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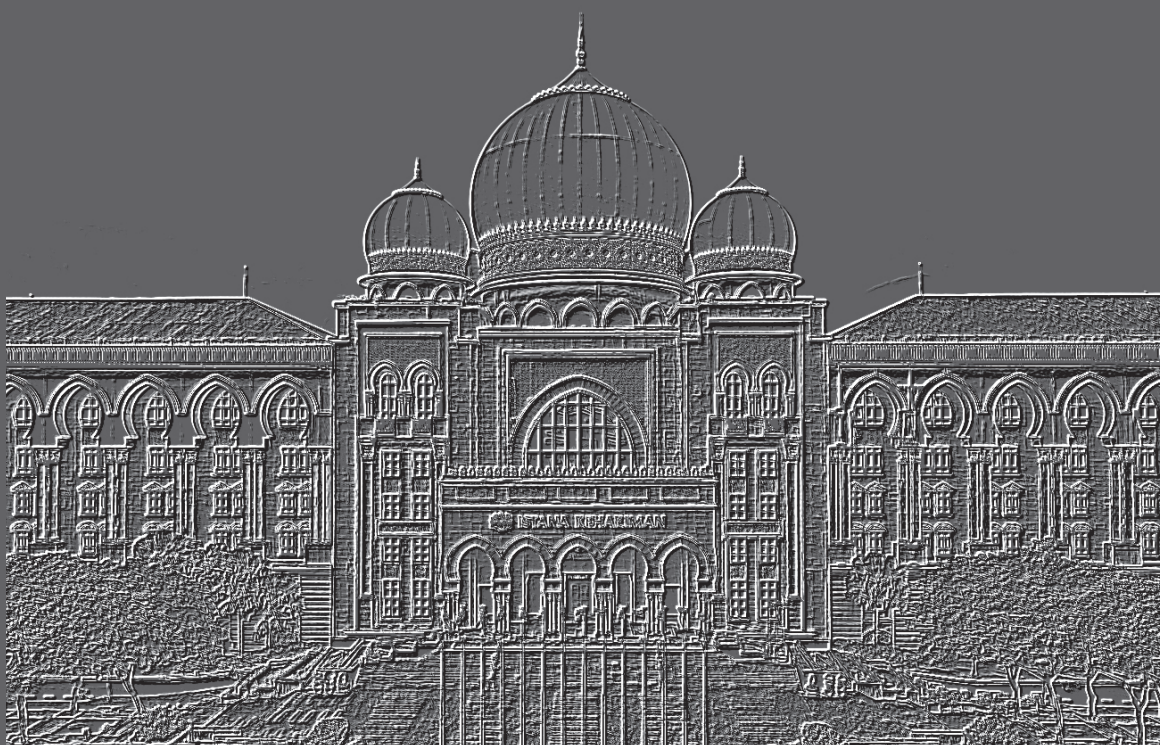
July 2022



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PREFACE

It is with great pleasure that we again present on behalf of the Malaysian Judiciary another publication of the *Journal of the Malaysian Judiciary* – its July 2022 edition, which is also the 13th publication in the series since its first issue in July 2016.

The celebrated words of Socrates that "*The only true wisdom is in knowing you know nothing*" and that "*The only good is knowledge and the only evil is ignorance*" never fail to ring true, as we continue the quest for excellence in legal knowledge and scholarship. The variety of subject matter in the contributions in this edition again reflects not only the importance and complexity of law, but also the underlying intellectual rigour that characterises the respect for good legal writing.

This July 2022 edition starts with a special article, "Sirih Pulang ke Gagang", which was the speech delivered by the Chief Justice of Malaysia in conjunction with the launch of the Golden Jubilee of the Faculty of Law of the University of Malaya. Poignant as well as stirring, it not only showcases the unrivalled successes of the Faculty of Law since its establishment more than half a century ago, but also recounts the Chief Justice's university experience as a servant of life and student of the law. The lessons were enriching as they were enduring and left a lasting impression, with the Chief Justice subscribing to values and principles which in the passage of time have also now become enshrined in the judicial oath of office to always preserve, protect and defend the Federal Constitution; thus affirming, as Head of the Malaysian Judiciary, the nation's fundamental tenet of constitutional supremacy.

In an especially discerning and topical essay on "The Role of the Judiciary in Advancing Human Rights through the UN Guiding Principles on Business and Human Rights and the 2030 Agenda for Sustainable Development Goals", Justice Azahar Mohamed (Chief Judge of Malaya) explains the role of the Judiciary in promoting sustainability in the context of climate change, including notably the establishment of the Environmental Courts in the Sessions Court and Magistrates' Court in 2012 in this developing area of law and discusses the global status and the emerging trends of climate change litigation.

The paper makes the hugely important point that judicial decisions have progressed much to the extent that the "right to life and personal liberty" recognised in Article 5(1) of the Federal Constitution should now be liberally construed to encapsulate all the various aspects of life including the right to a clean and healthy environment.

The crucial importance of climate change on our livelihoods, health, and future is again accentuated, this time in a compelling article by Justice Nallini Pathmanathan "The International Environmental Rule of Law: The North-South Divide – Sustainable Development: The Malaysian Experience" which deftly dissects the difficult and contentious debate on how the North-South divide has affected international environmental law and highlights the Malaysian experience in relation to environmental jurisprudence, development and the role of its Judiciary, noting in particular that Malaysia had co-sponsored the resolution passed last year by the United Nations Human Rights Council that access to a clean, healthy and sustainable environment is a fundamental human right.

This succinct article, and its critical appraisal of weighty issues on environmental jurisprudence, cannot fail to remind us of the stark reality of the conflict which reflects a perennial struggle between environmental protection on the one hand and economic development on the other hand, between the Global North and South.

In "Law in Literature and Literature in Law – A Study in Creativity", Justice Leong Wai Hong provides a fascinating account of the use of literature in the judgments of the courts, with at least one view – of Antonin Scalia no less – who expressed it to be important to make dissenting judgments interesting to win the public's attention, as well as that of law professors and law students. The article highlights that Malaysian judges have also drawn inspiration from literary figures, notably Shakespeare and Lewis Carroll and made references to their works in court judgments.

Special focus is made on probably the two most celebrated references to literature in a judgment in common law – both by Lord Atkin, at the House of Lords. The first, in *Donoghue v Stevenson*, drew inspiration from The Parable of the Good Samaritan in the Gospel of Luke. Secondly, his strong dissent in *Liversidge v Anderson* honoured the exchange between Humpty Dumpty and Alice from *Through the Looking Glass* by Lewis Carroll.

We are ever privileged to be honoured by Justice Belinda Ang from Singapore with a most erudite exposition of the law in "Anti-Suit Injunctions in Maritime Disputes: A Trend that Threatens to be Out of Control?" The article explores with meticulous clarity the principles that ought to be adhered to in order to ensure that the courts only exercise their jurisdiction to grant an anti-suit injunction in deserving cases fulfilling the ends of justice, and in the process continue to develop such injunctions to meet the needs of international commercial litigation and arbitration.

The article discusses key aspects concerning the granting of anti-suit injunctions, particularly on contractual basis, and where the commencement of the foreign proceedings by the anti-suit respondent amounts to vexatious or oppressive conduct. Whilst the remedy for breach of a forum agreement

is almost always the basis for the court's exercise of its anti-suit jurisdiction, the article makes a convincing case for a greater utilisation of the damages remedy, with a view to establishing a more coherent set of remedial responses to the enforcement of forum agreements.

In another contribution from Singapore, in "The Judicial Mask: A Happy Judge?" Justice Choo Han Teck writes a singularly insightful vignette on the reality of life as a judge, making more comprehensible that little understood challenge in living through the distinction between a judge's public service and his or her private life. It is not easy to acknowledge that given the very nature of the business of judging, even a desire for happiness in the vocation could be a distraction that can lead to a loss of focus.

Constantly under pressure to make the right decision in the discharge of the duty to administer justice according to law, the article issues a welcome reminder that a judge must always overcome feelings of dissatisfaction at the conduct of proceedings, and leave his personal feelings outside the courtroom.

In "Arbitration in Malaysia – An Assessment of the Judicial Approach to the Application and Construction of Section 8, Section 37 and Section 42 of the Arbitration Act 2005", Tan Sri Cecil Abraham engages in a scholarly discourse on the importance of the principle favouring minimalistic court intervention in challenges to arbitration awards.

We are aptly reminded that the present Arbitration Act 2005 is primarily based on the Model Law and the article provides a robust examination of the ever growing corpus of case law on sections 8, 37 and 42 of the Arbitration Act 2005 which shows that the courts have in the main recognised that party autonomy is the cornerstone of arbitration, by preserving the integrity of the arbitral process, absent patent injustice and infirmities as set out in the statute.

Finally, from the academia, we cannot but enjoy, probably with a measure of intrigue, the essay on the novel subject of "Private Judging – Are We Ready?" Written by Low Chee Keong, Low Tak Yip and Low Tak Hay it discusses the viability of the concept of private judging in the Malaysian civil justice system.

Although described as a private trial conducted by a former judge, making it not dissimilar to arbitration which also involves a neutral third party decision maker, the decision of the private judge may however be appealed for errors of law or as against the weight of the evidence. This idea is further commendably explored by the authors who explained and evaluated the advantages and disadvantages of private judging. The article firmly concludes in favour of the adoption of private judging, especially in specialist areas, at the same time further developing alternative dispute mechanisms in the country.

This edition is the result of the cooperation of the authors who so selflessly spent their time and energies towards producing the articles for which we

are privileged to have been able to act as editors. We again express our deep appreciation and admiration for their contributions. We are confident that the reader will benefit from these articles.

The Committee would also like to record its sincere appreciation to Datuk Darryl Goon, who retired on June 22, 2022 for his considerable contribution and many fresh ideas which had been integral to the work of the Committee.

As we remain committed to the pursuit of knowledge – encouraging and publishing materials and thoughtful work which are relevant, of scholarly and intellectual depth, as well as absorbing at the same time, we are, in equal measure, ever mindful that the *Journal of the Malaysian Judiciary* should seek to continue to perform a significant and worthy role in the changing face of legal scholarship in the country.

On behalf of the Editorial Committee
Mohd Nazlan Ghazali

CONTENTS

Sirih Pulang ke Gagang*

by

*The Rt. Hon. Tun Tengku Maimun binti Tuan Mat***

Pendahuluan

[1] Terlebih dahulu, saya memanjatkan setinggi-tinggi kesyukuran ke hadrat Allah SWT kerana dengan limpah kurnia dan izin-Nya jua kita dapat berkumpul di sini pada petang yang mulia ini bagi majlis pelancaran sambutan perayaan Jubli Emas Fakulti Undang-Undang, Universiti Malaya.

[2] Sesungguhnya, saya amat berbesar hati untuk hadir bagi menyampaikan ucapan 'Sirih Pulang ke Gagang' dalam majlis yang cukup gemilang ini.

[3] Fakulti Undang-Undang Universiti Malaya telah ditubuhkan pada April 21, 1972, pada hari Jumaat yang penuh barokah, sebagai institut pengajian tinggi undang-undang yang pertama di Malaysia di bawah pimpinan Allahyarham Tan Sri Professor Ahmad Ibrahim sebagai dekan yang pertama.

[4] Saya mendaftarkan diri sebagai pelajar di Fakulti Undang-Undang, pada tahun 1978. Alhamdulillah, setelah menamatkan pengajian selama empat tahun, saya telah menerima Ijazah Sarjana Muda Undang-Undang pada tahun 1982.

[5] Saya adalah salah seorang pelajar dalam *batch* yang ketujuh dan kami adalah kumpulan yang pertama yang didaftarkan seramai 100 pelajar. Sebelum kami, jumlah pelajar bagi satu *batch* adalah terhad kepada 50 orang.

[6] Daripada 100 pelajar dalam *batch* ke 7, selain saya yang telah dilantik sebagai Ketua Hakim Negara, 12 orang telah dilantik sebagai hakim di semua peringkat mahkamah atasan, seorang pernah

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* Special address at the 50th Golden Jubilee celebration of the University of Malaya Faculty of Law at Dewan Tunku Cancelor, University of Malaya, June 17, 2022.

** Chief Justice of Malaysia.

menyandang jawatan sebagai Menteri Besar Johor, seorang lagi merupakan bekas Timbalan Gabenor Bank Negara dan seorang bekas wakil *World Bank*. Malah, ada juga yang pernah menjadi tahanan ISA (*Internal Security Act*).

[7] Saya difahamkan bahawa kemasukan pelajar tahunan pada masa ini telah meningkat tetapi secara keseluruhannya kumpulan kemasukan masih dalam bilangan yang kecil. Fakulti Undang-Undang Universiti Malaya adalah institut pengajian tinggi undang-undang yang terulung di negara ini dan seharusnya ada persaingan yang tinggi untuk kemasukan ke Fakulti ini. Kita harus menitikberatkan aspek kualiti berbanding kuantiti demi mengeluarkan graduan yang berwibawa dan terkemuka di negara ini.

[8] Dalam tempoh 50 tahun penubuhan Fakulti Undang-Undang Universiti Malaya, ia telah melahirkan ramai pemimpin dan peneraju daripada pelbagai latar belakang, etnik, dan bangsa dari seluruh pelosok Malaysia. Pada masa ini, keempat-empat jawatan tertinggi Badan Kehakiman disandang oleh graduan Fakulti Undang-Undang Universiti Malaya, begitu juga dengan Yang di-Pertua Dewan Rakyat, Peguam Negara dan lebih-lebih lagi, Yang Amat Berhormat Perdana Menteri Malaysia.

[9] Selain sektor awam, ramai juga graduan kita yang telah melopori sektor swasta dan juga pertubuhan bukan kerajaan (NGO). Mereka juga telah banyak menyumbang ke arah pembangunan negara dan juga sistem undang-undang di negara kita.

Sirih pulang ke gagang

[10] Tema ucapan "Sirih pulang ke gagang", membawa saya kembali ke zaman saya berada di Fakulti Undang-Undang. Banyak perkara telah berubah sejak kali terakhir saya berada di sini sebagai seorang pelajar. Antaranya, kini Fakulti Undang-Undang sudah mempunyai bangunannya yang tersendiri. Ketika saya belajar dahulu, kelas kami ditempatkan di bangunan Institut Pengajian Tinggi. Saya masih ingat saat-saat saya menunggu bersama-sama rakan sekelas, di atas tangga atau di tepi "longkang" untuk masuk ke kelas.

[11] Mengimbau kembali kenangan kami semasa bergelar pelajar di Fakulti, tidak hairanlah jika pensyarah kami pernah berkata "*those loafers* … tunggu masuk lecture duduk bawah tangga"! atau pernah juga mereka berkata "duduk nganga tepi longkang"! Apa pun, selepas

40 tahun menerima Ijazah di Dewan Tunku Cancelor ("DTC") ini, hari ini kita bertemu semula di DTC, masing-masing dengan pencapaian yang boleh dibanggakan. Alhamdulillah.

[12] Sebenarnya, tidak banyak hal menarik yang dapat saya kongsikan, kerana boleh dikatakan fokus saya hanya kepada pelajaran. Pun begitu tidak pernah terlintas di fikiran saya ketika itu bahawa saya akan menjadi seorang hakim apatah lagi Ketua Hakim Negara.

[13] Empat tahun di Fakulti, saya mempelajari banyak perkara, bukan sekadar dari sudut undang-undang tetapi juga nilai-nilai dan prinsip-prinsip kehidupan. Sehubungan dengan itu, saya ingin mengambil kesempatan ini untuk merakamkan penghargaan dan ucapan terima kasih kepada semua pensyarah yang telah banyak memberi tunjuk ajar dan membentuk pemahaman perundangan saya hari ini. Antaranya, Tan Sri Professor Ahmad Ibrahim, Tan Sri Professor Visu Sinnadurai, Tan Sri Rafiah Salim, Tunku Professor Dato' Dr Hajjah Sofiah Jewa, Dato' Sulaiman Abdullah, Profesor Datin Mehrun Siraj, Professor Dato' P Balan, Profesor Azmi Khalid, Tan Sri Mohamad Ariff Md Yusof dan Dr Alima Joned.

[14] Sering kali saya tekankan prinsip-prinsip perundangan yang telah sebati dengan diri saya dalam ucapan dan alasan penghakiman saya. Prinsip-prinsip ini telah diterapkan dalam diri saya sepanjang empat tahun pembelajaran saya di Fakulti Undang-Undang dan sepanjang perjalanan kerjaya saya. Prinsip-prinsip ini antara lain termasuklah prinsip keadilan tanpa berat sebelah dan sebagai seorang hakim, kebebasan untuk membuat keputusan berlandaskan Perlembagaan Persekutuan dan lunas undang-undang tanpa apa-apa tekanan atau pengaruh – dalaman atau luaran. Ini juga selari dengan sumpah jawatan dan taat setia seorang hakim iaitu untuk sentiasa memelihara, melindungi dan mempertahankan Perlembagaan Malaysia.[1]

[15] Dalam melaksanakan tugas kehakiman, hakim-hakim di Malaysia adalah terikat dengan prinsip undang-undang yang sedia ada. Sama ada seseorang hakim itu menggunapakai atau tidak, prinsip-prinsip tersebut, tidak bermakna dia seorang yang "liberal" atau "konservatif". *In my view, there are only legally coherent or incoherent decisions – not liberal or conservative decisions*.

1 Jadual Ke-Enam, Perlembagaan Persekutuan Malaysia.

[16] Badan Kehakiman di negara ini sentiasa berpegang teguh kepada konsep keluhuran perlembagaan. Saya memetik penghakiman Tun Suffian di dalam kes *Ah Thian v Government of Malaysia*:[2]

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

[17] Juga dari bukunya, *An Introduction to the Constitution of Malaysia*, seperti yang berikut:[3]

> 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 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.

[18] Demikian kata-kata Tun Suffian, lebih kurang 40 tahun yang lalu.

[19] Mungkin ada sesetengah pihak yang berpendapat bahawa, melalui keputusan mengenai isu perlembagaan beberapa tahun kebelakangan ini, Badan Kehakiman lebih berkuasa daripada sebelumnya. Hakikatnya, Badan Kehakiman hanyalah mempertahankan fungsi kehakimannya dengan mengikuti duluan atau *precedent* yang telah ditetapkan. Selain kes *Ah Thian*, *precedent* terbaharu adalah kes-kes *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case*[4] ("*Semenyih Jaya*") dan *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*[5] ("*Indira Gandhi*"). Kedua-dua kes *Semenyih Jaya* dan *Indira Gandhi* telah diputuskan masing-masing dalam tahun 2017 dan 2018 secara sebulat suara oleh lima hakim, sebelum saya dilantik sebagai hakim Mahkamah Persekutuan.

