6 [2021] 2 CLJ 579.

7 *Nivesh Nair v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [05(HC)-7-01/2020(W), April 25, 2022]; *Dhinesh Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 4 AMR 317; [2022] 5 CLJ 1.

[37] It is natural that such decisions would affect the Executive which relies on ouster clauses and the Legislature which enacted them. The easier path for judges would have been to apply old English administrative law principles to sidestep the question of the constitutional validity of such clauses in the name of "conservatism" – a concept which I have said earlier I do not believe in.

[38] In the context of ouster clauses, the question was simply whether they were valid or not. That was the very limited context in which we could act and decide. We were not allowed, by the limits of our office, to redesign ouster clauses or worry about what would happen if they were invalidated because such questions are not strictly legal or constitutional but of policy. The outcome of the court's decisions, in light of separation of powers, is a question for the Executive and the Legislature. This is check and balance and is a mark of a healthy and functioning democracy.

[39] On our part, the Malaysian Judiciary shall continue to adjudicate cases of all kinds fairly and in accordance with the rule of law. The Judiciary has no intention of meddling in any executive or legislative affairs and the courts will act strictly and only as the final bastion against injustice as is the herculean task entrusted to us by the Federal Constitution, especially by Article 4(1). It must be remembered by all that the Constitution is not self-executing and it is the Judiciary that the Federal Constitution relies on to protect itself and to ensure that it continues to reign supreme. Judges otherwise have no interest in getting involved in what are in fact executive, policy or legislative matters.

Reforms

[40] I would like to take this opportunity to touch briefly on the Judicial Appointments Commission Act 2009. There has been some debate lately on the composition of the members of the Commission and their modes of appointment.

[41] Central to the administration of justice is the quality of our judges at all levels. It has become an accepted feature of the Malaysian Judiciary and also vital that its judges must be of the highest possible standards. It must remain our stance that only persons of the highest legal and moral calibre are appointed as judges.

[42] Underlying the approach of the Judicial Appointments Commission in terms of making recommendations is that only candidates of the highest quality should be recommended for appointment. This approach has worked well in the past and remains the right, and indeed the only, approach. It is crucial to judicial independence that the process of judicial appointments should remain apolitical and free from any form of interference and influence.

[43] We are mindful of the various views shared on these issues and we remain confident that with meaningful and effective engagement between the relevant stakeholders, legislative changes can be worked out and made to improve the workings of the Judicial Appointments Commission Act 2009.

[44] Throughout the year, the operational requirements and initiatives of the Judiciary have been supported by the government. Last year I mentioned that the government has agreed to the establishment of an independent Judicial Academy to cater to the training needs of superior court judges. However, I have been made to understand that there have been some glitches in the works and I hope that this can be seriously looked into so that the independently established Judicial Academy can be materialised as previously approved. It is important to the administration of justice that we have this support and for that the Judiciary is grateful.

Conclusion

[45] I must express my gratitude to all judges, judicial commissioners, judicial officers and court staff for working assiduously under adverse circumstances. It is because of our collective effort that our courts continue to carry out their business in the administration of justice.

[46] Let me also end by thanking all at the Bar, the Attorney General's Chambers and all our stakeholders present here today for working with us to administer justice in trying circumstances over the last few years. It is common knowledge that last year, the Judiciary was the target of scurrilous attacks during the hearing of certain high-profile cases. We remain grateful to the Bar in particular for issuing reasoned statements in support of the Judiciary. We look forward to your continued support and cooperation.

[47] Once again, I thank each and every one of you for attending and I wish you a happy new year.

Keynote Address at the National Symposium on Islamic Banking and Finance 2023*

by

The Right Honourable The Chief Justice of Malaysia,
Tun Tengku Maimun binti Tuan Mat

Introduction

[1] It is a pleasure and honour to be invited to deliver this opening address on the occasion of the National Symposium on Islamic Banking and Finance 2023. Islamic banking is now a mammoth in the banking sector and contributes significantly not only to the Malaysian economy but also international commerce. Something as big as this will naturally require legal support and show up in litigation. In fact the Malaysian Judiciary recognises this by our establishment of Muamalat courts.

[2] In this regard, I would like to congratulate both the Advocates Association of Sarawak ("AAS") and Association of Islamic Banking and Financial Institutions Malaysia ("AIBIM") for organising this conference with the view to marrying the law and commerce in this area.

[3] The past two years, no doubt, have caused unprecedented damage to both our domestic and global economies and we are still reeling from the COVID-19 pandemic. Yet, despite the continued uncertainty of the global economy, the Islamic banking and finance ("IBF") industry has seemed to burgeon with remarkable resilience from the first year of the pandemic, with its total asset size jumping by 14% and in 2021, progressed its growth to 17% with an estimation of US$3.6 trillion worth of assets and forecast to reach US$4.9 trillion by 2025 at a four-year compound annual growth rate (CAGR) of 7.9%.[1]

[4] Malaysia's prominence in the IBF industry is evident. Not only did Malaysia manage to retain the top spot of the Global Islamic

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* Keynote address by The Right Honourable The Chief Justice of Malaysia on the occation of the opening ceremony of the National Symposium on Islamic Banking and Finance 2023 at the Pullman Hotel Miri Waterfront, January 14, 2023.

1 State of the Global Islamic Economy Report 2022: Unlocking Opportunity, p 4.

Economy Indicator for the ninth consecutive year beating 81 countries,[2] but among the 136 countries assessed by the newly enhanced Islamic Finance Development Indicator ("IFDI") for the year 2022, Malaysia is leading with the highest IFDI score of 113.[3] Domestically, it has been projected that there will be 4% to 5% growth for Malaysia's banking sector in the year 2023 with the trend of the Islamic banking sector outperforming its conventional counterpart.

[5] Other unexpected consequences of COVID-19 lockdowns would be the burgeoning of the Islamic Fintech sector within the IBF ecosystem. Islamic Fintech refers to the use of new technologies to deliver Syariah-compliant financial solutions, products, services and investments. These technologies include artificial intelligence, biometrics, blockchain, distributed ledger, 5G, internet of things (IoT), robotics, quantum computing, etc.

[6] Malaysia has also been constantly ranked first based on the annual Global Islamic Fintech (GIFT) Report over the last few years. I am sure this is not sheer luck but due to a concerted effort by all parties involved.

[7] This excellent growth and momentum, however, cannot be taken for granted. There must remain an ongoing effort to promote sustainability and growth of IBF and Islamic Fintech, specifically. I am convinced that legal infrastructures focused on Syariah compliance are also a key factor to the flourishment of the IBF industry. However, laws and regulations must be routinely revised and updated to ensure their legal relevancy to the IBF market.

[8] A clear example of keeping up with the times is Bank Negara Malaysia ("BNM")'s Shariah Advisory Council ("SAC")'s issuance of a ruling that e-money is a permissible payment instrument under the Syariah as the resolution permits the trading and use of digital

2 State of the Global Islamic Economy Report 2022: Unlocking Opportunity. The report is produced by DinarStandard in partnership with Salaam Gateway with the support of Dubai Economy and Tourism (DET).

3 ICD-REFINITIV Islamic Finance Development Report 2022: Embracing Change. The 10th edition of the Islamic Finance Development Report is produced by the Islamic Corporation for the Development of the Private Sector (ICD), the private sector development arm of the Islamic Development Bank (IsDB) Group, and Refinitiv, the world's largest provider of financial markets data and infrastructure.

assets, a landmark development for the launch of Syariah-compliant crypto-trading facilities.

[9] Furthermore, the BNM's Policy Document on Licensing Framework for Digital Banks that came into effect in December 2020 has seen the approval of five digital bank licences by the Minister of Finance in April 2022, where two licences were approved under the Islamic Financial Services Act 2013. The introduction of the Malaysia Islamic Overnight Rate (MYOR-i) in March 2022 is also timely as it ignites more innovations of Syariah-compliant financial products which will further deepen Malaysia's IBF market. A holistic Syariah-compliant IBF ecosystem shall be fortified and best market practices and standards enhanced.

[10] It is my hope that these would all lead to achieving the intended outcome of the objective of the Syariah or otherwise known as Maqasid Syariah, especially *hifz al mal* (preservation of wealth). The concept does not literally mean preservation of wealth *per se* but encompasses the encouragement to generate, accumulate, preserve as well as distribute wealth in a just and fair manner.

[11] In the hype of technological advancement as digitalisation is thriving on the effects of the COVID-19 pandemic, every organisation or institution must evaluate their performance or productivity. For Islamic banks, customers' confidence certainly is one of the yardsticks to measure performance and productivity.

[12] Customers' confidence can be achieved through explicit disclosure and transparency. A high level of transparency most definitely will elevate the reputation of the Islamic banks besides enhancing the trust and loyalty of its customers.

[13] Transparency must be translated in the product offering and its processes as well as the terms and conditions of its contracts. Fair terms must be articulated in plain language together with the necessary explanation. This would greatly enhance the customers' experience and eventually build trust between the counterparties and may help to avoid disputes.

[14] BNM's Guidelines on Product Transparency and Disclosure reflect the effort taken by BNM in promoting the banking transparency journey. Such guidelines would certainly improve information

disclosure on products and services offered by financial institutions. As the financial landscape of this country is expanding from strength to strength, perhaps the scope of the guidelines may also aim to govern those new digital financial innovations.

[15] In time to come, we hope to hear less complaints from the customers about the misrepresentation or lack of transparency by Islamic banks. Basically, this is the role that should be played by lawyers to ensure that the customers understand the real meaning of the product characteristics or operating processes as well as the terms and conditions imposed.

[16] There have been cases involving banking agreements which ultimately come to the apex court. One of them concerns the interpretation and construction of an exclusion clause that may typically be found in most banking agreements. In the case of *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor*,[4] the Federal Court had to determine whether an exclusion clause in a loan agreement is void under section 29 of the Contracts Act 1950.

[17] The Federal Court held that such an exclusion clause is void under section 29 of the Contracts Act 1950 because it absolutely restricts the customer from enforcing his rights to sue the bank for any alleged breach by the bank of the loan agreement. The Federal Court found that such a clause is against public policy and that it is unconscionable on the part of the bank to seek refuge behind the clause and that it was an abuse of the freedom of contract.

[18] Perhaps the banking institutions should seriously consider this judgment and take necessary steps to review exclusion clauses as well as other possible unfair terms in financing contracts, especially in Islamic banking contracts. After all, fairness and justice are central to the religion of Islam. This, I believe, would further strengthen Malaysia's leadership position and advance the growth of Islamic banking and finance globally.

[19] As we are aware, Islamic banking transactions involve an interplay between the civil law on contracts and the Syariah ruling. Malaysia takes the approach of creating the SAC to ascertain the *fiqh muamalat* involved in the transaction.

4 [2019] 2 MLJ 1.

[20] A clear process has been set out to facilitate judges, arbitrators and Islamic financial institutions to refer matters which require the ascertainment of Islamic law to the SAC for its ruling or advice in determining parties' disputes.

[21] I am sure you are aware of the challenge brought before the Federal Court on the status of the SAC in relation to its potential conflict of jurisdiction with the civil court. In *JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Bhd & Ors* ("*JRI Resources*"),[5] heard by a nine-member Bench, it was held, by a majority decision, that the ascertainment of *fiqh muamalat* by the SAC does not encroach on the judicial power. The Federal Court ruled that the court remains as the final adjudicator and arbitrator of the disputes between the parties in any given case.

[22] To promote procedural legitimacy, the SAC on its part had taken efforts to ensure that the reasoning of the SAC is well-documented and accessible to the public. Issuance of the Syariah Standards and Operational Requirements by BNM is to provide clarity on the Syariah and operational requirements for 14 Islamic finance contracts. Members of the public now no longer accept any decision without reason. Therefore, reasoned decisions by the SAC become a necessity. With such reasoned decisions, it would provide certainty on the application of Syariah principles and would minimise the occurrence of different interpretations of Syariah contracts.

[23] *JRI Resources* may not be the first and last case where the constitutionality of the SAC rulings is challenged. It is to be noted that by section 57 of the Central Bank of Malaysia Act 2009, any ruling made by the SAC pursuant to a reference made to it under section 56 shall be binding on the court or the arbitrator making the reference. To avoid similar challenge in the future, contracting parties may want to consider stipulating a condition that they agree to abide by the SAC ruling. By doing so, the SAC ruling would not only bind the court but would also bind the contracting parties. The need to resort to the Federal Court to adjudicate on the constitutionality of the SAC ruling, in such circumstances, would not arise.

[24] Another aspect that may be considered by the SAC is to allow practitioners or parties to appear and argue before them in their

5 [2019] 5 CLJ 569.

discourse to ensure that parties are heard on their views, as opposed to the current practice where parties, as I understand it, are only required to put in their written opinion. Appearing before the SAC and arguing their case will provide opportunities for disgruntled parties to ventilate their arguments and participate more fully in the decision by the SAC.

[25] I believe one of the contributing factors towards the growth of the IBF industry is that judges in Malaysia are now well-equipped in adjudicating Islamic banking and finance cases as they have a better grasp and comprehension of Syariah financing facilities. In essence, the courts are more aware of Islamic banking transactions and uphold them where possible.

[26] One example is the more recent Federal Court case of *Maple Amalgamated Sdn Bhd & Anor v Bank Pertanian Malaysia Berhad* ("*Maple Amalgamated*"),[6] where the appellants sought to impugn the legality of the asset sale and purchase agreements on the grounds that the land which was the subject-matter of the asset sale and purchase agreements was estate land and, pursuant to section 214A of the National Land Code ("NLC"), any transfer, conveyance or disposal of estate land would require the consent of the Estate Land Board, something which had not been obtained by the parties.

[27] In answering the question of whether a *Bai Bithaman Ajil* ("BBA") financing facility is valid in light of section 214A of the NLC, the Federal Court took the more nuanced approach in viewing the underlying agreements forming the mechanics of Islamic financing facilities. As long as the effect of the Islamic financing facility is not in contravention of a statute or the legislative intent of the statute, then regardless of the purported effects of the underlying agreements forming part of the facility, the facility itself is valid in law. Hence, it was found that a BBA Islamic financing transaction does not contravene section 214A of the NLC. I hope that the *Maple Amalgamated* case will form a solid legal bedrock to indicate that it is the substance of the facility as a whole rather than its form which is significant in determining whether the transactions underlying such facilities are contrary to law.

[28] The Judiciary is aware of its need to keep abreast of the development of the IBF industry as inevitably we play a key role

6 [2021] 8 CLJ 409.

in not merely shaping the legal framework but ensuring that IBF shall successfully thrive domestically and globally. Naturally, the participating lawyers have assisted the judges in coming to their decision. Being the backbone of the Islamic finance ecosystem, lawyers likewise need to be fully prepared with the necessary knowledge and understanding of the IBF system. As such, I am glad to see this effort made by the AAS and AIBIM to bridge the knowledge gap.

Conclusion

[29] In conclusion, I wish to place on record my heartfelt appreciation to the organisers for hosting this event. I wish all delegates and participants a successful seminar.

Thank you.

Peace, Justice and Strong Institutions*

by

*Tunku Zain Al-'Abidin**

Introduction

[1] First of all thank you to Taylor's for extending this invitation to me. I've previously come to this campus in my capacity as Patron of the Society of Malaysian Contemporary Composers, to listen to the superb yet avant garde works of composers from Malaysia and the region on a wide variety of instruments.

[2] Today's content will be less avant garde, but of vital importance to our future as Malaysians and citizens of the world. Peace, justice and strong institutions all come under the ambit of sustainable development goal 16; and I know that many of you will be quite familiar with the United Nations ("UN") Sustainable Development Goals ("SDGs") and be already involved in pursuing them.

[3] But as I am today addressing a group of mostly younger Malaysians, I would like to begin by making reference to our foundational speeches and documents. For in them we can find peace, justice and strong institutions were at the heart of our country from the very beginning.

[4] Indeed, we can find nuggets of these concepts way back in the laws of, and writings about, the Terengganu Inscription Stone of the 14th century, the Sultanate of Malacca in the 16th century, and the old confederation of Negeri Sembilan in the 18th century. But ultimately, all these narratives were to synthesise into our modern post-colonial state.

Malaysia

[5] And thus on August 31, 1957 and September 16, 1963, our first Prime Minister Tunku Abdul Rahman proclaimed that the Federation

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* Keynote Address at the Launch of Taylor's Impact Labs on November 2, 2022 at Taylor's Lakeside Campus.

of Malaya, and then Malaysia, "with God's blessing shall be forever a sovereign democratic and independent State founded upon the principles of liberty and justice and ever seeking the welfare and happiness of its people and the maintenance of a just peace among all nations."

[6] Our Rukun Negara refers to "more perfect unity" among our society, "a democratic way of life", and "a just society" before declaring the principles of the rule of law and the supremacy of the constitution.

[7] And it is our Federal Constitution that establishes, defines and regulates the institutions that are supposed to achieve and uphold these principles. No mention is explicitly made that they should be "strong", but it was clearly the intention of the writers of our Constitution that they must be strong and effective in fulfilling their functions.

[8] So to me, we in Malaysia are lucky because we have inherited through our own history the importance of peace, justice and strong institutions. If we are to be consistent, we must do our duty as citizens of our country as much as having a global outlook. That is why I am very glad that in the Impact Labs document that comes with the launching of this lab, the UN SDGs target under the three headings are additionally paired with the themes from the Twelfth Malaysia Plan.

[9] This is a powerful way of affirming that the values and goals of Malaysia are already aligned with the values and goals of the SDGs. For in an environment where there are extremists who want to ignore global cooperation and look ever inwards into championing only their own race or religion, the most powerful counter is for those championing cooperation and inclusion to show that their efforts result in a better country for everyone.

[10] And if you drill down into the purposes and challenges under each hub, you will realise the sheer amount of work that still needs to be done. For example, under "peace", one target is protecting children from abuse, exploitation, trafficking and violence. Under "justice", one target is promoting and enforcing non-discriminatory laws and policies. And under "strong institutions", one target is substantially reducing corruption and bribery.

[11] For each of these targets, there is research and advocacy to be done. Best practice must be sought out, as the experience and evidence

from other countries is needed to formulate data-driven solutions for Malaysia.

[12] And indeed, you may ask, what about other countries? Don't they also have their own interpretations of what peace, justice and strong institutions mean? Might it not be the case that in some countries, "peace" means sacrificing freedom; or "justice" is defined by a narrow elite with no recourse for appeal; or "strong institutions" means a totalitarian police state where no one can challenge authority?

[13] The answer to these is of course words can be defined differently in different places by different people; and yes of course some countries come to very different conclusions than us. But we must remember that we too are being watched by the rest of the world to see if our way actually works. And indeed, decades ago, Malaysia was often respected and marvelled at by the world for our rapid economic progress, the elimination of hardcore poverty and the creation of a large middle class, tolerant values and exhibiting an enlightened Islam. Of course, some of these perceptions may have been manufactured or exaggerated both by our government and foreign observers, but the point is that in a world of fragile and divisive geopolitics, we must stay true to what we believe and achieve our goals accordingly.

[14] Although we speak today about the UN SDGs, in truth, there have been so many individuals and organisations over the decades whose work is consistent with these goals. Indeed, there are many charities and organisations that seek to explicitly solve the many problems plaguing our world, and while many of those relate to other SDGs, there is usually an angle that relates to SDG 16 as well.

[15] For example, the brilliant work of the team at Yayasan Chow Kit in providing shelter and advocating for children's rights might come neatly under SDGs 1, 2, 3, 4 and 10, but there is no doubt that peace and justice follow if we improve the institutions that identify and protect children in need, especially those who are stateless or refugees.

[16] At the IDEAS Autism Centre and Ideas Academy, the education that is provided to children who have disabilities, are from low-income families or are refugees can similarly be placed under SDGs 3, 4 and 10, but again in the Malaysian context these efforts are demonstrating that there is a better, more inclusive way than the current system. Indeed, the innovation – and results – of independent efforts should be used to improve government policy.

[17] When I see our athletes, especially our squash players, compete around Malaysia and across the world, I see peace being fostered as people get to know and respect each other in and off court. I see justice being ingrained as respect for the rules of sport graduates to respect for the rule of law: indeed that's precisely why Tunku Abdul Rahman promoted sports so much.

[18] When I hear our young musicians perform across the country and the region, I see the multiracial and multinational ensembles and orchestras as beautiful metaphors for harmonious cooperation – and as any trombonist will tell you, orchestras themselves must be strong institutions to do justice to the conductor's vision of the composer's piece.

[19] But for us at the Institute for Democracy and Economic Affairs ("IDEAS"), our work towards institutional reform is more explicit.

[20] Our most recent efforts were towards the political financing bill, so that political parties, politicians and candidates must be more transparent in where they are getting their money from; and similarly, donors must be more transparent in who they are giving their money too. Additionally we had mooted the idea of state funding of political parties based on the votes gained by their candidates so that there is less reliance on corporate patronage and corruption of which 1Malaysia Development Berhad (1MDB) remains the biggest example.

[21] We supported the anti-hopping law so that candidates have to think long and hard about whether to abandon the platform upon which they were elected; and of course, to give voters a certain level of assurance about whose manifesto they are voting for, and provide stability to a government that is formed with that politician's support.

[22] And before that we supported the lowering of the voting age to 18, coupled with automatic voter registration, to increase the democratic legitimacy of our elected representatives and thus our government. This will be put to the ultimate test in 17 days' time, when over five million new voters will have the opportunity to vote in a general election for the first time.

[23] While other efforts have been stymied by the dissolution of Parliament, after the formation of the next government, my colleagues at IDEAS will continue to press on political financing, but also on a

term limit for the Prime Minister, and the separation of the roles of the Attorney General as chief legal adviser to the government and Public Prosecutor.

[24] And of course, many of these reforms can be applied at the state level as well. Indeed, another one of our areas of interest is decentralisation, for Malaysia is a federation in name, but compared with other federations, we operate more like a unitary state in which the central government possesses the vast majority of the power. This is made even worse when so much of that power itself resides in the hands of the Prime Minister. In Malaysia today much of the debate on decentralisation is about the restoration of the Malaysia Agreement 1963 with respect to Sabah and Sarawak, which of course is right and proper, but I think we can go further, in terms of giving states more autonomy across various areas of public policy, from transport, housing and even education.

[25] I could go on with more specific examples, but in essence, all of these reforms are being pursued by us and others in civil society with the aim of strengthening our institutions as a whole: so they are better defined, better understood and enjoy better public confidence.

[26] But of course, critics will say that there may be imperfections in the legislation, and I agree that things can often be improved, but on balance, it is probably best that we have one foot in the door, and the main points covered, before wisdom and experience – whether through policy or judicial decisions – can guide us to improving such laws in the future.

[27] And when it comes to independence of the Judiciary, our support is unflinching. In the paradigm of the European Enlightenment the Judiciary is seen as one of the three vital branches of the state, alongside the Executive and Legislature, and separate from them. But this independence was also acknowledged by pre-colonial polities, and for example the Minangkabau in Pagar Ruyong had established systems of courts whose echoes continue to serve in specific capacities in Negeri Sembilan today, under the system of *Adat Perpatih*.

[28] I find that of late Malaysians have had quite a schizophrenic attitude towards the Judiciary. Some judgments are hailed as triumphs and prove that the Judiciary is independent, and some judgments are condemned as disasters and prove that the Executive still controls it.

Indeed, many eyes will be on a couple of upcoming decisions that involve very senior politicians, and this will be used to either praise or excoriate the Judiciary.

[29] As my legal friends remind me, however, it is important to read at least the summaries of the judgments to understand why things don't go the way you desire. There are technicalities, lawyers do make mistakes, and judges do disagree among themselves on the definitions of certain words. This helps us to better assess the independence of the Judiciary as a whole.

[30] Finally there is the final check and balance institution, the Yang di-Pertuan Agong together with the Conference of Rulers. Upon his installation, the Agong swears on oath to perform his duties in accordance with the Constitution, and indeed, the Federal Constitution specifies roles for the King and Rulers, such as in making appointments and declaring an Emergency, which of course was relevant during the COVID-19 pandemic when the Prime Minister's first request was refused. In recent years we have seen how different parts of the population have appealed to the palace to seek justice, for it is an apolitical institution with an extremely long-term view across generations, compared to politicians thinking of the next election.

[31] Yet, care must be taken by all sides to ensure the system works to serve the people. For ultimately, we live under a constitutional system. The reality is that all institutions need to take heed of what the constitution asks them to do. But on the flipside of that, constitutional literacy is vitally important. The *rakyat* must know why our institutions exist and what their functions are. And if they don't fulfil their functions, the freedom of expression must enable them to seek improvements.

Conclusion

[32] Ladies and gentlemen, I hope I have given an overview of some of the things that you as Malaysians can think about to make your communities, our country, our region and the world a better place through actively thinking about peace, justice and strong institutions, whatever your eventual profession. Many of you may go on to further studies and careers overseas, and that will provide new opportunities to be active in these areas.

[33] I'm very glad that Taylor's University, through its Learning 2030 strategy, is setting up these 13 Impact Labs in order to become

a purpose driven university. I do of course have affiliations to several other private and public universities in Malaysia, and it is my hope that the healthy competition and innovation that exist across these institutions lead to ever better ways to contribute to our country. I am confident that Taylor's has the leadership and expertise to use these impact labs to generate ideas, programmes and most importantly, students who will become exemplary citizens who have internalised within them the multi-faceted ways in which the 12 challenges towards peace, justice and strong institutions can be realised.

[34] So I congratulate Taylor's University, from the senate to the management, to faculty and professors, and I wish all the students the very best as you find your footing. Our world in your era is an unpredictable, fast-changing place, and your critical years have been distorted by a unprecedented global pandemic. But rest assured that having strong principles, guided by the wisdom of our forefathers and international cooperation, will see you through for the future.

SIFoCC Playing its Part as a Cornerstone of a Transnational System of Commercial Justice*

by

*The Honourable the Chief Justice Sundaresh Menon***

[1] The Standing International Forum of Commercial Courts ("SIFoCC") was established at the initiative of Lord Thomas in 2017 when he was Lord Chief Justice of England and Wales. In the years since then, it has grown in its membership and also in the ambition of its projects and conferences. Today, it is the largest gathering of commercial courts and judges from around the world, all united in their mission to deliver justice to parties engaged in transnational commerce. Lord Thomas, Mr Justice Robin Knowles and the Secretariat deserve to be congratulated for all their efforts in bringing about the remarkable growth of the Forum within such a short period. This suggests that it does have a vital role to play: those who participate in SIFoCC's programmes are all busy people and they would not continue to make the effort unless they believed it was worth doing so.

[2] I suggest that having gotten this far, we should now look ahead to how we might conceptualise the next chapter of the SIFoCC journey. My principal suggestion is this: transnational commerce remains a key driver of global efforts to sustain growth, alleviate poverty and improve lives. And given the extent to which trade today is truly transnational, the need of the moment is a commitment to develop and sustain a transnational *system* of commercial justice. SIFoCC is exceptionally well-placed to drive this effort, and I will seek to illustrate this with reference to the themes of the 4th SIFoCC Meeting held in Sydney in 2022, which reflect some of the most important issues faced

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* This paper is adapted from the keynote address given at the 4th Full Meeting of the Standing International Forum of Commercial Courts in Sydney, Australia on October 20, 2022. I am deeply grateful to my law clerk, Perry Peh, and my colleagues, Assistant Registrars Huang Jiahui and Tan Ee Kuan, for all their assistance in the research for and preparation of this address.

** Supreme Court of Singapore.

by those of us engaged in international commercial dispute resolution (or "ICDR") today.[1]

[3] I develop my thesis in three parts:

(a) First, I will explain what I mean by a transnational system of commercial justice and will argue that such a system is already in place, albeit as a work in progress.

(b) Next, I outline why and how we should work intentionally to enhance the development of this system.

(c) Finally, I will outline some ideas for how SIFoCC might evolve to play a central role in this effort.

Part 1: Globalisation and a transnational system of commercial justice

[4] At the heart of transnational commerce lies the phenomenon of globalisation. While it is impossible to speak of globalisation today without acknowledging the many challenges it faces, I believe, as I have argued on a number of recent occasions, that globalisation is here to stay.[2] This is not least because the greatest challenges that confront us today are global challenges that demand transnational collaborative responses: geopolitical instability, global health security, the erosion of truth, stagflation, structural income and wealth inequality, and the climate crisis.[3] None of these can be addressed by our retreating into national siloes. And addressing them will be that much harder if we cannot maintain a healthy flow of transnational commerce to sustain

1 The 4th Full Meeting of the SIFoCC was held on October 20–21, 2022 at the Commonwealth Law Courts Building in Sydney, Australia. It was a hybrid meeting with some of the participants attending in person and others virtually, and was jointly hosted by the Federal Court of Australia and the Supreme Court of New South Wales.

2 Sundaresh Menon, "The Law of Commerce in the 21st Century: Transnational Commercial Justice Amidst the Wax and Wane of Globalisation", lecture hosted by the University of Western Australian Law School and the Supreme Court of Western Australia (July 27, 2022), at https://www.judiciary.gov.sg/docs/default-source/news-docs/chief-justice-sundaresh-menon's-address-on-transnational-justice.pdf ("Law of Commerce in the 21st Century"); and Sundaresh Menon, "Justice in a Globalised Age", 3rd Judicial Roundtable on Commercial Law: Keynote Lecture (September 29, 2021), at https://www.judiciary.gov.sg/docs/default-source/news-docs/3rd-judicial-roundtable-on-commercial-law.pdf ("Justice in a Globalised Age").

3 See "Law of Commerce in the 21st Century", ibid, at para 12.

economic growth, and offer the hope that we *can* alleviate poverty and optimise the returns on our limited resources for the benefit of all.

[5] Much can be said for building a more sustainable vision of globalisation than what we have hitherto seen.[4] The precise vision we ought to embrace for the future will be a matter for discussion, contestation and experimentation for years to come. Nevertheless, it must be a vision of a globalised, interconnected world; and not a fragmented one made up of insular blocs standing apart. I outlined aspects of this vision at a lecture I delivered in Perth earlier this year,[5] and I will develop some of those points here.

A. The importance of a transnational system of commercial justice

[6] Whatever shape the future of globalisation takes, the law will remain a critical part of the infrastructure of commerce. This can be traced back to early civilisations, but a more proximate starting point for understanding the law's role in transnational commerce is the law merchant, or *lex mercatoria*: a common body of rules and customs widely adopted by merchants in Europe around the Middle Ages.[6] This was a system of law where rules were applied throughout the trading region in a broadly consistent way by means of a network of courts and informal adjudication that prioritised speed and efficiency.[7] From the 17th to the 19th centuries, these rules were gradually assimilated into national legal systems and largely lost their transnational character. As a consequence, international commercial law is today often thought of less as part of a coherent system and more as a hodgepodge of rules from different sources.

[7] I suggest that a renewed focus on a modern notion of a transnational *system* of commercial justice will be essential in a globalised world. To explain this, it will be necessary to outline what is meant by a

4 See "Justice in a Globalised Age", n 2 above, at paras 23–24.

5 "Law of Commerce in the 21st Century", n 2 above.

6 See Sundaresh Menon, "Roadmaps for the Transnational Convergence of Commercial Law: Lessons Learnt from the CISG", speech at the 35th Anniversary of the CISG (April 23, 2015) ("Lessons Learnt from the CISG") at paras 7–8.

7 See James Allsop and Samuel Walpole, "International Commercial Dispute Resolution as a System" in Sundaresh Menon and Anselmo Reyes (eds), *Transnational Commercial Disputes in an Age of Anti-Globalism and Pandemic* (Hart Publishing, forthcoming 2022) ("International Commercial Dispute Resolution as a System") at pp 50–51.

transnational *system* of commercial justice. At its most rudimentary, a legal system is a public framework of laws accompanied by institutions which make and develop those laws, and which seek to interpret and apply them in a broadly consistent manner, thereby offering a basis upon which differences can be resolved fairly. At a domestic level, we know what this means. But since the nationalisation of the *lex mercatoria,* it has been less obvious what it means in a transnational commercial setting. Yet, while we do not seek a supranational legal system, we can effectively achieve many of the benefits of having such a system to facilitate transnational commerce by seeing the many discrete players and processes that do regulate aspects of commerce as though they were part of a system, at least on a conceptual level.

[8] But why should we do this, even assuming it were possible? At the most fundamental level, this is because legal differences and uncertainty increase transaction costs and hamper growth.[8] And these costs will only increase with new risks in emerging areas, such as artificial intelligence and data privacy, that inevitably will have a transnational impact while also necessitating new ways of regulating modern business. In addition, cross-border business activity inevitably leads to cross-border commercial disputes, and this adds another layer of increased costs. A focus on fostering a transnational system of justice would prioritise the convergence of commercial laws where possible, and the minimisation of the inefficiencies that inhere in transnational dispute resolution.

B. The components of a transnational system of commercial justice

[9] Now, this seems a mammoth task to be sure, made even more difficult to navigate by the fact that different components of it have been worked on variously by different stakeholders over the course of the past few decades. Yet, somewhat ironically, it is because of this steady work on so many fronts that the transnational system of commercial justice is already in existence as a work in progress. I will briefly illustrate this with reference to two of its facets: convergence in procedural law and in substantive law.

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8 See Sundaresh Menon, "Doing Business Across Asia: Legal Convergence in an Asian Century", Opening Address (January 21, 2016), at https://www.judiciary.gov.sg/docs/default-source/news-docs/doing-business-across-asia---legal-convergence-in-an-asian-century-final-version-after-delivery--260116.pdf ("Legal Convergence in an Asian Century") at para 6.

[10] Beginning with procedural law, the exemplar for meaningful convergence is the set of rules of private international law governing arbitration agreements and awards. At its centre are the 1958 New York Convention,[9] which, with 170 parties and counting,[10] has created an almost universal regime for the enforcement of arbitral awards; and the UNCITRAL Model Law on International Commercial Arbitration, which is very widely adopted today.[11] These instruments create a robust and vitally important framework for managing the resolution of disputes by channelling them to the right venues and then avoiding the unnecessary re-litigation of issues by foreclosing the review of arbitral awards on their merits.[12] Such a perspective rests

9 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958, entered into force on June 7, 1959).

10 Following the deposition by Turkmenistan of its instrument of accession on May 4, 2022.

11 With the 2005 Hague Convention on Choice of Court Agreements (the Convention of June 30, 2005 on Choice of Court Agreements (entered into force on October 1, 2015)) and the Singapore Convention on Mediation (the United Nations Convention on International Settlement Agreements Resulting from Mediation (December 20, 2018, entered into force on September 12, 2020)), the international dispute resolution community has been working to replicate the success of the New York Convention in litigation and mediation respectively.

12 And there is a further possible dimension to preventing re-litigation by holding that in at least some circumstances, an application to resist enforcement of an arbitral award should be determined with reference to the outcome of a similar earlier application, whether before a different enforcement court, or to set aside the arbitral award in the seat court. There are differing views on this, but I have argued elsewhere that the best approach would be to apply the doctrine of issue estoppel transnationally, so that if the criteria for issue estoppel are satisfied, a party should not be allowed to re-litigate the same ground for resisting enforcement after the issue has already been decided by another court: see Sundaresh Menon, "The Role of the National Courts of the Seat in International Arbitration", keynote address at the 10th Annual International Conference of the Nani Palkhivala Arbitration Centre, (February 17, 2018), at https://www.judiciary.gov.sg/news-and-resources/news/news-details/chief-justice-sundaresh-menon-keynote-address-delivered-at-the-10th-annual-international-conference-of-the-nani-palkhivala-arbitration-centre-2018-the-role-of-the-national-courts-of-the-seat-in-international-arbitration, at para 32.

On the other hand, it should be noted that issue estoppel will typically not apply where the ground for setting aside is public policy, since the issue before each court is whether the award is consistent with the public policy of the jurisdiction where the court is located, and there is therefore no identity of subject-matter in relation to this issue when it is decided in different jurisdictions (see ibid, at para 34).

on a systematic rather than a court- or jurisdiction-centric approach to transnational commercial justice.[13]

[11] There have also been long-standing efforts at achieving convergence in substantive law, such as through the Convention on Contracts for the International Sale of Goods (or "CISG").[14] Today, however, we can expect to face an ever-growing set of legal issues that have an inherently transnational character – such as those arising from our responses to challenges like climate change and global public health. For example, disputes arising from projects under the Green Climate Fund of the UN Framework Convention on Climate Change (or "UNFCCC") have already come before arbitral tribunals.[15] These and other disputes may turn on the commitments made under the Paris Agreement, national rules or policies made to implement those commitments, and the actions of individuals or businesses in response to these events. Another example is the Chancery Lane Project, which has contributors from 113 countries. It has published a set of template contractual clauses which can be inserted into a range of business contracts to mandate the pursuit of climate-related priorities.[16] If the project is successful, it will soon fall to arbitral tribunals and commercial courts to interpret these clauses when contractual disputes arise. The legal norms arising from these decisions have the potential to become the transnational norms that will guide the greener conduct of global commerce. We will significantly handicap our ability to

13 Similarly, in relation to the *process* of international dispute resolution, it is unsurprising that international commercial arbitration has led the way in promoting convergence in the *conduct* of dispute resolution, since it tends to involve parties hailing from different legal traditions. The International Bar Association's Rules on the Taking of Evidence in International Arbitration, first adopted in 1999, sought to harmonise this process by borrowing from practices developed in common law and civil law jurisdictions, as well as those indigenous to international arbitration. See IBA Rules of Evidence Review Task Force, *Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration* (2021) at https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D, at p 3.

14 United Nations Convention on Contracts for the International Sale of Goods (April 11, 1980, entered into force on January 1, 1988). See "Lessons Learnt from the CISG", n 6 above.

15 See *ICC Commission Report: Resolving Climate Change Related Disputes through Arbitration and ADR* (ICC, 2019) at https://iccwbo.org/climate-change-disputes-report, at paras 2.4 and 4.1.

16 "About the Chancery Lane Project" at https://chancerylaneproject.org/about/ (accessed on July 15, 2022).

mount a coordinated response to such global challenges if we were to approach these disputes in an *ad hoc* fashion or in national siloes, instead of striving to achieve broad and thoughtful consistency in the approach we take to the interpretation, development and application of these norms, or at least to ensure that any divergences are principled.

[12] None of this means that the entire corpus of commercial law must be the same everywhere. Not only would that be unachievable, the laws of each jurisdiction reflect a compromise between the competing political, social and economic realities within that jurisdiction. But even so, in some select areas, we can attain uniformity; in others, we can pursue meaningful convergence; and in the remaining areas, we can at least aim to acquire an understanding of our principled differences. And for the reasons I have just explained, these are worthy goals for us to pursue. To achieve them, we should see the body of laws that govern international commerce and ICDR as well as the institutions involved in applying them from the perspective of a system rather than as a mere compilation of rules administered by discrete and disconnected entities: in short, we should seek to develop a modern day *lex mercatoria*.

C. International judicial dialogue as a driver of convergence

[13] The examples I have just discussed also illustrate the importance of what I call the *drivers* of meaningful convergence. In domestic law, we take it for granted that the law is made and refined by legislatures and courts. On the international plane, there is no single authority that has responsibility for the development of the law. Instead, convergence is driven by a multitude of stakeholders with varying degrees of coordination. Prime amongst these are international organisations, such as UNCITRAL, which promulgate international instruments such as the Model Law and the CISG.

[14] But another key driver of convergence is international judicial dialogue. This takes place on at least two levels: first, through the means that is especially well-known to the common law – the publication of judgments which are then read by practitioners and by courts in other jurisdictions. The cross-citation of authorities across different jurisdictions is an important way in which we ensure that the law develops in a manner that is cognizant of other pertinent positions and considerations.

[15] Second, and less frequently appreciated, is direct communication and collaboration between judges across jurisdictions. I suggest that the transnational system of commercial justice benefits tremendously from such exchanges, which are an often-overlooked source of strength for a court system: it helps judges keep abreast of legal developments emanating from their colleagues across the world and provides them with a sounding board for their own thoughts and ideas.

[16] This is where we see the genius that lies behind the establishment of SIFoCC as an international community of commercial judges. In the five years since its establishment, SIFoCC has already accomplished a number of notable feats, of which I highlight just these:

(a) SIFoCC has developed and published a Multilateral Memorandum on Enforcement of Commercial Judgments for Money, with each contributing judiciary explaining the legal position in their own jurisdiction.[17] While the Memorandum is not legally binding, it provides clear and reliable information that can give judges much greater confidence in understanding the implications of their rulings in transnational cases and afford litigants the comfort of knowing how they can monetise their judgments. With such a tool, we take a significant step towards achieving meaningful convergence in an area of law of central importance to commercial users.

(b) SIFoCC has also published a set of guidelines summarising international best practices in case management, incorporating the input of judges from more than a dozen jurisdictions.[18] This document provides an excellent starting point for courts to develop their own principles on effective case management, a vital capability for effective commercial dispute resolution.

(c) And at the height of the COVID-19 pandemic, SIFoCC issued two COVID-19 memoranda, in which member courts pooled their

17 "SIFoCC Multilateral Memorandum on Enforcement of Commercial Judgments for Money" (SIFoCC, Revised 2nd edn, 2021) at https://sifocc.org/2021/04/21/sifocc-multilateral-memorandum-on-enforcement-now-with-international-working-group-commentary/ ("SIFoCC Multilateral Memorandum").

18 "First SIFoCC International Working Group: International Best Practice in Case Management" (May 27, 2020), at https://sifocc.org/app/uploads/2020/05/SIFoCC-Presumptions-of-Best-Practice-in-Case-Management-May-2020.pdf.

experiences and lessons learnt from how they used technology to sustain the delivery of justice during the pandemic.[19]

[17] The remarkable work SIFoCC has already done should, I suggest, be seen as a precursor to a more ambitious goal: imagine an international community of leading commercial judges, international adjudicators and third-party neutrals, engaging in direct dialogue in the endeavour to develop and refine solutions and responses to the challenges that face all of us in the world of ICDR. Happily, we have taken the first step in this direction with the 4th SIFoCC Meeting. The topics of discussion at the meeting – the integrated system of dispute resolution, the complexification of disputes, the future of corporate legal responsibility and governance, jurisdictional conflicts, and commercial litigation funding – may be situated within the broader context of developing a transnational system of commercial justice. Those discussions made a direct contribution towards two important facets of this undertaking: first, improving ICDR by having it function more as a system; and second, raising the effectiveness and the capabilities of adjudicators and indeed, of the system as a whole.

Part 2: Intentionally working to enhance the system

A. Improving the function of international commercial dispute resolution

[18] I begin by suggesting that we should first acknowledge the reality that the ICDR system encompasses not only litigation, but also arbitration, and increasingly, mediation and other forms of dispute resolution. A commercial dispute today will frequently flow across these different mechanisms. To take one example, most complex infrastructure projects benefit immensely from the work of dispute boards, which can dramatically reduce what remains in dispute at the end of the project, to be resolved by further mediation, arbitration, or

19 "Delivering Justice During the Covid-19 Pandemic and the Future Use of Technology – Memorandum" (SIFoCC, May 2020), at https://sifocc.org/app/uploads/2020/05/SIFoCC-Covid-19-memorandum-29-May-2020.pdf; "Second SIFoCC COVID-19 Memorandum" (SIFoCC, March 2021), at https://s3-eu-west-2.amazonaws.com/sifocc-prod-storage-7f6qtyoj7wir/uploads/2021/03/6.7119_JO_Second_SIFoCC_COVID-19_memorandum_WEB.pdf.

litigation.[20] More commonly, the enforcement of an arbitral award or a mediated settlement agreement will typically lie in a commercial court, sometimes in a different jurisdiction from that of the law governing the arbitration or mediation. And multiple proceedings on the same or similar matters may arise in different jurisdictions or *fora*, raising the question how each should regard the related proceedings in the others, especially where a judgment or award has already been rendered.

i. Jurisdictional conflicts

[19] In these situations, commercial courts will typically be the ultimate arbiters of where disputes are to be adjudicated and whether recognition should be accorded to the outcomes of other proceedings. In this way, they are akin to the *control centres* of the ICDR system. There is no single pre-determined court that will serve as *the* control centre of any given dispute. Instead, each court has the prerogative to rule on jurisdictional disputes that pertain to the proceedings before it. It follows from this that we should strive to develop broadly common approaches to manage and reduce jurisdictional conflicts. The central guiding principle should be to minimise costs and uncertainty arising from the possibility of jurisdictional arbitrage and the re-litigation of decided issues, within the overarching aim of doing what is just in the circumstances. The rules that courts have developed in areas such as the enforcement of arbitration agreements, the effect of exclusive jurisdiction clauses, rules for managing *lis alibi pendens*, and the doctrine of *res judicata*, should be understood in this light, and it might be surprising how much common ground there is on these points among different jurisdictions. Such commonality would be less surprising if we thought of these rules not as a strategy to dominate a contest for turf, but as part of an effort to introduce order and predictability within the ICDR system.

[20] In the commentary that opens the SIFoCC Multilateral Memorandum on Enforcement of Commercial Judgments for Money, the learned authors observe that there is a "gradual drawing together

20 See Sundaresh Menon, "The Complexification of Disputes in the Digital Age", Goff Lecture 2021 (November 9, 2021), at https://www.judiciary.gov.sg/docs/default-source/news-docs/goff-lecture-2021.pdf ("The Complexification of Disputes") at para 54(a).

of the approaches of the civil and common law jurisdictions",[21] but they also recognise that the rules in this area are complex and not always capable of generalisation.[22] The same can probably be said for much of the law of jurisdictional conflict. SIFoCC offers the ideal platform for meaningful engagement over such issues. Perhaps, through such a forum, it might be possible to aspire to reach a common understanding of what the principles are, and to produce another Multilateral Memorandum, which would be a tremendous service to the international business community.

ii. Standards for the conduct of arbitration and mediation

[21] Adopting a systematic perspective would likewise enable us to see commercial courts as playing a vital role in maintaining quality standards for the conduct of arbitration and mediation. In the context of arbitration, courts will have to rule on contests as to the fairness of the process and on allegations of breach of natural justice. In doing so, they must strike a balance between safeguarding the integrity of the arbitral process, and not permitting disgruntled parties to contrive such allegations just to set aside the award – a phenomenon that has led to the coining of the term "due process paranoia".[23] Divergence in the jurisprudence of different courts on these standards can cause confusion and compromise the conduct of effective arbitration.

[22] With the increasing adoption of the Singapore Convention on Mediation, commercial courts will soon be faced with similar challenges arising from mediated settlement agreements. One ground for the refusal of enforcement under the Singapore Convention is a "serious breach" by a mediator of standards applicable to the mediation.[24] It will fall upon commercial courts to consider and articulate what amounts to such a "serious" breach, and broad consistency across jurisdictions will be equally important here.

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21 "SIFoCC Multilateral Memorandum", n 17 above, at p 15, para 21. The commentary is authored by Sir William Blair and Judge François Ancel.

22 Ibid, at p 7, para 5.

23 See Sundaresh Menon CJ, "Dispelling Due Process Paranoia: Fairness, Efficiency and the Rule of Law", speech at the Chartered Institute of Arbitrators Australia Annual Lecture 2020 (October 13, 2020) ("Dispelling Due Process Paranoia") at paras 4–5.

24 See art 5(1)(e) of the United Nations Convention on International Settlement Agreements Resulting from Mediation (December 20, 2018, entered into force on September 12, 2020) ("the Singapore Convention").

[23] SIFoCC provides the ideal setting for judges to understand diverse views on how these standards should be calibrated, but to do this, they will also need a real understanding of the realities of arbitration and mediation practice. At the roundtable discussion sessions at the 4th SIFoCC Meeting, we saw judges and representatives from the other disciplines in ICDR exchanging their perspectives. Imagine the benefits of SIFoCC institutionalising a regular dialogue on these matters among judges, arbitrators and mediators to raise awareness and understanding among the key players on all sides, with a view to working towards a set of shared perspectives on these issues. This was also a point that Judge Dominique Hascher, representing the International Council for Commercial Arbitration, had suggested during the meeting.

B. Enhancing the efficacy of adjudication

[24] A second facet of ICDR in which SIFoCC can lead the way is in raising the effectiveness of adjudication and the capabilities of adjudicators. I have in mind new types of issues or challenges that all of us involved in international dispute resolution are likely to face. Let me illustrate this with some examples.

i. Complexification

[25] I begin with the challenge of complexification. This is the phenomenon of disputes becoming so factually rich and technically complex that they threaten to become virtually impossible to adjudicate in the traditional ways, because they surpass the ability of any single adjudicator to fully comprehend and analyse. Solutions that aim to increase the efficiency of adjudication are important but can only take us so far.[25] When faced with a truly complex dispute, an adjudicator will have to find more drastic approaches to downsize it to a manageable scale. These may include relatively radical ideas that might challenge our traditional assumptions, such as representative sampling, bellwether trials,[26] and the use of summary procedures to dispose of lower-value claims in large trials.[27] There is immense value

25 See "The Complexification of Disputes", n 20 above, at paras 42 and 56.

26 Which has seen widespread use in the United States: see Alexandra D Lahav, "Bellwether Trials" (2008) 76(3) *George Washington Law Review* 576.

27 See Appendix E of the Singapore International Commercial Court Rules 2021, setting out a voluntary simplified adjudication process protocol for cases under the Technology, Infrastructure and Construction List.

to be had if these ideas were studied, discussed and shared across as wide a community of dispute resolvers as possible. Not only would this promote their acceptability, it would also shine a light on mistakes and best practices alike for our collective benefit.

[26] The value of seeing other disciplines, such as mediation, as part of an integrated ICDR system becomes especially evident in this context. Litigation and arbitration tend to be rights-based approaches to dispute resolution, whereas mediation is generally more interest-based. But these are not binary options. Sometimes, our interests may lie in moderating our insistence upon our rights and we can do this by incorporating techniques such as mediation or early neutral evaluation within the adjudication process itself.[28] This has been used to great success in complex insolvencies. A good example of this was in the collapse of Lehman Brothers, where the mediation protocol adopted by the United States ("US") Bankruptcy Court resulted in the settlement of hundreds of cases yielding billions of dollars for creditors.[29] Even where the whole dispute cannot be settled, the incorporation of such techniques can reduce the number and scope of procedural and substantive disputes that the court must rule on. Is it not time for us to engage in these dialogues with our fellow dispute resolvers? The roundtable discussion on complexification at the 4th SIFoCC Meeting started precisely such a dialogue, and SIFoCC affords a platform for us to continue that conversation – perhaps with the aim of finding ways to combine our diverse crafts in a shared commitment to better serve those engaged in transnational commerce.

ii. Transnational issues

[27] Looking further ahead, the global issues that I referred to at the start of this article will be another emerging source of complexification

28 See *Business and Property Courts of England & Wales Chancery Guide 2022*, at para 10.17; and see generally Sundaresh Menon, "The JDRN: Remoulding the Justice System", opening address at the Inaugural Meeting of the International Judicial Dispute Resolution Network (May 18, 2022) at https://www.judiciary.gov.sg/docs/default-source/news-and-resources-docs/chief-justice-sundaresh-menon's-opening-address-at-the-inaugural-jdrn-meeting.pdf.

29 See James M Peck, "Plan Mediation as an Effective Restructuring Tool", speech at the Singapore Academy of Law (April 1, 2019). For more on different forms of mediation that can be applied in insolvency proceedings, see "Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring" (Ministry of Law, April 20, 2016) at para 3.54.

which we cannot afford to leave to be addressed within jurisdictional siloes. The law's response to climate change is a central example. This can come at a number of levels. First, tremendous investment will be needed as part of the global response to climate change,[30] and many of these will inevitably give rise to disputes that will need to be adjudicated. Second, through the Chancery Lane Project mentioned earlier, and other avenues such as counterclaims in investor-state arbitration for damage caused by the investor to the environment,[31] we may have to reconsider our understanding of the usual patterns of legal rights and obligations in transnational commerce. Third, and most significantly, citizens may seek to hold governments, and perhaps also businesses, directly accountable for their contributions to climate change or their failure to mitigate it.[32]

[28] The roundtable discussion that took place at the 4th SIFoCC Meeting on how corporate legal responsibility and governance can respond to climate change was an important start. But I believe it will only be a preface to what will need to be a much wider-ranging discussion within the transnational system of commercial justice of the issues that we should be thinking about and the developments that are already afoot as the law responds to climate change. And again, I suggest that SIFoCC is especially well placed to be at the vanguard of this global effort.

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30 An estimated US$600 billion per year is needed in capital spending on clean energy in emerging and developing economies alone in order to limit the global temperature rise to 1.65°C: "Financing Clean Energy Transitions in Emerging and Developing Economies" (International Energy Agency, 2021) at https://www.iea.org/reports/financing-clean-energy-transitions-in-emerging-and-developing-economies, at p 26. Much of these investments will need to be transnational in nature: ibid, at p 58.

31 See, for instance, the counterclaim in *David Aven v The Republic of Costa Rica*, Case No UNCT/15/3.

32 Examples of recent cases in the Federal Court of Australia are *Minister for the Environment v Sharma* [2022] FCAFC 35 and *Pabai Pabai & Anor v Commonwealth of Australia* VID622/2021; see also "Landmark Class Action Lawsuit Sees Frontline Communities Sue Australian Government For Climate Crisis" (Grata Fund, October 26, 2021) at https://www.gratafund.org.au/climate_case_release. There has also been successful litigation against the Dutch Government for failure to set adequate emissions targets: see *The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, December 20, 2019).

C. The ICDR system in action

[29] These threads can be pulled together with an example of how systematic thinking has informed remarkable advances in the approach to managing complex international disputes in the field of cross-border insolvency. The Nortel Group comprised more than 130 companies located in more than 100 countries.[33] Following its insolvency, some US$7.3 billion was raised from the sale of the Group's intangible assets. The problem was that it was impossible to view these assets as being located in any one jurisdiction or owned by any one subsidiary.[34] As the Ontario Superior Court of Justice described it, the Nortel Group was a "highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities".[35] This could be said of any number of large companies today. The Ontario Superior Court and the US Bankruptcy Court for the District of Delaware decided to hold a joint trial to determine how to allocate the sale proceeds.[36] Under an agreed cross-border insolvency protocol, joint hearings took place before both courts with the judge, the lawyers and the witnesses in each courtroom connected to each other electronically.[37] Outside of the hearings, the two presiding judges communicated directly with each other in accordance with the protocol, and were able to determine that they could reach consistent rulings to distribute all the money. This was a stunning example of courts, the parties and their lawyers taking a systems-based approach to the resolution of a hyper-complex transnational dispute. If the Ontario and US courts had chosen to act within their own jurisdictional siloes, it would have been much more difficult, assuming it were possible at all, for the Group to be wound up in an orderly manner that preserved value for its creditors.

[30] Because of cases such as this, many insolvency judges have come to recognise the tremendous value of being able to communicate with one another when handling discrete parts of a cross-border insolvency. In 2016, a transnational group of like-minded insolvency judges came together in Singapore to form the Judicial Insolvency

33 *Re Nortel Networks Corp* [2015] OJ No 2440 (Ontario Superior Court of Justice) ("*Re Nortel*") at [1].
34 Ibid, at [195]–[203].
35 Ibid, at [16].
36 See *Re Nortel Networks Corp* [2013] OJ No 1579 (Ontario Superior Court of Justice).
37 *Re Nortel*, n 33 above, at [6]–[10].

Network (or "JIN"), and developed a set of guidelines for court-to-court communications that could readily be adopted by courts across the world.[38] These guidelines have been incorporated into the Rules or Practice Directions of a number of courts around the world, and have already been invoked in some cases.[39]

[31] Taking an even broader systemic perspective, those in the world of cross-border insolvency have recognised that such matters depend on a consistent overarching framework being available for their management. UNCITRAL first developed a Model Law on Cross-Border Insolvency to this end and then, seeing that the insolvency of *groups* of companies posed unique issues of coordination and the need for particular cross-jurisdictional solutions, it published a Model Law on Enterprise Group Insolvency in 2019 to promote a common and systematic approach to such cases.

[32] In these examples, we see the tremendous value of approaching our work from the perspective that we are each components of a larger ICDR system. I began by suggesting how we could conceptualise this system. While I acknowledge the scale of this vision, I also suggest that many of the foundational elements are already in place. The need of the moment is to dare to go further and reframe the various moving parts not as discrete elements pointing in vaguely the same direction, but instead as components of a transnational system of justice that regulates cross-border commercial activity. This will surely facilitate the development of coherent and consistent transnational legal norms in many of these diverse areas of procedural and substantive law. That would better serve the needs of international commerce by promoting what Chief Justice James Allsop has called "a culture of problem solving" that goes beyond black letter law and discrete processes, and

38 The JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters: see "Paving the Way For Improved Coordination of Cross-Border Insolvency Proceedings: Adoption of the Guidelines For Communication and Cooperation Between Courts in Cross-Border Insolvency Matters" (Supreme Court of Singapore, February 1, 2017) at https://www.judiciary.gov.sg/news-and-resources/news/news-details/paving-the-way-for-improved-coordination-of-cross-border-insolvency-proceedings-adoption-of-the-guidelines-for-communication-and-cooperation-between-courts-in-cross-border-insolvency-matters.