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2 [1976] 1 MLJ 112 di 113.
3 Tun Mohamed Suffian Hashim, *An Introduction to the Constitution of Malaysia*, 3rd Edn, (Pacifica Publications, 2007), ms 18.
4 [2017] 3 MLJ 561.
5 [2018] 1 MLJ 545.

[20] Selanjutnya, terdapat kes yang ketiga iaitu kes *Alma Nudo Atenza v Public Prosecutor and another appeal*,[6] yang juga telah diputuskan secara sebulat suara oleh sembilan hakim Mahkamah Persekutuan di mana prinsip undang-undang perlembagaan yang telah diputuskan dalam kes *Semenyih Jaya* dan *Indira Gandhi* telah diperkukuhkan.

[21] Prinsip-prinsip yang telah diputuskan melalui ketiga-ketiga kes di atas, yang seringkali disebut sebagai "*trilogy of cases*" adalah selari dengan pemahaman saya, yang sedikit sebanyak terbentuk hasil pelajaran yang saya perolehi di Fakulti. Saya dengan tulus ikhlas sekali lagi mengucapkan terima kasih kepada pensyarah-pensyarah yang telah memberi tunjuk ajar yang penting kepada saya.

[22] Pada kesempatan ini, saya mengucapkan tahniah kepada Yang Amat Berhormat Perdana Menteri Malaysia, Dato' Sri Ismail Sabri bin Yaakob sebagai graduan Fakulti Undang-Undang yang pertama yang menyandang jawatan Eksekutif yang tertinggi di Malaysia. Saya juga ingin merakamkan ucapan terima kasih kepada pentadbiran Yang Amat Berhormat yang sentiasa menghormati kebebasan Badan Kehakiman Malaysia. Sebagai graduan Fakulti Undang-Undang yang sama, saya yakin Yang Amat Berhormat Perdana Menteri akan memberikan sokongan dan kepercayaan yang berterusan kepada Badan Kehakiman dalam melaksanakan tanggungjawabnya mempertahankan Perlembagaan Persekutuan Malaysia.

[23] *The Law Faculty has gone on to produce stellar graduates who are now doing their part as citizens in every way, shape or form. The Faculty is the very birthplace of excellence and quality and as such, both the University and the Law Faculty must continue to aspire to greater heights to preserve the achievements of these past 50 years and to nurture inspiring talent for the many more years that are to come.*

[24] Secara keseluruhannya, saya sangat berbangga menjadi alumni Fakulti Undang-Undang Universiti Malaya dan saya meyokong segala usaha untuk memartabatkan Fakulti.

[25] Saya mengucapkan syabas dan tahniah kepada PARFUM yang diterajui oleh Tan Sri Shahrizat binti Abdul Jalil atas penganjuran sambutan ulang tahun yang ke-50 Fakulti. Ucapan syabas dan tahniah juga ditujukan kepada Fakulti di bawah pimpinan Dekan, Dato' Professor Madya Dr Johan Shamsuddin bin Sabaruddin.

6 [2019] 4 MLJ 1.

[26] Saya juga menyokong sepenuhnya inisiatif yang dicadangkan oleh PARFUM untuk menubuhkan PARFUM Jurist Lecture Series sebagai suatu inisiatif dan idea yang bernas untuk membudayakan wacana akademik antara alumni, para pelajar dan juga pihak-pihak berkepentingan yang lain. Saya juga menyanjung usaha-usaha baik PARFUM untuk menubuhkan Legal Aid Clinic untuk membantu pihak-pihak yang memerlukan bantuan guaman selaras dengan konsep akses kepada keadilan. Mungkin tiba masanya bagi alumni yang belum menjadi ahli untuk segera mendaftarkan diri sebagai ahli agar PARFUM menjadi keluarga yang lebih besar dan lebih bermakna dengan penyertaan meluas daripada ahli-ahli.

[27] Saya pasti kembalinya kita semua di sini membawa seribu satu kenangan manis. Sekali lagi, saya mengucapkan tahniah kepada semua yang terlibat dalam menganjurkan sambutan Jubli Emas Fakulti Undang-Undang yang kita sayangi ini.

TRANSLATION

Introduction

[1] First and foremost, praise be to Allah SWT as it is with His Blessings and Will that we are gathered here this evening to celebrate the launch of the Golden Jubilee of the Faculty of Law, University of Malaya.

[2] Indeed, I am most honoured to be here today to deliver a speech entitled "Sirih Pulang ke Gagang" at this very august ceremony.

[3] The Law Faculty was established on the auspicious Friday of the April 21, 1972 as the first ever law school in Malaysia under the able stewardship of Allahyarham Tan Sri Professor Ahmad Ibrahim as its first dean.

[4] I enrolled as an undergraduate student at the Law Faculty in 1978. Alhamdulillah, upon completing my 4-year course, I received my Bachelor of Laws (LLB) in the year 1982.

[5] I am from the 7th batch of students and our batch was the first batch to have as many as 100 students. Before us, the number of students per batch was limited to only 50 people.

[6] Of these 100 students in the 7th batch, and not including my appointment as Chief Justice, 12 of my batchmates have been appointed

as judges at all levels of the superior courts, one batchmate has held the position of Chief Minister of Johor, another has been the Deputy Governor of Bank Negara, and another represented the World Bank. In fact, one of our batchmates is also a former ISA (Internal Security Act) detainee.

[7] I understand that the present annual intake of students has increased in number but that as a whole, the relative cohort sizes are still small. The University of Malaya Law Faculty is a premier law school and competition for admission must remain stiff. We must continue to emphasise quality over quantity with the view to producing stellar graduates respected throughout the country.

[8] In the 50 years since the establishment of the University of Malaya Law Faculty, it has produced many a luminary from across all walks of life, ethnic groups, from all around Malaysia. At present, the four most senior Judges are Law Faculty graduates as are the Speaker of the Dewan Rakyat, the Attorney General of Malaysia and not to mention, the Right Honourable the Prime Minister of Malaysia.

[9] Apart from the public sector, many of our graduates have also occupied key positions in the private sector and in non-governmental organisations (NGO). They too have made significant contributions to the development of our country and our legal system.

Sirih pulang ke gagang

[10] The theme "Sirih Pulang ke Gagang" brings me back to the time I was in the Law Faculty. A lot has changed since I was last here as a student. For one, the Law Faculty now has its own building. When I was a student, our classes took place in the Higher Education Institute building. I can still recall those moments waiting with my batchmates on the stairs or next to the *longkang* (drain) for our turn to enter the class.

[11] Looking back at these memories, it is not surprising that my lecturers made remarks like "*those loafers*… tunggu masuk lecture duduk bawah tangga"! (*those loafers… waiting for lectures under the stairs*) or even saying things like "duduk nganga tepi longkang"! ("*gawking nearby the drain"*). After 40 years of receiving our law degrees here in Dewan Tunku Canselor ("DTC"), today we are reunited in DTC proudly recalling our achievements. Alhamdulillah.

[12] To be honest, I do not have many interesting things to share about my days in law school as one could say that I was mostly occupied with my classes. That said, it never once crossed my mind as a student that I would one day become a judge, what more the Chief Justice of Malaysia.

[13] I learned a great deal not just in the law but life values and principles in my four years at the Faculty. In this regard, I would like to take this opportunity to pay tribute and record my deepest appreciation to all my lecturers who provided me with immense guidance and who helped mould the legal understanding that I have today. Among them, I thank Tan Sri Professor Ahmad Ibrahim, Tan Sri Professor Visu Sinnadurai, Tan Sri Rafiah Salim, Tunku Professor Dato' Dr. Hajjah Sofiah Jewa, Dato' Sulaiman Abdullah, Profesor Datin Mehrun Siraj, Professor Dato' P Balan, Profesor Azmi Khalid, Tan Sri Mohamad Ariff Md Yusof and Dr Alima Joned.

[14] I have consistently, throughout my speeches and even judgments, articulated the legal principles that have been imbibed into me. These principles were instilled inside me throughout my four years in the Law Faculty and throughout my work life. These principles include, among others, justice without fear or favour, and as a judge, the independence to make decisions in accordance with the Federal Constitution and the law without any interference – external or internal. This is also concomitant with the oath of office of a judge to always preserve, protect and defend the Federal Constitution.[1]

[15] In carrying out their judicial duties, judges in Malaysia are bound by established principles and canons of law. Whether or not a judge applies those principles does not mean that a judge is "liberal" or "conservative". In my view, there are only legally coherent or incoherent decisions – not liberal or conservative decisions.

[16] The Malaysian Judiciary has always upheld the concept of constitutional supremacy. I quote the words of Tun Suffian in the case of *Ah Thian v Government of Malaysia*:[2]

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of

1 Sixth Schedule, Federal Constitution of Malaysia.
2 [1976] 1 MLJ 112 at 113.

> Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

[17] Also in his treatise, *An Introduction to the Constitution of Malaysia*, he said:[3]

> 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 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.

[18] Those are Tun Suffian's words, approximately 40 years ago.

[19] Perhaps there are some quarters who believe, based on the trend of recent constitutional judgments, that the courts are somehow more powerful than they once were. The reality is that the Judiciary is simply performing its constitutional functions by following established judicial precedent. Apart from the case of *Ah Thian*, the latest cases are *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case*[4] ("*Semenyih Jaya*") and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*[5] ("*Indira Gandhi*"). Both these cases were decided unanimously by five judges respectively in 2017 and 2018, before I was even appointed as a Federal Court judge.

[20] There is a third case, that is, *Alma Nudo Atenza v Public Prosecutor and another appeal*,[6] which was also decided unanimously but by nine Federal Court judges wherein the constitutional principles in *Semenyih Jaya* and *Indira Gandhi* were reaffirmed.

[21] The principles enshrined in those three cases, or as some call them "the trilogy of cases", are in line with my judicial understanding – which in part, was shaped by the legal education I received in the

3 Tun Mohamed Suffian Hashim, *An Introduction to the Constitution of Malaysia*, 3rd Edn, (Pacifica Publications, 2007), p 18.
4 [2017] 3 MLJ 561.
5 [2018] 1 MLJ 545.
6 [2019] 4 MLJ 1.

Faculty. I would like, once again, to record my deepest gratitude to all my lecturers who taught me these invaluable lessons and principles.

[22] On this occasion, I congratulate the Right Honourable the Prime Minister of Malaysia, Dato' Sri Ismail Sabri bin Yaakob for being the first ever graduate of the Law Faculty to hold the highest Executive Office in Malaysia. I would also like to record my thanks to the Right Honourable the Prime Minister and his administration for continuing to uphold the independence of the Judiciary. Being a fellow graduate of the Law Faculty, I am certain that the Prime Minister will continue to support and trust the Judiciary to uphold the Federal Constitution.

[23] The Law Faculty has gone on to produce stellar graduates who are now doing their part as citizens in every way, shape or form. The Faculty is the very birthplace of excellence and quality and as such, both the University and the Law Faculty must continue to aspire to greater heights to preserve the achievements of these past 50 years and to nurture inspiring talent for the many more years that are to come.

[24] As a whole, I am a proud alumna of the University of Malaya Law Faculty and I fully support all efforts to bring the Faculty to greater heights.

[25] I would like to congratulate PARFUM, led by Tan Sri Shahrizat binti Abdul Jalil on successfully holding this celebration to commemorate the Faculty's 50th Anniversary. Congratulations are also due to the Faculty under the leadership of the Dean, Dato' Associate Professor Dr Johan Shamsuddin bin Sabaruddin.

[26] I would also like to express my full support for PARFUM's idea to initiate the PARFUM Jurist Lecture Series as a brilliant means to promote academic discourse among the alumni, students and all other stakeholders. I also applaud PARFUM's efforts to establish the Legal Aid Clinic to provide legal aid to those in need in line with the concept of access to justice. Perhaps the time has come for alumni who are not yet members of PARFUM to sign up for membership so that the alumni family can grow larger and more meaningful with greater participation of members.

[27] I am sure that returning to the Faculty has brought back a thousand and one fond memories. Once again, I would like to bid congratulations to everyone involved in the preparation and organising of our beloved Law Faculty's Golden Jubilee.

The Role of the Judiciary in Advancing Human Rights through the UN Guiding Principles on Business and Human Rights (UNGP) and the 2030 Agenda for Sustainable Development Goals (SDG)*

by

*The Rt. Hon. Tan Sri Dato' Sri Azahar bin Mohamed***

Introduction

[1] It is a very great pleasure and also a privilege to be invited to deliver this keynote address by an organisation whose main function is to protect and promote human rights in Malaysia.

[2] Even though the Human Rights Commission of Malaysia ("SUHAKAM") and the Judiciary have a different role and responsibility, we each have a strong commitment to the concept of justice, the rule of law, fundamental rights and the values of democracy.

[3] SUHAKAM plays an important role in national dialogue concerning human rights. On behalf of the Malaysian Judiciary, let me thank SUHAKAM for convening this Judicial Colloquium with the theme: "The Role of the Judiciary in Advancing Human Rights Through the UN Guiding Principles on Business and Human Rights (UNGP) and the 2030 Agenda for Sustainable Development Goals (SDG)".

[4] The theme for this Colloquium is most appropriate and timely. As our country strives towards greater economic progress, this Colloquium provides a great opportunity and offers a great deal of scope for all of us to exchange views and knowledge, as well as share experiences on the protection of human rights in the context of the role of the Judiciary, particularly in promoting the agenda for sustainable development goals ("SDG"). Indeed, this Colloquium will also promote and enhance awareness on human rights and environmental issues, including climate change, among the members of the Malaysian Judiciary. I

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* Keynote address at the Judicial Colloquium 2022, March 31, 2022.

** The Right Honourable Chief Judge of Malaya.

must congratulate SUHAKAM for arranging such a stimulating and appealing list of topics for discussion.

[5] I personally welcome the opportunity to share my thoughts on this matter.

[6] As my starting point, let me highlight the United Nation Guiding Principles on Business and Human Rights ("UNGP") and what it entails.

[7] The UNGP is based on the state's existing obligations as the primary duty-bearer to respect, protect and fulfil human rights and fundamental freedoms by preventing human rights abuse by businesses. In meeting its duty to protect, the state enforces laws requiring businesses to respect human rights and guide businesses on how to respect human rights throughout their operations.

[8] Under the UNGP, all business enterprises have the responsibility to take mandatory human rights due diligence ("mHRDD"). The mHRDD is grounded on companies' obligation to focus their attention on the most serious human rights risks and identify existing or potential dangers to people with which they are involved in.[1]

[9] Since the risks to human rights may change over time, business enterprises are required under the UNGP to continuously and constantly identify and assess actual or adverse human rights impacts that they may cause and take appropriate actions to tackle the dangers.

[10] As for sustainability, this is addressed in the 2030 Agenda for SDG on which the theme of this Colloquium is grounded upon.

[11] The concept of sustainable development was described by the Brundtland Commission Report[2] published in 1987 as the "development

1 Mandatory Human Rights Due Diligence, https://www.ohchr.org/EN/Issues/Business/Pages/MandatoryHRDD.aspx (accessed January 25, 2022).

2 Brundtland Report, also called *Our Common Future*, publication released in 1987 by the World Commission on Environment and Development ("WCED") that introduced the concept of sustainable development and described how it could be achieved. Sponsored by the United Nations and chaired by Norwegian Prime Minister Gro Harlem Brundtland, the WCED explored the causes of environmental degradation, attempted to understand the interconnections between social equity, economic growth, and environmental problems, and developed policy solutions that integrated all three areas. See https://www.britannica.com/topic/Brundtland-Report (accessed January 25, 2022).

that meets the needs of the present without compromising the ability of future generations to meet their own needs."[3] The description by the Brundtland Commission Report emphasises two key words, namely, "needs" and "limitations". It delineates the eradication of poverty, employing environmental improvements, and social equitability through sustainable economic growth.

[12] The concept of sustainable development entrenches social, economic and environmental aspects which are inextricably linked to one another.[4] For example, the right to development is an inalienable human right as enshrined under Article 1 of The Declaration on the Right to Development 1986 and such right has to be practised in harmony with the environment and cannot be pursued as to substantially damage the environment.

[13] In line with promoting sustainable development, the United Nations ("UN") has adopted 17 sustainable goals,[5] aimed to end poverty, protect the planet and ensure peace and prosperity among the global citizens by the year 2030. The SDG is targeted at achieving sustainable development in economic, social and environmental aspects in a balanced and integrated manner.

[14] Among the 17 goals of SDG, our Colloquium today, according to the concept paper, will be focussing on goals 13 and 16. Goal 13 focuses on taking action to combat climate change and its impact whereas goal 16 focuses on promoting "peace, justice and strong institution". These two goals encompass very extensive issues and given the time constraint, in my speech this morning, I have taken the liberty to focus on the role of the Judiciary in promoting sustainability in the context of climate change.

Goal 13: Take urgent action to combat climate change and its impact

[15] The United Nations Framework on Climate Change defines climate change as "a modification of the climate which is attributed directly or indirectly to human activity that alters the composition

3 Fitzmaurice, M (nd), *The Principle of Sustainable Development in International Development Law* (Encyclopedia Life Support Systems).

4 UN General Assembly, Transforming our world: the 2030 Agenda for Resolution adopted by the General Assembly on 25th September 2015, Seventieth Session, A/RES/70/1 (October 21, 2015), pp 1–35.

5 Ibid.

of the global atmosphere, and which is in addition to natural climate variability observed over comparable time periods".[6]

[16] Climate change raises the risk of unusual and extreme weather. Malaysia is no exception when it comes to extremities in weather conditions and its consequences. We are already seeing the effects. Disasters such as floods and heatwaves are expected to become more frequent and intense. Recently, several states had already faced severe floods due to heavy rainfall that had displaced people from their homes, destroyed properties and even claimed lives in some cases.

[17] Over the last few decades, climate change and the negative consequences thereof have gained increased attention in national and international forums, courts, the mass media and public discourse generally.