39 See K Shanmugam, speech at the launch of the INSOL Asia Hub (August 5, 2019) at para 15 (referring to the case of *Aralez Pharmaceuticals* in the Ontario Superior Court of Justice).

instead focuses on the sensible and effective resolution of disputes as part of a system.[40] Finally, by sustaining a reputable ICDR system, we also strengthen the global rule of law.[41]

Part 3: The future of SIFoCC

[33] All of this also shows why it is so important to have a platform such as SIFoCC. Besides building up an international community of commercial judges, SIFoCC can bring together the leading experts and institutions in the ICDR system as a whole. On this count, the organisers of the 4th SIFoCC Meeting ought to be congratulated for including representatives from arbitral and mediation institutions, and we can look forward to continued exchanges with them and other players in this space under the SIFoCC umbrella.

[34] I suggest that SIFoCC should now look into establishing formal partnerships with some of the leading arbitration and mediation institutions so as to formalise our working relationships with them. This would recognise and underscore the importance of a systematic approach to ICDR and to the development of transnational commercial law. SIFoCC ought to further consider including representatives from the world of arbitration and mediation in the SIFoCC working groups, so as to ensure that its endeavours are developed from the perspective of an integrated ICDR system. In the more distant future, we might envisage the establishment of a SIFoCC research unit and the publication of materials that promote the systemisation of ICDR. This might even see SIFoCC collaborating with organisations such as the Asian Business Law Institute, the European Law Institute and the American Law Institute on the development of international commercial law, or perhaps engaging in dialogue with other bodies actively pursuing the project of convergence.

[35] As SIFoCC's membership and partnerships grow, this will further enrich the ongoing conversation among the stakeholders in the transnational system of commercial justice. This will help ensure that commercial courts and other dispute resolution providers around

40 "International Commercial Dispute Resolution as a System", n 7 above, at pp 55–56; see also James Allsop, "Commercial and investor-state arbitration: The importance of recognising their differences", ICCA Congress 2018 Opening Keynote Address (April 16, 2018).

41 "International Commercial Dispute Resolution as a System", n 7 above, at p 72.

the world are equipped with the knowledge, tools and practices to support the delivery of justice nationally and internationally. Justice David Barniville spoke for all of us at the 4th SIFoCC Meeting when he highlighted how much everyone had learnt from the conversations that were had there. We will need all the help we can get if we are to address the global challenges to which the flourishing of the world economy, and indeed our collective fates, are tied, and SIFoCC promises to be a vital ally in that endeavour.

[36] The vision I have outlined might seem like a moonshot, but it is a worthwhile goal because there will be many gains to be had from securing such a system, built on a shared vision and a mutual understanding among judges and dispute resolvers around the world. That such a system might help our world meet challenges as important as poverty and climate change underlines the responsibility on us, together, to keep this work going. And it is made more exciting by the fact that we have actually already commenced our journey.

Tracing the Influence of Western Jurisprudence in Asian Jurisdictions*

by

*Justice Datuk Nallini Pathmanathan***

How has the jurisprudence of Asian jurisdictions shaped up since they broke free of their former colonial masters? This session explores the changes in influence of western jurisprudence in major jurisdictions in the Asia Pacific region, and the trends of development as former colonies found their own respective paths, including the treatment by courts of western precedents and its implications on litigation practice.

[1] Thank you for inviting me to participate in this thought-provoking session. It is particularly apt as we celebrated 65 years of independence from colonial rule only yesterday. This topic is also timely as it carries the undertones of a growing debate that has captured the zeitgeist of modern society, as we try to collectively understand how colonialism has shaped our lived experiences.

[2] I speak, naturally, from the perspective of the Malaysian legal experience. Malaysia, as an independent nation, is physically free from the former strictures of colonial powers. Yet, to my mind, we have not completely divested ourselves of the colonial mentality that endures in our collective legal psyche.

[3] When tracing the legacy of colonialism in the field of law, the starting point is the mind. With the reception of English law as the primary law of the colonised land, came a form of "colonisation of the mind" – what do I mean by that? Simply that our legal thinking is subconsciously imbued with the notion that the law of our colonisers is somehow superior to the laws of any other land. While not necessarily true, this was a virtual inevitability. As such, English law became a metric/measure for what is deemed an acceptable system

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* Speech delivered at the IBA Asia Pacific Regional Forum: Litigating in the Asia Pacific Region in Singapore, September 1-2, 2022.

** Judge of the Federal Court.

of knowledge. It ringfences the boundaries for acceptable forms of rationale, expression, and thinking, some of which persist till today.

[4] This is especially true in view of legal education and practice in Malaysia. A vast number of Malaysian lawyers and judges were, and continue to be, trained in England, in the tradition of the English common law. A history of having been taught to think and express ourselves in the way one would in the courts of England, has undoubtedly contributed to the hegemony of the English common law. To that extent, I would argue, it has restrained the development of Malaysian jurisprudence. Colonisation has also bequeathed us a dual system of law, the Syariah and the secular system of law, often giving rise to deep conflicts.

[5] Having said that, the benefits of the system of law which we inherited from the English, have been considerable. We have a structured system of law anchored by a robust Federal Constitution. The English common law has afforded us an architecture for a rational development of the law, which is ideal. The methods of analysis under the English common law have stood the test of time and should not be underestimated in their potency. Having said that, I aim to examine what might be done to ensure we are free from this "colonisation of the mind" and to address the lacunae of independent thinking. This freedom of mind is the first step towards expanding the distinct Malaysian identity growing in our jurisprudence.

Pre-existing sources of law – English laws – Post-independence laws

[6] To better understand the dominant influence that colonialism exerted on the current state of Malaysian law, one needs to examine the pre-existing jurisprudence and sources of law that were displaced by the English common law.[1]

[7] Ours was a region rich with social, religious, and political influences from India, China, and the Arab world. Naturally, the communities in the region incorporated the Hindu, Buddhist, and Islamic traditions into their local customs and mores, our own *lex mercatoria* so to speak.

1 RH Hickling, *Malaysian Law* (Kuala Lumpur, Malaysia: Professional (Law) Books Publishers, 1987).

[8] These Eastern philosophies employed conciliation and mediation as primary means of resolving disputes – concepts which are now resurfacing in popularity as "alternative" modes of dispute resolution.

[9] Some eminent examples of "pre-Western" sources of law in the region include *adat*, the customary traditions observed by Muslim communities, as well as more elaborate written codes, such as the *Undang-Undang Melaka* and the *Kanun Pahang*. These local laws and customs established by the polities in the region were largely ignored and displaced with the arrival of colonial powers and their laws.

[10] In this regard, whilst the region had many colonial invaders – with the Portuguese in the country for 130 years; the Dutch for 183 years; and the Japanese for just over three years – only the British left their laws with us after their reign of about 170 years.

[11] The *First Charter of Justice* introduced the common law of England to Penang in 1807, and the *Second Charter of Justice* introduced the common law to Malacca and Singapore in 1826. English common law and the rules of equity were more firmly rooted in the region through the introduction of the Civil Law Ordinance in 1878.

[12] This influence of the English common law remained largely intact even in the decades immediately after Malaysia attained independence from British rule. The successor of the Civil Law Ordinance, the Civil Law Act 1956, imports the application of English laws in Malaysia – specifically through sections 3 and 5 of the Civil Law Act 1956.[2]

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2 Section 3 of the Civil Law Act 1956 states:

[1] *Application of U.K. common law, rules of equity and certain statutes*

(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall –

(a) in Peninsular Malaysia or any part thereof, apply the provisions of the common law of England and the rules of equity as administered in England on 7 April 1956 …

Section 5 of the Civil Law Act 1956 states:

5. *Application of English law in commercial matters*

(1) In all questions or issues which arise or which have to be decided in the States of Peninsular Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming

[13] The Civil Law Act 1956 does so with the express proviso that such English laws shall be applied "so far as the local circumstances and inhabitants permit" and that they may not be so applied where there already exists written law in the area. These provisions remain in force to date. Regrettably, they are not utilised as much as they should be.

[14] Notwithstanding these provisos in the Civil Law Act 1956, English law was (and remains) prominently in use. The Malaysian Judiciary of that time grew out of the British Colonial Legal Service, an organisation which in the days when Britain had a Colonial Office, was responsible for the appointment of lawyers to government service in colonial territories. Thus, as our judges and lawyers were trained in the United Kingdom ("UK") it became practical and commonplace to resort to English principles and case law when deciding upon the legal issues that came before the courts.

[15] It is relevant to note that the broader architecture of the Malaysian legal system also borrowed heavily from legal concepts and principles entrenched in the British legal system. These include our adoption and continued affirmation of the common law adversarial system and its attendant principles, such as *stare decisis* and the right of appeal.

Present day adjudication in the courts in Malaysia

[16] So that brings us to the present, and the manner in which litigation is conducted in the courts of Malaysia today. Academic commentators have found that Malaysian judges commonly "cite to a string of related cases, domestic and foreign, when they invoke or explain a certain relevant principle or rule."[3]

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into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

(2) In all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

3 Ng Kwai Hang and Brynna Jacobson, "How Global is the Common Law? A Comparative Study of Asian Common Law Systems – Hong Kong, Malaysia, and Singapore" (2017) 12 *Asian Journal of Comparative Law* 209-232 at 226.

[17] This is in stark contrast to, say, the UK, the United States, Australia, New Zealand, and even Canada. As the authors of the article "How Global is the Common Law" state, the general academic commentaries on comparative common law are synonymous with Anglo-American law. There is little if any reference to the common law of the rest of the Commonwealth. For example in the case of the UK, the highest English courts expect to be cited *from*, rather than citing *to*, foreign authorities from the Commonwealth. Although recently, they have been citing to Singapore authorities.

[18] To that extent the Anglo common law has been described as being displaying a "strong self-referencing and sovereigntist approach, most manifest in their aversion to citing foreign cases." As stated by the same academic commentators, these countries illustrate the inward-looking component of the common law, often articulated as "the common sense of the community, crystallised and formulated by *our* ancestors."

[19] This approach has been fortified by recent sentiments – for example, that the English courts are "custodians of a precious commodity" and should "exercise caution and restraint" in the way they treat the common law. And this in turn is said to be due to the "need to continue to demonstrate to the world that English law can safely be relied upon by the international business community." With the greatest of respect, it is difficult to see how such an approach/ mindset does not reflect shades of the colonial past.

[20] It needs to be said that in a globalised world of trade, there is no basis to contend any further that any one system of law or that any one body from either the Global North or South, has the monopoly on legal thinking or defining the correct law that is to be relied upon globally by all nations.

[21] Moving back to the position in Malaysia as a previous colony, the general position adopted for many decades was to cite decisions from the Privy Council and the House of Lords, pre-eminently. With the cessation of appeals to the Privy Council, the binding effect of such authorities has been diluted. However the reliance on judgments from the UK Supreme Court remain highly persuasive and are routinely referred to in immediate support of a particular legal contention, after reference to a Malaysian case. However, equally it must be said that there is reference to authorities from a host of other Commonwealth

nations, such as Singapore, India, Hong Kong, Australia, New Zealand and South Africa.

[22] The reason why Malaysian litigation has developed so as to cite authorities from numerous Commonwealth jurisdictions is, I would argue, to enable parties to arrive at the best possible resolution of a dispute by referencing the manner in which a similar dispute has been resolved in different jurisdictions. Drawing from this deep well of comparative jurisprudence found across the Commonwealth, Malaysian lawyers and judges better reflect the spirit and content of the common law. The methodology of common law reasoning, characterised through its incremental but persistent inquiry of underlying rationales to arrive at the correct justification for a given legal rule, benefits most when drawing from the widest possible range of legal analyses.

[23] This freedom from intellectual bias also means that one tends to recognise that great jurists are found throughout and not concentrated in select parts of the world.

Specific examples of Malaysian cases and the influence of English common law in current litigation practice

[24] A major part of decolonising our legal minds is to recognise that greater efforts must be had in carrying out our own analysis and reasoning. A Malaysian-centric legal tapestry ought to be woven first, with the strands of legal reasoning and analysis suited to our circumstances. Here, I would like to refer to a cross-section of recent Malaysian Federal Court decisions that exemplify this renewed attitude in Malaysian jurisprudence.

Constitutional law

[25] I start with the dualism that I alluded to earlier. One of the major issues that we face post-colonially is the conflict, or seeming conflict between the Syariah law and the secular system of law. In a country such as ours, this is a matter that requires considerable care, empathy and a deep comprehension of the legal divides between the two. Recently our apex court has dealt with setting out clear boundaries between the two. In *Rosliza binti Ibrahim v Kerajaan Negeri Selangor & Anor*,[4] the apex court had to deal with a case where the appellant

4 [2021] 2 AMR 551.

sought a declaration that she was not a Muslim. The position taken in the courts below was that this was a matter for the Syariah courts, not the civil courts. The apex court however drew a distinction between a person who had never been a Muslim and a person who was a Muslim and sought to leave the faith. The former could be dealt with in the civil courts while the latter fell squarely within the purview of the Syariah courts.

[26] In *Rosliza*'s case, it was not established that she had been born a Muslim, as she was an illegitimate child, and her mother was a Buddhist-Chinese. Her father was a Malay-Muslim but it was not proven that there had been a legal marriage between the two. Rosliza had been brought up as a practising Buddhist. In these circumstances she was granted the declaration.

[27] In *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor*,[5] charges were brought under the Syariah jurisdiction against a man for attempting to indulge in homosexual practices. An offence encompassing homosexuality is also covered under the Penal Code in Malaysia. Iki Putra sought a declaration from the apex court to the effect that his prosecution under the Syariah law was in contravention of the Federal Constitution. He could not be prosecuted under both systems. The declaration as granted. The case delineates the role of the Syariah as opposed to the criminal law system. Syariah law is imposed for offences against the precepts of Islam. Where there is provision for criminal offences under the Federal Constitution which would also constitute crimes under the Syariah system, it is the secular law that prevails.

[28] These two cases have gone a long way towards delineating the secular and Syariah jurisdictions within our system of laws. They have different and clearly separate functions. Moreover, the superior courts enjoy a wide jurisdiction over a majority of matters, both civil and criminal in this jurisdiction.

[29] Moving on to another aspect of constitutional law is the case of *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* ("*Maria Chin*")[6] where the appellant sought judicial review in relation to the constitutionality of an ouster clause under section 59A of the

5 [2021] 3 AMR 217.
6 [2021] 1 MLJ 750.

Immigration Act 1959/63,[7] as well as a travel ban. The dissenting judgments articulated the position that unlike the UK which practices parliamentary sovereignty, Malaysia practices constitutional supremacy. Constitutional judicial review is entrenched within the Federal Constitution. As such, no clause which seeks to denude the courts of their judicial power is tenable.

Prior to this the approach had been to adopt English law and their approach to judicial review, which is essentially administrative in nature. This dissenting position has since become the majority view in recent decisions of the apex court, such as *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* ("*Dhinesh*"),[8] *SIS Forum (Malaysia) v Kerajaan Negeri Selangor & Anor*[9] and *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & 2 Ors*.[10]

[30] These cases portray the perils of adopting the approaches of English constitutional case law, which is primarily administrative in nature, without having first analysed the existing constitutional framework in Malaysia. Both decisions seek to correct the course of Malaysian constitutional law by emphasising that the starting position to be adopted in Malaysia is the Federal Constitution itself, rather than the English position given that Malaysia practises constitutional supremacy while the UK practises parliamentary sovereignty. Accordingly the wholesale adoption of the case law of the UK is incorrect.

Tort – Tort of misfeasance in public office

[31] In *Tony Pua Kiam Wee v Government of Malaysia and another appeal*,[11] the issue that arose in the appeal in the apex court was how the common law tort of misfeasance in public office, which originates from English common law, ought to be construed and developed to meet the peculiar circumstances of the case. Those issues included whether such a tort was available and actionable by an individual against, initially the sitting and latterly the former Prime Minister, as a public officer. This case is an example of the need to expand the original English common law position, which was done.

7 Ibid, at [4]–[10].
8 [2022] 3 MLJ 356.
9 [2022] 2 AMR 633.
10 [2021] 6 AMR 442.
11 [2019] 12 MLJ 1.

Corporation law – Law on piercing the corporate veil

[32] In the field of company law, a recent decision of the apex court in *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* ("*Ong Leong Chiou*")[12] relating to the lifting of the corporate veil, considered the English position, as exemplified in *Prest v Petrodel Resources Ltd & Ors*[13] and took the view that it was consistent with the line of case law already present in Malaysia in other cases.[14]

In corporate law, therefore, the English common law continues to influence our law positively; that is, not simply as a barometer of validity or legitimacy by virtue of it originating from the English courts, but by comparing the reasoning and judicial discussion employed by the English courts (or any other relevant foreign court, for that matter) against that of the Malaysian court to interrogate the underlying rationale of a given rule or principle at law.

Contract law – Section 75 (Malaysian) Contracts Act 1950 versus the "penalty" rule at common law

[33] Another example relates to damages in Malaysian contract law which is governed by codified law. In the case of *Cubic Electronics Sdn Bhd (in liquidation) v MARS Telecommunications Sdn Bhd*,[15] the Federal Court moved away from the long-standing construction given to the damages provision in our Contracts Act 1950 which requires proof of actual loss before damages are awarded. No damages are recoverable *simpliciter* irrespective of whether it is a fixed damages clause or a penalty clause.

[34] The Federal Court re-construed section 75 so as to be consonant with the approach in the Indian apex court but also adapted the decision of the UK Supreme Court in *Cavendish Square Holding BV v Talal El Makdessi*[16] which abolished the dichotomy – until then perpetuated by the common law – between genuine pre-estimated damages and penalties. This is an example of how the Malaysian courts look to, *inter alia*, the English courts to evolve the construction

12 [2021] 3 MLJ 622.
13 [2013] 4 All ER 673.
14 See *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Ponnusamy & Ors* [2015] 1 MLJ 773 and *Takako Sakao (f) v Ng Pek Yuan (f) & Anor* [2009] 6 MLJ 751.
15 [2019] 1 AMR 737.
16 [2015] UKSC 67.

of our codified law so as to meet legitimate commercial interests in current times.

Conclusion – The future influence of Western laws and jurisprudence: Neo-colonisation – The impact of "extra-territorial" rules by supranational bodies

[35] I conclude by stating that in Malaysia, we have undoubtedly begun charting a course towards an era of cogent, independent reasoning that takes pride in our own law but does not leave behind the traditions of the common law, pre- and post-colonial, that bind us together.

[36] I could not have put together this article without the invaluable input and assistance of the following legal practitioners, Kailash Kalaiarasu, Vishnu Vijandran and Claudia Nyon. Thank you so much.

Keynote Address for the CIPAA Conference Day in Conjunction with AIAC's Asia ADR Week 2022*

by

*Justice Dato' Lee Swee Seng***

[1] A very good morning, a warm and bright Saturday morning to one and all. You could not have chosen to be in a far better place than to be here amongst like-minded people in the field of construction adjudication.

[2] Let me begin by thanking the organiser, the Asian International Arbitration Centre ("AIAC") and its Director Tan Sri Datuk Suriyadi bin Halim Omar for the kind invitation extended to me to deliver the Keynote Address for the CIPAA Conference Day in conjunction with your signature Asia ADR Week 2022 Programme.

[3] About my only qualification to speak on the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") is perhaps the fact that I was the Construction Court judge at the Kuala Lumpur High Court from January 2016 to August 2019 – a span of 3½ years. The CIPAA was still in its infancy, having come into force on April 15, 2014.

[4] Before long, cases arising out of the CIPAA adjudications had come before the courts and there was a need to interpret the various relevant provisions with respect to enforcement of adjudication decisions as well as setting aside and stay which constituted the more common applications before the High Court. It was imperative for the court to set the right tone and trajectory for a new piece of legislation that has as its avowed aim to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to

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* Keynote address delivered at the Asian International Arbitration Centre, October 8, 2022.

** Judge of the Court of Appeal. I would like to acknowledge the assistance provided by Jumirah binti Marjuki, Court of Appeal Registrar, Wan Fatimah Zaharah binti Wan Yussof, Deputy Registrar of the Federal Court, Sharifah Hascindie binti Syed Omar, Research Officer, Court of Appeal and Illi Marisqa binti Khalizan, Senior Registrar, High Court of Construction Kuala Lumpur for their assistance in the preparation of this presentation and for the statistics.

provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.

[5] Conscious of the fact that everyone to whom much has been given of him will much be required, I had tried to develop the law as best I could against the statutory framework of the CIPAA. The many and varied cases before me afforded a fertile ground on which case law may grow, develop and mature through the years. I am grateful for all your submissions made before me; most of them cogent and comprehensive. If there are any shortcomings in my judgments the infirmity is solely mine alone.

[6] By the time I left the Construction Court for the Court of Appeal I was more than glad that a second Construction Court had started in the Kuala Lumpur High Court. Perhaps the CIPAA is working well with affected parties turning to the courts for help and hope where necessary so that the rough justice from statutory adjudication has an opportunity to look more resplendent after passing through the crucible of curial scrutiny.

[7] The introduction of the CIPAA was a fresh wind of change blowing through the corridors of construction claims. The initial experience has been that of much hope and elation because of the speedy procedure from the commencement of an adjudication to the delivering of the adjudication decision. One estimate is that it is all wrapped up within 106 days or thereabout.

[8] The new paradigm brought along some new mantras, "pay first, argue later" and the new concept of temporary or interim finality and that one has to learn to live with a less than perfect decision in a perfectly imperfect world. We hear of terms such as "rough justice" and that the adjudicator needs to ask the right question though he may get the answer wrong rather than asking the wrong question and giving the right answer! It has spawned a new industry of claim consultants and adjudicators.

[9] I was initially alarmed to hear that it was all right to ask the right question but arrive at the wrong answer until I came across a quote from Steve Jobs: If you define the problem correctly, you almost have the solution. To put it differently, if you ask the right question, you almost always get the right answer.

[10] We often hear too that the need to get the right answer has been subordinated to the need to get a quick answer. In the UK case of *Carilion Construction Ltd v Devonport Royal Dockyard Ltd*,[1] Chadwick LJ said as follows:

> The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to recognise that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their sub-contractors … *The need to have the "right" answer has been subordinated to the need to have an answer quickly …*
>
> 87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. *To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense …*
>
> (Emphasis added.)

[11] For far too long contractors have been complaining that they were the first to finish the works and the last to be paid. Cash is king and cash flow the lifeblood of all industries particularly the construction industry. The man who finally does the work is many layers down the chain of subcontracting and he ends up not just bearing the heat and burden of the day but the brunt of non-payment. Some things have to give way somewhere when there are no payments made. The workers and suppliers have to be paid otherwise the workers will dump their tools and the suppliers would insist on cash before delivery.

[12] The contractors that finally get the work done are the ones ending up financing the project. It is still perceived that the ones who could

1 [2005] EWCA Civ 1358.

get the big contracts have both the knowhow and the know-who; they have a bigger capital base with persons of character and competence with deeper pockets to cushion any financial slowdown in payment.

[13] The popularity of the CIPAA can be seen linguistically in the fact that "CIPAA" has evolved from a noun to a verb. Contractors are now saying "if you don't pay me I'll CIPAA you". A lawyer appeared before us and said that under the "CHIPAA", stay is rarely granted and we quickly corrected him and said the more popular pronunciation is "CIPAA" rather than "CHIPAA".

[14] We're now in the eighth year of the implementation of the Act and some stakeholders have commented that the process in some instances have become unduly technical and that the mantra now is more of "argue more now and pay much much later".

[15] By and large, the construction industry has welcomed its implementation and like all new pieces of legislation, there will be areas that need further tweaking and fine-tuning to further improve its efficacy in its declared objective as captured in its long title which is to facilitate cash flow and to ensure that payments cascade down the chain of contracting and subcontracting.

[16] Many cases have been brought before the courts and in keeping with the ethos of the CIPAA, the courts have used a fast-track approach in disposing of cases arising out of CIPAA adjudication. Most adjudication cases are disposed of within three to four months from the date of filing with the cases with more novel issues taking a slightly longer period but rarely exceeding nine months from the filing date.

Statistics from the Kuala Lumpur High Court

[17] A look at some court statistics would give an indication as to the number of cases filed with and disposed of by the Construction Court in Kuala Lumpur. These are cases mainly under sections 15, 16, 28 and 30 of the CIPAA.

REGISTRATION AND DISPOSAL OF CASES UNDER SECTION 28, SECTION 15, SECTION 16 AND SECTION 30 OF THE CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012 (CIPAA) FROM 2013–2022 (AS AT SEPTEMBER 30, 2022) (KUALA LUMPUR HIGH COURT)

YEAR	REGISTRATION	DISPOSAL	BALANCE
2013	0	0	**0**
2014	1	1	0
2015	26	26	0
2016	152	152	0
2017	219	219	0
2018	272	272	0
2019	246	246	0
2020	226	224	2 **Case remitted from COA** WA-24C-97-05/2020 WA-24C-147-06/2020
2021	202	198	4
2022 **(As at September 30, 2022)**	178	95	83
TOTAL	**1522**	**1433**	89

[18] From the table above we can see that the numbers peaked around 2018–2019 and after that there was a drop in 2020 and 2021 though not a sharp one as the courts were hearing cases remotely via Zoom application.

REGISTRATION OF CASES UNDER SECTION 28, SECTION 15, SECTION 16 AND SECTION 30 OF THE CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012 (CIPAA) FROM 2013–2022 (AS AT SEPTEMBER 30, 2022) (KUALA LUMPUR HIGH COURT)

NATURE OF APPLICATION	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022 (as at 30.9.2022)	TOTAL
Application to enforce decision (Section 28)	0	0	16	98	122	161	106	98	91	79	771
Application to set aside decision (Section 15)	0	1	7	46	68	75	103	73	74	60	507

NATURE OF APPLICATION	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022 (as at 30.9.2022)	TOTAL
Application to stay decision (Section 16)	0	0	3	8	24	32	35	39	29	24	194
Application for direct payment from principal (Section 30)	0	0	0	0	5	4	2	16	8	15	50
TOTAL	**0**	**1**	**26**	**152**	**219**	**272**	**246**	**226**	**202**	**178**	**1522**

[19] From the table above we can see that the numbers filed for enforcement of adjudication decisions are much more than for setting aside precisely because without the sanction of enforcement the losing party may not pay. Correspondingly the losing party may not want to spend more time and costs on setting aside if it does not stand a good chance of being able to do so, seeing the limited grounds for setting aside an adjudication decision.

DISPOSAL OF CASES UNDER SECTION 28, SECTION 15, SECTION 16 AND SECTION 30 OF THE CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012 (CIPAA) FROM 2013–2022 (AS AT SEPTEMBER 30, 2022) (KUALA LUMPUR HIGH COURT)

NATURE OF APPLICATION	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022 (as at 30.9.2022)	TOTAL
Application to enforce decision (Section 28)	0	0	16	98	122	161	106	97	90	46	736
Application to set aside decision (Section 15)	0	1	7	46	68	75	103	72	72	30	474
Application to stay decision (Section 16)	0	0	3	8	24	32	35	39	28	11	180
Application for direct payment from principal (Section 30)	0	0	0	0	5	4	2	16	8	8	43
TOTAL	**0**	**1**	**26**	**152**	**219**	**272**	**246**	**224**	**198**	**95**	**1433**

A breakdown of cases in the Kuala Lumpur High Court for 2021

OS UNDER SECTION 28 CIPAA (TOTAL 90 CASES) AS AT 30.9.2022

STATUS	CASES	PERCENTAGE
ALLOWED	52	58%
DISALLOWED/DISMISSED	10	11%
CONSENT ORDER RECORDED	7	8%
NOTICE OF DISCONTINUANCE FILED/WITHDRAWN	20	22%
TRANSFER TO SHAH ALAM HIGH COURT	1	1%
TOTAL	**90**	**100%**

OS UNDER SECTION 15 CIPAA (TOTAL 72 CASES) AS AT 30.9.2022

STATUS	CASES	PERCENTAGE
ALLOWED	8	11%
DISALLOWED/DISMISSED	36	50%
NOTICE OF DISCONTINUANCE FILED/WITHDRAWN	23	32%
CONSENT ORDER RECORDED	5	7%
TRANSFER	-	-
TOTAL	**72**	**100%**

OS UNDER SECTION 16 CIPAA (TOTAL 28 CASES) AS AT 30.9.2022

STATUS	CASES	PERCENTAGE
ALLOWED	-	-
ALLOWED WITH CONDITION	1	4%
DISALLOWED/DISMISSED	10	36%
NOTICE OF DISCONTINUANCE FILED/WITHDRAWN	10	36%
CONSENT ORDER RECORDED FOR CONDITIONAL STAY	4	14%
CONSENT ORDER RECORDED WITHOUT CONDITION	2	7%
TRANSFER TO SHAH ALAM HIGH COURT	1	4%
TOTAL	**28**	**100%**

[20] The percentage of cases for dismissal of application to enforce an adjudication decision was about 11%. The rest were allowed or a consent judgment recorded or a notice of discontinuance filed or the

application withdrawn. The 11% for which enforcement was dismissed would correspond also to the percentage of cases where setting aside was allowed.