[18] On May 8, 1992, the UN General Assembly adopted the United Nations Framework Convention on Climate Change ("UNFCCC") concerning greenhouse warming.[7] Malaysia signed the UNFCCC on June 9, 1993 and ratified it on July 17, 1994. Subsequently, the government established a National Steering Committee on Climate Change ("NSCCC") to meet its obligations under the Convention and Malaysia is committed, among others, to prepare Malaysia's National Communications to the UNFCCC.[8]

[19] It is important to note that the goal that Malaysia is supporting through this initiative, among others, relates to SDG 13 in taking urgent action to combat climate change and its impacts.[9]

[20] Though Malaysia has ratified the UNFCCC back in 1994, to date, Malaysia has no specific legislation on climate change. So far, the legislative approach is to treat climate change issues like any other environmental matters. Some of you may recall that last year, the Minister of Environment and Water announced that the Ministry has completed the climate change legal framework which will serve

6 Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (UNEP, 2005), p 94.

7 Ibid.

8 Malaysia's Initial National Communication submitted to the UNFCCC (July 2000).

9 The Sustainable Development Goals in Malaysia, Singapore and Brunei Darussalam, Climate Action.

as the basis for the country's Climate Change Bill. The minister also stated that a review of the National Climate Change Policy will be conducted to take into account the important outcomes of the Paris Agreement on climate change mitigation, the latest development at domestic and international levels, as well as integration under the United Nations SDGs.[10]

[21] I believe that this development is very much welcomed and will pave way for better governance of climate change issues in Malaysia as well as to serve as a guideline for more effective compliance mechanisms in terms of curbing the effects of climate change.

Right to environment

[22] Generally, when we talk about climate change, it is best that we understand the position of the right to environment under our law.

[23] In Malaysia, there is no specific provision in the written Federal Constitution which speaks about the recognition or protection for a healthful environment. Our Federal Constitution does not have an explicit provision for the protection or conservation of the environment or climate change.

[24] It seems that Malaysia's approach to environmental management through policies and legal measures have not evolved from a constitutional mandate to afford the public a right to clean air, water and environment. More often than not, these measures and actions are more of a reaction to intolerable environmental circumstances.

[25] While the Malaysian Federal Constitution does not specifically provide for the protection of environment, Article 5 of Part II does contain a provision on fundamental liberties, which states that "no person shall be deprived of his life or personal liberty save in accordance with the law". This Article does not explicitly deal with environmental rights. However, it is possible for this Article to be construed liberally to allow for the right to a healthful environment. Indeed, our judges have dealt with issues pertaining to the right to a clean environment in a more liberal manner.

10 Sim Leoi, "*Malaysia's latest plans to fight global warming*", *The Star*, September 21, 2021.

[26] Almost 35 years ago, a High Court judge in *Sinuri bin Tubar v Syarikat East Johor Sawmills Sdn Bhd*[11] made an interesting observation, when it was said that "Human calls for nature do not wait for governments to function. Clean water is a birth right of every human being as much as clean air".

[27] But much more importantly, Article 5 of the Federal Constitution that I have mentioned a moment ago has been given a fresh interpretation by the Malaysian Court of Appeal in the case of *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan*.[12] In the words of the Court of Appeal, "The expression 'life' incorporates all those facets that are integral part of life itself and those matters which go to form the quality of life … it includes the right to live in a reasonably healthy and pollution free environment". In other words, the Court of Appeal concluded that while our written Federal Constitution does not specifically provide for right to environment, it is implicit in Article 5(1), which guarantees the right to life.

[28] Such also was the observation made by the Federal Court in *Bato' Bagi & Ors v State Government of Sarawak*[13] where it was stated that "life" in Article 5(1) "incorporates all those facets that are integral part of life itself and those matters which go to form the quality of life …".

[29] In other words, the "right to life and personal liberty" recognised in Article 5(1) of the Federal Constitution encompasses all various aspects of life including the right to a clean and healthy environment.

The role of judges and courts in addressing climate change

[30] Let me now turn specifically to the role of judges and courts in addressing climate change and its impact.

[31] In the first place, a brief overview of the global status of climate change litigation and the emerging trends in other jurisdictions would be in order. Even though our legal setting can be contrasted with that of other jurisdictions, we must always pay careful attention to what is happening elsewhere in the world. As climate impacts grow, so too do climate litigations. Recent judicial decisions reveal several trends in regard to the purposes of climate change litigation. In a 2017 global

11 [1987] 1 MLJ 315, HC.
12 [1996] 1 MLJ 261, CA.
13 [2011] 6 MLJ 297, FC.

review of the status of climate change litigation undertaken by the United Nations Environment Programme ("UNEP"), five trends were identified. We have so much to learn from these emerging trends. Therefore, by way of broad overview, I think it is worthwhile that I highlight them here.[14]

> First, holding governments to their legislative and policy commitments. In this category of cases, citizens and non-governmental organisations are suing to hold their governments accountable for climate-related commitments. Many nations have laws or policies addressing aspects of the climate problem, and the Paris Agreement provided for national commitments toward the goal of averting average global warming in excess of 1.5°C and 2°C. Litigants have begun to make use of these codifications in arguments about the adequacy or inadequacy of efforts by national governments to protect individual rights *vis-à-vis* climate change and its impacts.
>
> Secondly, linking the impacts of resource extraction to climate change and resilience. In many cases, challenges to a project or policy identify linkages between resource extraction and climate-related impacts, both in the form of emissions due to combustion of extracted fossil fuels and in the form of impairments to resiliency and adaptive capacity. Litigants eager for policy to address climate change have begun to challenge environmental review and permitting processes that unduly ignore resource extraction activities' implications for the climate. These challenges seek to make those linkages legally significant and either deserving of consideration or else compelling an alternative approach to natural resource management.
>
> Thirdly, establishing that particular emissions of greenhouse gases are the proximate cause of particular adverse climate change impacts. Based on scientific understanding of the relationship between emissions and climate change, several cases seek to establish liabilities for corporate entities that generate emissions with full knowledge of those emissions' effects on the global climate. In addition to arguing that climate change-related injuries are proximately caused by particular emitters, the parties seeking

14 See UNEP, Law Division, "The Status of Climate Change Litigation – A Global Review" (2017).

relief in each of these cases have proposed various ways for courts to apportion liability for those injuries among named defendants and others.

Fourthly, establishing liability for failure to adapt and the impacts of adaptation. Technical understanding of climate change and the quality of predictions about future temperature and weather patterns are improving. Recognising that adaptation efforts have not kept pace with these improvements, litigants are bringing claims that seek to assign responsibility where failures to adapt result in foreseeable, material harms. Government-led adaptation measures have also inspired claimants to seek injunctive relief or compensation for alleged injury to their property rights.

And fifthly, applying the public trust doctrine to climate change. Litigants are making arguments for climate action based on the public trust doctrine, which assigns the state responsibility for the integrity of a nation's public trust resources for future generations. Such claims raise questions of individuals' fundamental rights, as well as concerns about the balance of powers among the judicial, legislative and executive branches or functions of governments.

[32] So, I have given you the global status and the emerging trends of climate change litigation. In recent times, courts are responding to the rising climate change disasters. Governments and business entities are being held liable for greenhouse emissions in court actions filed by civil societies, concerned citizens and even children.

[33] It is against the backdrop of these trends that I move on now to look at the position in our own jurisdiction.

[34] As one of the arms of the government within our own constitutional and legal framework, our courts play an important role in addressing climate change and its impact.

[35] I would like to echo the words of the Right Hon The Chief Justice of Malaysia, Tun Tengku Maimun binti Tuan Mat in her Ladyship's speech during last year's Webinar on Environmental Law Co-Organised by the Malaysian Judiciary and the Embassy of Sweden in Malaysia. Her Ladyship aptly mentioned:

> [15] … The Judiciary plays its part in the protection of environmental rights in at least one of two broad spheres. The first is in public law.

> The public law aspects include judicial review either on a constitutional or administrative law front. These forms of actions can be brought by or against the State.

[36] Here, I want to elaborate further the public law aspect. It cannot be disputed that judicial power is vested in the hands of the Judiciary. A fundamental aspect of judicial power is judicial review. Central to this notion is the judicial control of administrative or ministerial action which our courts exercise through judicial review. And it is this aspect of judicial power that enables the Judiciary to ensure persons in authority act in accordance with the law and to hold them accountable if they act unlawfully and fail to observe the law while performing their respective public duties. As stated by Raja Azlan Shah CJ (as His Highness then was) in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*:[15]

> The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before that public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place.

[37] Our Chief Justice Tun Tengku Maimun binti Tuan Mat in a very recent case of *SIS Forum (Malaysia) v Kerajaan Negeri Selangor & Anor* ("*SIS Forum*"),[16] in which we sat in a quorum of seven, emphasised that judicial review is a core tenet of the rule of law which is inextricably linked to the notion of constitutional supremacy in a democratic form of government. This is because, according to her Ladyship, a core feature of the rule of law is the doctrine of separation of powers, a corollary to which is the concept of check and balance. The case of *SIS Forum* demonstrated how, in accordance with its constitutional responsibility, the court had undertaken the role of check and balance.

[38] In resolving legal disputes, our courts are therefore empowered under Article 4(1) of the Federal Constitution to strike down any law which is inconsistent with the provisions of the Federal Constitution.

15 [1979] 1 MLJ 135, FC.
16 [2022] 3 CLJ 339, FC.

This supremacy clause ensures legislative and executive compliance with the provisions of the Federal Constitution, in the context of our discussion today, with the right to a clean and healthy environment. Further, the courts also have additional powers under paragraph 1 of the Schedule to the Courts of Judicature Act 1964 to review and quash decisions made by persons in authority and to fashion any appropriate reliefs.

[39] The Malaysian Judiciary's responses to climate change are evolving. It is a new developing area of law. As we have seen, some of the emerging trends in climate change litigations in other jurisdictions that I have pointed out earlier, which focused on enforcing existing domestic environmental legislation and challenging governmental failures in enforcement or non-compliance of policy, are not too alien to the Malaysian Judiciary. Therefore, on the issue of climate change and its impact where the decisions of persons in authority have caused adverse impacts on the environment, judicial review of the decisions of such persons becomes an important option to an interested concerned citizen in seeking redress and appropriate remedies from the courts. In this context, Malaysia has ratified the Paris Agreement and made a number of commitments to reduce greenhouse gas emissions. In accordance with the principles of judicial review, persons in authority should take into consideration this fundamental factor adequately when making decisions which affect our right to live in a clean, safe and healthy environment.

The mechanism and infrastructure in the Malaysian judiciary

[40] The Malaysian Judiciary has always been committed in providing access to justice in respect of issues relating to environment with the establishment of the Environmental Courts in the Sessions Court and Magistrates' Court in 2012. Among the goals of the establishment of the Malaysian Environmental Courts are to expand and improve access to environmental justice, to provide an expeditious disposal of environment-related cases and to ensure uniformity of decision-making in environmental cases. [17]

[41] Indeed, the establishment of the Environmental Courts seeks to ensure better administration of justice for environmental criminal

17 Azahar Mohamed, "Hazy Days Ahead: Legal Rights Under International and Domestic Laws" (2017) *Journal of the Malaysian Judiciary* 51–52.

cases in the Sessions Court and Magistrates' Court, and to monitor and dispose of such cases in a more efficient manner.[18] In order to achieve this, all the Sessions Courts and Magistrates' Courts have to accord priority to environmental cases by preparing a schedule for the hearings, including the hearings in Circuit Courts which sit as the Environmental Magistrates' Court.[19]

[42] The setting up of the Environmental Courts, I would say, was timely and has, no doubt, marked a significant change in judicial attitude on environmental justice. It underlined the greater awareness and expanded responsiveness of environmental issues and climate change among the Malaysian judges.

[43] While judicial process is important, addressing climate change through our courts has its limits and boundaries. There are at least two fundamental reasons for this. First, the administration of justice in Malaysia is based on an adversarial system of law. An adversarial system brings cases to the court with two opposing parties presenting themselves before a neutral and impartial judge who then determines the legal dispute accordingly based on the evidence presented by the competing parties. In accordance with the adversarial system that we practice, it is important to emphasise that in Malaysia, we do not have the practice of *suo motu*. Unlike some other jurisdictions, a Malaysian court cannot take an action on its own accord, without any application or actions filed by the two opposing parties involved in the dispute. To this, I want to clarify an important point. In the past, the judicial process operated along traditional adversarial principles and left the control of the litigation entirely to the competing parties. Now, from the moment cases are filed in court, with active case management, judges themselves take control of the proceedings to ensure a just, fair and expeditious disposal of cases.

[44] Secondly, it must be kept in mind that litigants who intend to move our courts must have *locus standi* to bring any environmental or climate change action. A claimant must have a standing to bring the case. In the case of *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor*,[20] the rule of *locus standi* has been made clearer by the Federal Court. So long as litigants have a real

18 Chief Registrar Practice Direction No. 3 of 2012.
19 Ibid.
20 [2014] 3 MLJ 145, FC.

and genuine interest in the litigation and their rights are somehow adversely affected such that they are not frivolous litigants, they may initiate a claim. The rule of *locus standi* has a gate-keeping function which excludes vexatious litigants and unworthy cases. Some would argue that those requirements are disproportionately restrictive in the context of climate change litigation. I would only add one more word here in respect of this issue. Whether a standing rule should be loosened or not, we must, in my opinion, mould our system of law to meet our precise need. It is ultimately a value judgment that each jurisdiction must make.

[45] I leave all these issues on the subject of adversarial system and *locus standi* for your consideration and discussion at this Colloquium.

[46] It is on that note, in closing, I would like to make the following points.

[47] The Judiciary as the guardian of the Federal Constitution and as an institution that upholds the rule of law, plays an important role in the protection of environmental rights.

[48] The Judiciary together with the Legislature and Executive share a significant and equal role and responsibility in addressing climate change and its impact. This is because major policies and legislation are the key framework to accomplish the objective in addressing climate change. With clear policies and legislation, the Judiciary will be able to play an even more important role in interpreting and enforcing those laws so as to ensure the rationale of those laws are successfully accomplished.

[49] Finally, it leaves me to thank the organiser for giving me the opportunity to share some thoughts with you this morning.

[50] I wish all of you a successful colloquium.

The International Environmental Rule of Law: The North-South Divide

Sustainable Development: The Malaysian Experience*

by

*Justice Datuk Nallini Pathmanathan***

[1] It is a great privilege to participate in this illustrious conference. In my short presentation I highlight two aspects of environmental law, namely:

(i) how the North-South divide has affected international environmental law; and secondly,

(ii) the Malaysian experience in relation to environmental jurisprudence, development and the role of its Judiciary.

[2] I speak of the North-South conflict because the framework of international environmental law has been formulated primarily based on the perspectives of the Global North, for historical and economic reasons. The perspective of the Global South has been accorded far less acknowledgement. The goal of international environmental law cannot be successfully met if this is not addressed.

International environmental law and the North-South divide

[3] The North-South dimension has and continues to play a pivotal role in international environmental law. Historically, the divide compromised the efficacy of international environmental law, and the future requires that this divide be bridged.

[4] The root cause of this divide is founded on economic colonisation – the inequality in economic power between the Global North and the Global South.[1] Economic justice encompasses environmental justice, as the latter comprises a core component of the tussle for the

** Judge of the Federal Court.

1 Shawkat Alam, Sumudu Atapattu, Carmen G Gonzalez and Jona Razzaque (eds), *International Environmental Law and the Global South* (Cambridge University Press, 2015), p xxxiii, foreword by judge Christopher Weeramantry.

resources of Mother Earth, as well as the allocation of responsibility for present and historic environmental harm. The conflict presents itself as a struggle between economic development and environmental protection between the Global North and South, although such conflicts play out within these regions as well.

[5] The North-South divide can be traced to the creation, features and orientation of international law from its genesis to its present day form.[2] The pre-Westphalian concept of the law of nations or international law comprised communities, tribes, and peoples who enjoyed sovereignty, rights, and duties without the dominance of any one region, culture or peoples. With the Treaty of Westphalia of 1648 and subsequent treaties, coupled with the conquest of the Americas, Asia and Africa and the onset of colonisation, there was a shift in the framework of international legal concepts and principles, devised by the conquerors who were largely European, to entrench their dominance and need for local land and resources in the colonised world.

[6] This was done, *inter alia*, by the imposition of the idea that European values and laws were the only viable and universal basis for civilisation. The indigenous or homegrown approaches of the colonised states to treaty-making and claims over their lands and assets were abrogated. The result was, and remains to this day a Eurocentric and Global North-based value system, which gives an illusion of fairness and equity across the nations, while the reality is different.

[7] Northern states conquered and exploited resources of the colonised regions for industrialisation and development for decades, with little concern for environmental degradation.[3] Today the South needs to exploit its natural resources for development and poverty alleviation, which is a paramount priority for subsistence. They therefore demand that this must be the first step towards addressing environmental protection. The North says otherwise. The conflict reflects the huge economic disparities between the North and the South, and there lies the nub of the conflict. There is therefore a crying need for the perspectives and needs of the South to be genuinely acknowledged and to comprise the basic structure for further North-South negotiations.

2 Ibid, at p 23, Ch 1 "History of the North-South Divide in International Law: Colonial Discourses, Sovereignty and Self-Determination" by M Rafiqul Islam.
3 Ibid, at p 48.

Development – Sustainable or unsustainable?

[8] This divide has also had detrimental effects on the evolution of "sustainable" development in the South. As the Report of the World Commission on Environment and Development: Our Common Future[4] states:

> Humanity has to make development sustainable to ensure that it meets the needs of the present, but without compromising the ability of future generations to meet their own needs.

[9] The Industrial Revolution saw economic development in the Global North flourishing, while the environment sustained considerable environmental degradation. International environmentalism became a serious concern with the advent of the United Nations Environment Programme and the adoption of the Stockholm Declaration which held the promise of a solution to the numerous environmental problems that subsisted across international borders.[5]

[10] In reality however, the economically-weaker states of the South had not achieved the benefits (nor burdens) of the industrialisation age, and were focused on pursuing economic development rather than environmentalism. Environmentalism slowed the process of development which was therefore an unviable option.

[11] The solution was sought to be accomplished by the concept of "sustainable development", the brainchild of the Brundtland Commission which was asked to devise strategies for "sustainable" development. This difficult task required the reconciliation of two antagonistic elements, namely, economic growth and environmental protection. However this solution suffers from a two-fold conundrum. Firstly, it fails to hold the Global North accountable for its environmental degradation as it underwent and benefited from its development paradigm; secondly it fails to take into account the unsustainability of the industrialisation and modernisation model prevailing in the Global North. This is because development in the Global North saw the environment as an external factor that was to be "conquered" or dealt with, and which is a secondary concern compared to economic growth. Such a philosophy or ethos cannot afford a suitable model

4 (New York: Oxford University Press, 1987), p 8.