[21] With respect to stay, consistent with the ethos of the CIPAA, there were no stay applications that were allowed unconditionally. Only 4% of stays were allowed with conditions. About 36% stay applications were dismissed. There was also about 14% recorded for a consent order for conditional stay.

Statistics from the Court of Appeal

CIPAA CASES AT THE COURT OF APPEAL
FROM 2017 TO 2022 (AS AT SEPTEMBER 30, 2022)
TOTAL REGISTERED CASES

YEAR	CODE		
	02(C)(A) (General Civil Appeal)	01(C)(A) (Appeal Involving Government)	TOTAL
2017	29	0	**29**
2018	30	1	**31**
2019	86	0	**86**
2020	43	0	**43**
2021	60	5	**65**
2022	24	2	**26**
TOTAL	**272**	**8**	**280**

[22] From the above cases registered with the Court of Appeal we can surmise that about 20% of the CIPAA cases disposed of nationwide would go on appeal to the Court of Appeal.

STATUS OF CIPAA CASES IN THE COURT OF APPEAL
FROM 2017 TO 2022 (AS AT SEPTEMBER 30, 2022)

YEAR REGISTRATION	DISPOSAL						TOTAL	PENDING				TOTAL
	ALLOWED	DISMISSED	WD	WOD	CJ	S/O		CM	HEARING	PART HEARD	DECISION	
2017	7	13	3	6		2	29					0
2018	6	10	2	8		5	31					0
2019	4	19	3	42	3	13	84		2			2
2020	6	14	3	16	1	4	43					0
2021	3	8		12			23	13	24	3		42
2022		1		3	1		5	6	13			21
TOTAL	26	64	9	87	5	24	215	21	41	3	0	65
PERCENTAGE	9%	23%	3%	31%	2%	8%	77%	7%	14%	1%	0%	23%

[23] We can see that about 10% of the cases on appeal to the Court of Appeal are successful and the balance 90% either dismissed, settled, withdrawn or struck out.

CIPAA CASES AT FEDERAL COURT AS AT 05.10.2022

TOTAL CIPAA REGISTERED (CIVIL APPEAL)

CODE / YEAR	02(C) (general civil appeals)	01(C) (appeals involving government)	Total
2017	3	0	3
2018	11	1	12
2019	3	0	3
2020	0	0	0
2021	0	0	0
2022	2	0	2
TOTAL	19	1	20

CIPAA CASES AT FEDERAL COURT AS AT 05.10.2022

PENDING CIPAA (CIVIL APPEAL)

CODE / YEAR	02(C) (general civil appeals)	01(C) (appeals involving government)	Total
2017	0	0	0
2018	0	0	0
2019	0	0	0
2020	0	0	0
2021	0	0	0
2022	2	0	2
TOTAL	2	0	2

CIPAA CASES AT FEDERAL COURT AS AT 05.10.2022

PENDING CIPAA (LEAVE APPLICATION)

CODE / YEAR	08(C) (leave application)	Total
2016	0	0
2017	0	0
2018	0	0
2019	0	0
2020	0	0
2021	4	4
2022	8	8
TOTAL	12	12

[24] As for the cases pending in the Federal Court, we note that most cases have been disposed of with only two pending. The success rate seems to be higher compared to the Court of Appeal but then again by the time it reaches the Federal Court we know these are tough questions of law which could go either way.

CIPAA CASES AT FEDERAL COURT AS AT 05.10.2022

BREAKDOWN STATUS OF CIPAA CASES (CIVIL APPEAL)

YEAR REGISTRATION	DISPOSAL						TOTAL	PENDING				TOTAL
	ALLOWED	DISMISSED	WD	NOD	CJ	S/O		CM	HEARING	MENTION	DECISION	
2017	1	-	-	-	-	2	3	-	-	-	-	0
2018	3	8	-	-	-	2	13	-	-	-	-	0
2019	2	-	-	-	-	-	2	-	-	-	-	0
2020	-	-	-	-	-	-	0	-	-	-	-	0
2021	-	-	-	-	-	-	0	-	-	-	-	0
2022	-	-	-	-	-	-	0	-	-	2	-	2
TOTAL	6	8	0	0	0	4	18	0	0	2	0	2
PERCENTAGE	30%	40%	0%	0%	0%	20%	90%	0%	0%	10%	0	10%

CIPAA CASES AT FEDERAL COURT AS AT 05.10.2022

BREAKDOWN STATUS OF CIPAA CASES (LEAVE APPLICATION)

YEAR REGISTRATION	DISPOSAL						TOTAL	PENDING				TOTAL
	ALLOWED	DISMISSED	WD	NOD	CJ	S/O		CM	HEARING	MENTION	DECISION	
2016	3	-	-	1	-	-	4	-	-	-	-	0
2017	4	-	-	2	-	2	8	-	-	-	-	0
2018	11	2	-	2	-	-	15	-	-	-	-	0
2019	2	4	-	2	-	1	9	-	-	-	-	0
2020	-	-	-	-	-	-	0	-	-	-	-	0
2021	2	2	-	3	-	3	10	2	2	-	-	4
2022	-	3	-	-	-	2	5	2	6	-	-	8
TOTAL	22	11	0	10	0	8	51	4	8	0	0	12
PERCENTAGE	35%	17%	0%	16%	0%	13%	81%	6%	13%	0%	0%	19%

CIPAA CASES AT FEDERAL COURT AS AT 05.10.2022

TOTAL CIPAA REGISTERED (CIVIL APPEAL)

CODE / YEAR	03(C) (general civil appeals)	01(C) (appeals involving government)	Total
2017	3	0	3
2018	11	1	12
2019	3	0	3
2020	0	0	0
2021	0	0	0
2022	2	0	2
TOTAL	19	1	20

[25] There are only about 12 applications for leave pending in the Federal Court.

[26] As you may be able to surmise the success rate for leave is only about 35%.

Reported cases in the journals

[27] One of the roles of judges is to develop the law. Statute law is never perfect and there is often, consistent with the dynamic nature of law, a need for it to be supplemented and complemented by case law as judges interpret the relevant provisions of the statute with respect to applying the law to the facts.

[28] We are aware the more cases we decide and are reported, the more you have to read and keep abreast with the development in the law. No one can escape from that because the law is never static.

[29] The reported cases are in tandem with the disposal of cases for the year. There are so far in the Current Law Journal (CLJ) four reported cases in the Federal Court, 12 from the Court of Appeal and 29 from the High Court.

[30] The All Malaysia Reports (AMR) reports the most, capturing about 106 judgments from the High Court. The number of reported cases from the High Court is about 29 in the Malayan Law Journal (MLJ).

Procedural matters

[31] Currently there is no fixed time frame to apply to set aside an adjudication decision other than that the application is required to be filed in the High Court before the application for enforcement of the adjudication decision has been disposed of by the High Court as provided for under Order 69A r 5 of the Rules of Court 2012 ("ROC").

[32] With this space given to the unsuccessful party (often the non-paying party) to apply to set aside, many do not do so until the successful party (normally the unpaid party) has applied to enforce the adjudication decision. Sometimes we discern that a strategy is being adopted to buy time by filing the application to set aside in a High Court of another local jurisdiction.

[33] So one may have the unpaid party as the plaintiff filing the originating summons, say, in Kuala Lumpur where the non-paying party as defendant has its place of business, seeking to enforce the adjudication decision. The non-paying party as plaintiff would file a separate originating summons in Penang, for instance, where the project is. It would then seek to transfer the originating summons for the enforcement to the Penang High Court to be heard together with the originating summons for the setting aside. Much unnecessary time and energy is dissipated.

[34] It might be good to explore fixing a time of, say, 30 days from the date of the adjudication decision for a party serious about setting aside an adjudication decision to do so. Many unpaid parties would argue that it is an afterthought for the non-paying party to file its application to set aside only after the unpaid party has applied for enforcement of the adjudication decision.

[35] However, as Order 69A r 5 of the ROC itself provides for such a time frame to apply to set aside, it may be argued that there is no basis for saying that it is an afterthought for after all the ROC itself allows for setting aside to be filed even after the enforcement application has been filed for so long as it has not been disposed of yet.

[36] A fixed time frame of 30 days from the date of the adjudication decision would ensure that the aggrieved party acts promptly and not present the High Court with a stale application. There should also be a provision in Order 69A of the ROC for the court to have the discretion to extend the time to file the setting aside application for valid reasons.

[37] To avoid unnecessary time and energy being dissipated over the High Court hearing applications to transfer from one High Court to another, a provision may be added to the CIPAA to objectively fix the High Court in the State where the project or site is as the High Court in which the application ought to be filed. Already the definition of "working day" is with reference to where the site is located and it means a calendar day but excludes weekends and public holidays applicable at the state or federal territory where the site is located.

Jurisdiction of adjudicator

[38] Jurisdiction under the CIPAA is a loaded word and may be used in at least three senses. In *Terminal Perintis Sdn Bhd v Tan Ngee Hong*

Construction Sdn Bhd (and Another Originating Summons) ("*Terminal Perintis*"),[2] it was observed as follows:

> [70] In the application of our CIPAA, we are free from the shackles of the language of administrative law and judicial review. The word "jurisdiction" is used in s 15(d) as in the adjudicator having acted in "excess of his jurisdiction" as a ground for setting aside an adjudication decision. It is also used in s 27(1) with respect to an adjudicator's jurisdiction being limited to the matters raised in the payment claim and the payment response. Then there is a reference to it in s 27(2) with respect to extending his jurisdiction by way of agreement in writing to deal with matters not specifically raised in the payment claim and payment response. Finally there is the reference to a "jurisdictional" challenge, which when raised, does not prevent the adjudicator from proceeding and completing the adjudication without prejudice to the rights of any party to set it aside under s 15 or to oppose its enforcement under s 28.
>
> [71] There are many senses in which the word "jurisdiction" may be understood. We need only to differentiate between core jurisdiction, competence jurisdiction and contingent jurisdiction.
>
> [72] Core jurisdiction would be the question of whether the subject matter of the dispute is one which the Act has conferred on the adjudicator. Thus if a contract is not a construction contract, but a shipping or mining contract or a contract for legal fees with respect to advice given in construction contract, or that the contract is with respect to construction of a dwelling house for a natural person, then this court will interfere if the adjudicator got it wrong. It is a case where the adjudicator has no jurisdiction to begin with. So too if the construction contract is carried out wholly outside Malaysia.
>
> [73] If it is a question of the competence of the adjudicator as in he has not been properly appointed in that what purported to be a payment claim, is not on the face of it a payment claim or that the payment claim was not served or that it was not expressly stated as a claim made under the CIPAA, then this court would be at liberty to set aside the adjudication decision on ground of excess of jurisdiction. This is not only because the adjudicator cannot decide on his own competence or capacity to adjudicate when the very validity of his appointment is questioned but also that it is part of the legislative intent that if there is non-compliance with a basic and essential

2 [2017] 7 AMR 887.

> requirement of the CIPAA with respect to a payment claim under s 5, then the adjudication proceedings and the decision made would be a nullity.
>
> [74] In a case of contingent jurisdiction, it would be a case where for there to be jurisdiction, there must be further compliance with the requirements of the Act as in that the dispute must be one falling within the matters raised in the payment claim and the payment response as provided for under s 27(1) of the CIPAA. In that example the word "jurisdiction" is used in the sense of the scope of the dispute that is before the adjudicator for decision.

[39] Some adjudicators are at a loss as to what to do when they are confronted with a jurisdictional challenge. Section 27(3) of the CIPAA provides as follows:

> Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).

[40] The subsection means what it says. The adjudicator is entitled to proceed as if he has jurisdiction and he may even give his reasons why he thinks he has jurisdiction and form a non-binding opinion on a jurisdictional issue but just that the adjudicator is not obliged to do so. Being a jurisdictional issue, it may be raised at any time in the adjudication proceedings and certainly when the matter is brought to the High Court in a setting aside application under section 15 of the CIPAA.

[41] In a plain case where the adjudicator has no jurisdiction in the sense of core jurisdiction, for example, that the construction work was carried out wholly outside the territory of Malaysia and there is no dispute of facts on that score, then it would appear that the adjudicator should decline jurisdiction and strike out or dismiss the claim.

[42] In a case where the facts are in dispute with respect to where the construction work was carried out, the adjudicator should be allowed to proceed with the adjudication and decide accordingly.

[43] Most adjudicators would take the path of least resistance and proceed with the adjudication and then let the parties take up the matter in the applications before the court.

[44] The Federal Court in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd*[3] has clarified that an adjudicator is obliged to take into consideration all defences raised in the adjudication response though not raised in the payment response. Though section 27(1) of the CIPAA refers to the fact that the adjudicator's jurisdiction in relation to any dispute is limited to the *matter* referred to adjudication by the parties in their payment claim and payment response, the Federal Court explained that by "matter" is meant the subject-matter of the claim or the cause of action in the payment claim.

[45] Thus, it was held by the Federal Court as follows:

> [56] In short, s 27(1) of the CIPAA refers to the subject matter of the claim under s 5 of the CIPAA, which is the "cause of action" identified by the claimant by reference to the applicable clause of the construction contract. Thus if the payment claim relates to progress claim No. 28 (as in the present case) the jurisdiction of the adjudicator is limited to this progress claim and nothing else. The payment response is likewise limited to an answer to progress claim No. 28.
>
> [57] It can thus be said that the appellant's case regarding the jurisdiction referred to in s 27(1) of the CIPAA, is the subject matter of the claim and the cause of action as that identified under the relevant provision of the construction contract. By s 27(2) of the CIPAA, the parties may by consent extend the jurisdiction of the adjudicator to cover other matters. A typical example will be that of other progress claims falling due before the adjudication commences. Section 27(1) of the CIPAA has nothing to do with the grounds of the claim or the reasons for opposing the claim.

[46] What then would be the consequence if an adjudicator refuses to consider or wrongly rules out considering the defences raised for the first time in the adjudication response but not raised in the payment response? An adjudicator who wrongly declined to consider what was properly raised in the defence as found for the first time in the adjudication response would have caused a denial of natural justice and the adjudication decision would be liable to be set aside under section15(b) of the CIPAA.

[47] The feedback from stakeholders seems to be that there would then be nothing to prevent a non-paying party from springing a

3 [2017] 8 AMR 167.

defence and a set-off when serving its adjudication response with a very detailed expert report on delay caused and defects rectification. Under section 11 of the CIPAA, the claimant is required, within five working days from the receipt of the adjudication response, to serve a written reply to the adjudication response together with any supporting document on the respondent.

[48] It would be quite impossible to do that with the result that the claimant would have been effectively ambushed. Perhaps then there should be an amendment to section 10 with respect to the adjudication response to state clearly and categorically that there shall not be consideration of any defences raised in the adjudication response which had not been raised in the payment response.

Scope of section 35 on prohibition of conditional payment

[49] Section 35 of the CIPAA is worded interestingly as follows:

> 35. *Prohibition of conditional payment*
>
> (1) *Any* conditional payment provision in a construction contract in relation to payment under the construction contract is void.
>
> (2) *For the purposes of this section, it is a conditional payment provision when*:
>
> (a) The obligation of one party to make payment is conditional upon that party having received payment from a third party; or
>
> (b) The obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of that party.
>
> (Emphasis added)

[50] The question that arises is whether a conditional payment provision is confined to only cases involving "pay when paid" provisions or that it may well cover other provisions with respect to a condition attached to payment which has the effect of delaying payment. In *Terminal Perintis* (supra), the issue arose in the context in which the employer had terminated the contractor under a PAM Contract. Clause 25.4 reads:

> 25.4 In the event that the employment of the Contractor is determined under Clause 25.1 or 25.3, the following shall be the respective rights and duties of the Employer and the Contractor:
>
> …
>
> 25.4(d) the Contractor shall allow or pay to the Employer all cost incurred to complete the Works including all loss and/or expenses suffered by the Employer. Until after completion of the Works under clause 25.4(a), *the Employer shall not be bound by any provision in the Contract to make any further payment to the Contractor, including payments which have been certified but not yet paid when the employment of the Contractor was determined*.
>
> (Emphasis added.)

[51] The arguments that may be marshalled in support of a more expansive interpretation of the meaning of a conditional payment provision are as follows:

> [132] My reasoning for embarking on a more expansive approach to determining whether a provision in a contract is a conditional payment provision in *Econpile [Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd (and Another Originating Summons)* [2018] 2 AMR 143] is reproduced below for ease of reference:
>
> " [80] We are aware that when if the subsection had use the words '(2) For the purpose of this section, "conditional payment" means –', then we are left in no doubt that the two examples are exhaustive and permits of no other additional instances of conditional payment terms. If that subsection had used the word 'includes' instead of 'means' we would also be quite clear and confident that the examples given are by no means exhaustive.
>
> [81] However seeing that Parliament had chosen to state a general principle first in s 35(1) and has couched it to be all-encompassing as in the use of the expression 'Any conditional payment provision …' I would prefer a more expansive interpretation that would accord with the purpose of the Act. Parliament could have used the expression in s 35(1) as 'A conditional payment provision within the meaning of subsection (2) is void'. It could be safely concluded that Parliament had left it to the court to determine on a case by case basis as to whether a conditional payment term would be defeating the purpose of the Act.

> [82] For instance if a conditional payment term is merely that the unpaid party as contractor must show proof of payment to his subcontractors before the employer needs to pay the contractor, such a condition might not be unreasonable and might be good in enhancing corporate governance and efficiency in contracts management. There might well be a myriad of conditions not all of which would be defeating the purpose of the Act. In fact the explanatory statement to the bill reads: 'The proposed Act further provides default payment terms in the absence of provisions to that effect and *prohibits conditional payment terms that inhibit cash flow*'. (Emphasis added.)
>
> [83] On the contrary, a condition like clause 25.4(d) has the effect, upon the termination of the contract, of postponing payment due until the final accounts are concluded and the works completed and that would be defeating the purpose of the Act. Therefore such a clause is void and unenforceable and the adjudicator may disregard it altogether."

[52] The above approach was followed in *Lion Pacific Sdn Bhd v Pestech Technology Sdn Bhd and Another Case*[4] by Justice Wong Kian Kheong J and also by Justice Lim Chong Fong J in *Gemilang Malaysia Bhd v PLM Interiors Sdn Bhd*.[5]

[53] To put the matter to rest, perhaps there should be an amendment to state unambiguously that any contracting out of the CIPAA shall be void and that the provisions of the CIPAA shall have effect notwithstanding any provision to the contrary in any contract. In fact it could be stated further that any provision which has the effect of restricting or prejudicing the operation of the CIPAA shall be void.

[54] I have come across clauses in bespoke construction contracts that say to the effect that upon the service of a payment claim under the CIPAA on the employer, this contract shall be terminated automatically followed by the consequences of no requirement to pay until the project is completed and final accounts prepared.

[55] The problem for the contractor who has been terminated would be the uncertain waiting period and delay in payment for the rescue

4 [2020] AMEJ 1766.
5 [2020] AMEJ 0205.

contractor may well not be able to complete the project and suffer termination like the former contractor.

[56] Some forms of restrictions on adjudication may be more subtle, for example, that any adjudication shall be preceded by notice of intention to proceed with adjudication which must be in writing and served on the employer within 30 days of the issuance of any interim certificate of payment. It is no different from arbitration clauses in some motor insurance contracts where it is provided that it is a condition precedent that before a claim is made by the insured, the insured must give the insurer a notice in writing of its intention to claim within 30 days of the happening of the accident.

[57] Another area of uncertainty which may be sorted out by way of relevant amendments to the CIPAA would be whether the conditional payment provision applies only to adjudication proceedings only or to all proceedings whether it be litigation or arbitration involving construction contracts as defined by the CIPAA.

[58] There are currently two different decisions on this point. In *Bond M & E (KL) Sdn Bhd v Isyoda (M) Sdn Bhd (Brampton Holdings Sdn Bhd, third party)*,[6] it was held that section 35 of the CIPAA only applies to adjudications commenced under the Act. The CIPAA is peculiarly and particularly for all matters in relation to statutory adjudication and nothing else. At paragraph [65] it was stated that "If Parliament had wanted the prohibition to be of general application in the construction industry, it would have amended the Contracts Act 1950 and not confine and restrict its operation to statutory adjudication under the CIPAA."

[59] A contrary view was expressed in *Khairi Consult Sdn Bhd v GJ Runding Sdn Bhd*[7] where it was held that section 35 of the CIPAA would apply even in a court proceeding for so long as the requirements under section 2 had been fulfilled with respect to applicability of the Act and that the construction contract was made after the date of coming into force of the CIPAA, i.e. April 15, 2014, and the construction contract was not an excluded contract under section 3 with respect to its non-applicability to certain categories of construction contracts and neither was it an exempted contract under section 40 of the CIPAA.

6 [2017] AMEJ 1620.
7 [2021] AMEJ 0575.

Adjudication decision and winding up

[60] In the Court of Appeal case of *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd*,[8] it was held that a successful party armed with an adjudication decision in its favour may serve a statutory notice under section 466 of the Companies Act 2016 on the unsuccessful party and thereafter proceed to present a winding-up petition against the unsuccessful party. The fact that the adjudication decision had not been enforced yet under section 28 of the CIPAA was no bar to present a winding-up petition against the unsuccessful party on the ground of its inability to pay its debt.

[61] After all, under section 13 of the CIPAA it is provided as follows:

> 13. *Effect of Adjudication Decision*
>
> The adjudication decision is binding unless –
>
> (a) It is set aside by the High Court on any of the grounds referred to in section 15;
>
> (b) The subject matter of the decision is settled by a written agreement between the parties; or
>
> (c) The dispute is finally decided by arbitration or the court.

[62] Likewise in another Court of Appeal case of *Sime Darby Energy Solutions Sdn Bhd v RZH Setia Jaya Sdn Bhd*,[9] it was underscored that merely because the adjudication decision is only "temporarily binding" within the meaning of section 13 of the CIPAA, that does not mean that an order should be issued to restrain the presenting of a winding-up petition as in a *Fortuna* injunction. Whether or not the unsuccessful party had a *bona fide* cross-claim against against the successful party on merits to challenge the winding-up petition was a matter for the winding-up court to decide. Though the unsuccessful party had already commenced arbitration on the subject claim, that was found to be not a relevant ground in support of a *Fortuna* injunction. The Court of Appeal opined at paragraph [50] that it was not "convinced that an unproven cross-claim can be the basis for restraining the filing of a winding-up petition based on a valid and enforceable" adjudication decision.

8 [2019] 3 AMR 32.
9 [2021] MLJU 1494.

[63] The arguments in support of the prohibition against proceeding with a winding-up petition includes the fact that section 28 of the CIPAA used the expression enforced "as if it is a judgment or order of the High Court" as follows:

> 28. *Enforcement of adjudication decision as judgment*
>
> (1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision *as if it is a judgment* or order of the High Court.
>
> (Emphasis added.)

[64] What is meant by "as if"? It has been argued that it is not the same as "it is". As winding up has drastic consequences including hampering and even paralysing the unsuccessful party from pursuing its cross-claim and coupled with the fact that the adjudication decision is only of "temporary finality", the successful party may pursue the modes of execution under the ROC but not winding up. See the High Court case of *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd*.[10]

[65] The further argument is that when compared to section 38(1) of the Arbitration Act 2005, the words used with respect to recognition and enforcement of an arbitral award are as follows:

> On an application in writing to the High Court, an award made in respect of a domestic arbitration or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by *entry as a judgment in terms of the award* or by action.
>
> (Emphasis added)

[66] Perhaps at the end of the day it depends on the particular facts of each case as to the *bona fides* of the cross-claim of the unsuccessful party in the arbitration and that it is not an afterthought. Section 28(1) could also be made clearer though some would say there cannot be any doubt that winding up need not be preceded by a judgment of a court for the test is whether the debt is *bona fide* not disputed. A legislative amendment may well clear the air.

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10 [2021] 8 MLJ 99.

Void adjudication decision made outside specified period

[67] Section 12(3) of the CIPAA provides that "An adjudication decision which is not made within the period specified in subsection (2) is void." In most of the cases where it has been held to be void are cases where it was one day late. We may be good at algorithms and algebra but not so good at addition.

[68] Section 12(2) provides as follows:

> Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within –
>
> (a) Forty-five working days *from* the service of the adjudication response or reply to the adjudication response, whichever is later;
>
> (b) Forty-five working days *from* the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or
>
> (c) Such further time as agreed to by the parties.
>
> (Emphasis added)

[69] In *Skyworld Development Sdn Bhd v Zarim Corp Sdn Bhd and Other Appeals*,[11] it was held that as the adjudication decision was delivered a day after the last day of the section 12(2)(a) period, it was void under section 12(3) of the CIPAA. The parties had not earlier agreed under section 12(2)(c) to extend time for the adjudicator to deliver his decision. More than that, the fees paid would have to be refunded. See also *MRCB Builders Sdn Bhd v SMM Resources Sdn Bhd and Another Case*;[12] *Encorp Iskandar Development Sdn Bhd v Konsortium Ipmines Merz Sdn Bhd & Anor*[13] and *Konsortium Ipmines Merz Sdn Bhd v Encorp Iskandar Development Sdn Bhd*.[14]

[70] As an adjudicator you cannot afford to cut so thinly and risk your whole decision being rendered void. Always give yourself some space of a week for life is very unpredictable — you may fall sick, there may be a family emergency, or you may meet with an accident. You do not have to produce a work of art in your writing

11 [2019] MLJU 162.
12 [2021] MLJU 1455, HC.
13 [2021] MLJU 1016.
14 Court of Appeal Civil Appeal B-02(C)(A)-984-08/2020.

of the adjudication decision. You only have to set out the facts and your reasons for deciding the way you did. The need for discipline in writing cannot be over-emphasised.

Issues that may be before the Federal Court

[71] There are many other issues and questions of law which aggrieved parties are trying to prevail upon the Federal Court to grant leave for the matter to be ventilated in full at the final appeal to the apex court. Some of the issues are:

1. Whether a stay of an adjudication decision can be made under section 16(1)(b) of the CIPAA after the adjudication decision has been enforced?
2. Whether when a second adjudication is proceeded with because the first adjudication decision had been set aside on breach of natural justice, is it necessary to proceed with a fresh notice of adjudication or whether a fresh payment claim has to be served all over again?
3. Whether an adjudicator who delivered his adjudication decision in favour of the successful party outside of the prescribed period under section 12(2) of the CIPAA and which decision is declared void by the court may be liable to be sued for damages by the successful party who has to begin the process all over again in the light of section 34 of the CIPAA which provides for immunity to the adjudicator for any act or omission done in good faith in the performance of his functions under the CIPAA?

[72] The never-ending issues is not a reflection of the inadequacy of the CIPAA but rather a reflection of how robust the law is in the field of construction adjudication. Judges can only do so much in terms of statutory interpretation and applying where appropriate the purposive approach. There are limits to reading words into a statute and stretching a word already there to cover more expansively other related situations. Finally, it would be up to the stakeholders to lobby for relevant amendments to the legislation.

[73] Amendments are always an exercise in addressing problems that have arisen and in anticipating that which may arise in the future. The biggest room they say is always the room for improvement. In light of the journey that Odysseus must make may I end with this quote:

> Ideals are like the stars; we may never reach them but they help us chart our course.

Equity in Australia and the United Kingdom: Dissonance and Concordance

by

*Justice Mark Leeming**

This article falls within the area of "comparative common law" (a concept which includes equity). It touches on four aspects of equitable principle. Speaking generally, some aspects of the first and second (confidential information and liability for knowing assistance in a breach of trust) in the Australian and United Kingdom legal systems have diverged; some aspects of the third and fourth (exceptions to Saunders v Vautier and judicial advice) have converged. How did that come about and what can be learned from it?

Introduction

[1] I am no expert of the law of England and Wales,[1] still less Scotland, but my firm view is that there is utility in considering how different legal systems address quite precise questions *at a level of detail*. That is not to deny the utility of a more general approach, as is often undertaken in some branches of comparative law. From time to time courts have to resolve controversial questions which are, in a sense, universal. Should advocates enjoy an absolute immunity from suit? Should claims for pure mental harm be permitted? It is certainly useful to know the answers given in other legal systems to such questions, and quite commonly the answers are accessible, because the issues have been determined by ultimate appellate courts. But the devil may lurk in the details:[2] there is often a level of concealed complexity in the answers if divorced from their rationale and historical development.

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* Judge of Appeal, Supreme Court of New South Wales; Challis Lecturer in Equity, University of Sydney. This article is a lightly revised version of a presentation at a seminar organised by the Institute of European and Comparative Law at Oxford University on October 25, 2019 when I was a Herbert Smith Freehills Visitor at the University of Cambridge. I am grateful for comments on an earlier draft of this article from Lionel Bently, for the assistance of Maria Mellos, and for the contributions of participants at the seminar. All errors are mine.

1 Hereafter, for concision, "England".

2 See *Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* [2018] HCA 53; 93 ALJR 1 at [127], *per* Gageler J.

The Australian approaches to advocates' immunity[3] and damages for "nervous shock" or pure mental harm,[4] are quite complex.

[2] Most decisions of most courts turn on much more narrowly framed questions. It is to be borne in mind that *every time* a litigant in an Australian court relies on a decision of a United Kingdom ("UK") court (which must be hundreds and probably thousands of times each year), one aspect of assessing its persuasive value turns on the extent to which the foreign law has diverged from the Australian law. Sometimes this may not be separately articulated, and sometimes it is instinctive – no one would cite UK authority on quantum for compensatory damages for personal injury. Instead, citation of foreign law tends to occur in areas where the divergence is less pronounced, and, especially, where statute has not intruded at all, or has occurred in a similar way. But that may make it even harder to determine to what extent such divergence as there has been should detract from the value to be accorded to the decision.

[3] The four topics are chosen, not accidentally, from equity's exclusive jurisdiction. As James Allsop has recently observed, "Equity and equitable principle have a justification and coherence that is not merely historical and rooted in the organisation of English courts of centuries past. A conception of equity is an inhering part of any civilised

3 In *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12 the High Court preserved the immunity, rejecting a submission based in part upon developments in the United Kingdom, but altered its basis, so that it rested upon finality, with the consequence, only recently established, that it does not apply to negligent advice as to the settlement of litigation: *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1; [2016] HCA 16, with familiar flow on consequences as the new law was applied to cases in the system: see for example *Kendirjian v Lepore* (2017) 259 CLR 275; [2017] HCA 13.

4 Principally because (a) Australian courts did not follow the lead of English courts in departing from *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222; and (b) a minority of State Legislatures introduced reforming legislation in the mid 20th century which anticipated the availability of such damages to close family members and witnesses but which then were outflanked by developments in judge-made law in cases from other States where there was no such legislation; and (c) 21st century legislation curtailing the right to recover in all cases where injury is caused by a failure to take reasonable care: see M Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019), Ch 7. The details in particular areas, such as carriage by air, continue to be worked out: see *Parkes Shire Council v South West Helicopters Pty Ltd* (2019) 266 CLR 212; [2019] HCA 14.

system of law and justice."[5] Those characteristics, which I (echoing, amongst others, Lords Millett and Briggs)[6] have elsewhere sought to defend,[7] suggest that equity ought to provide strong, interesting candidates for comparative analysis. The examples are selected in part with a view to putting to one side the distorting effect of statutes. The purpose is to consider how and why two broadly similar legal systems have converged and diverged in their responses to the same precise questions.

Confidential information

[4] The first topic updates a presentation given at Cambridge eight years ago this month.[8] The paper started by noting the absence of any equivalent to the Human Rights Act 1998 (UK) in most Australian jurisdictions. Nothing much has changed, despite recommendations in a major report from the Australian Law Reform Commission ("ALRC"),[9] save for the passage of the Human Rights Act 2019 (Qld), parts of which have recently commenced, with the balance coming into force on January 1, 2020. The Queensland Act contains a privacy right[10] but does not implement the ALRC's recommendations. It confers no right to injunctive or pecuniary remedies of itself. It contains a provision requiring *statutes* to be interpreted, to the extent possible, so as to be compatible with human rights,[11] but is silent as to judge-made law.

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5 J Allsop, "The Intersection of Companies and Trusts", Harold Ford Memorial Lecture, September 26, 2019, (2020) 43(3) *Melbourne University Law Review* 1128 at 1130.

6 See P Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214; M Briggs, "Equity in Business" (speech delivered at The Denning Society Annual Lecture, Lincoln's Inn, London, November 8, 2018), available at https://www.supremecourt.uk/docs/speech-181108.pdf; (2019) 135 LQR 567.

7 See M Leeming, "The Role of Equity in 21st Century Commercial Disputes – Meeting the Needs of Any Sophisticated and Successful Legal System" (2019) 47 *Aust Bar Rev* 137, the title of which derives from W Gummow, "Conclusion" in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005).

8 M Leeming, "Confidential Information: Same Problems, Different Resolutions in the United Kingdom and Australia", Sydney Law School Research Paper No 11/70, available at SSRN: https://ssrn.com/abstract=1942069.

9 *Serious Invasions of Privacy in the Digital Era* (AGPS, 2013), ALRC Report 123.

10 Section 25: "A person has the right — (a) not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and (b) not to have the person's reputation unlawfully attacked."

11 Section 48(1): "All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights."

There are considerable similarities with the Human Rights Act 1998 (UK), including provisions for declarations of incompatibility,[12] with no private law consequences *per se*.[13] Yet Australian jurisdictions have not developed anything like a tort of misuse of private information.[14] There has been little incentive to follow the English approach. Eight years ago, a High Court decision on the Victorian Charter of Human Rights and Responsibilities Act 2006, which includes counterparts to Articles 8 and 10 (see section 13 "Privacy and reputation" and section 15 "Freedom of expression"), had just been delivered.[15] Gummow J said that "the House of Lords decisions upon the UK Act exercised a fascination to the point of obsession in the preparation and presentation of much of the submissions in the present appeal. That proved unfortunate …".[16] One critical distinction flows from Australian federalism, for it is far from clear how developments of judge-made law underlying the Human Rights Act could apply to the common law of Australia where only one of six States has enacted similar legislation; the same may be said of the position where two States and one Territory have done so. The characterisation of the right has very significant consequences, including in relation to choice of law, the availability of injunctions and damages, and the way in which other parties may be liable (vicariously and in other ways). [17]

12 Section 53.

13 Section 54: "A declaration of incompatibility does not — (a) affect in any way the validity of the statutory provision for which the declaration was made; or (b) create in any person any legal right or give rise to any civil cause of action."

14 *Cf Campbell v MGN Ltd* [2004] 2 AC 457; [2004] UKHL 22 at [14]; *Murray v Express Newspapers Plc* [2009] Ch 481; *Google Inc v Vidak-Hall* [2016] QB 1003; [2015] EWCA Civ 311, especially at [51]–[54]; and see B McDonald and D Rolph, "Remedial Consequences of Classification of a Privacy Action: Dog or Wolf, Tort or Equity?" in J Varuhas and N Moreham (eds), *Remedies for Breach of Privacy* (Hart Publishing, 2018), Ch 10. For Australia, see *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63 at [38]–[41], *per* Gleeson CJ, and at [335], *per* Callinan J; *Grosse v Purvis* [2003] QDC 151; Aust Torts Reports 81–706; *Doe v Australian Broadcasting Corporation* [2007] VCC 281; A Mason, "Legislative and Judicial Law-making: Can we Locate an Identifiable Boundary?" (2003) 24 *Adel L Rev* 15 at 35–36; D Butler, "Protecting personal privacy in Australia: Quo vadis?" (2016) 46 *Aust Bar Rev* 107.

15 *Momcilovic v The Queen* (2011) 245 CLR 1; [2011] HCA 34.

16 Ibid, at [160].

17 See J Varuhas and N Moreham, "Remedies for Breach of Privacy" and B McDonald and D Rolph, "Remedial Consequences of Classification of a Privacy Action: Dog or Wolf, Tort or Equity?", both in J Varuhas and N Moreham (eds), *Remedies for Breach of Privacy* (Hart Publishing, 2018), Chs 1 and 10.

[5] Perhaps the largest change in the UK has not yet been felt. The Trade Secrets (Enforcement, etc) Regulations 2018[18] implement a 2016 European Union Directive,[19] qualify the granting of relief by mandatory regard to a form of proportionality,[20] and impose a cap which appears to be akin to a reasonable licence fee on compensation which may be ordered in lieu of injunctive relief.[21] They mandate regard to, *inter alia*, "moral prejudice" in the assessment of damages.[22] One way in which the regulation might be influential is the different definition of "trade secret"; another is that its structure appears to force courts to distinguish "compensation" ordered under regulation 16 instead of injunctive relief, and "damages" under regulation 17, in a way reminiscent of a familiar distinction between damages at common law and under the Lord Cairns' Act (see further below).

Differences in scope and characterisation of equitable confidence

[6] The paper noted that Australian courts appeared to be more ready to protect so-called "getting to know you" confidences given by a former client – as it has been put, "the client's strengths, weaknesses, honesty or lack thereof, reaction to crisis, pressure or tension, attitude

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18 I thank Lionel Bently for drawing this regulation to my attention. A timely account of the regulation, and the law prior to its being made, may be found in T Aplin and R Arnold, "UK implementation of the Trade Secrets Directive", in J Schvosbo, T Minnssen and T Riis (eds), *The Harmonisation of Trade Secrets in the EU – An Appraisal of the EU Directive* (Edward Elgar, 2020), ch 5, also available at SSRN: https://ssrn.com/abstract=3393593.

19 Directive 2016/943 of the European Parliament and of the Council of June 8, 2016 on the protection of undisclosed know-how and business information against their unlawful acquisition, use and disclosure (OJ L157, June 15, 2017), pursuant to the European Communities Act 1972, s 2.

20 See regs 12(2) and 15(1), which are in similar terms. The former provides that "In considering whether to make an order under regulation 11(1) and in assessing the proportionality of such an order, a court must take into account the specific circumstances of the case, including where appropriate (a) the value and other specific features of the trade secret, (b) the measures taken to protect the trade secret, (c) the conduct of the alleged infringer in acquiring, using or disclosing the trade secret, (d) the impact of the unlawful use or disclosure of the trade secret, (e) the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties, (f) the legitimate interests of third parties, (g) the public interest, and (h) the safeguard of fundamental rights." Regulation 11(1) confers power to make orders in the nature of interlocutory injunctions and for delivery up. Regulation 15(1) applies similarly to applications for final relief.

21 Regulation 16(2).

22 Regulation 17(3).

to litigation and settling cases and tactics".[23] That trend has continued,[24] while the reluctance of English courts[25] seems, so far as I can see,[26] not to have changed.

[7] The paper noted the differences within Australia's separate jurisdictions. Most Australian courts hold, in agreement with *Prince Jefri Bolkiah*, that there is no "duty of loyalty" between a solicitor and a former client, such that he or she is free to act for a new client with an adverse interest so long as there is no breach of confidence or conflict with a duty to the court, save that Victorian courts persist in recognising such a duty.[27] Since then the weight of authority has continued to disfavour a duty of loyalty, including a line of Federal Court decisions in the Victorian registry,[28] although Victorian Supreme Court judges have (entirely understandably) continued to recognise this duty.[29] Although, unlike the United States ("US"), there is said to be a single common law of Australia, that does not prevent the existence of sharp points of difference within different jurisdictions. But neither has it prevented courts in England from applying Australian (and New Zealand) decisions when they have seemed apposite.[30]

23 *Yunghanns v Elfic Ltd* (July 3, 1998, Supreme Court of Victoria).

24 See for example *In the matter of Edgecliff Car Rentals Pty Ltd (deregistered)* [2017] NSWSC 244 (injunction granted by reason of knowledge of "litigious character and tendencies" of former clients); *Nash v Timbercorp Finance Pty Ltd (in liq)* [2019] FCA 957 at [68]–[69], [79]–[81] (applicant ultimately unsuccessful, but not on this ground).

25 See Goubran, "Conflicts of Duty: The Perennial Lawyers' Tale – a Comparative Study of the Law in England and Australia" (2006) 30 MULR 88.

26 I am conscious that that tentative conclusion is based only upon the absence of decided cases. The legal system is vastly more than the tiny self-selecting minority of proceedings that run to judgment.

27 See *Ismail-Zai v Western Australia* (2007) 34 WAR 379; [2007] WASCA 150; see also *PCCW-HKT Telephone Ltd v Aitken* [2009] HKCFA 11, noted *Nolan* (2009) 125 LQR 374.

28 *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* (2014) 228 FCR 252; [2014] FCA 1065; *Nash v Timbercorp Finance Pty Ltd (in liq), in the matter of the bankrupt estate of Nash* [2019] FCA 957 at [121]–[122]. See also *Tecnicas Reunidas SA v Andrew* [2018] NSWCA 192 at [36].

29 See *Berengo v Berengo* [2014] VSC 667 at [53]–[57] and the decisions there cited; *Break Fast Investments v Rigby Cooke Lawyers* [2015] VSC 305 at [2] and *Schmidt v AHRKalimpa Pty Ltd* [2020] VSCA 193 at [142]. For the difficulties in other jurisdictions such as the Australian Capital Territory, see *Birkett Investments Pty v Streatfield Investments Pty Ltd* [2016] ACTSC 323 at [25].

30 See, most recently, *Glencairn IP Holdings Ltd v Product Specialities Inc* [2019] EWHC 1733 (IPEC).

Pecuniary remedies for breach of confidence

[8] The paper then turned to the question: "What pecuniary remedies are available for a breach of confidence at general law?" Australian law had not then,[31] and still has not today,[32] taken what Lord Nicholls described as the "modest step" of permitting an account of profits for breach of contract.[33] That leads to a crisp question: when the source of a confidence is a contractual promise, when nonetheless will an account of profits be available in equity? The paper addressed the then recent decision of the Full Federal Court in *Optus Networks Pty Ltd v Telstra Corporation Ltd* ("*Optus v Telstra*"),[34] where elaborate contractual provision had been made identifying what was confidential and limiting damages for breach of those provisions. The court rejected the proposition that that was of itself sufficient to deny the availability of an account, and regarded the unavailability of an account of profits for breach of contract as a powerful reason telling against the implied exclusion of an equitable obligation. However, if the confidence is equitable, common law damages are not available, and the weight of Australian authority is to the effect that the Lord Cairns' Act damages are not available.[35] There is an exception in Victoria, where legislative amendment has expanded the power to order such damages.[36]

[9] The Full Federal Court held that the plaintiff could sue on an equitable confidence, notwithstanding that it was partly regulated by contract, and then elect (if appropriate, after obtaining discovery) between a compensatory order (either damages for breach of contractual confidence, or equitable compensation for breach of equitable confidence) or an account of profits. The latter might still be

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31 *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157 at [158]–[159].

32 See *Rickard & Wilson & Active Safety Services Pty Ltd v Testel Australia Pty Ltd* [2019] SASCFC 16 at [116]–[122] (Kelly J, Kourakis CJ and Bampton J agreeing).

33 *Attorney General v Blake* [2001] 1 AC 268 at 285.

34 [2010] FCAFC 21; 265 ALR 281.

35 See *Concept Television Productions Pty Ltd v Australian Broadcasting Corporation* (1988) 12 IPR 129 at 136.

36 See *Giller v Procopets* (2010) 24 VR 1 at [403] (noting that the text above considerably simplifies the reasoning of a decision which remains controversial); and see K Barnett and M Bryan, "Lord Cairns's Act: A Case Study in the Unintended Consequences of Legislation" (2015) 9 *J of Eq* 150.

denied on discretionary grounds, no differently from most equitable remedies.[37]

[10] It seems that English courts have grappled with these precise problems quite differently. The starting point for present purposes is Lord Nicholls' observation in *Attorney General v Blake* ("*Blake*"):[38]

> If confidential information is wrongfully divulged in breach of a non-disclosure agreement, it would be nothing short of sophistry to say that an account of profits may be ordered in respect of the equitable wrong but not in respect of the breach of contract which governs the relationship between the parties.

[11] The "equitable wrong" (which I confess jars to my Australian ears)[39] in contrast with the contractual right recognises the different causes of action such a plaintiff might have, but the conclusion that there might be different remedies (which is the established Australian position) is dismissed as mere "sophistry". I wonder if this is an instance of rhetoric substituting for reasons – what is so untoward about the same conduct giving rise to separate causes of action with different remedies (such as (i) breach of contract and conversion; or (ii) negligence and breach of fiduciary duty)? On this basis it was held that an account of profits could be ordered in exceptional circumstances for breach of contract; perhaps not surprisingly, given the highly unusual facts of *Blake*, it has been noted that those "exceptional circumstances" have proven difficult to articulate.[40]

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37 In *Australian Medic-Care Co Ltd v Hamilton Pharmaceuticals Pty Ltd* [2009] FCA 1220; 261 ALR 501 at [674], Finn J had said "The grant of this form of relief in breach of confidence cases is in the end a matter for the Court, notwithstanding a party's election for an account … An apparent reason for this is that, given the variable character of confidential information, its misuse even in a profit making activity may not realistically be able to be said to result in any profit being attributable to it, the misuse merely effecting what was in effect a saving of time and trouble …".

38 [2001] 1 AC 268 at 285.

39 As Peter Turner has written, "It is no coincidence that equity contains no law of torts, nor that equity declares itself unable to award damages": P Turner, "Privacy Remedies Viewed Through an Equitable Lens" in J Varuhas and N Moreham (eds), *Remedies for Breach of Privacy* (Hart Publishing, 2018) 265 at 279. But *cf Guest v Guest* [2022] UKSC 27; [2022] 3 WLR 911 at [4].

40 See D Campbell and P Wylie, "Ain't No Talking (What Circumstances are Exceptional)" [2003] CLJ 605; and the unsuccessful claims in *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm); [2017] FSR 36 at [192]–[219] and *Stretchline Intellectual Properties Ltd v H&M Hennes & Maurtiz UK Ltd (No 3)* [2016] EWHC 162 (Pat); [2016] RPC 15.

[12] Some local disquiet with aspects of Lord Nicholls' speech in *Blake* may arguably be seen in Lord Reed's judgment in *Morris-Garner v One Step (Support) Ltd*.[41]

> Finally, in relation to Lord Nicholls' speech, the connection which he drew between *Wrotham Park* and an account of profits has had consequences in the later case law which are unlikely to have been intended. One has been a view that damages assessed on the basis of a hypothetical release fee, and an account of profits, are similar remedies (partial and total disgorgement of profits, respectively), at different points along a sliding scale, calibrated according to the degree of disapproval with which the court regards the defendant's conduct …
>
> Related to this has been a view, illustrated by the present case, that damages assessed on the basis of a hypothetical release fee, like an account of profits in some circumstances, are available at the election of the claimant, and can be awarded by the court at its discretion whenever they might appear to be a just response. Neither view can be justified on an orthodox analysis of damages for breach of contract.

[13] That said, his Lordship subsequently acknowledged that "some contractual rights, such as a right to control the use of land, intellectual property or confidential information" might warrant different treatment.[42]

Discretionary refusal of pecuniary remedies

[14] The paper then stated that more interesting than the debate about whether equitable compensation or the Lord Cairns' Act damages are available for a breach of an equitable confidence were the quite recent suggestions that there are restrictions on the right of election. A judgment of a relatively junior judge in the Chancery Division, Sales J, in *Vercoe v Rutland Fund Management Ltd*,[43] which invoked Lord Nicholls' reasoning for the reverse purpose of restricting the availability of an account of profits for an equitable confidence, was quoted at length. The analysis is, if I may say so, thoughtful and careful, and it is not possible in the space available to do justice to it. The paper reproduced the following paragraphs:

41 [2019] AC 649; [2018] UKSC 20 at [81].
42 Ibid, at [92]–[93].
43 [2010] EWHC 424.

Lord Nicholls also identified certain remedial differences between equity and common law in relation to infringement of rights of property as being the product of mere accidents of history rather than any valid underlying principle (p 280D) and rejected the sophistry involved in saying that the remedy of an account of profits may be available for breach of confidence but not for breach of contract, where the equitable and contractual obligations are in substance the same (p 285C-E).

In my view, Lord Nicholls' speech in *Blake* has opened the way to a more principled examination of the circumstances in which an account of profits will be ordered by the courts and where it will not. His reasoning at p 285C-E, comparing remedies available in contract and for breach of confidence in relation to the same underlying facts, flows in both directions. It both opens up the possibility of an award of an account of profits in relation to breach of contract relating to confidential information and also opens up the possibility for a more principled debate about when an account of profits should be refused in relation to a breach of confidence, and a damages award (typically assessed by reference to a notional reasonable price to buy release from the claimant's rights, similar to the award made in *Wrotham Park* and *Seager v Copydex*) made instead. Both in cases of breach of contract and in cases of breach of confidence, the question (at a high level of generality) is, what is the just response to the wrong in question (*cf* Lord Nicholls at p 284H, set out above)? In both cases, to adapt Lord Nicholls' formulation at p 285A, the test is whether the claimant's interest in performance of the obligation in question (whether regarded as an equitable obligation or a contractual obligation) makes it just and equitable that the defendant should retain no benefit from his breach of that obligation. …

The law will control the choice between these remedies, having regard to the need to strike a fair balance between the interests of the parties at the remedial stage, rather than leaving it to the discretion of the claimant. The significance of *Seager v Copydex* is that it shows that, even in relation to confidential information closely akin to a patent (such as a secret manufacturing design or process), the law will not necessarily afford protection to the claimant extending to an account of profits. Still more strongly will that be the case as one moves further away from confidential information in a form resembling classic intellectual property rights towards forms of obligation in respect of confidential information more akin to purely personal obligations in contract and tort.

[15] The paper noted that the key steps in the reasoning process were to observe that Lord Nicholls' reasoning "flows in two directions", to treat as immaterial whether the obligation is "regarded as" an equitable obligation or a contractual obligation, and thereby to elide distinctions between the right to performance of a contract and the right to protection of a confidence.

Summary

[16] The paper summarised the divergent positions as follows:[44]

> There may thus be seen two very different approaches to the same problem. The Australian approach is informed by an inability to obtain a non-compensatory remedy for breach of contract, and it may readily be conceded that there are respectable arguments on both sides of the "exceptional circumstances" power to do so identified in *Blake*. The Australian approach involves questions of contractual construction (namely, whether expressly or impliedly the parties have abrogated or qualified their rights in equity; if so, equity follows the law) which are themselves informed by the additional remedies afforded by equity for breach of an equitable confidence. That sort of interplay is, in a sense, the converse of the interplay seen in the typical case where the fact that the parties have stated in a contract that information is confidential is influential (although not decisive) in determining whether it does indeed have the requisite character of confidentiality. However, if an equitable confidence has not been abrogated or qualified, then the traditional election is preserved, subject to discretionary refusal (which might be expected to be rare).
>
> The English approach is simpler; in itself that is certainly no bad thing. It seems to eschew a difference between a contractual confidence and an equitable confidence whose source is contract. Two (related) considerations might be identified to question the universality of that elision. The first is that many if not most contractual confidences are over-reaching, in the sense that as well as protecting by contract what is inherently confidential, the contractual terms prevent unauthorised use of other information which would not be protected in equity.
>
> The second is that quite different policy goals underlie the vindication of the performance of contractual obligations (including by equitable

44 See now K Barnett, "Gain-Based Relief for Breach of Privacy" in J Varuhas and N Moreham (eds), *Remedies for Breach of Privacy* (Hart Publishing, 2018), Ch 8.

remedies in equity's auxiliary jurisdiction), and the protection of confidential information in equity's exclusive jurisdiction (such as whether the adequacy of damages has any relevance to the granting of injunctive relief). It may be recalled that confidence is and has for centuries been one of the three "proper and peculiar objects of a court of equity".

[17] Since then, Sales J's analysis has received substantial support, including from the Court of Appeal,[45] but may perhaps have been undercut by Lord Reed's implicit antipathy to the reasoning in *Blake.* The approach in *Optus v Telstra* accords with what was said in *CF Partners (UK) LLP v Barclays Bank Plc*.[46] It is nuanced, and presupposes that the threshold issue is that the plaintiff may have overlapping contractual and equitable rights, which may have been excluded by the parties' agreement: if so, equity follows the law.[47] Where a contract is expressed to be exhaustive, that has been sufficient to exclude equitable remedies for breach of confidence.[48] However, if a court in the UK is ordering damages for misuse of a trade secret in accordance with the 2018 regulations, the pecuniary remedies available under regulations 16 and 17 enable the analysis to cut through the complexities encountered in Australia distinguishing equitable and contractual confidences. In particular, that regulation now expressly requires the court to take into account "the negative economic consequences, including any lost profits, which the trade secret holder has suffered, and any unfair profits made by the infringer" in calculating the award of damages.[49]

Three further examples

[18] The following three examples are summaries from a fuller comparative analysis published elsewhere.[50]

45 *Walsh v Shanahan* [2013] EWCA Civ 411, especially at [63]–[64] (Rimer LJ, Laws and Hallett LJJ agreeing). See also *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm); [2017] FSR 36 at [222]–[230], *per* Leggat J.

46 [2014] EWHC 3049 (Ch) at [131]–[134].

47 See M Leeming, "Overlapping Claims at Common Law and in Equity: An Embarrassment of Riches?" (2017) 11 *J of Eq* 229.

48 *Gold and Copper Resources Pty Ltd v Newcrest Operations Ltd* [2013] NSWSC 281 at [89]–[96]. This is consistent with *Streetscape Projects (Australia) Pty Ltd v City of Sydney* (2013) 85 NSWLR 196; [2013] NSWCA 2 at [150].

49 Regulation 17(3)(i).

50 M Leeming, "The Comparative Distinctiveness of Equity" (2016) 2(2) CJCCL 403 at 412–419.

(i) Liability for knowing assistance in breach of trust

[19] Although liability is to be traced to Lord Selborne's words in *Barnes v Addy* that "strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, … unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees",[51] the Australian approach still requires there to have been a "dishonest and fraudulent design" by the fiduciary, as to which the third party assisted and had sufficient notice. Notice includes knowledge of the circumstances which would indicate the facts to an honest and reasonable person, while mere constructive notice is insufficient.[52] The Australian High Court has emphasised that the formulation by Lord Selborne was not an exhaustive statement of the circumstances in which a person who was not a recipient of trust property and had not acted as a trustee *de son tort* might be liable,[53] and that, in particular, a person who induces or procures a trustee to commit a breach of trust will be liable irrespective of the quality of the breach. However, a person who participates in the breach but falls short of inducing or procuring it will only be liable if the breach amounts to a dishonest and fraudulent design.[54] All this reflects a close adherence to Lord Selborne's words.

[20] The principles governing liability in England were reformulated in *Royal Brunei Airlines v Tan* ("*Royal Brunei*"),[55] where it was held that a third party could be liable, even for a wholly innocent breach by the fiduciary, if the *third party* had the requisite state of mind. I do not understand the analysis of *Barnes v Addy* liability in *Williams v Central Bank of Nigeria* to touch on this issue.[56] There has been some fluctuation in *Twinsectra v Yardley*[57] and *Barlow Clowes International*

51 (1874) LR 9 Ch App 144 at 151–152.

52 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 ("*Farah Constructions*"); *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609; [2014] NSWCA 266; *FTV Holdings Cairns Pty Ltd v Smith* [2014] QCA 217 at [58]–[62].

53 *Farah Constructions*, ibid, at [161].

54 See *Farah Constructions*, ibid, at [164]; *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609; [2014] NSWCA 266 at [77]–[78]; C Harpum, "The Stranger as Constructive Trustee: Part 1" (1986) 102 LQR 114 at 144.

55 [1995] 2 AC 378.

56 [2014] AC 1189; [2014] UKSC 10.

57 [2002] 2 AC 164; [2002] UKHL 12.

Ltd v Eurotrust International Ltd[58] on the question of the third party's state of mind. There has been a similar wavering in Australia, as to the *fiduciary's* state of mind.[59] But whatever be the position on knowledge, the English focus on the state of mind of the third party appears to subsume the distinction made in the Australian authorities.