5 See *International Environmental Law and the Global South*, supra n 1, at p 50, Ch 3 by Ruth Gordon.

for sustainable development. But as the Global South pursues this "model" of unsustainable rather than sustainable development, environmental disaster threatens, leaving it to future generations to deal with the fall-out.

[12] Perhaps the answer lies in identifying and accepting the huge differences between the "needs" of the Global North and the South. The South requires human needs to be met, while consumer wants and consumption remain at the core of the needs of the Global North. The vastly greater appropriation of the earth's resources by the North is an inherent inequity, which requires serious consideration and redress. Therefore any realistic resolution must be imbued with the goals and aspirations of the Global South in a real sense. There must be acceptance that the current development paradigm which places economic growth well above environmental concerns should be seriously recalibrated. Perhaps the answer lies in accepting that for our future generations, the solution lies in finding a middle path between the high consumption and sometimes wasteful lifestyle of the Global North and the poverty of the Global South. This would address the need for genuine sustainability, and contribute towards a dialogue that seriously addresses the issue of sustainable development within a framework of global justice and fairness.[6]

Middle ground

[13] It would be unfair to portray the divide as being entirely negative. There has been progress, for example, in the formation and application of the principle of common but differentiated responsibilities. This imposes common responsibilities on both the North and the South to protect the environment, but the Northern states bear more burdens than their Southern counterparts. Here the rationale is that the Northern states are largely responsible for past environmental degradation, for a far larger consumption of the planet's resources, and possess superior financial and technological abilities to protect the environment.[7] While responsibility for the past remains elusive in the application of this principle, there is acceptance of the future responsibilities by the Global North.

6 Ibid, at p 52.
7 Ibid, at p 49, Ch 1.

[14] In conclusion on this part, as I said at the outset, it is necessary to address the North-South divide more substantively. It is necessary to provide redress for the historic legacy of the past, as well as unacceptable levels of consumption of the earth's resources. Global consensus must include a more universal embracing of values from the South in order to balance the dominance of the Eurocentric approach to global governance in this field.

The Malaysian experience

[15] In Malaysia, we have a written constitution, the Federal Constitution. The environmental governance framework allows for a shared jurisdiction between the federal and state authorities. This can give rise to conflict although federal law generally prevails.

[16] Parliament has promulgated a vast array of statutes to combat environmental degradation, so to that extent there can be no complaint of a lack of sufficient legislation. However, effective enforcement remains a serious concern.

[17] From the adjudicative aspect, a long-standing obstacle to environmental justice has been the relatively narrow definition accorded to the issue of legal standing. Potential litigants have to surmount hurdles in order to establish *locus standi*. The stringent test enumerated in the early '80s was softened somewhat by subsequent case law, to allow persons who are "adversely affected" to move the courts.[8] However, the scope of the phrase remains very much in dispute, particularly in relation to environmental matters.

[18] This is in contrast to the position in India where public interest litigation is part and parcel of participative justice. *This is borne out by the simplicity with which an aggrieved member of the public, may write a letter to the judiciary, which is equivalent to a writ, marking the commencement of a suit.*

[19] Our case law on environmental justice has been chequered. Early cases allowed development to prevail over the rights of Indigenous peoples, giving clear preference to development.[9] Subsequently,

8 See *QSR Brands v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air and Komunikasi & Anor* [2014] 3 MLJ 145.

9 Bakun Dam.

however, the pendulum swung the other way, with the courts holding that the state owed the Indigenous people of West Malaysia, the Orang Asli, a fiduciary duty.[10] Again, a more stringent approach was adopted in a recent decision, in relation to native customary rights in East Malaysia, cutting down the rights of Indigenous peoples. However, the effects of this decision have been diluted by statutory amendments to legislation recognising these rights.

[20] However, the Judiciary has been sensitive to environmental problems. Article 5 of our Federal Constitution (similar to Article 21 of India's Constitution) guarantees the right to life and personal liberty. In the case of *Tan Tek Seng*,[11] the judgment of one of our foremost jurists, former judge of the Court of Appeal, Gopal Sri Ram, held that the right to life and liberty includes a right to a healthy and pollution-free environment. It is noteworthy that Malaysia co-sponsored the resolution passed last year by the United Nations Human Rights Council that access to a clean, healthy and sustainable environment is a fundamental human right.

[21] Our goals are:

(i) achievement of 31% of renewable energy capacity for power generation in 2025 and 40% in 2035 in national power grid through Malaysia's Energy Transition Plan 2021–2040;

(ii) maintaining at least 50% forest cover as pledged during the Rio Earth Summit 1982;

(iii) implementing natural-based solutions to reduce long-term impacts of development through the planting of a 100 million trees;

(iv) moving towards zero waste directed to landfill through the waste-to-energy concept and to increase the recycling rate target to 40% by 2025; and

(v) the implementation of several national plans and policies geared towards ensuring a low carbon pathway and resilience towards climate change.

10 *Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors* [2005] 4 CLJ 169.

11 *Tan Tek Seng v Suruhanjaya perkhidmatan Pendidikan Malaysia & Anor* [1996] 1 MLJ 261 at 288.

[22] In this context, two of the largest energy companies in Malaysia have rolled out their plans to achieve net-zero emissions by 2050.

Conclusion

[23] As a judge, I believe that judges have an instrumental role to play in the preservation of the environment. Firstly, courts are where litigants go, when their rights need vindication. Secondly, our decisions ensure that governments comply with their legal obligations. Thirdly, when scientific evidence relating to the environment is admitted in courtrooms and judicial findings of fact made, this helps raise the visibility of such scientific material, and contributes to discourse on the matter.

[24] I can do no better than to conclude with a quote by Vandana Shiva, "We share this planet our home with millions of species. Justice and sustainability both demand that we do not use more resources than we need".

Law in Literature and Literature in Law
A Study in Creativity

by

*Justice Leong Wai Hong**

> "These observations are made so that people will not say, 'Something is rotten in the state of Denmark,' — Shakespeare, Hamlet, 1."
>
> Justice NH Chan in
> *Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Anor*[1]

Introduction

[1] Since time immemorial, literature has been a source of inspiration for many. From William Shakespeare's *Romeo and Juliet* to George Orwell's *1984*, society has reflected upon literature and drawn inspiration from it. Judges in various jurisdictions are not an exception to this phenomenon and would often quote literature in their judgments. Lord Atkin's famous quote of the exchange between Humpty Dumpty and Alice in Lewis Carroll's *Through the Looking Glass* in *Liversidge v Anderson*[2] and Justice NH Chan's famous quote from *Hamlet* in *Ayer Molek*[3] illustrate this judicial creativity.

Law in literature

[2] The interplay between law and literature can be seen in the seminal work of *Merchant of Venice* by William Shakespeare. *Merchant of Venice* is a story of a Jewish moneylender, Shylock, who lent money to one Bassanio to pursue the hand of a fair lady named Portia. Shylock insisted on a guarantor as Bassanio was a man who lived beyond his means. Antonio who was a friend of Bassanio agreed to be his guarantor. Shylock then proceeded to give the loan on a

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* Judicial Commissioner of the High Court of Malaya. I am grateful to my former pupil, Chew Sue Peng from Messrs Skrine, for her research assistance. I thank my former lawyer from Messrs Skrine, Kalai Balakrishnan, for proof reading.

1 [1995] 2 MLJ 734 at 744.

2 *Liversidge v Anderson* [1941] 3 All ER 338, HL.

3 [1995] 2 MLJ 734 at 744.

penalty, i.e. he gets to cut off a pound of Antonio's flesh if the loan was not repaid.[4]

[3] *Merchant of Venice* was written in a time in Europe when Jews were routinely discriminated against. Venice, the setting of the play, was no exception. The discrimination was purely on religious grounds and sanctioned by the law then. William Shakespeare in *Merchant of Venice* put the spotlight on this "irrational legal discrimination" in a famous soliloquy by Shylock on how the Jews had been ill-treated by the Christians.

[4] The passage reads as follows:

> SHYLOCK…
>
> I am a Jew. Hath
> not a Jew eyes? hath not a Jew hands, organs,
> dimensions, senses, affections, passions? fed with
> the same food, hurt with the same weapons, subject
> to the same diseases, healed by the same means,
> warmed and cooled by the same winter and summer, as
> a Christian is? If you prick us, do we not bleed?
> if you tickle us, do we not laugh? if you poison
> us, do we not die? and if you wrong us, shall we not
> revenge? If we are like you in the rest, we will
> resemble you in that. If a Jew wrong a Christian,
> what is his humility? Revenge. If a Christian
> wrong a Jew, what should his sufferance be by
> Christian example? Why, revenge. The villainy you
> teach me, I will execute, and it shall go hard but I
> will better the instruction.

[5] Historically, it is not clear whether William Shakespeare was anti-Semitic or sympathetic to Jews when he wrote the above passage in *Merchant of Venice*. The reason is obvious considering that historians cannot even agree whether William Shakespeare did write those plays attributed to him. There are a few other contenders.[5]

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4 Lord Denning, *Leaves From My Library: An English Anthology* (Butterworth & Co, 1986), pp 17–33.

5 Ian Wilson, *Shakespeare the Evidence Unlocking the Mysteries of the Man and his Work*, 1st edn (Headline Book Publishing, 1993); and see James Shapiro, *Contested Will: Who Wrote Shakespeare* (Simon & Schuster, 2010).

Literature in law

Should judges quote literature?

[6] There is a lot of debate both amongst lawyers and non-lawyers on whether it is good for judges to quote literature in their judgments.[6]

[7] The late Justice Antonin Scalia of the US Supreme Court had this to say about the role quoting literary writers has in writing judicial opinions. He said "it was a tactic he primarily adopted when drafting his dissents. It is important to make dissents interesting".

> "What is the use in writing a dissent on the Supreme Court? In the Court of Appeals, you write dissents to warn off other Courts of Appeals, 'This is a bad decision, you other circuits, do not follow it'. When you are on the Supreme Court, you have lost. Why don't you just go quietly and say I dissent without giving any reasons?"
>
> "It is very important to make dissents interesting", Justice Scalia reiterated, adding that he writes his dissents primarily to attract the attention of law professors and law students. "So I will quote Shakespeare. I will use Bugs Bunny. I will use whatever will attract their attention."[7]

[8] Justice Scalia's tactic of primarily quoting literary writers in his dissents to make his dissents interesting raises an interesting point. An interesting quote is usually newsworthy. It makes memorable reading and recollection. It brings his grounds for dissents to the attention of law professors for them to comment on and to fellow judges to encourage them to agree with his dissent in subsequent cases. Arguably, the most famous dissent in the English common law is the sole dissenting judgment of Lord Atkin in *Liversidge v Anderson*.[8] Perhaps or because of the rationale explained by Justice Scalia, Lord

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6 See Henderson, M, "Citing Fiction" in *The Green Bag: An Entertaining Journal of Law* (2008) 11(2) *University of Chicago, Public Law and Legal Theory Working Paper No 212*, pp 171–185; Kirby, M, "Literature in Australian Judicial Reasoning" (2021), https://www.hcourt.gov.au/assets/publications/speeches/formerjustices/kirbyj/kirbyj_literature_judicialreasoning.htm (accessed October 20, 2021).

7 Cynthia Claytor, "An Evening with Justice Antonin Scalia and Justice Kemal Bokhary", *Hong Kong Lawyer* (March 2016), http://www.hk-lawyer.org/content/evening-justice-antonin-scalia-and-justice-kemal-bokhary (accessed October 1, 2021).

8 *Liversidge v Anderson* [1941] 3 All ER 338, HL.

Atkin's sole dissenting judgment has become the prevailing law in the English and Commonwealth jurisprudence that the words "reasonable cause to believe" requires proof of an objective fact and not a mere subjective belief. I will say more of *Liversidge v Anderson* below.

[9] Appearing beside Justice Scalia who made the observations referred to above at a private talk held on February 1, 2016 in a discussion hosted by the Chinese University of Hong Kong, Justice Kemal Bokhary of Hong Kong's Court of Final Appeal cautioned against the use of Shakespeare in judgments.

[10] Justice Bokhary "was of the opinion that Shakespeare should be used sparingly. The English Shakespeare used is not necessarily intelligible to all English speakers today. While Shakespeare wrote with incomparable power, much of what he wrote is incomprehensible to people who are not Shakespearean scholars. The important thing is to be selective in quoting him."[9]

[11] The Honourable Justice Michael Kirby AC of the High Court of Australia's view on this topic is as follows.

> My point at the outset is, therefore, a simple one. Between judicial ideas, conveyed in words, sentences, and in literature, lies a symbiotic relationship. It is an inescapable relationship in the case of judges for, ordinarily, they have been educated in literature. To some extent, their values, feelings, aspirations and fears have been verbalised in, and shaped by, literature learned at home, in school and in the solitary moments of reading, watching, listening and reflecting on powerful thoughts, powerfully expressed … But usually literature can help the judicial writer to express important ideas in ways better than they could muster, unaided. Such literature becomes part of the rhetoric of judicial exposition, explanation and persuasion.[10]

Malaysian judgments

> "Something is rotten in the state of Denmark,"
>
> *Hamlet* by William Shakespeare

9 Cynthia Claytor, supra n 7.

10 Kirby, M, "Literature in Australian Judicial Reasoning" (2021), https://www.hcourt.gov.au/assets/publications/speeches/formerjustices/kirbyj/kirbyj_literature_judicialreasoning.htm (accessed October 20, 2021).

[12] Arguably the most famous Malaysian case to cite Shakespeare is the 1995 Court of Appeal decision in *Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Anor*.[11]

[13] The facts of *Ayer Molek* are as follows. Insas Sdn Bhd ("Insas") who were the plaintiffs had obtained an ex parte mandatory injunction against Ayer Molek to compel them to effect the registration of the transfer of shares to Insas and to issue new certificates in Insas' names within two working days of Ayer Molek receiving the share certificates. Ayer Molek filed an application to set aside the ex parte order. The application came up for hearing before the High Court on April 13, 1995 but it was adjourned to April 27, 1995. After the two working days, the High Court allowed for compliance of the ex parte order. Ayer Molek immediately applied for a stay of the injunction in the High Court, but the judge refused to grant a stay. As a result, the shares were registered and new share certificates were issued to Insas. Ayer Molek appealed to the Court of Appeal and filed a motion for stay of the ex parte order pending appeal. The Court of Appeal which comprised of Justice NH Chan, Justice Siti Norma Yaakob and Justice KC Vohrah granted the stay order.

[14] Justice NH Chan was critical of the High Court decision. His Lordship held that:

> The fact that the proceedings were filed in the wrong division does not render the proceedings in any way invalid but may, coupled with other considerations in the present case, give the impression to right-thinking people that litigants can choose the judge before whom they wish to appear for their case to be adjudicated upon. *This, we consider, may lead to very unhealthy negative thinking and since justice must not only be done but must also be seen to be done*, it is incumbent on the trial judge, upon perusal of the pleadings, to have taken the initiative of transferring the proceedings to the right division so as to dispel any notion that he is partial to any party. This is yet another reason for strengthening our conviction that it is right and proper that we exercise our inherent power to prevent an injustice being done by the issue of an interim injunction restraining the respondents from enjoying the fruits of the registration of the infamous shares in their names. *These observations are made so that people will not say, "Something is rotten in the state of Denmark," — Shakespeare, Hamlet, 1.*
>
> (Emphasis added.)

11 [1995] 2 MLJ 734.

[15] *Hamlet* is a tragedy written by William Shakespeare between 1599 and 1601. It is his longest play. Set in Denmark, *Hamlet* depicts Prince Hamlet and his revenge against his uncle, Claudius, who had murdered Hamlet's father, seized his throne and married Hamlet's mother.

[16] In the play, two guardsmen on duty, Horatio and Marcellus, were aware of the murder of the King. After meeting Hamlet and telling him that they had seen the ghost of Hamlet's father, i.e. the King, the following exchange took place between the two guardsmen:

> [Exit Ghost and Hamlet.]
>
> *HORATIO*
> He waxes desperate with imagination.
>
> *MARCELLUS*
> Let's follow. 'Tis not fit thus to obey him.
>
> *HORATIO*
> Have after. To what issue will this come?
>
> *MARCELLUS*
> *Something is rotten in the state of Denmark.*
>
> *HORATIO*
> Heaven will direct it.
>
> *MARCELLUS*
> Nay, let's follow him.
>
> (Emphasis added.)

[17] When Justice NH Chan wrote in his grounds "These observations are made so that people will not say, 'Something is rotten in the state of Denmark,' — Shakespeare, Hamlet, 1." he was alluding to the transgressions of justice in the High Court room situated in Wisma Denmark (also referred to as Denmark House) in Kuala Lumpur, Malaysia.[12]

12 Yatim, H, "Vohrah Among Judges Who Heard Appeal in Infamous *Ayer Molek* Case", *The Edge Markets* (2020), https://www.theedgemarkets.com/article/vohrah-among-judges-who-heard-appeal-infamous-ayer-molek-case (accessed September 3, 2021).

> "'When I use a word,' Humpty Dumpty said, … 'it means just what I choose it to mean, neither more nor less.' …"
>
> *Through the Looking Glass* by Lewis Carroll

[18] There are two famous novels by Lewis Carroll. *Alice's Adventures in Wonderland* was published in 1865. The sequel *Through the Looking Glass* was published in 1871. *Through the Looking Glass* has been mined by judges to illustrate and strengthen their reasoning. For example, the famous exchange between Humpty Dumpty and Alice was quoted by Justice Lee Swee Seng in his 2010 Malaysian decision of *Sri Palmar Development & Construction Sdn Bhd v Jurukur Perunding Services Sdn Bhd*.[13]

[19] In *Sri Palmar,* the plaintiff appointed the defendant to carry out certain title survey works. The parties orally agreed that the defendant's fee would be RM100,000, which sum was subsequently raised to RM130,000. However, the defendant claimed that there was no such agreement and that the full fees payable was RM219,245, calculated according to Schedule 13 of the Licensed Land Surveyors Regulations 1959 ("the Regulations"). The defendant applied for a summary determination of the issues. One of the issues was whether a land surveyor and his client could agree to the payment of a lesser fee than the prescribed scale fees under regulations 99(1), 100(3) and 101(d) of the Regulations.

[20] Regulation 99(1) of the Regulations reads, "Every land surveyor making a title survey *shall charge fees* as prescribed in the Thirteenth Schedule hereto."

[21] Regulation 100(3) provides, "The Board may, in any case referred to in sub-regulation (2), order the title survey to be carried out and completed by the Survey Department or another licensed land surveyor and the fee *shall be paid in accordance* with the provisions of regulation 99."

[22] Regulation 101(d) of the Regulations further states, "Every licensed land surveyor *shall observe* and be guided by the following provisions of the Code of Professional Conduct: every licensed land surveyor other than employees of statutory bodies *shall*, for making

13 [2010] 6 MLJ 166.

a title survey, be *remunerated by the fees payable by his client to the Board under regulation 99(1)*."

[23] The defendant raised the defence of illegality. He contended that based on the unambiguous wording of the word "shall", there is a prohibition on giving discount on fees chargeable on title survey.

[24] Justice Lee Swee Seng dismissed the defendant's contention.

[25] His Lordship quoted the exchange between Humpty Dumpty and Alice in Lewis Caroll's *Through the Looking Glass* when analysing the meaning of the word "shall" as used in the Regulations. His Lordship said:

> [8] It was further submitted by the defendant that by making it compulsory and mandatory for the client of a land surveyor to pay the exact amount of the scale fees charged in accordance with the Schedule 13 of the Regulations to the board, it is the intention of the Act and the Regulations that there shall be no discount on the fees charged on title survey.
>
> [9] The defendant further urged the court that from the clear wordings of the Act and the Regulations, it can be construed that the objective of the said laws is aimed at protecting the interests of the members of the public (for instance, the purchasers of properties in a housing development) in ensuring that they get their final titles (as compared to qualified titles) timeously after the completion of the building. With the issuance of final titles, it will in turn, maintain and enhance the integrity of the Torrens land system in Malaysia. By allowing the land surveyor and/or his client the latitude and liberty to agree on the title survey fees chargeable, whether express or implied, will defeat the said aim of the Act and the Regulations and is plainly against the public policy as well.
>
> [10] *What does the word "shall" mean?* Is it more akin to and indeed amounting to a "must" or can it be a mere "may"? Must the word "shall" mean a mandatory "must" or may it mean a directory "may"? I am reminded of the verbal exchange in Lewis Caroll's *Through the Looking Glass*:
>
> > "'*When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean, neither more nor less.'* 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'"

[11] I agree that generally the word "shall" is ordinarily mandatory but it is sometimes not so interpreted if the context or the intention otherwise demands, as per Hidayatullah J in *Sainik Motors v State of Rajasthan* AIR 1961 SC 1480. Similarly, in *State of Uttar Pradesh v Babu Ram* AIR 1961 SC 751, Subbarao J stated:

> "When a statute uses 'shall' prima facie it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute."

(Emphasis added.)

> "Good name in man and woman …,
> Is the immediate jewel of their souls;"
>
> *Othello* by William Shakespeare

> "Take honour from me and my life is done."
>
> *Richard II* by William Shakespeare

[26] In the Malaysian case of *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor*,[14] Anwar Ibrahim claimed that an article published in the *New Straits Times* newspaper was defamatory. Justice Harmindar Singh allowed the claim.

[27] In his judgment, Justice Harmindar Singh quoted *Othello* by William Shakespeare. His Lordship's quote was inspired by this passage:

> OTHELLO
> What dost thou mean?
>
> IAGO
> *Good name in man and woman, dear my lord,*
> *Is the immediate jewel of their souls:*
> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands:
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed.
>
> OTHELLO
> By heaven, I'll know thy thoughts.

(Emphasis added.)

14 [2010] 2 MLJ 492.

[28] Justice Harmindar Singh also quoted from *Richard II* by William Shakespeare. His Lordship quoted from the emphasised part of this passage.

> THOMAS MOWBRAY
> Yea, but not change his spots: take but my shame.
> And I resign my gage. My dear dear lord,
> The purest treasure mortal times afford
> Is spotless reputation: that away,
> Men are but gilded loam or painted clay.
> A jewel in a ten-times-barr'd-up chest
> Is a bold spirit in a loyal breast.
> *Mine honour is my life; both grow in one:*
> *Take honour from me, and my life is done:*
> Then, dear my liege, mine honour let me try;
> In that I live and for that will I die.
>
> (Emphasis added.)

[29] Justice Harmindar Singh when allowing the claim for defamation, held as follows:

> [2] In any discussion of reputation, there is the customary or some say obligatory reference to Shakespeare's characterisation of *"good name" as the "immediate jewel" of the soul* (see W Shakespeare, Othello, Act III Scene iii). The "purse" was "trash" when compared to the value of a "good name". Some believe that reputation is a form of honour (see RC Post, The Social Foundations of Defamation Law: Reputation and the Constitution [1986] 74 California Law Review 691). So dishonour or loss of face is an absolute fall from grace. As Shakespeare depicted:
>
> > "*Mine honour is my life, both grow in one,*
> > *Take honour from me and my life is done.*
> >
> > W Shakespeare, Richard II, Act I Scene"[15]
>
> (Emphasis added.)

United Kingdom ("UK") judgments

[30] Arguably, the two most famous references to literature in a judgment are by Lord Atkin in two judgments of the House of Lords.

15 Ibid, at pp 498-499.

They are *Donoghue v Stevenson*[16] and *Liversidge v Anderson*.[17] I shall examine *Donoghue v Stevenson* first.

Donoghue v Stevenson

> "But he (the lawyer) wanted to justify himself, so he asked Jesus, 'And who is my neighbour?'"
>
> *The Parable of the Good Samaritan, Luke 10:29*

[31] The Parable of the Good Samaritan appears only in the Gospel of Luke. It does not appear in the Gospels of Matthew, Mark and John. And yet, it provided the spark that inspired Lord Atkin to formulate in *Donoghue v Stevenson* a "general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances."[18]

[32] The facts of *Donoghue v Stevenson* are as follows. Donoghue alleged that she suffered shock and severe gastroenteritis from drinking a ginger beer containing the body of a partially decomposed snail. Donoghue argued that Stevenson, the manufacturer owed a duty of care to her as a consumer.

[33] The only question before the House of Lords was a question of law. Lord Atkin framed the question as follows:

> The question is whether the manufacturer of an article of drink sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.[19]

[34] To answer the question, Lord Atkin was inspired by the Parable of the Good Samaritan in the Gospel of Luke.[20] The Parable reads as follows:-

> [25] On one occasion an expert in the law stood up to test Jesus. "Teacher," he asked, "what must I do to inherit eternal life?"

16 [1932] AC 562.
17 [1941] 3 All ER 338, HL.
18 [1932] AC 562, HL at 580.
19 Ibid, at 578.
20 Applegarth P, "Lord Atkin: Principle and Progress" (2016) 90 *Australia Law Journal* 711 at 732.

> [26] "What is written in the Law?" he replied. "How do you read it?"
>
> [27] He answered, "Love the Lord your God with all your heart and with all your soul and with all your strength and with all your mind"; and, "Love your neighbour as yourself."
>
> [28] "You have answered correctly," Jesus replied. "Do this and you will live."
>
> [29] But he wanted to justify himself, so he asked Jesus, "And who is my neighbour?"
>
> [30] In reply Jesus said: "A man was going down from Jerusalem to Jericho, when he was attacked by robbers. They stripped him of his clothes, beat him and went away, leaving him half dead. [31] A priest happened to be going down the same road, and when he saw the man, he passed by on the other side. [32] So too, a Levite, when he came to the place and saw him, passed by on the other side. [33] But a Samaritan, as he travelled, came where the man was; and when he saw him, he took pity on him. [34] He went to him and bandaged his wounds, pouring on oil and wine. Then he put the man on his own donkey, brought him to an inn and took care of him. [35] The next day he took out two denarii[e] and gave them to the innkeeper. 'Look after him,' he said, 'and when I return, I will reimburse you for any extra expense you may have.'"
>
> [36] "Which of these three do you think was a neighbour to the man who fell into the hands of robbers?"
>
> [37] The expert in the law replied, "The one who had mercy on him."
>
> Jesus told him, "Go and do likewise."

[35] Lord Atkin then formulated what is now known as the famous "neighbour principle" in establishing the classical test for the existence of a duty of care in the tort of negligence.[21] He held:

> The rule that you are to love your neighbour becomes in law: You must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my

21 Geoffrey Lewis, *Lord Atkin* (Butterworth, 1983), p 58.

> neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[22]

Liversidge v Anderson

> "'When I use a word,' Humpty Dumpty said, … 'it means just what I choose it to mean, neither more nor less.' …"
>
> *Through the Looking Glass* by Lewis Carroll

[36] One of the most famous references to literature in a judgment can be found in Lord Atkin's lone dissent in the wartime decision of *Liversidge v Anderson*[23] in the House of Lords where Lord Atkin quoted the exchange between Humpty Dumpty and Alice from *Through the Looking Glass* by Lewis Carroll.

[37] *Liversidge* was decided when the UK was at war with Nazi Germany. Prior to the outbreak of war, it was widely feared that there would be people in the UK who would aid the Nazis in their war against the UK. A Bill was thus passed which allowed the Secretary of State to make a detention order against any person for purposes of public safety. The wording of regulation 18B of the Defence (General) Regulations 1939 was initially as follows:

> The Secretary of State, *if satisfied* with respect to any particular person that with a view to prevent him from acting in any manner prejudicial to the public safety or the defence of the Realm it is necessary to do so, may make an order.[24]
>
> (Emphasis added.)

[38] Due to severe public disquiet, regulation 18B was subsequently amended to read as follows:

> If the Secretary of State *has reasonable cause to believe* any person to be of hostile origin or associations, or to have been recently concerned in acts prejudicial to the public safety or the defence of the Realm or in the preparation or instigation of such acts and that by reason

22 [1932] AC 562, HL at 580.
23 [1941] 3 All ER 338, HL.
24 Lord Tom Bingham, "The Case of *Liversidge v Anderson*: The Rule of Law Amid the Clash of Arms" (2007) 43 *The International Lawyer* 33 at 34.

> thereof, it is necessary to exercise control over him, he may make an order against the person directing that he be detained.[25]
>
> (Emphasis added.)

[39] Liversidge who was detained under this regulation sued the Home Secretary for false imprisonment. The issue before the House of Lords was on the statutory interpretation of regulation 18B. Liversidge argued that the words required that there must be an external fact as to the reasonable cause for the belief. The Home Secretary argued that he only had to believe that he had reasonable cause.

[40] Four of the five Law Lords agreed with the Home Secretary. The majority held that where the Secretary of State honestly asserted that he had reasonable cause to believe that one of the necessary conditions existed, the arrest was considered lawful.[26] As such, the appeal by Liversidge was dismissed.

[41] Lord Atkin favoured an objective interpretation and held that under the regulation, the Home Secretary should have reasonable grounds for detention. As part of his reasoning, Lord Atkin made his famous reference to *Through the Looking Glass*:

> I protest, even if I do it alone, against a strained construction put upon words, with the effect of giving an uncontrolled power of imprisonment to the Minister. To recapitulate, the words have only one meaning. They are used with that meaning in statements of the common law and in statutes. They have never been used in the sense now imputed to them. They are used in the Defence Regulations in the natural meaning, and, when it is intended to express the meaning now imputed to them, different and apt words are used in the Defence Regulations generally and in this regulation in particular. Even if it were relevant; which it is not, there is no absurdity, or no such degree of public mischief as would lead to a non-natural construction.
>
> I know of only one authority which might justify the suggested method of construction. *"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you can make*

25 Ibid.
26 Lord Tom Bingham, supra n 24 at 36.

> *words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master – that's all."* (ALICE THROUGH THE LOOKING GLASS, c. vi).[27]

[42] Lord Atkin's dissenting judgment has been called as one of the "most celebrated dissenting judgments" by Lord Bingham of Cornhill, former Lord Chief Justice of England and Wales.[28]

[43] Lord Atkin had used the exchange between Humpty Dumpty and Alice to disapprove of the other Law Lords' method of construction. The inclusion of the exchange was highly controversial.[29]

[44] In fact, Lord Simon who was the Lord Chancellor of the day had written to Lord Atkin suggesting that the Lewis Carroll reference should be removed from his judgment.[30] Lord Simon said:

> My Dear Atkin,
>
> I do hope you will not resent it if I write this private and friendly note.
>
> I asked … this morning to let me see, in confidence, the speeches prepared for the 18B judgments …
>
> … my eye catches your very amusing citation from Lewis Carroll. Do you really, on final reflection, think this is necessary? I fear that it may be regarded as wounding to your colleagues who take the view you satirise, and I feel sure you would not willingly seek to hold them up to ridicule. I am all in favour of enlivening judgments with literary allusion but I would venture (greatly daring I know) to ask you whether the paragraph should be retained. Of course it is entirely for you. But I have gained so much from occasional suggestions of yours (mostly, it is true, in cases when we have been sitting together) and I trust you will forgive this query. I at any rate feel that neither the dignity of the House, nor the collaboration of

27 *Liversidge v Anderson* [1941] 3 All ER 338, HL.

28 Lord Tom Bingham, supra n 24 at 36.

29 Lord Justice Jack Beatson, "Judicial Independence: Internal And External Challenges and Opportunities", Atkin Lecture, Judiciary UK (November 14, 2017), https://www.judiciary.uk/wp-content/uploads/2017/12/beatson-lj-atkin-lecture-20171201.pdf (accessed September 4, 2021).

30 Ibid; and see Geoffrey Lewis, supra n 21 at pp 138–157.

colleagues, nor the force of your reasoning would suffer from the omission.

Yours ever,
John Simon[31]

[45] Lord Atkin declined to do so. He replied the following day:

My Dear Simon,

I thoroughly understand and appreciate your kind intentions in writing as you do, and I feel sure that you will understand if I write frankly in answer. The present cases as I see them do not merely involve questions of the liberty of the particular persons concerned but involve the duty of the court to stand impartially between the subject and the executive. I feel strongly about the matter, and I am not dismayed that at present I stand alone.

I have the highest esteem for my colleagues. If I had not I could have used very different language to what I have used. I have not the slightest intent to ridicule them, nor I think does the passage you mention ridicule them.

…

With many thanks.

Always yours,
A.[32]

[46] Lord Atkin was subsequently cold-shouldered by his four colleagues as they felt wounded by his "unnecessary and gratuitous" literary reference. More recently, in 2015, Justice PT Applegarth of the Supreme Court of Queensland had opined that "it was an unfortunate feature of Lord Atkin's uncompromising attitude that such a brilliant judgment took an unnecessarily swipe at his colleagues with his humiliating reference to Alice in Wonderland (sic)."[33]

[47] Lord Atkin's sole dissenting judgment has now become the prevailing law in the English and Commonwealth jurisprudence that

31 Geoffrey Lewis, ibid, at p 139.
32 Ibid.
33 PDT Applegarth, "Lord Atkin: Principle And Progress" (2016) 90 *Australia Law Journal* 711 at 712.

the words "reasonable cause to believe" requires proof of an objective fact and not a mere subjective belief.[34] It is clear that the reference to *Through the Looking Glass* by Lord Atkin brings his dissenting judgment to the public's attention. This outcome perhaps arguably supports the philosophy of Justice Scalia mentioned earlier in this article that when drafting his dissents, "It is very important to make dissents interesting", Justice Scalia reiterated, adding that he writes his dissents primarily to attract the attention of law professors and law students. "So I will quote Shakespeare. I will use Bugs Bunny. I will use whatever will attract their attention."[35]

United States ("US") judgments

> "… whether Leviathan can long endure so wide a chase, and so remorseless a havoc; whether he must not at last be exterminated from the waters, and the last whale, like the last man, smoke his last pipe, and then himself evaporate in the final puff."
>
> *Moby Dick* by Herman Melville

[48] In *Japan Whaling Association v American Cetacean Society*,[36] wildlife conservationists filed a suit for a writ of mandamus to compel the Secretary of Commerce to certify that Japan had violated the International Whaling Commission's ("IWC") zero quota. The District Court granted summary judgment for the environmental groups and ordered the Secretary of Commerce to certify that Japan was in violation of IWC's zero whale quota. The Court of Appeal affirmed the decision.

[49] In a narrow five to four decision, the US Supreme Court allowed the appeal. Justice Marshall penned a strong dissent and quoted Herman Melville's *Moby Dick* in his judgment:

> I would affirm the judgment below on the ground that the Secretary has exceeded his authority by using his power of certification, not as a means for identifying serious whaling violations, but as a means for evading the constraints of the Packwood Amendment. Even focusing,

34 Ibid, at 743.
35 Cynthia Claytor, supra n 7.
36 478 US 221(1986).

> as the Court does, upon the distinct question whether the statute prevents the Secretary from determining that the effectiveness of a conservation program is not diminished by a substantial transgression of whaling quotas, I find the Court's conclusion utterly unsupported. I am troubled that this Court is empowering an officer of the Executive Branch sworn to uphold and defend the laws of the United States, to ignore Congress' pointed response to a question long pondered: "*whether Leviathan can long endure so wide a chase, and so remorseless a havoc; whether he must not at last be exterminated from the waters, and the last whale, like the last man, smoke his last pipe, and then himself evaporate in the final puff.*"
>
> H. Melville, Moby Dick 436 (Signet ed. 1961).[37]

[50] The second US case I will refer to is the 1988 Supreme Court case of *Coy v Iowa*.[38]

> "Then call them to our presence – face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak …"
>
> *Richard II* by William Shakespeare

[51] In the 1988 Supreme Court case of *Coy v Iowa*,[39] the defendant was accused of sexually assaulting two 13-year-old girls. When the two girls testified against him in open court, a screen was put up between the witness stand and the defendant's table. The defendant was convicted. He appealed on the ground that his sixth amendment "right… to be confronted with the witnesses against him" was violated.[40]

[52] The question was whether the confrontation clause of the Sixth Amendment could be interpreted, in a prosecution for alleged child abuse, to permit the complaining witnesses to testify at trial behind a screen to prevent face-to-face eye contact with the accused.[41]

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37 Ibid.
38 487 US 1012 (1988).
39 Ibid; and see Bruce Allen Murphy, *Scalia: A Court of One* (Simon & Schuster, 2015), p 153.
40 Robert H Skilton, "Shakespeare and the Supreme Court" (1991) XXI(4) *University of Wisconsin Law School Forum, Gargoyle* 4, https://media.law.wisc.edu/s/c_420/yzkwm/gargoyle_21_4_2.pdf (accessed August 30, 2021).
41 Ibid.

[53] Justice Scalia, who wrote for the majority held that the Iowa procedure was "unconstitutional".[42] Justice Scalia quoted from *Richard II* by Shakespeare with Richard II saying:

> Then call them to our presence – face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak …[43]

[54] Justice Scalia concluded that "the irreducible literal meaning of the Clause [must be] a right to meet face to face all those who appear and give evidence at trial".[44]

Conclusion

[55] In my opinion, a judicious use of literature in particular the more famous classics in the grounds of decision adds flavour and context to the decision. It is, however, a literary device not for the faint of heart. A sure and deft hand is needed.