(ii) Exceptions to Saunders v Vautier

[21] In some circumstances, in accordance with one aspect of the "rule"[60] in *Saunders v Vautier*, fewer than all of a number of absolutely entitled adult beneficiaries can bring a trust to an end *pro rata*, by calling for the transfer of their shares of the trust property. May that occur where the trustee holds shares in a private company and the result is that there is a change of control in the company (as in the case of the breaking up a blocking stake)?

[22] In Australia and England, one beneficiary can bring to an end a trust of divisible property *pro rata*, subject to there not being "special circumstances". A line of authority holds that the mere breaking up of a parcel of shares is insufficient to constitute special circumstances.[61] However, if it is shown that the consequence is a loss in value, then there will be special circumstances.

[23] In *Beck v Henley*,[62] the New South Wales Court of Appeal was asked to depart from that line of authority. After considering the English decisions from which the "special circumstances" exception was derived, the court held that it should not lightly depart from judicial authority that was "long standing and consistent", and which had been applied and followed in other jurisdictions.[63] Further, the court considered the potential consequences of deviating, stating:[64]

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58 [2005] UKPC 37; [2006] 1 All ER 333.

59 *Westpac Banking Corporation v Bell Group Ltd (No 3)* (2012) 42 WAR 1; [2012] WASCA 157 sought to dilute the test of dishonesty on the part of the fiduciary; it seems not to have been followed outside Western Australia.

60 The "rule" is better seen as a power on the part of the beneficiaries, with a correlative liability on the part of the trustee. See e.g. *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98; [2005] HCA 53 at [44].

61 See *Re Marshall* [1914] 1 Ch 192; *Re Sandeman's Will Trusts* [1937] 1 All ER 368; *Re Weiner's Will Trusts* [1956] 1 WLR 579; and *Lloyds Bank Ltd v Duker* [1987] 1 WLR 1324.

62 [2014] NSWCA 201; (2014) 11 ASTLR 457.

63 Ibid, at [81] (my words, with which Beazley P and Sackville AJA agreed).

64 Ibid. See also the evident international comity on this issue in *Carol Boian; Re Estate of Dan Antonio Boian* [2014] NSWSC 800, especially at [31]–[43].

> It is not possible to quantify the costs — in terms of certainty, and upsetting the considered and informed desires of settlors, testators and beneficiaries, of the change in the law for which [the appellant] contends. All that can be said is that those costs would be real.

(iii) Judicial advice

[24] Statutes in Australia and England, all deriving from a Bill sponsored by Lord St Leonards,[65] authorise a trustee to obtain the benefit of a statutory defence if the trustee follows advice given after full disclosure. It makes sense — given the character of the application and the nature of the defence — to regard this as essentially equitable. The subject was considered at length in *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar*.[66]

[25] The High Court of Australia there observed that where the New South Wales legislation "reflected and even copied laws enacted, or made, for identical or analogous circumstances in England, it was permissible and helpful to construe the New South Wales legislation with the benefit of the experience expressed in judicial observations on the English analogues".[67] Despite very significant differences in legislative history, the High Court pointed to what Lord St Leonards had said in 1857 when introducing the Trustee Relief Bill as to its being a "cheap and simple process of determining questions".[68] The High Court continued "The legislative courses taken in England and New South Wales, although superficially they diverged, in substance became very similar. It is this fact that makes it relevant and useful for this Court to consider them for the purpose of understanding and applying in these proceedings the local legislation."

[26] Nevertheless, the High Court had regard to the significantly altered (and expanded) provisions in section 63 of the New South Wales Trustee Act 1925 as warranting the result that there should be no limitation confining the availability of advice to non-adversarial proceedings.

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65 Law of Property Amendment Act 1859 (UK), s 30.
66 (2008) 237 CLR 66; [2008] HCA 42.
67 Ibid, at [53].
68 Ibid, at [67].

Conclusion

[27] Obviously very little by way of empirical conclusion can be drawn from a non-randomly chosen sample of four! With that very important caveat, I suggest the following.

[28] First, there is a role for Lord Neuberger's suggestion that is it "highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world".[69] Other things being equal, courts may, when faced with leeways of choice, draw upon the decisions of foreign courts with a view to promoting similar development. Ultimately, this enhances not only the predictability of the law, but also its transparency, because consistency with foreign decisions is a sound reason for preferring one choice to another. This occurs in all common law jurisdictions save the US, where reliance on foreign law is controversial.[70] Moreover, as Lord Reed said while applying precisely such an approach, the relevant rules need not be identical: "as in mathematics, isomorphism is not the same as equality".[71] The gravamen of reasoning based on a comparative approach, and indeed the point of the case studies in this article, is to understand what are the differences, as commonly may be seen at the level of detail, and how they came about. It may be that a local statute altered the line of authority (judicial advice), or a different step was taken in the judge-made law (in the form of *Blake* and *Royal Brunei*), leading directly or indirectly to a divergent approach making the foreign decision inapt.

[29] Alternatively, the issue may be so rarefied and the number of decisions so small and so untouched by statute that there are no

69 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250; [2014] UKSC 45 at [45].

70 This was especially associated with Scalia J: see for example *Roper v Simmons* 543 US 551 (2005). This position is not without some irony, given the multiplicity of divergent and separate systems of "common laws" within that federation, somewhat removed from the *ius commune* or the commonality introduced by the royal courts in mediaeval England. A number of commentators have pointed to other ironic aspects of this position, including P Finkelman, "Foreign Law and American Constitutional Interpretation: A Long and Venerable Tradition" (2007) *NYU Annual Survey of American Law*, Vol 63, 2007–2008, available at SSRN: https://ssrn.com/abstract=1310733.

71 *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2015] AC 1503; [2014] UKSC 58 at [137].

differences at all (the special circumstances exception to *Saunders v Vautier*), in which case a foreign decision will carry significant weight. But if there are numerous considerations bearing upon the different approaches (many aspects of breach of confidence), the persuasive force of foreign decisions may be minimal. Such qualitative considerations are indispensable when assessing what weight is to be given to comparative decisions. This is the point noted at the outset of this article: "comparative common law" is the daily grist in testing and resolving submissions in litigation in Australian courts.

[30] Secondly, the nature of advocacy, and the nature of judgment writing, is that there is a tendency to include as many reasons as are available to support a given conclusion.

[31] Often this occurs without a clear statement of which reasons are more powerful and which are less so. This is especially true in appellate courts, where different members of the court may place different weight on the various reasons. Hence a perennial problem in comparative law is that the mere citation of foreign decisions may be merely as a buttress, or even a fig leaf, rather than dispositive. Lord Hoffmann's hyperbole contains a germ of truth when he referred to "the way courts always use comparative law; as a rhetorical flourish, to lend support to a conclusion reached on independent grounds."[72] Cognate with this, and especially true of the citation of US decisions, where there is often a range of decisions on any contentious point, is the risk of conscious or unconscious selectivity.[73] But even if one cannot with certainty identify the extent of the influence, I think one can be confident that it exists. The force of Justice Breyer's observation in debate on this point with Justice Scalia is surely self-evident:[74] "If here I have a human being, called a judge, in a different country, dealing with a similar problem, why don't I read what he says if it's similar enough? Maybe I'll learn something." *Beck v Henley* and the

72 L Hoffmann, "Fairchild and After" in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press, 2013), p 64.

73 "[T]o invoke alien law when it agrees with one's own thinking and ignore it otherwise, is not reasoned decision-making, but sophistry": *Roper v Simmons* 125 S Ct 1183 (2005) at 1228, *per* Scalia J.

74 (2005) 3 *International Journal of Constitutional Law* 519, cited by G Halmai, "The Use of Foreign Law in Constitutional Interpretation" in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012), p 1332.

Macedonian Orthodox Church cases are not, on a fair reading of the judgments, decisions where comparative law was cited merely to lend support to a conclusion reached on independent grounds.

[32] A third point concerns the role of academic commentary. Often the easiest way to access foreign law is through academic writings. The only time I can remember being asked, judicially, to read carefully academic writing, with a view to deciding the case in a particular way, was Rayment QC recommending Charles Harpum's long article, "The Stranger as Constructive Trustee". [75] The challenge he faced was unusual in civil litigation. In order to succeed, he had to persuade the court not merely that his was the preferable argument, but that three senior judges sitting as the Western Australian Court of Appeal were "clearly wrong".[76] It may be that many advocates, whose task is merely to win the case, feel that citing academic literature is apt to prompt an unsettling question from the court: "Is there no (judicial) authority that supports this proposition?"

[33] That does not prevent reading academic literature, and citing it when it is insightful. But it is also to be borne in mind that advocates make choices all the time when formulating submissions, and may rely on an idea taken from the literature without acknowledging it. As presently advised, I see no obligation, either as a matter of law or ethics, upon advocates to cite academic literature which has provided the idea for a submission – especially if the article was written in relation to a different jurisdiction. From time to time academic commentators, who understandably desire their work to influence the courts *in ways that are demonstrable*, complain that judgments fail to cite their work.

[34] There may be many reasons for that. And just as judgments must not be read as statutes, judgments must likewise not be read as academic literature. In particular, a failure to cite which would be deprecated in an article is not necessarily a defect of a judgment, although where academic literature materially contributes to an aspect of the court's reasoning, citation is ordinarily warranted (which in turn may in some cases give rise to a question whether the litigants ought to be given an opportunity to be heard as to the particular article).

75 (1986) 102 LQR 114 at 267.

76 See *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609; [2014] NSWCA 266.

[35] But very often the leeways of choice which arise in an intermediate appellate court – which tend to be relatively interstitial and most commonly involve choices of statutory construction – seem not to be the subject of any considered academic commentary. If they are discussed, that tends to occur in textbooks, rather than journals. My experience is that questions of principle largely divorced from statute law relatively seldom arise – the examples considered in this article are *not* representative. That is not merely because most appeals are decided on the facts, nor because most law in practice is statutory. It is also because the litigants are concerned to win, and it may sometimes be in neither party's interest to raise a question of law. Winning on a debatable question of law in an intermediate appellate court may be an excellent opportunity way for the loser to seek special leave to appeal to the High Court. The unsought reformulation of *Barnes v Addy* liability by the New South Wales Court of Appeal provides an example.[77]

[36] However, although academic commentary may be lacking, or is not provided to the court, such points may often be found (albeit after diligent research) in other common law jurisdictions. The same problems do, after all, tend to arise in different jurisdictions. To reiterate the first point, in such cases it tends to be essential to know quite a deal about the context and background to the point in *both* jurisdictions, so as to assess how persuasive the reasoning of the other court is.

77 "And the relevant part of the Court of Appeal's judgment was also unjust to the respondent, which might have wished to say something against deciding the case on that basis, or in that particular way. The judgment, which states no reason why restitutionary liability should be recognised, conveys the impression that the result was so foreordained and so inevitably correct that it was not necessary to seek any assistance, however modest, from the respondent. For its part, the respondent, which has its own good reasons for being aggrieved about the step which the Court of Appeal took, offered only the most lukewarm of support for the reasoning in this Court, and then only 'very much as a subsidiary argument'": *Farah Constructions* (2007) 230 CLR 89; [2007] HCA 22 at [133].

Judicial Review in Sports
Innovation and Evolution by the Indian Courts

by

*Justice Anish Dayal**

Introduction

[1] The mention of "sports" would normally conjure images of a game, rules, players, intense competition, fans, teams, medals and trophies. The emotion, excitement and expectation are universal and truly global in character. It does not differ in its very essence from nation to nation. The structuring of sporting bodies which govern the sport is also universal in character. Amateur sports (as different from professional sport) in each country are largely governed under similar organisational structures. This is primarily because over a period of time sports governance has been entrusted to collectives named as "Federations" or "Committees" or "Associations" (legally speaking, association of persons having a representative membership of individuals or sub-bodies). These bodies which govern all Olympic and non-Olympic amateur sports at the international, national and sub-national level are, for the purposes of sports governance, autonomous, independent and organised in a pyramidical hierarchy. This autonomy and independence preclude any oversight, control or regulation by any governmental or judicial body. In this pyramidical hierarchy at the apex is the international federation governing all national federations which in turn govern the sub-national federations. The insulation is complete and brooks no interference by any state-based regulation or legislation in its functioning. This insulation is unique, *sui generis* and ironical, since the sports it governs are played under respective national flags for national honour and glory.

Illustration

[2] To illustrate, let us take a peek at how amateur football is governed for any country, say, India. At the national level, the federation which governs the sport, its rules, competition and accreditation of

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players is the All India Football Federation ("AIFF"). The AIFF and other coordinate federations governing the sport of football in each respective country are members and constituents of the international body called Fédération Internationale de Football Association ("FIFA"). On the other side, the constituents and members of the AIFF would be the sub-national associations which govern football at a zonal/regional level in a country. It is this pyramid with international federation at the top, the national federation in the middle and the sub-national/zonal/regional associations at the bottom which define, govern, rule and supervise a particular sport.

[3] This pyramidical structure is also true for larger organisations which govern Olympic sports overall and which may be familiar to readers in all jurisdictions. On top of the pyramid, the International Olympic Committee ("IOC") governs Olympic sports and conducts the Olympics, which is headquartered at Lausanne, Switzerland. The constituents at the national level are National Olympic Committees ("NOCs"). For example, in India, the National Olympic Committee is called the Indian Olympic Association ("IOA"). In some cases, there are regional/sub-national Olympic Associations which work under the aegis of NOCs and manage Olympic sports in sub-national regions.

[4] This pyramidical structure is largely uniform across all amateur sports, to the exclusion of professional sports which could be governed and run by private organisations, clubs, leagues, etc. In a number of cases professional sport is the creation and progeny of the national sports federation. For example, the immensely popular Indian Premier League ("IPL") for cricket is run by the national cricket federation of India, the Board of Control for Cricket in India ("BCCI").

The conundrum

[5] This pyramidical structure for reasons of history and legacy is unique in some respects. *Firstly*, it allows no independent freewheeling constituent to become part of the pyramid unless the governing body above it recognises it as a "legitimate body". As an illustration, if a newly-minted football association were to claim that it could manage football better in India than the AIFF, it would become part of the pyramid only if it is duly recognised, authorised and endorsed by FIFA. This engenders monopoly and is arguably anti-competitive; *secondly*, the constitution, supervision, reporting, dispute resolution

and grievance redressal are all managed within this hierarchical pyramid, both horizontally and vertically; *thirdly,* and most importantly for the purposes of this article, this pyramid is legally autonomous, in that it does not allow for any judicial interference at the national levels since each national organisation is expected to follow the governance structure as mandated by the international federation. The legal conundrum arises here. While on one hand the national sports federation within this pyramidical structure is under the patronage, permission and supervision of the international organisation in that sport, on the other hand the team that it fields in that sport is the "national" team of that sport, playing under the banner and flag of the country it represents. The Indian football team is the one fielded by the AIFF for international competitions, while the AIFF continues to be governed by the rules and charters of FIFA. Ideally, neither would there be any oversight allowed by any national government, legislation or the national judiciary. Therefore, there exists no legally recognised and validated standard for any judicial review of the governance, constitution, acts and omissions of the national federations at national level. It is this conundrum which has been the grist for judicial innovation and evolution to allow some judicial review by the Indian courts and particularly, the High Court of Delhi. A new jurisprudence has evolved over the last decade, in order to curtail excesses and aberrations of national sports federations.

The first "hop"

[6] At the local level in India, sports federations, either for an Olympic sport or a non-Olympic sport, are mostly registered under the Indian Societies Registration Act and are therefore, for their birth and genesis regulated by such legislation. However, this regulation is only restricted to a general oversight of a Registrar of Societies with no effective power to bring errant societies in line, but could wield very limited powers to resolve disputes regarding registration of the society. The federations would conduct their elections in the manner they wanted, with or without internal disputes, and file their regulation and proforma reports with the Registrar.

[7] However, there was one chink in this armour. Even though the NOC (the IOA in India) and the national sports federations ("NSFs") were not taking any direct financial assistance from the government, they were receiving subsidies in the form of tax exemptions for the

promotion of sports (like exemption from entertainment tax on tickets, from customs duty on import of sport equipment). Over a period of time, therefore, various guidelines were promulgated by the government prescribing limitations and restrictions on the manner of functioning of the IOA and NSFs, if such subsidies had to continue. These set of guidelines, over a period of time, were consolidated in what is called the National Sports Code of India ("Sports Code"). There was yet another critical arrow in the regulatory quiver. The fact that the NSFs or the NOC would field a team under the flag and name of India, would make them subject to restrictions on such use and therefore provide useful leverage for issuing guidelines. The Sports Code therefore became the first salvo in unravelling this conundrum.

The second "step"

[8] The first major judicial challenge to this imposition on the autonomy of sports federations came via a writ petition (petition for judicial review of administrative action) filed before the High Court of Delhi by the IOA in 2012. Guidelines in the form of the Sports Code were assailed on the ground that the Sports Code was promulgated by the central government while legislative competence to legislate on "sports" under the Constitution of India was the prerogative of the state governments of India. The Sports Code by the central government to regulate sports was thus seen as a breach of this constitutional division of legislative competence between the central government and the state governments. The High Court of Delhi, speaking through a Division Bench of Justice Ravindra Bhat and Justice Najmi Waziri, held in the seminal judgment reported as *Indian Olympic Association v Union of India* ("*IOA*"),[1] that the Sports Code regulating NSFs and the IOA fell within the legislative competence of the central government under the Constitution of India and the central government was empowered to promulgate the Sports Code.

[9] What was important in this landmark decision was the jurisprudential basis by which the court was providing legitimacy to the Sports Code which encompassed a veritable menu of regulations, *inter alia*, prescribing staffing requirements, pays and salaries of NSFs/IOA, manner of holding elections, tenures of office bearers, etc. The court opined that considering that the central government's support

1 2014 Supreme Court Cases OnLine Delhi 2967.

to these sports bodies, while not being in the form of monetary grant, gave a host of other indirect benefits, *inter alia*, sponsoring travel abroad for competitions, buying sports equipment, providing coaching expertise and most importantly allowing a team fielded by the federation for that particular sport to play under the India flag[2]. The crux of the court's judicial innovation in this context was that "aid or recognition is not a one-way street". The central government had a legitimate right to recognise sporting bodies for the purpose of use of the expression "India" enabling national sports teams sponsored by these NSFs and the IOA to in turn use that appellation. And such right was inextricably intertwined with the duty to follow certain basic standards. On this basic premise of reciprocity of benefits and restrictions, the court upheld the legislative competence of the central government to issue these guidelines encapsulated as the "Sports Code". The Parliament of India has mooted on various occasions framing an appropriate omnibus legislation to govern sports and sporting bodies in India but that has not passed legislative muster yet. This decision of the Delhi High Court, therefore, provided an entry point for the government to ensure that the IOA/NSFs function in a transparent, equitable and fair manner, keeping the interest of sports and sports persons at the very highest and not indulge in petty personal interests propelled by power and politics. And this in turn opened up the floodgates for judicial review and compliance.

The third "jump"

[10] Thus, petitions were started in the courts by public-interest petitioners as well as aggrieved stakeholders to ensure compliance of this Sports Code by the IOA and NSFs. Using the *IOA* decision of 2014 (supra) as a base, the Delhi High Court further embellished and evolved juridical review on a case-to-case basis involving a plethora of sporting organisations, *inter alia*, including sporting federations of hockey, chess, badminton, table tennis, kabaddi, archery, football, kho-kho, boxing, wrestling, gymnastics, judo and many others. By these decisions, some minor and other major, the court ensured that the errant NSFs/IOA were directed, pushed, and nudged back into compliance of the guidelines. While this propelled the sporting federations to reorganise and conduct themselves in probity, it also brought to fore the fundamental conflict between the autonomy of the

2 Ibid, at para [84].

sports pyramidical hierarchy and the arm of law and the legislature to regulate.

[11] This conflict has recently come to the forefront in India relating again to the IOA, yet again before the High Court of Delhi. In a public-interest litigation, *Rahul Mehra v Union of India*,[3] the petitioner sought in public interest that *firstly*, a mandamus be issued for strict compliance by the IOA and the NSFs with the Sports Code; *secondly*, recognition of defaulting NSF(s) be suspended and/or withdrawn, government patronage and the benefits the NSFs reap from government largesse such as access to government stadia, sports facilities, financial assistance, tax concessions, customs duty exemptions, funding of travel and hospitality, etc. granted to NSF office bearers for sporting competitions, etc. to cease forthwith; *thirdly*, such benefits be not resumed till the constitution and administration of the IOA/NSF is brought into conformity with the Sports Code, which mandated elections to these federations to be truly representative in nature, free and fair and providing adequate representation to sports persons and women.

[12] In deciding the matter, the Delhi High Court speaking through the Division Bench of Justice Manmohan and Justice Najmi Waziri delivered a judgment on August 16, 2022, yet again traversing the legal landscape regarding the Sports Code. This time, however, the legislative competence issue was no longer *res integra* (considering the 2014 *IOA* judgment). What was being reviewed were micro issues pertaining to elections, constitution of the parties, age limits, tenures, representation of sports persons in such bodies, disqualification for being elected to such bodies, etc. The court gave its opinion on various issues and concluded that *firstly*, the legal regime *apropos* sports administration in India has to be implemented fully and effectively and compliance with the Sports Code is non-negotiable; *secondly*, if a sports federation does not comply with the law of the land, it will receive no recognition from the government and all benefits and facilities to it will stop promptly; *thirdly*, the governmental monitoring of compliance is expected to be prompt, robust and meticulous at all times and annual compliances are mandatory for continued recognition of the sports federation. In particular, as regards the IOA, the principal respondent in the matter, it was held that there was persistent recalcitrance of the IOA

3 2022 Supreme Court Cases OnLine Delhi 2438.

for almost half a century to comply with the Sports Code, despite its consistent assurance to the government and therefore it was the court's opinion that the IOA's affairs be put in the hands of a Committee of Administrators, which would be a body headed by a former judge of the Supreme Court and other senior eminent bureaucrats and sports persons as its members and consultants. What probably provoked the court is expressed pithily in the first line of the judgment quoting the adage "the more things change the more they stay the same". However, the story was not to end here.

The churn

[13] The IOA preferred an appeal before the Supreme Court of India on an immediate basis and got a status quo on implementation of the High Court order. This was triggered by the submission made by the IOA that the appointment of the Committee of Administrators by the Delhi High Court supplanting the IOA's elected body would lead to suspension by the IOC, since the autonomous hierarchical structure would brook no interference at the local level which did not have an approval of the international body. The status quo was further extended but in the meantime the IOC, possibly having taken note of the developments in India, mandated the IOA to complete the election of their new body on an immediate basis. The Supreme Court had also in the meantime approved the timeline for amendment of the draft constitution of the IOA and its elections, as has been agreed by the IOA in its meeting with the IOC. The Supreme Court had also formed a committee under a retired Supreme Court judge for ensuring that the constitution of the IOA was complied with and election of the IOA would accordingly be held under a new constitution of the IOA. Just before submission of this article, it has been reported in the media that one of the most eminent athletes of India Ms PT Usha has become the new President of the IOA, a first in many respects, the first international athlete and a woman to head the IOA.

[14] Water still has to flow on this issue. In this synoptic analysis, we have just paused to reflect on how jurisprudence has evolved, at least in India, to ensure that there is compliance by NSFs to a uniform set of rules and regulations ensuring probity, fairness, and preventing dominance or cartelisation by self-serving individuals when heading these governing bodies merely for power and pelf. Even though the international bodies have raised a red flag, citing autonomy and

undue interference at national levels, this hop, step and jump has probably ensured that the churn would engender a transparent, effective, and competent sports governance in the country. And that it is not insulated from judicial review, merely on the principle of international autonomy.

[15] These are significant winds of change in the governance of sports through nationally located sports federations. What has significantly permeated this change is the evolution of law on judicial review of such federations moving from a complete insulation arising out of a legacy principle of autonomy to an ecosystem which allows simultaneous compliance with international charters and also ensures fair play and probity in its membership and functioning at the national level.

The Moment of Truth? – Admissibility of the Results of a Polygraph Examination

by

*Justice Evrol Mariette Peters**

All truths are easy to understand once they are discovered; the point is to discover them.[1]

Short abstract

[1] In October 2019, the then Director-General of the National Centre for Governance, Integrity and Anti-Corruption (GIACC), Tan Sri Abu Kassim Mohamed, in his inaugural lecture at the *Hari Integriti USM* (2019), suggested that the results of a polygraph examination should be used as evidence in court, although he did qualify it by stating that its admissibility should be left ultimately to the Judiciary to determine.

[2] The interest in the results of a polygraph examination gained momentum after one Muhammad Yusoff Rawther[2] claimed to have spent hours with the police, taking a polygraph examination to determine the veracity of his sexual assault claims against PKR president, Datuk Seri Anwar Ibrahim. Although the then Inspector-General of Police, Tan Sri Abdul Hamid Bador, had assured[3] that the examination conducted on Muhammad Yusoff Rawther was only to determine the credibility of his claims and not for any other purpose, such news had sparked interest in the accuracy (or otherwise) of the results of a polygraph examination.

[3] This article addresses and examines the legal implications as well as admissibility of the results of a polygraph examination in a court of law.

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* Judge of the High Court of Malaya.

1 Galileo (1564–1642), Italian astronomer.

2 Former research assistant to Datuk Seri Anwar Ibrahim.

3 "IGP: Yusoff Rawther's Polygraph Test Not For Court Evidence", *The Star*, December 23, 2019.

I. Introduction

[4] The pursuit for the ultimate truth has been the endeavor of mankind since time immemorial and as a result, various methods, both spiritual and physiological, have been employed for such purpose.

[5] It is important to note that lie detectors have existed for the longest time in various forms and shapes. One of the most intriguing forms was the method displayed by King Solomon,[4] whose wisdom was known to be exceptional, unique and unrivalled.

[6] The story of how King Solomon dealt with the dispute between two women, each claiming to be the mother of an infant, is legendary.[5] According to the narrative, when King Solomon was asked to determine who the actual mother was, he ordered for the infant to be halved, and for each woman to take home a piece. Whilst the first woman thought that was fair and agreed to the suggestion, the second one decided to give up her half to spare the infant's life. This was King Solomon's foolproof method of extracting the truth.

[7] Unfortunately, the display of such profound wisdom is few and far between, and perhaps even non-existent. Hence, the quest for alternative lie-detecting methods, one of which, practised in ancient China, was the "rice chewing" ordeal. This was done by filling the mouth of the suspect with dry rice, and having him spit it out after a while. If that mouthful of rice remained dry, the suspect was found guilty. Such conclusion was based on the convoluted premise that fear and anxiety, caused by the purported guilt, would decrease salivation, rendering a dry mouth, which was incapable of chewing and moistening the rice.

[8] Other ancient lie-detecting methods included trial by ordeal such as licking a hot iron, to demonstrate lying by a burnt tongue,[6] or even putting one's hand into the Mouth of Truth,[7] and losing it as a sign of lying.[8]

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4 A biblical king said to have been born in 990 BC and reigned from 970 to 931 BC.

5 Old Testament: 1 Kings 3:16–28.

6 This is also known as *Bisha'h*, believed to have originated from ancient Egypt.

7 A marble mask in Rome, said to have been built in the first century, was actually viewed as a form of lie detection, and an interesting one at that, since it was believed that if a liar puts his hand inside its mouth, he will lose it.

8 See Martina Vicianova, "Historical Techniques of Lie Detection" (2015) *Eur J Psychol* 252.

[9] In recent times, we have witnessed several politicians take the *sumpah laknat*[9] to prove their innocence. However, since this method is not one that is immediately capable of detecting lies, the quest for the perfect lie detector continues.

II. What is a "polygraph"

[10] The word "polygraph" literally means "many writings", which is a reference to the method of recording several physiological activities at the same time.

[11] A polygraph, which is touted as a more modern form of lie detector, works on the assumption that lying is accompanied by a change in the body's physiological activity, based on the assessment and measurement of bodily activities such as heart rate, blood pressure, and perspiration. Hence, unlike the fabled "Pinocchio", the polygraph attempts to capture only the indirect and purported effects of lying, if at all.

[12] Although the definition of "polygraph" is not found in any Malaysian statute, reference may be made to the United States ("US") Employee Polygraph Protection Act of 1988 ("EPP Act")[10] which has defined both lie detector and polygraph as follows:

> (3) Lie detector
>
> The term "*lie detector" includes a polygraph*, deceptograph, voice stress analyser, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.
>
> (4) Polygraph
>
> The term "polygraph" means an instrument that –
>
> *records* continuously, visually, permanently, and simultaneously *changes in cardiovascular, respiratory, and electrodermal patterns* as minimum instrumentation standards;

9 The *sumpah laknat*, also known as "*mubahala"* (invocation of God's curse), is an oath a Muslim makes to God, asking for divine retribution in the form of a curse against the other party if the latter is lying.