42 487 US 1012 (1988).

43 Ibid.

44 Ibid, at 1021; and see Bruce Allen Murphy, *Scalia: A Court of One* (Simon & Schuster, 2015), p 154.

Anti-Suit Injunctions in Maritime Disputes: A Trend That Threatens To Be Out of Control?*

by

*Justice Belinda Ang***

Abstract

This article discusses three broad areas relating to the anti-suit injunction in maritime disputes: (a) the grant of the anti-suit injunction against non-parties; (b) the possibility of a damages claim for breach of a forum agreement; and (c) the enforcement of the anti-suit injunction. There has been a significant expansion in the scope of the anti-suit injunction, primarily spearheaded by the English courts. As we venture into these largely unchartered waters, it is critical that we do not lose our "north star" – ensuring that the anti-suit injunction serves the ends of justice rather than becoming a litigation tactic and procedural weapon where satellite litigation and legal costs distract parties' attention from the main event.

Introduction

[1] Anti-suit injunctions have been described in common law jurisdictions as "the most internationally sensitive prop in the English court's box of tricks".[1] In the United States ("US"), the anti-suit

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** Judge of the Supreme Court of Singapore.

1 Thomas Raphael QC, "Do As You Would Be Done By? System-Transcendent Justification and Anti-Suit Injunctions" [2016] LMCLQ 256 ("*System-Transcendent Justification*") at 257.

jurisdiction is familiar under the doctrine of equitable estoppel. As a result of its increasing popularity over the years and its frequent appearances on the dockets of courts, the anti-suit injunction as a strategic tool has, to some extent, "become legitimised by familiarity".[2] However, we must not forget that it also has the potential to attract significant controversy and debate.

[2] In this article, I will discuss three broad areas relating to the anti-suit injunction: (a) the grant of the anti-suit injunction against non-parties; (b) the possibility of a damages claim for breach of a forum agreement; and (c) the enforcement of the anti-suit injunction. Of course, this article does not purport to provide an exhaustive discussion of these three areas. Nevertheless, it hopes to highlight some of the main points of interest, which can serve to generate further discussion in the future. What is clear is that anti-suit injunctions and damages for breaches of forum agreements – powerful tools at the disposal of common law courts and tribunals – are likely to ensure that forum agreements in favour of such courts or tribunals are complied with.

[3] It has been said, and it is true, that shipping often spearheads the development of the common law in different areas and the anti-suit injunction is no exception. It is therefore not surprising that many notable examples of the power of anti-suit injunctions have been developed in shipping cases decided by the English courts. English courts have extended the grant of anti-suit injunctions on a contractual basis to the grant of anti-suit injunctions on a "*quasi*-contractual" basis, giving rise to the so-called "*quasi*-contractual anti-suit injunction" issued against non-parties to the forum agreement. English courts have also awarded damages for breach of forum agreements. Such liability has been founded on breach of contract, the tort of inducing breach of contract, and even breach of an equitable obligation. In principle, the damages award could extend to all the losses suffered by the claimant which had been caused by the counterparty's breach of the forum agreement, subject to the normal rules of remoteness, causation, and mitigation. Damages could therefore potentially include all unrecovered costs of the foreign proceedings, as well as any amount that the claimant is ordered by the foreign court to pay and does pay in damages.

2 Richard Fentiman, "Anti-Suit Injunctions – Comity Redux?" (2012) CLJ 273 at 273.

[4] The variety of issues surrounding the remedy of damages and the expansive anti-suit jurisdiction, where non-parties to forum agreements can sue those who themselves are non-parties to the forum agreements, I hasten to suggest, speaks to the unrestrained reach of anti-suit injunctions. The title of this article draws attention to the trend of the ever-expanding scope of the anti-suit jurisdiction, as more and more cases come up to widen the boundaries of anti-suit injunctions in shipping and other international commercial disputes.

General principles

[5] Before turning to the three areas mentioned above, I briefly set out some of the general principles surrounding the anti-suit injunction in Singapore (which are the same principles as in England for anti-suit relief). It is well-established that the anti-suit injunction is an equitable remedy and that the court will exercise its jurisdiction to grant an anti-suit injunction in cases where the ends of justice require it.[3]

[6] There are three main categories of cases in which anti-suit injunctions have been granted, the first two of which are the main focus of this article:[4]

(a) First, anti-suit injunctions granted on the contractual basis. When foreign proceedings are commenced in breach of a forum agreement between the direct contracting parties, an anti-suit injunction will be granted to restrain the party in breach of the agreement, unless there are strong reasons otherwise.[5] This will encompass proceedings commenced in breach of exclusive jurisdiction clauses, arbitration agreements, and under Singapore law, possibly even non-exclusive jurisdiction clauses.[6]

(b) Second, anti-suit injunctions granted on the basis that the commencement of the foreign proceedings by the anti-suit respondent amounts to vexatious or oppressive conduct. In

3 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 ("*Sun Travels*") at [65].

4 Chng Wei Yao Kenny, "Breach of Agreement *Versus* Vexatious, Oppressive and Unconscionable Conduct: Clarifying their Relationship in the Law of Anti-Suit Injunctions" (2015) 27 SAcLJ 340 ("Kenny Chng") at para 7.

5 *Sun Travels*, supra n 3, at [68].

6 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779; Kenny Chng, supra n 4, at paras 12–17.

such cases, apart from the question of vexation or oppression, the court will consider other factors including whether the anti-suit respondent is amenable to the jurisdiction of the Singapore court, whether Singapore is the natural forum for the resolution of the dispute between the parties, and whether the anti-suit respondent would be unjustly deprived of any legitimate juridical advantages sought in the foreign proceedings.[7]

(c) Third, anti-suit injunctions granted to restrain the prosecution of foreign proceedings which amount to an abuse of the process of the Singapore court. This category of cases is conceptually distinct from the first two categories – the first two categories are founded on the court's equitable jurisdiction, whereas the third category is founded on the court's inherent jurisdiction to prevent the abuse of its process.[8]

Anti-suit injunctions and non-parties

[7] This part of the article focuses on anti-suit injunctions that are granted on the contractual basis, that is, on the basis of an agreement not to commence or continue legal proceedings in a foreign forum. A straightforward example is an anti-suit injunction that is sought to restrain the *direct* contracting party from acting contrary to the jurisdiction or arbitration agreement. Under Singapore law, this very ground may also encompass proceedings commenced in breach of non-exclusive jurisdiction clauses. In all of these cases, the anti-suit injunction is intended to prevent a breach of the forum agreement between the *direct* contracting parties. The area that merits particular consideration is the issuance of anti-suit injunctions against *non-parties* (i.e. persons who are not direct contracting parties). In this situation, an anti-suit injunction is granted "where the injunction defendant may not fully be party to and bound by a contractual forum clause as a matter of contract, but [is] nevertheless … required to comply with the effect of the clause".[9] This is the area of anti-suit jurisprudence where

7 *Sun Travels*, supra n 3, at [66]; Kenny Chng, supra n 4, at paras 8–10.

8 *Beckkett Pte Ltd v Deutsche Bank AG* [2011] 2 SLR 96 at [19]; *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 at [22]; *Masri v Consolidated Contractors International (UK) Ltd and others (No 3)* [2009] QB 503 ("*Masri*") at [100]; Kenny Chng, supra n 4, at para 7.

9 Thomas Raphael QC, *The Anti-Suit Injunction*, 2nd edn (Oxford University Press, 2019) ("*The Anti-Suit Injunction*"), para 10.01.

English courts have extended the grant of anti-suit injunctions founded on a contractual right not to be sued in a forum other than the one agreed to between the parties to the grant of anti-suit injunctions on a "*quasi*-contractual" basis.[10] The "*quasi*-contractual" ground for an anti-suit injunction appears to apply where there are foreign proceedings brought by the anti-suit respondent for breach of contract, there is an English exclusive jurisdiction clause or London arbitration clause in that contract and the anti-suit applicant denies that it is a party to that contract. In this developing line of English cases, non-parties can be either anti-suit applicant or anti-suit respondent. I will be identifying with examples the various forms of *quasi*-contractual cases shortly. I will also be discussing the juridical approach of the English courts to determining when persons who are not even direct parties to a forum agreement can be subject to the anti-suit jurisdiction of the English courts. In other words, when will anti-suit injunctions be issued and when will anti-suit injunctions not be granted?

[8] Recently, the Singapore High Court in *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd*[11] ("*Hai Jiang 1401*") was invited to consider this "*quasi*-contractual" ground that had originated from the English decision in *Sea Premium Shipping Ltd v Sea Consortium Pte Ltd*[12] ("*Sea Premium*"). Quentin Loh J (as he then was) opined that the *Sea Premium* line of cases were "persuasive" and found them "applicable as part of Singapore law",[13] meaning that the court's anti-suit injunction jurisdiction could be invoked on the "*quasi*-contractual" ground. At present, *Hai Jiang 1401* is good law until an opportunity arises for the Singapore Court of Appeal or the Appellate Division to consider that decision and come to a different view.

[9] However, the decision in *Hai Jiang 1401* is not without its critics. As Associate Professor Paul Myburgh puts it, the expansion of the scope of the contractual anti-suit injunction to a non-party on the basis of the *Sea Premium* jurisdiction "gives pause for thought".[14] He

10 The term "*quasi*-contractual" is a misnomer, as the grant of anti-suit injunctions in this context has nothing to do with unjust enrichment and restitutionary claims, which the "*quasi*-contractual" terminology has traditionally been associated with.

11 [2020] 4 SLR 1014.

12 [2001] EWHC 540 (Admlty).

13 *Hai Jiang 1401*, supra n 11, at [81].

14 Paul Myburgh, "Non Parties, Forum Agreements and Expanding Anti-Suit Injunctions" [2020] LMCLQ 345 ("Myburgh") at 352.

raises two points for consideration. First, he argues that the need for caution in issuing anti-suit injunctions suggests that a contractual anti-suit injunction should not be issued unless the court can point to a clear and direct breach of a forum agreement between the parties. This means examining the existence and governing law of the forum clause and interpreting the scope of the said clause in accordance with its governing law to determine if the nature and substance of the dispute fall within the ambit of the clause. As the nature of the inquiry for anti-suit injunctions is the same – i.e. whether there has been a breach of the forum agreement – in principle, it ought not to make any difference whether that forum agreement is governed by Singapore law or foreign law. Expert evidence of foreign law adduced in the usual way suffices to assist the Singapore court in determining the matter. Second, Associate Professor Myburgh notes that the conceptual foundation for issuing the contractual anti-suit injunction in non-party cases remains unclear. Similarly, Thomas Raphael QC points out that in non-party cases, "there is no actual contract, and the idea that a party claiming in another's shoes should always be bound by a forum clause in the original contract is not universally shared" although it has "real moral force".[15] These points are not without merit. Indeed, Loh J recognised in *Hai Jiang 1401* that "this is a complex area of law" where "the juridical underpinnings … are underdeveloped" and "the boundaries of the effect of exclusive forum clauses … on third parties are being tested".[16]

[10] In grappling with these complex questions, it may be useful to distinguish between the various types of non-party cases that have arisen. An understanding of the specific basis for the right that the non-party is seeking to enforce (or that is sought to be enforced against the non-party) may shed some light on the question of whether the non-party anti-suit applicant should be allowed to avail itself of the original or extended contractual anti-suit injunction jurisdiction. In this regard, the cases have generally been divided into two broad categories.[17]

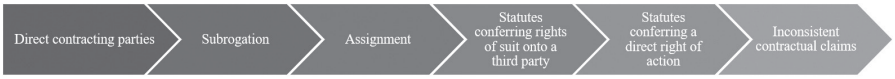
(a) First, the derived rights category. Here rights are acquired by a third party (i.e. the non-party) who is not an original contracting party to the contract containing a forum clause. When the non-

15 *The Anti-Suit Injunction*, supra n 9, at para 10.79.
16 *Hai Jiang 1401*, supra n 11, at [82]–[83].
17 *The Anti-Suit Injunction*, supra n 9, at para 10.02.

party brings a claim based on such a derived right, the party being sued (who is a party to the contract) seeks an anti-suit injunction on the basis of the forum clause contained in that contract. In English jurisprudence, the obligation of the non-party to comply with the forum clause has sometimes been referred to as a "derived rights obligation".

(b) Second, the inconsistent contractual claims category where the anti-suit applicant denies the existence or validity of the contract under which it is sued but the anti-suit respondent makes a claim under or arising out of the contract in violation of the forum clause contained therein. In these circumstances, the obligation on the part of the anti-suit respondent to comply with the forum clause has been referred to in English jurisprudence as an "inconsistent claims obligation".

[11] I propose to draw finer distinctions within these broad categories, in order to lend greater conceptual clarity to the discussion. I will also situate these sub-categories on a spectrum, gradated according to their similarity to the traditional case involving direct contracting parties. I would suggest that the further the facts stray from this archetypal case, the more circumspect the court ought to be about granting a contractual anti-suit injunction. The following diagram neatly encapsulates the various sub-categories which I will discuss, as well as their degree of similarity to the traditional situation involving direct contracting parties.



[12] Before I turn to the various categories of cases, a word of clarification. I have excluded from these various categories of cases the familiar jurisdiction or arbitration clauses found in bills of lading and charterparties. Every shipping lawyer knows that such clauses can bind anyone who subsequently becomes either a holder or endorsee of the bills of lading by virtue of the Bills of Lading Act.[18] There is also the situation where jurisdiction or arbitration clauses in the relevant charterparty are somehow incorporated by reference and thereby form part of the terms of the bills of lading.

18 (Cap 384, 1994 Rev Ed).

Subrogation

[13] Turning now to the various categories of cases, the situation that is arguably the most akin to the archetypal case involving direct contracting parties is where a non-party derives rights of suit against a contractual party by virtue of the doctrine of subrogation. Examples of cases involving subrogated claims include *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH* (*The Jay Bola*)[19] ("*The Jay Bola*") and *Fair Wind Navigation SA v ACE Seguradora SA*.[20] In these cases, the insured was a contracting party whose claim was subsequently subrogated to the insurer. The insurer as subrogee then brought an action against the other contracting party, ignoring the forum clause. In response, the contracting party sought a contractual anti-suit injunction against the insurer, which the court readily granted, applying the benefit and burden analysis wherein the insurer was not entitled to take the benefit of the contract (i.e. the right to claim damages for breach of contract) without accepting its burden (i.e. the obligation to arbitrate).

[14] This analysis is straightforward and is justifiable in principle, having regard to the nature and effect of the doctrine of subrogation. It is often said that the insurer "steps into the shoes" of the insured by virtue of the subrogation. Indeed, the subrogated proceedings themselves are often, if not always, brought in the name of the insured. Accordingly, it is not controversial that the insurer's derived rights are regarded as subject to the forum clause contained in the contract between the insured and its counterparty.[21] For these reasons, it is generally accepted that a contractual anti-suit injunction may be issued against a non-party as subrogee, notwithstanding the absence of a direct contractual relationship between the anti-suit applicant and the anti-suit respondent. Conversely, if the non-party as subrogee is sued by the contracting party in respect of the subrogated claim, in principle, the non-party as subrogee should also be able to seek a contractual anti-suit injunction against the contracting party.

19 [1997] 2 Lloyd's Rep 279.
20 [2017] EWHC 3352 (Comm).
21 *The Jay Bola*, supra n 19, at 284–285.

Assignment

[15] Next, we have cases where a non-party derives rights of suit against a contractual party by virtue of assignment. English courts have no difficulty enforcing jurisdiction or arbitration clauses against assignees of rights.[22] The underlying principle (called the "conditional benefit" principle) is that an assertion of assigned rights carries with it a duty or burden to comply with the forum agreement. Whilst the burden of a contract (e.g. the obligation under a forum clause) cannot be assigned, the so-called "conditional benefit" principle is taken to be an exception to that general rule that in an assignment, only the benefits of the contract pass from the assignor to the assignee. This exception ensures that the third-party assignee who wishes to take action to enforce its substantive right is bound to enforce its right by adhering to the forum agreement. Such an obligation is inextricably linked to the benefit assigned.

[16] I digress here for a moment. In the context of the English court's anti-suit jurisdiction, the applicable equitable principle, as identified by Steven Gee QC, is that "he who claims to enjoy rights cannot do so without honouring the conditions which are both relevant to and attached to the exercise of those rights".[23] Put differently, the anti-suit applicant has a recognised "equitable right" which is enforceable by injunction against the anti-suit respondent (a non-party assignee) who seeks to act inconsistently with the forum clause.[24] It is notable that English law treats the assignee's non-compliance with the forum agreement not as a breach of contract, but as a breach of an equivalent obligation in *equity* which the counterparty is entitled in equity to enforce against the assignee.

[17] Returning to the matter of assignment, while assignment cases are quite similar in purpose to subrogation cases, they remain doctrinally different. Consequently, the justification for issuing contractual anti-suit injunctions is perhaps not as clear under Singapore law because,

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22 Steven Gee QC, *Commercial Injunctions*, 6th edn (Sweet & Maxwell, 2016) ("Gee"), para 14-024; *Montedipe SpA and another v JTP-RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep 11 at 15; *Rumput (Panama) SA and Belzetta Shipping Co SA v Islamic Republic of Iran Shipping Lines (The Leage)* [1984] 2 Lloyd's Rep 259; *Shayler v Woolf* [1946] Ch 320 ("*Shayler*"); *Aspell v Seymour* [1929] WN 152.

23 Gee, supra n 22, at para 14-024.

24 *Airbus SAS v Generali Italia SpA and others* [2019] 2 Lloyd's Rep 59 at [95]–[97].

unlike in subrogation cases, there is some ambiguity surrounding the assignability of a jurisdiction or arbitration clause and the effect of the same on an assignee.

[18] Turning first to the assignability of a jurisdiction or arbitration clause, it has often been *assumed* that such clauses are capable of assignment.[25] In *Hai Jiang 1401*, Loh J had no difficulty concluding that there was a *prima facie* case that the rights and benefits of the arbitration clause had been assigned to a non-party, thus warranting the grant of a contractual anti-suit injunction in favour of that non-party.[26] However, it is worth taking a closer look at how such an assignment will operate as a matter of Singapore law. It is well-established that an arbitration agreement is founded upon the consent of the original contracting parties. How then does the element of consent feature in the context of assignment? One argument may be that the consent to arbitrate "is located in the assignee's consent to take the benefit of the substantive right".[27] However, as the Court of Appeal pointed out in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* ("*Rals International (CA)*"), this "potentially gives rise to another conceptual difficulty", which is that "allowing non-parties to an arbitration agreement to avail themselves of the right to arbitration under the agreement would, on its face, conflict with the doctrine of privity".[28] One might suggest that it is perhaps because of the ambiguity surrounding the assignability of arbitration clauses that the effect of arbitration clauses on third parties had to be legislated via section 9 of the Contracts (Rights of Third Parties) Act ("CRTPA"),[29] which I discuss in greater detail below.

[19] Even if a jurisdiction or arbitration clause is capable of assignment, there remain significant difficulties surrounding the question of the effect of such a clause on an assignee as a matter of Singapore law. In *Rals International (CA)*, the Court of Appeal observed in *obiter* that an assignee of a contractual right may be *entitled* to exercise all of the remedies of the assignor in respect of that right, including the

25 *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 ("*Rals International (CA)*") at [52]–[53], citing *Shayler*, supra n 22.

26 *Hai Jiang 1401*, supra n 11, at [45].

27 *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd* [2016] 1 SLR 79 ("*Rals International (HC)*" at [118].

28 *Rals International (CA)*, supra n 25, at [55].

29 (Cap 53B, 2002 Rev Ed).

right to arbitrate disputes with the obligor falling within the scope of the arbitration agreement.[30] In the court's view, the more difficult question was whether the assignee is *obliged* to submit to arbitration all disputes with the obligor falling within the scope of the arbitration agreement. In the proceedings below, the High Court had opined that, according to the principle of conditional benefit, the assignee must take the assigned contractual benefit along with the burden of arbitration which is an intrinsic part of the right.[31] Ultimately, the Court of Appeal did not reach any firm view and left the issue open. One of the court's concerns was how to reconcile the above propositions with the "well-entrenched common law principle that contractual burdens cannot be assigned".[32] By analogy, such concerns would extend also to cases involving an exclusive jurisdiction clause.

[20] This is a complex issue that requires some unravelling. I will come to a possible approach to this conundrum later in my discussion on the CRTPA (see [27] below). It suffices for now to observe that ultimately, whether an assignee can take the benefit of a forum agreement and can be obliged to adhere to the forum agreement is a preliminary question that will need to be answered before the contractual anti-suit injunction even becomes available as a potential remedy.

Statutes conferring rights of suit onto a third party

[21] I turn now to cases involving statutes that confer rights of suit onto a non-party. An example of such a statute is Singapore's CRTPA,[33] which was based on the Contracts (Rights of Third Parties) Act 1999 in the United Kingdom ("the UK CRTPA").[34] In such cases, as in cases concerning assignment, a similar preliminary question arises as to

30 *Rals International (CA)*, supra n 25, at [55].

31 *Rals International (HC)*, supra n 27, at [111]–[113], [117]–[123].

32 *Rals International (CA)*, supra n 25, at [53]–[56]. See also *Aspen Underwriting Ltd & Ors v Kairos Shipping Ltd and others (The Atlantik Confidence)* [2020] 2 WLR 909 at [26]–[28], where the United Kingdom Supreme Court discussed the principle of conditional benefit, citing the Singapore Court of Appeal's observations in *Rals International (CA)*, supra n 25, at [55].

33 It is noted, however, that s 7(4) of the CRTPA excludes the application of s 2 in the case of a contract for the carriage of goods by sea, or a contract for the carriage of goods by rail or road, or by air, which is subject to the rules of the appropriate international transport convention, except that a third party may, in reliance on s 2, avail himself of an exclusion or limitation of liability in such a contract.

34 Contracts (Rights of Third Parties) Act 1999 (c 31) (UK).

whether a third party can take the benefit or be made to bear the burden of a forum agreement pursuant to the CRTPA. It is only if this question is answered in the affirmative that the contractual anti-suit injunction will come into play.

[22] The operation of arbitration clauses and exclusive jurisdiction clauses in the context of the CRTPA was recently considered in a non-shipping case by the Court of Appeal in *VKC v VJZ and another*[35] ("*VKC*"). Two points about this decision are notable. First, the court held that exclusive jurisdiction clauses do not fall within the ambit of section 2(1)(b) of the CRTPA.[36] This means that, in the context of anti-suit injunctions, section 2(1)(b) of the CRTPA will not be able to assist a third party who seeks a contractual anti-suit injunction where an exclusive jurisdiction clause is involved.

[23] Second, the court considered the English Court of Appeal's decision in *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP*[37] ("*Fortress*"), and observed that section 8(1) of the UK CRTPA is based on a "conditional benefit" approach, ensuring that the third party who wishes to take action to enforce its substantive right is not only able to enforce it effectively by arbitration, but is also bound to enforce its right by arbitration.[38] In *Fortress*, the English Court of Appeal clarified that section 8(1) of the UK CRTPA applies only when the benefit of a contractual term is conferred on a third party, the exercise of which is subject to a procedural qualification to do so by arbitration. In such situations, the arbitration clause is a *procedural qualification* to a substantive right. This means that when a third party seeks to enforce a substantive right pursuant to the UK CRTPA, a condition of such enforcement is that it must do so by arbitration. However, a third party who is merely defending proceedings brought against it cannot insist on arbitration, unless it is clear from the language of the contract that the third party's right to avail itself of a particular defence is subject to the dispute being brought in arbitration. On the other hand, section 8(2) of the UK CRTPA applies when the *procedural right* to arbitrate is itself conferred on the

35 [2021] SLR 753.
36 Ibid, at [72].
37 *Fortress Value Recovery Fund I LLC and others v Blue Skye Special Opportunities Fund LP and others* [2013] 1 WLR 3466 ("*Fortress*").
38 *VKC*, supra n 35, at [63], citing Toulson LJ's decision in *Fortress*, ibid, at [42].

third party.[39] In such cases, the third party may choose whether or not to exercise this procedural right.

[24] Since section 9(1) and (2) of Singapore's CRPTA are *in pari materia* with section 8(1) and (2) of the UK CRTPA, and given the Court of Appeal's endorsement of *Fortress* in *VKC*, it seems likely that the Singapore courts will adopt a similar approach as the English courts in this regard. Notably, the English court's characterisation of the right to arbitrate as a procedural qualification or a procedural right echoes the Singapore High Court's observations in an earlier case that an arbitration agreement "is entered into, not as one of the parties' substantive rights or obligations, but only to prescribe a procedural right and obligation which caters for the possibility of future disputes over their substantive rights and obligations".[40] I pause to clarify, however, that the term "procedural right" is used in this discussion simply to describe a right that pertains to the *procedure* of dispute resolution. It does not refer to the procedural-substantive dichotomy typically used for purposes of characterisation under conflict of laws rules. Thus, an arbitration agreement being described as giving rise to a "procedural right" does not necessarily mean that the *lex fori* applies to govern disputes arising from that arbitration agreement.[41]

[25] In the context of anti-suit injunctions, the analysis in *VKC* and *Fortress* suggests that the UK CRTPA (and by extension, Singapore's CRTPA) may assist a *non-party* in obtaining an anti-suit injunction based on an arbitration clause, but only if the non-party can show that it falls within section 8(1) or (2) of the UK CRTPA, or section 9(1) or (2) of the Singapore CRTPA. However, the UK CRTPA (and the Singapore CRTPA) will not assist a *contracting party* to obtain an anti-suit injunction against a non-party based on an arbitration clause, unless the non-party is seeking to enforce a substantive right which is subject to the procedural qualification to arbitrate, or has chosen to exercise its procedural right to arbitrate.

[26] I use the facts of *Hai Jiang 1401* to illustrate this point. The case involved the vessel *MV Seven Champion* which had been bareboat

39 *VKC*, ibid, at [69]–[70].

40 *Rals International (HC)*, supra n 27, at [111]; see also *BXH v BXI* [2020] 1 SLR 1043 at [75].

41 See Koji Takahashi, "Damages for Breach of a Choice-of-Court Agreement" (2008) *Yearbook of Private International Law* 57 ("Takahashi") at 67–68.

chartered by Hai Jiang 1401 Pte Ltd ("Hai Jiang") to Lewek Champion Shipping Pte Ltd ("LCS"). Among other things, LCS undertook to Hai Jiang to remove the existing crane on the vessel, strengthen the vessel's structure and install a new higher capacity crane. Hai Jiang, LCS, and a sub-bareboat charterer then entered into a general assignment agreement, under which LCS assigned to Hai Jiang various rights and interests. Subsequently, crane upgrading works were carried out on the vessel pursuant to a crane upgrade agreement ("CUA") entered into between LCS and Singapore Technologies Marine Ltd ("STM"). The CUA provided that any dispute arising out of or in connection with the CUA was subject to arbitration in accordance with the rules of the Singapore Chamber of Maritime Arbitration. After LCS was wound up, STM commenced proceedings in Sharjah, United Arab Emirates, against Hai Jiang, seeking to recover the outstanding balance fees for works done to the vessel. Hai Jiang then sought an anti-suit injunction from the Singapore court to restrain STM from continuing with the Sharjah proceedings. As the party *being* sued, it does not appear that Hai Jiang was seeking to enforce any substantive right that was subject to a procedural qualification to do so by arbitration. In other words, it seems unlikely that Hai Jiang would have been able to avail itself of section 9(1) of the Singapore CRTPA. However, given Loh J's finding (on a *prima facie* basis) that Hai Jiang had been assigned the rights and benefits of the arbitration clause contained in the CUA,[42] Hai Jiang might have been able to avail itself of the benefit of the arbitration clause pursuant to section 9(2) of the Singapore CRTPA, in addition to being able to enforce the clause as assignee. This may have formed a reasoned basis upon which Hai Jiang could have been granted a contractual anti-suit injunction against STM.

[27] One might notice that this discussion regarding the CRTPA is reminiscent of the quandary faced in *Rals International (CA)* regarding whether an assignee can take the benefit of an arbitration agreement and/or be obliged to submit to arbitration disputes falling within the scope of the arbitration agreement. The underlying concern in the assignment cases and in the cases involving the CRTPA is ultimately that the law should *not* impose the pure burden to arbitrate onto non-contracting parties. Given this fundamental similarity, it may be possible to apply the approach under the CRTPA (which involves

42 *Hai Jiang 1401*, supra n 11, at [45].

statutory assignment) to cases involving contractual assignment. Under the CRTPA, a "burden" to arbitrate only arises: (a) as a procedural condition to the third party's exercise of a substantive right; or (b) when the third party has chosen to exercise the procedural right to arbitrate.[43] Reasoning by analogy, in a contractual assignment, a non-party as assignee will be entitled to and obliged to arbitrate in two situations. First, if the assignee is seeking to enforce an assigned substantive right which, as a matter of construction, is subject to a procedural qualification to do so by arbitration. This aligns with the principle of conditional benefit – the assignee must take the benefit of the substantive right along with the burden of arbitration. Second, if the procedural right to arbitrate has itself been assigned to the assignee,[44] and the assignee chooses to exercise that procedural right. Of course, we have to assume that the procedural right to arbitrate is assignable and that the effect of the procedural right covers arbitration with respect to non-parties. Outside of these two situations, an assignee can neither take the benefit of the arbitration agreement, nor be obliged to bear its burden. Taking this reasoning one step further, the same principles arguably ought to apply equally to exclusive jurisdiction clauses.

Statutes conferring a direct right of action against a wrongdoer's insurer

[28] Moving further down the spectrum, I turn now to the cases involving statutes that confer onto injured parties a direct right of action against the wrongdoer's insurer.[45] Examples of such cases include *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd*[46] and *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS*[47] ("*The Yusuf Cepnioglu*"). In these cases, foreign legislation

43 *VKC*, supra n 35, at [66]; see also UK Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242, 1996), para 14.15; Explanatory Notes to the UK CRTPA at paras 34–35.

44 See, e.g. in *Hai Jiang 1401*, supra n 11, at [45], where the High Court found that the arbitration clause itself had *prima facie* been assigned.

45 See, e.g. the Third Parties (Rights Against Insurers) Act (Cap 395, 1994 Rev Ed).

46 *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67.

47 [2016] EWCA Civ 386.

conferred onto the injured party a direct right of action against the shipowner's insurer, in light of the fact that the shipowner itself had become insolvent. After proceedings were commenced in a foreign court pursuant to such legislation, the shipowner's insurer sought an anti-suit injunction from the English court against the injured party based on an arbitration clause contained in the terms of the P&I Club cover. One of the main reasons for doing so was to secure the application of a "pay to be paid" clause in the terms of the P&I Club cover; such a clause would be unenforceable in foreign proceedings but enforceable in the contractual forum. In turn, this ensured the defeat of the injured party's claim as the insolvent shipowner had not expended any money to satisfy the injured party's claim. It is notable that these types of cases are likely to occur in the maritime context. The enactment of foreign legislation conferring direct rights of action onto injured parties is "far from uncommon", and most if not all shipowners are members of a P&I Club, the rules of which usually contain an arbitration clause and a "pay to be paid" clause.[48]

[29] Three points are notable about this type of cases. First, the characterisation test that was applied to the injured party's claim. In *The Yusuf Cepnioglu*, the English Court of Appeal determined on the evidence that the relevant Turkish statute did not give to the Turkish charterer an independent cause of action against the P&I Club. Instead, the direct-action statute allowed the charterer to enforce for its own benefit the contract between the insured (i.e. the shipowner) and the P&I Club, in which case the claim being essentially contractual in nature was governed by English law and subject to London arbitration under the P&I Club rules.

[30] Second, once the claim is characterised as contractual, the next query concerns the juridical basis for the court's grant of an anti-suit injunction in such cases, namely, whether it would be on the contractual basis as per the case of *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)*[49] ("*The Angelic Grace*") or on the vexatious or oppressive ground? One has to remember that in *The*

48 *The Yusuf Cepnioglu*, ibid, at [40]–[41]; it is noted that several jurisdictions including Spain, Turkey, Finland and several US states have domestic legislation conferring direct rights of action onto injured parties.

49 [1995] 1 Lloyd's Rep 87.

Yusuf Cepnioglu, the charterer was not a party to a contract with the P&I Club with its London arbitration clause. In that case, the charterer was pursuing a right given to it under Turkish law and there was nothing vexatious or oppressive about that. Longmore LJ held that *The Angelic Grace* applied for the reason that the anti-suit injunction was to protect the P&I Club's contractual right that the dispute be referred to arbitration, a contractual right which equity required the third party (i.e. the charterer) to recognise.[50] Moore-Bick LJ used the language of vexation and oppression while analogising the case to the contractual situation. His Lordship accepted the reasoning in *The Jay Bola,* as well as the principle that a claimant who became entitled to enforce a contractual claim directly against an insurer must comply with an arbitration clause in the contract of insurance. He saw "no distinction of principle" between the facts of *The Yusuf Cepnioglu* where the charterer obtained a statutory right to recover damages directly from an insurer and the position of a person who became entitled to enforce an obligation by virtue of an assignment or other transfer (as was the case in *The Jay Bola*).[51] The manner in which the charterer obtained the right to enforce for its own benefit was immaterial.

[31] We know that the application of the aforementioned principle to a straightforward case involving the original parties to an agreement containing an arbitration or jurisdiction clause is not controversial. However, I would argue that the further one strays from the position involving direct contracting parties, the more cautious the court should be in issuing contractual anti-suit injunctions.

[32] Third, apart from the ambiguity surrounding the juridical basis for the grant of an anti-suit injunction in such cases, it is also notable that concerns regarding the "conflict of conflicts" are more pertinent in this context. It is often the case in such situations that the rules on conflict of laws in the local forum will point in a diametrically different direction from the rules on conflict of laws in a foreign forum. For example, the foreign forum may characterise the claim differently from the local forum, as was the case in *The Yusuf Cepnioglu*. This may suggest that a more nuanced approach is required in such cases, even if one is to apply the strong-cause test. In this regard, Raphael QC has suggested employing what he terms a "system-transcendent"

50 *The Yusuf Cepnioglu*, supra n 47, at [35].
51 Ibid, at [51].

justification – a justification that is "capable of being rationalised on a universalisable basis … so that another legal system could, in principle, be rationally persuaded to accept them as legitimate from an international perspective, even if its own rules differ".[52]

Inconsistent contractual claims

[33] Finally, I turn to the category of cases that is arguably the most dissimilar from the archetypal case involving direct contracting parties – cases involving inconsistent contractual claims. An example is the case of *Qingdao Huiquan Shipping Co v Shanghai Dong He Xin Industry Group Co Ltd*[53] ("*Qingdao Huiquan*"). In that case, the shipowners agreed to carry a bulk cargo of nickel ore on board the vessel *Confidence Ocean* from Indonesia to China pursuant to a time charter. The charterers failed to pay hire and the shipowners exercised a lien over the cargo at the discharge port in China. The cargo receiver was a Chinese company called Emori (China) Co Ltd ("Emori"), from whom the shipowners sought to recover the sum owed. A settlement agreement was reached between Emori and the shipowners whereby Emori's agent, Shanghai Dong He Xin Industry Group Co Ltd ("SDHX"), would pay a lump sum representing the sums owed under the charter to the shipowners in return for the lifting of the lien over the cargo, notwithstanding the fact that SDHX was not a party to the agreement. It was also a term of the settlement agreement that the shipowners would pursue legal proceedings against the charterers to recover the sums due under the charter and then account to Emori for any sums recovered as a result, up to the amount received from SDHX. The settlement agreement was governed by English law and disputes were to be submitted to London arbitration. The shipowners sued the charterers, but no sums were recovered. Although SDHX paid the settlement sum, it alleged that there was an oral agreement with the shipowners in which it was agreed that the sum to be paid by SDHX was an advance for which it was entitled to a refund in any event. SDHX commenced legal proceedings in China to claim a refund of the sum paid under the settlement agreement and contended that because its claim was based on the alleged oral agreement, it was not bound by the English law and arbitration clause in the settlement agreement. In other words, an

52 *System-Transcendent Justification*, supra n 1, at 256.
53 [2019] 1 Lloyd's Rep 520.

inconsistent contractual claim was run in China. After it became clear from the Chinese proceedings that SDHX's claim was premised upon the settlement agreement, the shipowners applied to the English court for an interim anti-suit injunction restraining SDHX from pursuing the Chinese proceedings. The issue of whether there was an oral agreement with SDHX was immaterial in the circumstances. This was because the English court held that the basis of SDHX's claim in the Chinese proceedings was to seek a refund of the sum paid under the settlement agreement. Furthermore, although SDHX was not a party to the settlement agreement, SDHX was bound by the English law and arbitration clause contained therein.