10 The EPP Act is a statute that, save for certain exemptions, generally prevents employers from using lie-detector tests, either for pre-employment screening or during the course of employment.

and

is used, or the results of which are used, for the purpose of *rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.*

(Emphasis added.)

[13] Although the current version of the modern polygraph was invented circa 1921 by a Canadian John Larson (a then psychologist employed at the Berkeley Police Department), crude versions of components of the polygraph such as the plethysmograph,[11] hydrosphygmograph[12] and pneumograph,[13] which were attributed to various inventors since 1874, had already been tried and tested. Through advancement of science and technology, the polygraph model created by John Larson had become more sophisticated and developed into what is predominantly used today.

[14] The definition in the US EPP Act indicates that a polygraph is based on sensors that are attached to the individual who is taking the examination. These sensors typically record a person's breathing rate, pulse (heart rate), blood pressure, and perspiration. Fluctuations are monitored with the assistance of various apparatus including inflatable pressure cuffs on the upper arm to gauge blood pressure; electrodes affixed to the fingertips to measure skin resistance; a pneumograph tube tightly encircling the chest to observe respiration patterns; and devices in the chair to determine body movements.

[15] A polygraph examination includes a series of questions warranting a "yes" or "no" answer (sometimes known as "closed" questions), responded to by the examinee whilst he is connected to the sensors that would transmit data on these physiological phenomena by wire to the instrument, which uses analog or digital technology to record the data. The record of physiological responses during the polygraph examination is known as the polygraph chart.

[16] A polygraph examination is useful in many industries especially where it is crucial to identify deception or verify information. These

11 Invented by Italian physiologist Angelo Mosso, circa 1876, which was used to detect and record blood pressure changes.

12 Invented by Cesare Lombroso in 1895, which was used to measure physiological changes such as blood pressure and pulse rates.

13 Invented by Italian psychologist Vittorio Benussi in 1914, to record velocity and force of chest movements during respiration.

include pre-employment screening in law enforcement, investigative agencies and other investigations of specific events, such as crime and insurance claims. In fact, it is interesting to note that results of a polygraph examination had also inspired the American game show, "Moment of Truth".[14]

[17] Although there are numerous ways and methods of conducting a polygraph examination, a typical polygraph examination begins with a pre-test or a general phase, where the examiner will go through, with the examinee, the different aspects of the polygraph examination and its mechanics. This is to enable the examiner to familiarise himself with the examinee and his background.

[18] The second phase is the actual polygraph examination itself, where the examiner will ask a series of closed questions,[15] whilst the polygraph instrument is attached to the examinee. As the examinee answers the questions, his or her physiological data is continuously collected, measured, and recorded by the polygraph instrument.

[19] The final phase of the polygraph examination is the evaluation and interpretation of the chart by the examiner and the formulation of his opinion.

III. Admissibility of the results of a polygraph examination

1. Foreign jurisdictions

[20] This issue of whether the results of a polygraph examination should be relied upon by a judge in a court of law has been addressed in several countries including the US, United Kingdom ("UK"), India and Singapore. In a nutshell, courts in such countries have been reluctant to admit such evidence.

[21] In the US, the admissibility of the results of a polygraph examination has been demarcated by the main cases of *Frye v US*

14 The series ran from January 2008 to August 2009.

15 The questions and techniques differ from relevant/irrelevant techniques and control question test, to directed lie test and guilty knowledge test. See *Scientific Validity of Polygraph Testing: A Research Review and Evaluation, A Technical Memorandum Washington, DC: US Congress Office of Technology Assessment OTA-TM-H-15*, November 1983 for a detailed description of the range of questions, techniques, and applications.

("*Frye*"),[16] *Daubert v Merrell Dow Pharmaceuticals Inc* ("*Daubert*"),[17] and *United States v Scheffer* ("*Scheffer*").[18]

[22] In *Frye*, the accused, James Alphonso Frye, had initially confessed to the murder of one Dr RW Brown, but that he did so in self-defence. He subsequently claimed that such confession was false, and to establish his innocence, he attempted to admit in evidence, the results of a systolic blood pressure deception test, conducted on him by one Dr William Moulton Marston,[19] whose opinion was that the final story of the accused was the accurate one.

[23] In addressing the issue of whether it was proper to admit the opinion evidence of an expert witness on the systolic blood pressure deception test, the court, through Associate Justice Van Orsdel, answered the question in the negative, in the following passage:

> Somewhere in this twilight zone [between experimental and demonstrable stages of discovery] the evidential force of the principle must be recognised, and while courts will go a long way in admitting expert testimony deduced from a well-recognised scientific principle or discovery, the thing from which the deduction is made *must be sufficiently established to have gained general acceptance* in the particular field in which it belongs.
>
> (Emphasis added.)

[24] The above-quoted passage is the genesis of what became known as the *Frye* test or *Frye* standard, which stipulates that expert opinion based on a scientific technique is admissible only when that technique is generally accepted as reliable in the relevant scientific community. In other words, the *Frye* test had appointed the scientific community as gatekeeper, who will determine the admissibility of scientific evidence. Hence, if the scientific community took the approach that a method or theory was acceptable, only then should the court proceed to admit such evidence.

[25] In a nutshell, according to *Frye*, the systolic blood pressure deception test had not gained the requisite standing and scientific

16 293 F 1013 (DC Cir, 1923).
17 509 US 579 (1993) at 589.
18 523 US 303 (1998).
19 A psychologist, who had discovered the systolic blood pressure deception test in 1915.

recognition among psychological and physiological authorities at the time of trial, to justify the introduction of expert opinion regarding the matter.

[26] Although case law in the US was dominated by the *Frye* principle when dealing with the admissibility of expert opinion evidence, 70 years later, the legal landscape changed with the decision in *Daubert* in 1993, wherein the issue was whether Bendectin, an anti-nausea drug, if taken during pregnancy, would cause birth defects.

[27] Although *Daubert* had nothing whatsoever to do with the admissibility of the results of a polygraph examination, the significance of the case was how it had departed from the principle in *Frye*, and that it was now the judge, and not the scientific community, who was the gatekeeper of the admissibility of scientific evidence.

[28] The decision in *Daubert* was based on rule 702 of the US Federal Rule of Evidence ("FRE")[20] and consideration of following factors such as: (1) whether the expert's technique or theory could be tested and assessed for reliability; (2) whether the technique or theory had been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory had been generally accepted in the scientific community.

[29] The more recent decision in the US with regard to the admissibility of the results of a polygraph examination is *Scheffer*, where the accused was charged and convicted in a military court on several criminal charges, including consumption of methamphetamine. He claimed that he had not knowingly consumed the drug, and eventually passed a polygraph examination to that effect. The accused sought to admit the results of the polygraph examination as evidence to support his credibility, but was prevented by rule 707 of the US Military Rule of Evidence, the relevant part of which reads:

20 Rule 702 reads: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."

(a) Notwithstanding any other provision of law, *the results of a polygraph examination,* the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination *shall not be admitted into evidence.*

(Emphasis added.)

[30] Justice Thomas in declaring that the "the jury is the best lie detector", found that "there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams."[21]

[31] Although in *Frye* and *Scheffer*, the admissibility of the results of a polygraph examination in a court of law was frowned upon, on the basis that it was junk science, it is crucial to note that several other jurisdictions in the US had decided otherwise.[22]

[32] In the UK, although polygraph examinations have been used by the probation service in the management of people convicted of sexual offences since 2014, the results of such examinations are not admissible in court.

[33] The leading case in Canada on the admissibility of the results of a polygraph examination is *R v Béland*,[23] where it was held by the Supreme Court of Canada that such evidence is not admissible in criminal trials mainly because it is unnecessary, as it is an area which the judge or jury is capable of forming their own opinion on, and as such, the opinion evidence of experts on this matter would be superfluous.

[34] The same justification was provided for by Sinclair DCJ in the District Court of New South Wales in *R v Murray*,[24] when he ruled on the inadmissibility of the results of a polygraph examination.

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21 See n 18 above, at p 312.

22 For instance, where parties had stipulated on record for admissions *via* polygraph to be admitted, or for the purpose to corroborate other evidence or to impeach or corroborate specific testimony. See cases such as *Herman v Eagle Star Ins Co* 283 F Supp 33, affirmed 396 F 2d 427; *People v Houser* 85 Cal App 2d 86; *State v Freeland* 255 Iowa 1334; *State v Brown* 177 So 2d 532; *State v Valdez* 91 Ariz 274; *People v Zazzetta* 27 Ill 2d 302; *People v Potts* 74 Ill App 2d 301; *California Ins Co* v *Allen* 235 F 2d 17.

23 [1987] 2 SCR 398.

24 1982 7A Crim R48.

[35] In India, the reluctance of the courts was demonstrated in *Smt Selvi & Ors v State of Karnataka*,[25] where it was held by Chief Justice KG Balakrishnan, that it was not only the results of a polygraph examination, but that the practices of narcoanalysis,[26] brain mapping,[27] and FMRI[28] were also unconstitutional and void.

[36] Singapore had also ruled against the admissibility of evidence of the results of polygraph examinations, as highlighted in *Public Prosecutor v Ling Chengfeng @ Ling Koh Hoo*,[29] where it was held that the accused's willingness to take a polygraph examination was irrelevant and had no bearing on his case, since the results of such examination is, in any event, inadmissible.

[37] This was followed by the case of *Siew Yit Beng v Public Prosecutor*[30] where it was held by Yong Pung How CJ, that the act of conveying the results of a polygraph examination to the examinee would not render any subsequent confession inadmissible, provided that nothing is construed as inducement, threat or promise.

[38] In *Public Prosecutor v Lye Yoke Ping Jenn*,[31] the use of the results of a polygraph examination was ruled to be optional[32] and did not form standard procedure. In addition, no adverse inference may be drawn against any person for refusing to take the polygraph examination, since such examination was for the benefit of the suspect.

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25 AIR 2010 SC 1974.

26 Narcoanalysis is psychotherapy conducted while the patient is in a hypnotic state induced by drugs, especially as a means of releasing repressed memories.

27 Brain mapping is a non-invasive procedure that involves placing a cap on your head and connecting it to electrodes to measure brain activity.

28 Also known as functional magnetic resonance imaging or functional MRI, it measures brain activity by detecting changes associated with blood flow.

29 [2018] SGDC 77.

30 [2000] 2 SLR(R) 785; [2000] SGHC 157.

31 [2016] SGDC 337.

32 The professional association for polygraph examiners in Singapore is known as the Singapore Association of Polygraphers ("SAP"), which is a joint effort by examiners from the Singapore Police Force ("SPF"), Corrupt Practices Investigation Bureau ("CPIB") and some other government agencies. Its membership currently stands at about 40 and includes examiners from the SPF, CPIB and some other government agencies. In addition to setting ethical and practice standards for members, the association also strives to provide continual training and acts as a regulatory body for them. Members of the SAP are also encouraged to be members of the American Polygraph Association.

2. *Malaysia*

[39] In Malaysia, although reference was made in *Tan Liong Sin v Etiqa Insurance Berhad*[33] to the results of a polygraph examination in respect of an insurance claim, there are no authorities that deal with its admissibility in a court of law.

The evidence of expert witnesses

[40] However, despite the absence of specific legislation governing the admissibility of the results of a polygraph examination, the statutory provision that needs to be examined is section 45 of the Evidence Act 1950 ("Evidence Act"), which reads:

> 45. *Opinions of experts*
>
> When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of *persons specially skilled* in that foreign law, *science or art*, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.
>
> Such persons are called experts.
>
> (Emphasis added.)

Science, pseudo-science, or non-science?

[41] Section 45 of the Evidence Act lists the areas of opinion that an expert may provide, and since "science or art" is stipulated in the section, the issue that needs to be addressed is whether such category encompasses the results of a polygraph examination, or if such results are regarded as mere pseudo-science or junk science.[34]

[42] This is where it is crucial to understand the function and mechanics of the polygraph. The polygraph measures blood pressure, heart rate, respiration, and galvanic skin response. Those aspects of the polygraph are undeniably scientific. The non-scientific aspect of the opinion evidence on the results of a polygraph examination is the correlation between these physiological measurements and the act of

33 [2016] 1 LNS 413.

34 This is in comparison to other disciplines, such as finger print evidence which is now an exact science as it is deemed "to be an unforgeable signature".

lying or deceiving. One must bear in mind that these physiological responses recorded by the polygraph are in actual fact to measure the level of the examinee's anxiety.

[43] At the outset, it may be argued that this exercise in itself is flawed as it generalises and presupposes that all individuals experience anxiety for exactly the same reasons and under the same circumstances. The fact of the matter is that there may not necessarily exist a link between the act of deceiving and anxiety levels, as anxiety may be caused by several factors, including having to undergo a polygraph examination, which in itself is, for some examinees, an apprehensive exercise.

[44] The further aspect of a polygraph examination revolves around the concept of "deception" itself. The issue that is in the forefront is whether the concepts of truth and untruth are absolute in all situations. It cannot be denied that there may be a peripheral area between a truth and lie, or even where the examinee may believe that it is the truth, when it is not, or the converse, that is, where the examinee believes it is a lie, when it is actually true. As such, ambiguity lies in the interpretation of anxiety levels during a polygraph examination.

[45] Thus, although the junk science label may amount to an extreme oversimplification of the discipline of a polygraph examination, the fact that it lacks the rigorous, objective standards of evidence that are expected from actual science, may very well put it in the realm of pseudo-science.

[46] In Malaysia, courts are not bound by either the *Frye* standard or *Daubert* test, when dealing with expert opinion evidence. In fact, the expression "science or art" was given a liberal interpretation by the Singapore High Court in *Leong Wing Kong v Public Prosecutor*,[35] where it was stated by Yong Pung How CJ that "the scope of the term has been widely construed and is not restricted to the subjects of pure science and art." As such, "typewriting" was also included in "science or art", as decided by the High Court in *Chandrasekaran & Ors v Public Prosecutor*.[36]

[47] It may, therefore, be difficult to argue that opinion evidence of the results of a polygraph examination does not come within the purview of "science" in section 45 of the Evidence Act.

35 [1994] 2 SLR 54.
36 [1971] 1 MLJ 153.

Who is a person "specially skilled"

[48] An expert is defined in section 45 of the Evidence Act as a "person specially skilled". The issue has always been whether he needs to be armed with a string of qualifications and a world of experience, or whether it can be one or the other, and if it is, which is more convincing to a judge, as the trier of fact.

[49] A "person specially skilled" was described by Suffian LP in *Public Prosecutor v Muhamed bin Sulaiman*[37] as someone who has the adequate knowledge. As such, although an expert is referred to as someone with special skill, he need not be so by special study. He may be so by experience, and that was the basis for concluding, in *Kong Nen Siew v Lim Siew Hong*,[38] that even a semi-skilled or semi-professional person may qualify as an expert.

[50] This is fortified by the description in Order 40 r 1 of the Rules of Court 2012 ("Rules of Court"), which renders a person an expert by virtue of his knowledge or experience. The provisions reads:

> Order 40
> Court expert
>
> *Appointment of expert to report on certain question* (O. 40, r. 1)
>
> …
>
> (5) In this rule "expert", in relation to any question arising in a cause or matter, means any person *who has such knowledge or experience* of or in connection with that question that his opinion on it would be admissible in evidence.
>
> (Emphasis added.)

[51] In adducing expert opinion evidence with regard to the results of a polygraph examination, the "person specially skilled" is called a polygraph examiner or sometimes referred to as a forensic psycho-physiologist. Such person should have at least attended polygraph school or an accredited polygraph course.[39]

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37 [1982] 2 MLJ 320.

38 [1971] 1 MLJ 262. See also *Kulasingam v Thambipillai* [1997] 1 MLJ 288 and *Chin Sen Wah v Public Prosecutor* [1958] MLJ 154.

39 In Malaysia, polygraph examiners courses are available and are run by private bodies such as the Polygraph Science Academy Malaysia.

[52] Polygraph examiners are trained to use a polygraph machine to interpret the physiological measurements, its correlation to anxiety and deception, and to eventually determine if the examinee is telling the truth. However, that alone may not be sufficient. The court is supposed to weigh both qualifications and experience of the polygraph examiner in determining his expertise as an expert witness. In light of the developing nature of the science of polygraph, qualifications in this context should include accredited courses on continuing education for polygraph examiners.

Role of the expert

[53] In the context of providing an opinion on an area listed in section 45 of the Evidence Act, the role of an expert should first be examined.

[54] Pursuant to Order 40A r 2(1) of the Rules of Court, the expert's function is to assist the court on the matters within his expertise. The provision reads:

> Order 40A
> Experts of parties
>
> *Expert's duty to Court* (O. 40A, r. 2)
>
> (1) It is the duty of an expert *to assist the Court* on the matters within his expertise.
>
> (Emphasis added.)

[55] The role of the expert witness in court has been emphasised as early as 1782 in *Folkes v Chadd*,[40] where it was stated by Lord Mansfield CJ that "if on proven facts, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary."

[56] This principle was reiterated in *R v Turner*,[41] where the issue for determination was how an ordinary person who was not suffering from mental illness was likely to react to the stresses and strains of life. It was held that it was not necessary to resort to an expert for his opinion on such matter, as the trier of fact, whether judge or jury, would be the more appropriate person to make such finding, and could do so without resorting to or relying on the opinion of an expert.

40 99 ER 686; (1783) 3 Doug KB 340.
41 [1975] 1 All ER 70.

[57] That the function of the expert is merely to assist, and not make decisions for the court was reiterated in a plethora of Malaysian cases including *Wong Swee Chin v Public Prosecutor*,[42] where it was explained by Raja Azlan Shah CJ (as HRH then was) that "except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting, rather than compelling the formulation of the ultimate judgments. In the ultimate analysis, it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion."

Role of the judge as trier of fact

[58] If the expert goes beyond what is legally required of him, it may result in usurping the function of the trial judge who, in Malaysia, has been both the trier of law and fact since 1995 when jury trials were abolished.[43]

[59] The emphasis on the results of a polygraph examination also begs the question if the faith in judges is at such a low level, that such results have to be resorted to; or whether the faith in the aura of the infallibility of the results of a polygraph examination is so high that it has diminished the role and function of the judge as a trier of fact.

[60] The skepticism with judges dates to the views of renowned philosophers such as Oliver Wendel Holmes[44] and Jerome Frank,[45] whose approach to law was premised on the conduct of the judges, and the factors that influence a judge in his decision-making process.

[61] The fact-skepticism of Jerome Frank was reflected in the following oft-quoted passage from his book, *Law and the Modern Mind*:

> So, the judges' sympathies and antipathies are likely to be active with respect to the persons of the witness, the attorneys and the parties to the suit. His own past may have created plus or minus reactions to women, or blonde women, or men with beards, or ministers,

42 [1981] 1 MLJ 212. See also *Chou Kooi Pang v Public Prosecutor* [1998] 3 SLR 593 and *Syed Abu Bakar v Public Prosecutor* [1984] 2 MLJ 19.

43 See Criminal Procedure Code (Amendment) Act 1995 (Act A908), s 11.

44 1841–1935, legal scholar and US Supreme Court Justice who inspired the American legal realism movement.

45 1889–1957, American legal philosopher and author who was also instrumental in the legal realism movement.

> or college graduates, or Democrats. A certain cough or twang or gesture may start up memories painful or pleasant in the main. Those memories of the judge, while he is listening to a witness with such a twang or cough or gesture, may affect the judges initial hearing of, or subsequent recollection of, what the witness said, or of the weight or credibility which the judge will attach to the witness testimony.[46]

[62] The above-quoted passage reflected the faith that the American realists had in the judicial fact-finding process. In fact, the alleged uncertainty in the fact-finding exercise by judges had provoked Frank's comment that "justice is what the judge ate for breakfast". Such skepticism also begs the question of how a judge actually arrives at his finding of facts.

[63] Although Frank's views generated much interest in how judges actually arrive at their decisions, the views of the American realists were considered too extreme, as opined in the following passage:

> Frank's extreme view that the personality of the judge was the law could not stand. *It too obviously ignored the substantive autonomy of law and the real constraints which legal doctrine can place on the judging process. It also ignored the disciplining virtues of using canons of construction which can channel judgment in specific directions*. It further ignored, the discipline that comes from being part of an "interpretative community" on the bench. No one wants to be overruled. Everyone searches for a common ground that can link the past with the present without binding one's hands into the future.[47]
>
> (Emphasis added.)

[64] In fact, Frank's views were regarded as an oversimplification of how a judge rules on finding of facts, without considering factors such as the oath that judges take,[48] the oath/affirmation that are administered to witnesses,[49] and the prescribed procedural rules that judges are bound to follow.[50]

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46 First edn (New York: Brentano's, 1930), p 115.

47 Gerard Quinn, "The Judging Process and the Personality of the Judge: The Contribution of Jerome Frank" (2002) *Judicial Studies Institute Journal* 141.

48 See Federal Constitution, Article 124 and Sixth Schedule.

49 See Oaths and Affirmation Act 1949, s 13.

50 See also Tom Bingham, *The Business of Judging: Selected Essays and Speeches: 1985–1999* (Oxford University Press, 2011).

[65] Judges are tasked with testing the credibility of witnesses, or in other words, to determine if a particular witness is telling the truth or conversely, lying. This is done particularly during cross-examination of a witness, where questions that are allowed are prescribed by section 146 of the Evidence Act.[51]

[66] There are numerous case laws that are instructive on how a witness should be assessed and evaluated by a judge. Reference is made to the cases of *Sean Thornton (a minor by his mother and next friend) v Northern Ireland Housing Executive*[52] and *McAllister v Campbell*,[53] where a list of factors for a judge to consider when evaluating a witness were enumerated as follows, namely, (a) the inherent probability or improbability of representations of fact; (b) the presence of independent evidence tending to corroborate or undermine any given statement of fact; (c) the presence of contemporaneous records; (d) the demeanour of witnesses; (e) the frailty of the population at large in accurately recollecting and describing events in the distant past; (f) whether the witness takes refuge in wild speculation or uncorroborated allegations of fabrication; and (g) whether the witness had a motive for misleading the court.

[67] It has been explained that "credibility assessment is not a science. It is not always possible to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events and … assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalisation."[54]

[68] It is also crucial to note that there is no hard and fast rule in totally believing or disbelieving a witness, but rather a judge may choose to believe none, part, or all of the testimony and as such, may attach different weight to different parts of the evidence.

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51 Section 146 (Questions lawful in cross-examination): When a witness may be cross-examined he may, in addition to the questions hereinbefore referred to, be asked any questions which tend – (a) to test his accuracy, veracity or credibility; (b) to discover who he is and what is his position in life; or (c) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

52 [2010] NIQB 4.

53 [2014] NIQB 24.

54 *MacNeil v Playford* 2010 NSSC 330, *per* Justice T Fergeron.

[69] The question of whether to believe a particular witness depends on various circumstances and the law has left it to the judge to decide whether the evidence should be believed, and if so, what weight should be attached to it, or what effect should be given to it. Furthermore, in many instances, court proceedings are not just about obtaining the truth, but rather how one arrives at the truth, creating a dichotomy between substantive justice and procedural justice.[55]

IV. The problems with the polygraph

1. The errors

[70] The main issue with the results of a polygraph examination is the inaccuracies that may be caused by the examiner's failure to sufficiently prepare the examinee for the examination, or by a misreading of the physiological data on the polygraph charts. These errors are generally referred to as either a false positive (when a truthful examinee is reported as being deceptive); or false negative (when a deceptive examinee is reported as truthful).

[71] Errors may be compounded by variables such as the examinee's physical condition and emotional state, medical history, and the administration of different questions and techniques at a polygraph examination.

2. Admissibility by stipulation

[72] An ideal situation is for an examinee to voluntarily subject himself to a polygraph examination, since no one should be forced to do so.

[73] This brings to the forefront the requirement of a stipulation, that is, where parties have stipulated that the results of the examination should be admissible in evidence. This was illustrated in the US (Arizona) case of *State v Valdez*,[56] where the accused person was charged with possessing narcotics. Prior to the trial, the parties signed a stipulation, agreeing that the defendant would take a lie detector test and that the results would be admissible by either party. At the Supreme Court, it was held that the results of a polygraph examination and

55 On a more detailed reading of substantive and procedural justice, see JW Salmond, *The First Principles of Jurisprudence* (Stevens & Haynes, 1893), p 215, Ch IV.

56 91 Ariz 274, 283, 371 P 2d 894 (1962) at 900.

expert testimony relating thereto are admissible upon the stipulation entered into by both parties, subject to: (1) the discretion of the trial judge to refuse to admit the results of the polygraph examination if he is not convinced of the examiner's qualifications or the propriety of the conditions under which the examination was conducted; and (2) an opportunity to the opposing party to cross-examine the operator with respect to his qualifications and training, the test conditions, the limitations and possibilities for error, and any other matter deemed pertinent by the trial judge.[57]

[74] Although the voluntariness of subjecting oneself to a polygraph examination may reduce the impediments to the admissibility of the results of such examination, the question that arises is whether an adverse inference[58] should be drawn if one refuses the polygraph examination. Conversely, if a party voluntarily subjects himself to a polygraph examination, whether that may be the subject of positive comment.

[75] This issue was addressed in the Singapore case of *Public Prosecutor v Lye Yoke Ping Jenn*,[59] where it was held that no adverse inference is allowed to be drawn from the refusal to take the polygraph examination, since the use of such examination is for the benefit of the suspect(s).

[76] Even if an examinee voluntarily subjects himself to a polygraph examination, the issue is whether the results of such examination should be final and not subject to review or appeal; or should an examinee be provided with remedies, if he subsequently believes that an error has been made, or whether he should be allowed, for whatever reason, to request a second examination or retain an independent examiner for a second opinion.

[77] These are some of the issues that need to be addressed before deciding on the admissibility of the results of a polygraph examination.

3. The scope – Cases, examinees and questions

[78] Whilst conventionally, polygraph examinations were administered on witnesses or suspects as a way to assist and expedite criminal investigations, by interrogating such suspects, the question

57 See also "Dilemmas of Polygraph Stipulations" (1984) 14 *Seton Hall L Rev* 285.
58 Evidence Act, s 114(g).
59 [2016] SGDC 337.

that arises is whether the results of a polygraph examination may be used in a civil court, and if so, whether it should be confined to only litigants, or should it extend to their witnesses.

[79] One must also be clear in the reason for administering the polygraph examination, that is, whether the purpose of such exercise is to obtain the truth of the issues in question, or is the function of the examination to discredit or enhance the credibility of the examinee as a witness in court.

[80] If the results of a polygraph examination have a bearing on the truthfulness or otherwise of a witness, the further issue would be whether that would offend against the character evidence rule prescribed by the Evidence Act.[60]

[81] In the case of the type of individual examined, the further question is whether a minimum and maximum age should be prescribed, and if so, whether the age of majority should be the yardstick or whether the competency of the examinee would provide a more suitable benchmark. If competency is to be a prerequisite to a polygraph examination, then the further issue is who should decide on such competency, bearing in mind that a polygraph is not conducted in court.

[82] There is also the issue of whether the scope of questions that may be asked during a polygraph examination should be confined, and whether a list of prohibitive inquiries should be stipulated. For instance, in the US, the EPP Act, as well as the American Polygraph Association, state that no examiner should inquire into religious beliefs or affiliations (unless specifically relevant to the job), beliefs or opinions regarding racial matters, political beliefs or affiliations, beliefs, affiliations or lawful activities regarding unions or labour organisations, and lawful sexual preferences or activities.

4. Beating the lie detector

[83] In the debate of whether the results of a polygraph examination should be admissible in court, consideration must be given to the possibility of overcoming or beating a lie detector, thus rendering inaccurate such results.

60 See s 52 (In civil cases character to prove conduct imputed irrelevant) and s 54 (Previous bad character not relevant except in reply).

[84] In 1941, William Scott Stewart published an article titled "How to Beat the Lie Detector" in the November issue of the *Esquire* magazine. According to Stewart, it is possible to manipulate the polygraph's results by intensifying one's emotions when asked harmless questions. Such "harmless questions" are asked during the control question test (CQT)[61] and are designed as comparisons to the relevant questions.[62] As for physical countermeasures, Stewart suggested "biting the tongue or inside of the mouth or making muscle movements that cannot be seen by the operator, such as moving a toe or flexing a leg muscle."

[85] Since then, numerous articles have been written on how to manipulate and overcome a polygraph examination.[63] The possibility of manipulation renders the results of polygraph examination susceptible to inconclusive and, in some cases, even false results.

5. The prejudicial effect versus probative value

[86] Above all is the issue of whether the courts should have the overriding discretion to consider the probative value of the evidence as opposed to its prejudicial effect, regardless of the relevancy of such evidence.

[87] The term "probative value" had been considered as early as the 1940s in the cases of *R v Sims*[64] ("*Sims*") and *Noor Mohamed v R*,[65] where in the latter case, the application of the concept was explained by Lord Du Parcq in the following passage:

> … in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but *cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some*

61 See n 16 above.
62 Ibid.
63 See, for example, *Beat the Box: The Insider's Guide to Outwitting the Lie Detector* (Barnes & Noble, 2011).
64 [1946] 1 All ER 697, CA.
65 [1949] AC 182, PC.

tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

(Emphasis added.)

[88] In light of all that has been said regarding the reliability of the results of a polygraph examination, even if such results are technically relevant pursuant to section 45 of the Evidence Act, the court retains the inherent power to exclude it, if it is of the view that such evidence is prejudicial.

V. Conclusion

[89] In the final analysis, it is the opinion of the author that although the truth is discoverable, it is not for the polygraph examiner to extract it, but for the trial judge, in his role as the trier of fact, to be the best lie detector that he can.

[90] The fact of the matter is that a polygraph examination is a complex process, and varies widely in its application. The unreliability of the examination, and the lack of standardised procedures, increase the prejudicial effect of the admissibility of the results of a polygraph examination.

[91] The instrument or equipment may be the same, but the variables are, among others, in the type of individual tested, the polygraph examiner and the training/qualifications that he or she has, the purpose of the examination, and types of questions asked.

[92] In fact, the words "lie detector" are in itself a misnomer because there is no such thing as a machine that is capable of detecting untruths. What it merely does, as alluded to earlier, is to chart physiological changes in blood pressure, skin resistance, respiration patterns, and muscular movements. Each of these variables is supposed to be a manifestation of emotion.

[93] Legal and scientific communities remain polarised. Perhaps with more development in science and technology, the legal and science communities may have more faith in the results of a polygraph examination. This brings to mind the developments that we have witnessed in the science of identification evidence of fingerprint and handwriting, which are also areas stipulated in section 45 of the Evidence Act.

[94] With developments in science and technology, fingerprint identification has come a long way from the Galton system[66] to the latest computer technology which uses sophisticated computer software to highlight specific identifying features.

[95] The opinion evidence of handwriting is also a type of evidence that courts, in the past, have been reluctant to rely on completely as it lacks scientific basis. However, over the years, advancement in technology has witnessed an improvement in the efficiency of this technique. Handwriting experts are now referred to as document examiners, who are qualified chemists, who not only analyse handwriting, they scrutinise signatures, ink and even the material it is documented on. No longer do handwriting experts conjure images of detectives looking through magnifying glasses.

[96] It is undeniable that, just like any discipline, the science of polygraph examination has seen development and advancement.[67] However, until (or if ever) we reach a stage of confidence in the mechanics of a polygraph as a lie detector, and the expert opinion evidence of a polygraph examiner, we have to acknowledge that it is still very much part of a human enterprise, and as such, any opinion in relation thereto carries infinitesimal weight or none at all.

[97] This brings to mind the *dicta* of Justice Thomas in *Scheffer* where after concluding that there is no way to establish the accuracy of a polygraph examiner's conclusion, his Lordship opined that the best lie detector that the court could have is the trier of fact.

[98] As such, in bench trials, the only person qualified to capture the moment of truth is the judge himself.

66 Sir Francis Galton published his famous book *Finger Prints* (1892) in which he formulated a classification system that was based on three fingerprint patterns: loop, whorl and arch.

67 See "True Story? Lie Detection Systems Go High-Tech", *BBC News*, January 31, 2022.

The Rule of Law in the Digital Ecosystem

by

*Justice Adlin Abdul Majid**

A. Introduction

[1] Technology is at the epicentre of the human experience of today. Much of our existence now revolves around shared digital platforms that dictate social interactions, commerce, geo-politics and even faith. Whether seen as an opportunity, a disruption or a threat, the ubiquitousness of this digital ecosystem is beyond question.

[2] This new way of life is largely attributable to the evolution and rapid growth of the internet. At the beginning, the internet was a medium to share information between selected groups. Subsequently, with different communities using the internet for daily communications, commercialisation of the internet took place. Over time, the internet has become a commodity service. COVID-19 further pushed the digitisation agenda, with virtual meetings and e-commerce now becoming a norm in daily lives.

[3] Within this digital ecosystem, a multitude of new legal issues have emerged. Issues related to authentication, digital contracts, online payments and privacy have given rise to legal considerations unique to the digital space. The effective governance of the digital space is therefore critical.

[4] This article seeks to examine the concept of the rule of law and its place in the digital ecosystem. The rule of law is dependent on a framework of certainty and predictability, and this can cause tensions within an ecosystem where changes happen at a speed in which laws are not able to keep up. The conflicting priorities arising from the implementation of laws in the realm of technology will be considered, with focus on the Malaysian experience.

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B. The rule of law

[5] The term "rule of law" was first expressed by Professor AV Dicey, in *An Introduction to the Study of the Law of the Constitution*. He explained the three meanings of the rule of law:

> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.
>
> It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the "administrative law" (*droit administratif*) or the "administrative tribunals" (*tribunaux administratifs*) of France. The notion which lies at the bottom of the "administrative law" known to foreign countries is, that affairs or disputes in which the Government or its servants are concerned are beyond the sphere of the civil Courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.
>
> The "rule of law" lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules in which foreign countries naturally form part of the constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts and Parliament so extended to determine the position of the Crown and its servants; thus the constitution is the result of the ordinary law of the land.[1]

[6] In this article, I will focus on the first two meanings of the rule of law as explained by Professor Dicey. They are the supremacy of the law, in that a person can only be punished for a breach of the

1 AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 9th edn (Macmillan, 1945), p 188.

law and for nothing else, and equality before the law in that no one person is above the law.

[7] In a more recent publication, *The Rule of Law*, Lord Tom Bingham considered the concept of the rule of law based on the definitions set out by Professor Dicey. The result is a reconstitution of the core principle of the rule of law as being:

> … that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts. [2]

[8] Lord Bingham laid down eight key ingredients necessary to give effect to this core principle:

(a) The law must be accessible and so far as possible intelligible, clear and predictable.[3]

(b) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.[4]

(c) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.[5]

(d) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.[6]

(e) The law must afford adequate protection of fundamental human rights.[7]

(f) Means must be provided for resolving, without prohibitive costs or inordinate delay, *bona fide* civil disputes which parties themselves are unable to resolve.[8]

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2 Tom Bingham, *The Rule of Law* (Penguin Books, 2011), p 8.
3 Ibid, at p 37.
4 Ibid, at p 48.
5 Ibid, at p 55.
6 Ibid, at p 60.
7 Ibid, at p 66.
8 Ibid, at p 85.

(g) Adjudicative procedures provided by the state should be fair.[9]

(h) The rule of law requires compliance by the state with its obligations in international law as in national law.[10]

[9] The rule of law is recognised by the Federal Constitution of Malaysia. By Article 4(1), the Federal Constitution establishes itself as the supreme law of Malaysia, and any law passed which is inconsistent with the Federal Constitution shall be void. Part II of the Federal Constitution recognises fundamental liberties, including the liberty of a person,[11] the right to equality before the law and equal protection of the law,[12] the freedom of movement[13] and the freedom of speech, assembly and association.[14]

[10] The doctrine of separation of the powers of the Executive, Legislature and Judiciary, which is necessary to prevent power from being concentrated in one branch, is contained in Chapter 3 of Part IV, Chapter 4 of Part IV and Part IX of the Federal Constitution, respectively.

[11] Article 43 of the Federal Constitution provides for the accountability of the Cabinet of Ministers, who are collectively responsible to Parliament,[15] while Part X provides for the protection of the integrity and independence of public servants.

C. The issues

[12] The concept of the rule of law is premised on a level of certainty and predictability, in the way laws are created, in adherence to laws, and in the enforcement of laws.

[13] The offline world is typically jurisdiction-based, with social and commercial interactions carried out within state borders. The consequence of these interactions is less complicated, as values within a society are in most cases consistent. There are settled expectations, customs and practices that form the basis of the social order of the

9 Ibid, at p 90.
10 Ibid, at p 110.
11 Federal Constitution, Art 5(1).
12 Ibid, Art 8(1).
13 Ibid, Art 9.
14 Ibid, Art 10(1).
15 Ibid, Art 43(3).

society. Thus, laws created are in line with these expectations, customs and practices.

[14] Contrast this with the digital ecosystem, a borderless space where individuals from diverse backgrounds, nationalities, ethnicities and political orientations communicate and interact. Value systems differ in such a diverse environment, which makes it essential for the rule of law to be in place.

[15] A governance structure for the online environment was implemented relatively early on in Malaysia, just after the internet boom in the mid-1990s. This was the time of the Multimedia Super Corridor, an ambitious initiative in which the government aimed to propel Malaysia's development through the adoption of technology. Towards this end, the government implemented projects such as the e-government and e-commerce flagships, to encourage Malaysians to use online government services and engage in online commercial transactions.

[16] With these developments, there was an urgent need to update existing laws, to encourage the use of technology in daily life, and more importantly to ensure that laws could apply to this new space. What is known as a set of Malaysian "cyberlaws" were thus put in place.

[17] The Communications and Multimedia Act 1998 ("CMA") was enacted to govern the newly converged communications and multimedia industry. Specific laws were also passed to address particular areas of urgent concern. The Computer Crimes Act 1997 was passed to criminalise acts relating to the misuse of computers. To regulate online transactions and e-commerce, the Digital Signature Act 1997 and the Electronic Commerce Act 2006 were put in place. The Electronic Government Activities Act 2007 was passed to regulate online government services. Finally, the Personal Data Protection Act 2010 ("PDPA") was enacted to protect personal data used in commercial transactions.

[18] Even with a legal infrastructure for the digital ecosystem in place in Malaysia, the challenges in preserving the rule of law in the digital ecosystem persist. There are a few reasons for this. The nature of the digital ecosystem, which is borderless and self-regulating, creates an ongoing problem of the conflicting applications of different national laws within the digital sphere. Cyberspace has also given rise to unique

considerations, such as access to information, cross-border flow of data, the right to privacy and issues on national security, that may in certain circumstances conflict with the concept of the rule of law. In addition, the enactment of laws, which must undergo due process, is relatively slow and is unable to catch up with developments in technology.

[19] I will examine the following issues on the challenges in preserving the rule of law in the digital ecosystem:

(a) The first is the issue of upholding the supremacy of the law and equality before the law, two essential elements of the rule of law, in the digital space.

(b) I will then address conflicting considerations arising from implementing and enforcing laws in cyberspace.

(c) Finally, there remains a question of whether it is possible to govern an environment as diverse as cyberspace.

D. Supremacy of the law and equality before the law in the digital environment

[20] Supremacy of the law requires there to be certainty on laws to be complied with, and on how a person can be punished for breach of the law. Equality before the law ensures that all persons are subject to the same laws.

[21] The underlying premise of the supremacy of the law and equality before the law is certainty and predictability of the law. Only if a person knows for certain what the law is and how he can comply with the law, that there can be truth to the words of Professor Dicey on supremacy of the law:

> Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else … [16]

[22] Such certainty may not exist in the digital environment, as there will inevitably be conflicting laws of different jurisdictions that apply to the same subject-matter. The issue paper published in 2014 by the

16 AV Dicey, n 1 above, at p 189.

Council of Europe Commissioner for Human Rights, "The Rule of Law on the Internet and in the Wider Digital World", explains this concern in the context of the freedom of expression:

> The first point to recall here is that, as a result of the "margin of appreciation" doctrine,[17] there can be significant differences even between Council of Europe member states as to what acts, and in particular what forms of expression, are lawful or unlawful. A statement that is defamatory or held to constitute "support for terrorism", or a book, picture or video that is considered obscene and illegal in one country, may be perfectly legal in another – with neither country being in breach of the ECHR. Some states – including some Council of Europe member states – are much stricter than others with regard to expressions "glorifying jihadism" or "separatism", or "supporting terrorism", or denying the Holocaust, or infringing privacy, or insulting a head of state. Any measure implemented with transborder effect while relying on a "margin of appreciation" will collide with the freedom of expression and legal certainty of individuals in the second country whose rights are thereby restricted and, indeed, with the opposing "margin of appreciation" of the second country. This raises the question of what states may do about statements, books, pictures or videos that are put online in a country where they are legal, by a resident of that country, but that can be accessed in another country where they are illegal.[18]

[23] For materials that are unlawful under most, if not all national laws, such as child pornography images and materials that incite racial or religious extremism, all countries would be likely to render cooperation and take action against those involved. However, the question of which country's law should apply can be complicated if a material is unlawful in one country but not in another.[19]

[24] The issue paper calls for clear guidelines and legal rules to address this conflict, and goes on to recommend that:

> … States should in principle only exercise jurisdiction over foreign materials that are not illegal under international law in limited

17 The term "margin of appreciation" refers to the space for manoeuvre allowable for national authorities in the fulfilment of their obligations under the European Convention on Human Rights.

18 Council of Europe Commissioner for Human Rights, "The Rule of Law on the Internet and in the Wider Digital World" (2014), at p 56.

19 Ibid, at p 61.

> circumstances, notably when there is a clear and close nexus between the materials and/or the disseminator and the state taking action. They should respect the right of other states to draw the lines on freedom of expression differently from themselves, within the limits of international human rights law. However, further guidance on this issue, starting from this proposed principle, and spelling out any proposed exceptions to this principle, is urgently needed.[20]

[25] Without specific and clear guidance, the possible conflicting applications of different national laws in cyberspace will continue to result in uncertainty, thus undermining the supremacy of the law and equality before the law.

[26] Yet, each country would need to take its own considerations into account in the enforcement of its national laws. How a set of guidelines would apply across multiple jurisdictions without undermining national supremacy remains an issue.

[27] The European Union General Data Protection Regulation ("GDPR") is an example of this conflict. The GDPR, enforced in 2018, is a regulation intended to harmonise privacy laws in the European Union ("EU"), with a more unified approach towards privacy across the region.

[28] The GDPR has far-reaching implications, with its extra-territorial effect provided for in article 3(2). The provision reads:

> This Regulation applies to the processing of personal data of data subjects[21] who are in the Union by a controller[22] or a processor[23] not established in the Union, where the processing activities are related to:

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20 Ibid.

21 A data subject is defined in art 4 of the GDPR as "… an identified or identifiable natural person …", and an identifiable natural person is "… one who can be identified, directly or indirectly, via an identifier such as a name, an identification number, location data, or via factors specific to the person's physical, physiological, genetic, mental, economic, cultural or social identity …" .

22 A "controller" is defined in art 4 of the GDPR as "… the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data".

23 A "processor" is defined in art 4 of the GDPR as "… a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller".

(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or

(b) the monitoring of their behaviour as far as their behaviour takes place within the Union.[24]

[29] The effect of article 3(2) is that non-EU-based establishments that target data subjects in the EU are subject to the GDPR. As an example, a Malaysian company developing a mobile application that collects information of users worldwide (including those in the EU), may be required to comply with the GDPR.

[30] The applicability of the GDPR to non-EU data controllers and processors in the circumstances set out in article 3(2), would lead to certainty and predictability in the standard of compliance with data protection laws across different jurisdictions. Organisations will be aware of the standards that they need to follow in processing personal data.

[31] The effect, however, is a strain on certain Malaysian organisations, as they must not only consider their obligations under the PDPA, but also the GDPR. If the GDPR applies, the organisation will need to assess the level of compliance of its current processing activities with the GDPR and conduct a gap analysis to identify the areas of non-compliance. The exercise is typically costly, requiring the engagement of GDPR legal experts and involving the development of new processes and documentation and the restructuring of the organisation's compliance functions. Some organisations will also be required to appoint a representative in the EU.[25]

[32] There are also differing compliance requirements in the GDPR and the PDPA. The requirements to notify the supervisory authority in the event of a data breach[26] and to appoint a data protection officer[27] are contained in the GDPR, but not in the PDPA.

[33] The difficulties in complying with the GDPR raise the question of whether there is in fact equality before the law, and hence whether

24 GDPR, art 3(2).
25 Ibid, art 27.
26 Ibid, art 33.
27 Ibid, art 37.

the rule of law can be effectively upheld, when some organisations are hampered from complying with the law (in this case the GDPR), due to cost or technical considerations. Further, the PDPA was drafted by taking into account the needs and capabilities of Malaysian businesses, but these needs would have effectively been overridden by the requirements in the GDPR.

E. Conflicting considerations in cyberspace

[34] The very nature of cyberspace gives rise to conflicting considerations. This online space is unique, and as a result, unique issues are required to be tackled, forcing a re-evaluation of approaches and standards.

[35] Malaysia's approach towards censorship is an apt illustration. The government recognised early on that the instantaneous nature of the internet meant that mediums of communication and information are decentralised, leading to a loss of centralised control (i.e. government control) over such mediums. Full and effective censorship was thus seen to be impossible.

[36] With this recognition, and also in line with the aim of the Multimedia Super Corridor to attract world-class technology companies to Malaysia, the government adopted a policy of non-censorship of the internet, as embodied in the MSC Bill of Guarantees (now known as the Malaysia Digital Bill of Guarantees).[28] The MSC Bill of Guarantees No. 7 contains a commitment by the government:

> To ensure no censorship of the internet.

[37] The policy was embodied in law, with section 3(3) of the CMA providing that:

> Nothing in this Act shall be construed as permitting the censorship of the Internet.

[38] Such a bold commitment seems to have, however, been watered down by enforcement actions taken pursuant to several provisions of the CMA, most notably the following:

28 https://mdec.my/wp-content/uploads/MD-BoG-Explanatory-Notes_30-June-2022.pdf.

(a) Section 211(1):

> No content applications service provider, or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person.

(b) Section 233(1):

> A person who –
>
> (a) by means of any network facilities or network service or applications service knowingly –
>
> (i) makes, creates or solicits; and
>
> (ii) initiates the transmission of,
>
> any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person; or
>
> (b) initiates a communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address,
>
> commits an offence.

[39] The above provisions have an extensive effect as they create a potentially endless category of offences. They have in the past been used to investigate, arrest and charge individuals expressing controversial views, and consequently to block sites used by these individuals. Due to the wide-ranging nature of sections 211 and 233 of the CMA, actions by some of these individuals could be argued to have fallen short of qualifying as a criminal offence.

[40] Further, section 263 of the CMA provides that:

> (1) A licensee shall use his best endeavour to network that he owns or prevent the facilities provides or the network service, applications service or content applications service that he provides from being used in, or in relation to, the commission of any offence under any law of Malaysia.

(2) A licensee shall, upon written request by the Commission or any other authority, assist the Commission or other authority as far as reasonably necessary in preventing the commission or attempted commission of an offence under any written law of Malaysia or otherwise in enforcing the laws of Malaysia, including, but not limited to, the protection of the public revenue and preservation of national security.

[41] The obligations imposed under section 263(1) are vague, with no guidance imposed on the minimum requirements that a licensee should have in place to prevent network facilities, network services or applications services from being used for the commission of an offence. Section 263(2) is also far-reaching and can potentially be used to block sites that are believed to be threats, even though an offence may not have been proven to be committed.

[42] I must stress that firstly, this assessment is not meant to be a critique of the applications of sections 211, 233 or 263 of the CMA. Secondly, it is well acknowledged that censoring online content is not uncommon. There may be legitimate reasons to block a site, such as when there are pornographic materials, incitement to violence, when any other criminal offence has been committed or when there are violations of intellectual property laws.

[43] What is in issue here is simply the strong and unequivocal commitment that had been undertaken by the government in ensuring no censorship of the internet, as laid out in the MSC Bill of Guarantees No. 7 and section 3(3) of the CMA. The subsequent actions of authorities, in the exercise of powers under sections 211, 233 and 263 could undermine this commitment, and in turn, undermine the rule of law.

[44] A study conducted in 2016[29] shows websites that were blocked at that time in Malaysia fell under numerous categories, namely file sharing, pornography, gambling, religion, online dating, news media, hosting and blogging platforms, and political criticism. The blocking of file sharing, pornography and gambling websites can be legally

29 Maria Xynou, Arturo Filastò, Khairil Yusof and Tan Sze Ming of Open Observatory of Network Interference (OONI) and Sinar Project, "The State of Internet Censorship in Malaysia" (December 20, 2016), at https://ooni.org/post/malaysia-report#key-findings.

justified under Malaysia's laws. However, the study expressed concern that news on 1MDB involving the then Prime Minister, had led to independent news sites such as the *Sarawak Report* and the *Malaysian Insider* being blocked for covering the affair. Since the change in government in 2018, the websites have been unblocked. That being said, the act of blocking is an act that undermined the rule of law, particularly in light of section 3(3) of the CMA.

[45] Other conflicting commitments that arise in the digital environment are closely aligned to a key ingredient laid out by Lord Bingham, as being necessary to give effect to the rule of law, namely:

> The law must afford adequate protection of fundamental human rights.[30]

[46] One such right is the freedom of expression.[31] In Malaysia, the right to the freedom of speech and expression is recognised in the Federal Constitution.[32] In the context of the digital ecosystem, this right needs to be balanced with the risk that unmoderated free speech could pose to the stability and security of a country and its citizens.

[47] The internet amplifies views and ideas. On the one hand, this allows users to expand their horizons, as ideas and information are exchanged. However, it is also a far-reaching platform for those with extremist views, to fuel hatred and encourage violence on issues such as racism, religious extremism and terrorism. The development of targeted advertising and algorithmic filter bubbles result in users being able to select content that reinforces their existing preferences, and users being clustered into like-minded groups, creating what is known as an "echo-chamber effect". This has serious negative consequences on misinformation and the freedom of expression. With these concerns in mind, the degree of the freedom of expression on the internet must be balanced with sufficient regulations, to tackle issues such as fake news and hate speech.

[48] Another consideration is the need to balance the right to privacy with national security requirements. The right to privacy is also recognised as a fundamental human right necessary to give effect

30 Tom Bingham, n 2 above, at p 66.
31 Ibid, at p 78.
32 Federal Constitution, Art 10(1)(a).

to the rule of law.[33] In Malaysia, the right to privacy is recognised as encompassed within Article 5(1) of the Federal Constitution.[34]

[49] It is to be noted that Malaysia does not have an all-inclusive law covering privacy, as the PDPA only applies to the processing of personal data in respect of commercial transactions.[35] Nonetheless, even with the limited application of the PDPA, there are restrictions imposed on the ability of a data user[36] to disclose personal data of data subjects[37] in sections 8 and 39 of the PDPA. The privacy of data subjects is preserved by these provisions. The sanctity of the protection of privacy and personal data must however be balanced with the need for access to such information in situations involving national security. This would include situations involving terrorism and serious threats of violence. More recently, with the COVID-19 pandemic, disclosures of information that would have been otherwise protected under the PDPA were justified under the Prevention and Control of Infectious Diseases Act 1988.

F. Governing the digital ecosystem

[50] What is clear when assessing issues related to the digital ecosystem and the preservation of the rule of law within the ecosystem is the lack of centralised control in cyberspace. The internet is an un-intermediated experience, where users are able to communicate directly with each other, with no gatekeeper present. Further, cyberspace is developing so rapidly that the slow process of the laws is not able to catch up.

[51] Is the digital ecosystem then a no-man's land that cannot be effectively governed? The answer to this question is not necessarily a resounding "yes". Consider the thoughts of Shawn DuBravac in his book *Digital Destiny*:

> … Old laws that stated simply "Don't steal" made sense in a world in which your physical possessions were the only thing that anyone

33 Tom Bingham, n 2 above, at p 74.

34 *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333.

35 PDPA, s 2(1).

36 A data user is defined in s 4 of the PDPA as "… a person who either alone or jointly or in common with other persons processes any personal data or has control over or authorizes the processing of any personal data …".

37 A data subject is defined in s 4 of the PDPA as "… an individual who is the subject of the personal data;".

> could steal. But what about our digital possessions? Do our online browsing, shopping, and Facebook page qualify as "possessions," off limits to anyone but ourselves? How far can the doctrine of property rights be extended into the digital realm, and does it cover the digital bread crumbs we leave behind? A new paradigm is emerging to govern our new digital-physical world. It could take a number of shapes, but one thing is clear: this new paradigm will be much more fluid – and therefore it will require a public policy approach that is much more fluid.[38]

[52] One of the answers to governing the digital ecosystem seems to lie in the more fluid approach of self-regulation. This approach was adopted in the CMA, where one of the key features is the principle of self-regulation.

[53] Under the CMA, the Communications and Multimedia Commission ("MCMC"), the governing authority for the CMA, has the power to designate industry forums[39] within the communications and multimedia industry. These forums, whose members will include licensees under the CMA, may prepare voluntary industry codes dealing with matters provided for under the CMA.[40] Compliance with the industry codes, though not mandatory, would constitute a legal defence for licensees.[41]

[54] Several industry codes have been registered with the MCMC,[42] namely the Internet Access Service Provider (IASP) Sub-Code for the Communications and Multimedia Industry Malaysia, the General Consumer Code of Practice for the Communications and Multimedia Industry Malaysia and the Malaysian Communications and Multimedia Content Code. They are created by members of the respective forums, and in their creation, would have taken into account industry needs, through the engagement of the relevant stakeholders.

[55] The PDPA adopted a similar approach, requiring specific classes of data users to register with the Personal Data Protection Commissioner

38 Shawn DuBravac, *Digital Destiny* (Regnery Publishing, 2015), p 311.
39 CMA, s 94.
40 Ibid, s 95.
41 Ibid, s 98.
42 Social Regulation – Registration of Voluntary Industry Codes, at https://www.mcmc.gov.my/en/legal/registers/cma-registers.

("PDP Commissioner").[43] The PDP Commissioner may then designate a data-user forum in respect of these specific classes of data users,[44] and the forum may prepare codes of practices[45] which will govern the processing of personal data by members of the forum. Various codes of practice have been registered,[46] including the Code of Practice for the Communications and Multimedia Industry, the Code of Practice for the Banking and Financial Institutions Sector and the Code of Practice for the Utilities Sector (Electricity).

[56] Industries that are self-regulated are generally able to efficiently adapt to changes. This approach is more in line with the speed at which changes in the digital ecosystem occur. Regulations, and in the case of the CMA and the PDPA, industry codes, are better able to play a game of catch-up with developments in technology, than laws can.

G. Conclusion

[57] Upholding the rule of law with the digital ecosystem requires more than just the enactment and enforcement of laws. As new technologies, such as artificial intelligence, machine learning, virtual reality, blockchain and the internet of things, emerge and become more entrenched in our daily lives, new issues will need to be tackled. In addressing these issues, the rule of law must be actively considered, nurtured and fostered, as well as balanced with competing considerations in this fast-paced environment. The law has adapted to this environment, with a more flexible approach through industry self-regulation.

[58] There is more to be done. Vinton Cerf, known as one of the "fathers of the internet", and David Bray of the People-Centered Internet Coalition, co-authored "The Unfinished Work of the Internet" in the publication, *Society & the Internet: How Networks of Information and Communication are Changing Our Lives*. Their concluding words in the article are:

> The authors believe that the challenges that technologies pose for our societies must be addressed in a multi-stakeholder fashion.

43 PDPA, s 14.
44 Ibid, s 21.
45 Ibid, s 23.
46 https://www.pdp.gov.my/jpdpv2/tata_amalan/.

> Governments, technologists, civil society and the private sector have shared and sometimes very specific responsibilities to settle issues and solve problems that arise. Once policies are established, perhaps using multi-stakeholder methods, they must be implemented by the parties best able to carry them out. The decade ahead will require us to continue to adapt more quickly to change …[47]

[59] Legal issues within the digital ecosystem are similarly required to be tackled through cooperation of multiple stakeholders, involving the work of generations. To preserve the rule of law in the digital ecosystem, the law must be equally applied to all. For this to happen, digital infrastructure must be accessible to all. Therefore, the work of tackling legal issues in the online environment involves not only the enhancement of the legal infrastructure, but must also take into account social and economic considerations, such as equal access to the internet. Until this parity is achieved, there can be no true equality before the law.

47 *Society & The Internet: How Networks of Information and Communication are Changing Our Lives*, 2nd edn (Oxford University Press, 2019), p 416.

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