[34] This decision is in line with the *Sea Premium* line of cases like *The Yusuf Cepnioglu* which support the principle that: (a) where an agreement contains a forum clause for the resolution of disputes, and (b) a third party who brings proceedings based on the agreement itself is in contravention of the forum clause, then (c) this provides the English court with sufficient grounds to grant an anti-suit injunction, on the basis that the English court must protect the anti-suit applicant's contractual right to settle disputes in accordance with the agreement. In *Qingdao Huiquan*, since SDHX (a non-party) wished to base its claim on the settlement agreement, it could not act inconsistently with the English law and arbitration clause contained therein. The English court would step in to protect the anti-suit applicant's contractual right to settle disputes in accordance with the settlement agreement unless there was a strong reason not to do so. As I alluded to earlier, this has also been referred to as the "*quasi*-contractual anti-suit injunction".

[35] *Quasi*-contractual anti-suit injunctions originated from a line of cases starting with *Sea Premium*, which was most recently endorsed in *Times Trading Corp v National Bank of Fujairah (Dubai Branch)*[54] ("*The Archagelos Gabriel*"). The facts of *The Archagelos Gabriel* are as follows. Times Trading Corp ("Times") applied to the English court for an interim injunction to restrain the National Bank of Fujairah (Dubai Branch) from suing or continuing with proceedings in Singapore. Times alleged that the proceedings in Singapore were in breach of the bank's obligation to arbitrate in London. The case concerned a cargo

54 [2020] EWHC 1078 (Comm); see also *Dell Emerging Markets (EMEA) Ltd and another v IB Maroc.com SA* [2017] EWHC 2397 (Comm).

of coal carried on board the vessel *Archagelos Gabriel* that had been delivered without production of the bills of lading. The bills of lading were held by the bank. The vessel was owned by Rosalind Maritime LLC ("Rosalind"). The bills of lading incorporated an arbitration clause requiring disputes to be submitted to London arbitration. The proceedings in Singapore were issued after the limitation period of 12 months. However, the bank commenced London arbitration against Rosalind before the expiry of the time bar. Rosalind asserted the existence of a bareboat charter between Rosalind and Times, making Times the correct counterparty to the bank's claim. The bank joined Times to the Singapore proceedings and applied to add Times as respondent to the London arbitration. Times brought the application for an anti-suit injunction to prevent continuation of the Singapore proceedings against it, relying on the arbitration clause. Times argued the anti-suit injunction application on the basis that it was a *contractual* anti-suit injunction application. The bank submitted that there was an issue as to who was the carrier and in those circumstances the court could not be satisfied that there was an arbitration clause between the bank and Times. The bank's argument took the arguments into cases on *quasi*-contractual anti-suit injunctions.

[36] The decision in *The Archagelos Gabriel* is of particular interest because of its detailed analysis of the English cases on *quasi*-contractual anti-suit injunctions. As mentioned earlier in this article, *quasi*-contractual anti-suit injunction cases in England have been divided into two categories: (a) the "derived rights" category – where the existence of the contract is not in doubt, but the person who has brought proceedings which are sought to be enjoined is not a direct party to that contract (as considered in *The Jay Bola*); and (b) the "inconsistent contractual claims" category (the *Sea Premium* line of cases) – where the anti-suit applicant denies the very existence of the contract (or validity of the forum agreement) under which it is sued but the anti-suit respondent seeks to make a claim under the contract in violation of the forum clause which forms part of the contract.

[37] Cockerill J in *The Archagelos Gabriel* opined that both categories of cases share a common underpinning, that is, the prevention of a party from taking the benefit of a substantive contract without also assuming the burden of the forum agreement contained therein. Whilst the facts of *The Archagelos Gabriel* did not fit into either category in that the existence of the direct contract between the two parties

which contained the arbitration agreement was in dispute, Cockerill J was nevertheless satisfied that the case fell within the ambit of the common principle. As such, it should be treated "as if" the injunction sought was contractual and *The Angelic Grace* was applied by analogy.

[38] Commercial law practitioners in England have described the outcome of the decision in *The Archagelos Gabriel* as "creative". First, the judgment demonstrates reliance on broad underlying principle to extend by analogy the ambit of *quasi*-contractual anti-suit injunctions that do not fall within specific existing categories. Second, it shows that an anti-suit injunction may be granted even though the requirement of showing a forum agreement between the parties to the requisite standard could not be met. Enthused by the flexible and pragmatic approach the English court is willing to take in order to reach an outcome that is just in all the circumstances, including the imposition of conditions to the anti-suit injunction where appropriate, commercial law practitioners will have reason to advise a client to apply for an anti-suit injunction even though a client's case does not fit neatly within the existing two broad categories.

[39] In *The Archagelos Gabriel*, the existence of a direct contract between the two parties was in dispute. Should the same approach be taken here in Singapore to grant "*quasi*-contractual anti-suit injunctions" without proof to the requisite standard the existence or validity of an arbitration or jurisdiction clause? I would suggest with difficulty. In *Hai Jiang 1401,* as a precondition to an anti-suit injunction application on a contractual basis, Loh J required proof, on a *prima facie* basis, of a valid arbitration agreement between the parties to the foreign proceedings.[55]

[40] Further, the juridical basis for the English court's grant of *quasi*-contractual anti-suit injunctions is not entirely clear. Some cases have adopted a contractual analysis. In *Sea Premium*, Steel J opined that although "the analogy [was] not complete", the case "should be decided to similar effect" as the contractual cases because the claim was of a contractual nature under the charterparty. The anti-suit applicant

55 *Hai Jiang 1401*, supra n 11, at [34]; see also the recent decision in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158, where the Court of Appeal held that when a debtor raises a dispute which is the subject of an arbitration agreement to resist a winding-up application filed on the basis of an unsatisfied debt, the *prima facie* standard of review applies.

was the new owner who claimed not to be party to the contract on which the charterer was suing. The former was allowed to enforce the arbitration clause in the charterparty because the charterer was seeking to bring a contractual claim under the charterparty. Similarly, in *Qingdao Huiquan*, Bryan J observed that an injunction was warranted because the anti-suit respondent was "not entitled to found a claim on rights arising out of a contract without also being bound by the forum provisions of that contract".[56]

[41] In contrast, other cases have adopted the language of vexation or oppression. For example, in *Jewel Owner Ltd and another v Sagaan Developments Trading Ltd (The MD Gemini)* ("*The MD Gemini*"), Popplewell J opined that it would be oppressive and vexatious for a party to commence foreign proceedings to enforce its rights under a contract without giving effect to the forum clause which was part and parcel of that contract, notwithstanding that the party being sued maintains that it is not a party to that contract.[57] In that case, the anti-suit applicant was the shipowner who claimed not to be a party to the bunker contract on which the bunker suppliers were suing. In similar vein, Raphael QC opines that there are three possible bases for the grant of an anti-suit injunction in cases involving inconsistent contractual claims: estoppel, the existence of an equitable obligation, and vexation or oppression. Putting Raphael QC's observations in context, the reason why the forum clause can be enforced by injunction in *Sea Premium* and *The MD Gemini* is that it would be inequitable or oppressive and vexatious for a party to a contract to seek to enforce a contractual claim arising out of that contract without respecting the forum clause within that contract. Raphael QC's views were endorsed in *Hai Jiang 1401*, where Loh J opined that "all three bases [were] capable of grounding an [anti-suit injunction] depending on the particular facts before the court".[58]

[42] It is apparent from the above that cases involving inconsistent contractual claims are the least similar to the archetypal case involving direct contracting parties. One may question whether the contractual anti-suit injunction should apply to a non-party just because the non-party's claim is a contractual one which is somehow connected

56 *Qingdao Huiquan*, supra n 53, at [31].
57 *Jewel Owner Ltd and another v Sagaan Developments Trading Ltd (The MD Gemini)* [2012] 2 Lloyd's Rep 672 at [15].
58 *Hai Jiang 1401*, supra n 11, at [83].

to the contract containing the forum agreement. The introduction of the so-called "*quasi*-contractual anti-suit injunction" is telling. It is worth looking into how the language of equitable rights and obligations began to seep into the discussion on anti-suit injunctions and non-parties. In order to bridge the gap between contractual cases and *quasi*-contractual cases, the use of such language in the English court's reasoning has become quite prevalent and expansive, in that anti-suit injunctions have been granted on so-called *quasi*-contractual grounds in cases where non-parties to forum agreements can sue those who themselves are even non-parties to the forum agreements. I have earlier referred to the equitable principle identified by Gee QC (at [16] above) in broad terms. The notion of an equitable right not to be sued in a foreign forum was expressly referred to in *British Airways Board v Laker Airways Ltd and others*[59] ("*British Airways*"). In that case, Lord Diplock referred to the anti-suit applicant being entitled under English law to a legal or equitable right not to be sued in a foreign court. In explaining the legal right not to be sued, Lord Diplock provided as an example the situation where there is an exclusive jurisdiction clause in a contract. As for the equitable right not to be sued, Lord Diplock referred to "conduct that is 'unconscionable' in the eyes of English law".[60] In other words, Lord Diplock was *not* referring to equitable rights in the sense that they are used today (i.e. rights that arise in the fiduciary context for breach of trust). Similarly, although Lord Scarman referred to "an equitable right of the [anti-suit] applicant", he described this as "an entitlement to be protected from a foreign suit the bringing of which … is in the circumstances unconscionable and so unjust".[61] In other words, the term "equitable right" was used in *British Airways* to describe the anti-suit applicant's entitlement to an anti-suit injunction on the basis that there was something affecting the conscience of the anti-suit respondent.

[43] Along the way, however, it seems that the terms "equitable right" and "equitable obligation" and the infringement of the anti-suit applicant's equitable right became the requisite "equity" that affected the conscience of the anti-suit respondent. The jurisprudence has somehow veered to apply to anti-suit injunctions geared towards the protection of forum agreements in situations involving non-parties.

59 [1985] AC 58.
60 Ibid, at p 81.
61 Ibid, at p 95.

The importation of such language to the context of the *contractual* anti-suit injunction has given rise to the hybrid *quasi*-contractual anti-suit injunction, which applies contractual principles *by analogy* on the basis that it would be inequitable not to do so. I suggest that this grey area between the contractual basis and the vexatious or oppressive basis ought to be clarified. I note that in *Hai Jiang 1401*, in making reference to principles governing anti-suit injunctions in general, Loh J appears to have regarded vexation or oppression and breach of contract as simply factors going towards the court's discretion to grant an anti-suit injunction.[62] However, in light of the Court of Appeal's clarification in *VKC* that these are separate grounds,[63] it may be apposite to clarify exactly which category of anti-suit injunctions the inconsistent contractual claims cases fall under. Given the above analysis, the vexatious or oppressive basis may be more appropriate.

[44] To round up this part of the discussion, I note that the *quasi*-contractual anti-suit injunction is a concept of considerable elasticity. To play out litigation tactics, claimants will try to stretch its boundaries, as illustrated by the facts of the English case of *Clearlake Shipping Pte Ltd and another v Xiang Da Marine Pte Ltd*.[64] This case involved a voyage charter and a sub-voyage charter, both of which contained an exclusive English jurisdiction clause. The cargo receiver sued the shipowner in Singapore for misrepresentation arising from certain switch bills of lading. The shipowner then commenced third-party proceedings against the voyage charterer and the sub-voyage charterer for various claims, including breach of contract and tortious misrepresentation. In response, the voyage charterer and the sub-voyage charterer applied to the English court for an anti-suit injunction. At first instance, the anti-suit injunctions were granted – the anti-suit injunction sought by the voyage charterer was granted on the contractual basis, while the anti-suit injunction sought by the sub-voyage charterer was granted on the basis of the *Sea Premium* line of cases. Subsequently, the shipowner amended its pleadings in the Singapore proceedings so that its claim against the sub-voyage charterer was solely brought in tort and all contractual claims were abandoned. On appeal, the sub-voyage charterer no longer relied upon the *Sea Premium* line of

62 *Hai Jiang 1401*, supra n 11, at [83], [21].
63 *VKC*, supra n 35, at [16]–[18].
64 [2019] EWHC 2284 (Comm).

cases, so that the anti-suit injunction was ultimately granted solely on the vexatious or oppressive basis.[65]

[45] However, *if* the sub-voyage charterer had not abandoned its reliance on *Sea Premium*, the question arises as to whether it would have been justifiable for the court to initially grant a *contractual* anti-suit injunction, or even a *quasi-contractual* anti-suit injunction on the *Sea Premium* jurisdiction, notwithstanding the absence of any contractual claim. The answer must surely be no. Ultimately, this goes to show that while courts should develop the contractual anti-suit injunction to serve the ends of justice, they must also be wary of unduly expanding the contractual anti-suit injunction beyond the ambit of principle and common sense.

Damages for breach of forum agreements

[46] I turn now to the second topic which is damages for breach of a forum agreement. This topic is not exactly controversial on a first principles basis in a situation where there is a breach of a contractual obligation and a claim for damages is made, although there remains some residual concern regarding judicial comity and the quantification of damages. In contrast to this common law claim for damages, there have also been equitable claims for equitable compensation, which raise an entirely new set of questions and concerns. I will endeavour to find and explain the premise and perimeters of the latter mode of obtaining monetary compensation.

[47] The starting point in the discussion is the common law claim for damages. The main issue in this regard is whether a claimant may recover damages for breach of a forum agreement, such breach having been occasioned by the commencement of proceedings in a non-contractual forum. If so, then a damages claim could potentially supplement or even substitute the anti-suit injunction as another means of giving effect to a forum agreement. Such damages claims can arise in a myriad of circumstances, although these may generally be divided into two categories.[66] First, cases where the non-contractual forum finds that the action has been brought in breach of a forum agreement

65 Ibid, at [25], [34].

66 Takahashi, supra n 41, at 60–62, 85; see Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) ("Briggs"), para 8.15, where the author proposes six different ways in which a non-contractual forum could deal with a claim brought allegedly in breach of a forum agreement.

and accordingly refuses to hear the matter by either dismissing or staying the proceedings. In these cases, the damages sought will most likely consist only of the costs of resisting the proceedings in the non-contractual forum. Second, cases where, notwithstanding the forum agreement, the non-contractual forum decides to hear the case on the merits, and subsequently makes a decision on the substantive claim and possibly a costs order. In these cases, the items of claim for which damages may be sought are more complicated. If the non-contractual forum rules in favour of the party in breach of the forum agreement, the damages sought may not be limited simply to the costs incurred in resisting or defending the proceedings; they may extend even to the amount of substantive liability that has been imposed on the innocent party. I note that while it is possible that damages claims may be brought in that *same non-contractual forum*,[67] we are concerned here with damages claims that are brought in a *different forum*, specifically, the *contractual forum*.

[48] Above all, it is important to bear in mind the principled distinction to be drawn between: (a) a claim for damages where the breach of a forum agreement which forms the basis of an anti-suit injunction application relates to a direct contract between the two parties in dispute; and (b) a claim for damages where the grant of the "*quasi*-contractual anti-suit injunction" is without proof to the requisite standard of the existence or validity of the forum agreement (especially the category of cases involving inconsistent contractual claims). I would suggest that the case for damages is weaker in the latter. As we shall see, the implications that arise from allowing damages claims or equitable compensation in *quasi*-contractual cases are illustrated by the English High Court decision in *Argos Pereira Espana SL and another v Athenian Marine Ltd*[68] ("*Argos*"). With the exception of *Argos*, the authorities mentioned below are all straightforward cases involving direct contracting parties or parties with derived rights, such as subrogees.

The English authorities

[49] I begin with an overview of the existing English authorities. Under English law, it is well-established that a claimant may recover

67 See Takahashi, supra n 41, at 71–74 for a discussion regarding the situation where the damages claim is brought in the same forum.

68 [2021] EWHC 544 (Comm).

damages for a breach of a forum agreement. Such damages may include the costs of defending the foreign proceedings commenced in breach of the forum agreement. In some cases, damages may extend even to the substantive liability that has been or may be imposed by the foreign court.

[50] Authority for this principle can be traced back to the English Court of Appeal decision in *Union Discount Co Ltd v Zoller and others*[69] ("*Union Discount*"), which involved a contract containing an exclusive English jurisdiction clause. In breach of this exclusive jurisdiction clause, one party commenced proceedings in New York, which were eventually struck out. However, no application for costs was made as such costs were not recoverable under New York law. Instead, the successful party sought to recover its costs as damages for breach of contract in English proceedings. Although the claim was struck out at first instance, this was reversed on appeal. In allowing the appeal, the court highlighted several "unusual features" of the case, including that the rules of the foreign forum only permitted recovery of costs in exceptional circumstances, and that the foreign court had made no adjudication as to costs. The court further opined that there were no policy reasons preventing recovery, in particular, no concerns arising in relation to comity or *res judicata*. Nevertheless, the court recognised that this was a "field not much explored in recent litigation", and that there may be more "doubtful cases", such as where the costs rules in the foreign forum were similar to those under English law.[70]

[51] Around the same time that *Union Discount* was decided, the House of Lords in *Donohue v Armco Inc and others*[71] ("*Donohue*") made several *obiter* remarks that supported the approach in *Union Discount*. In *Donohue*, the House of Lords was faced with an application for an anti-suit injunction in respect of proceedings brought in New York contrary to an English exclusive jurisdiction clause. It was argued that if the anti-suit applicant subsequently incurred a greater liability or was put to a greater expense in New York than in London, then he might have a claim in damages for breach of the exclusive jurisdiction clause. Lord Scott agreed that there was "no reason in principle why

69 [2002] 1 WLR 1517.
70 Ibid, at [18], [23], [26], [35]–[38].
71 [2002] 1 Lloyd's Rep 425.

[the anti-suit applicant] should not recover … such part of those costs as he incurred in his successful defence of the claims that fall within that clause".[72] Lord Hobhouse took a slightly more qualified approach, observing that the position was "complex" but if the anti-suit applicant could show that he had "suffered loss as a result of the breach of the clause, the ordinary remedy in damages for breach of contract would be open to him".[73]

[52] Since then, *Union Discount* has been robustly applied and developed in subsequent cases. In the words of Professor Adrian Briggs QC, the proposition in *Union Discount* went "from novelty to banality in a very short time".[74] In *A/S D/S Svenborg D/S af 1912 A/S Bodies Corporate trading in partnership as "Maersk Sealand" v Akar*, the innocent party was awarded not only the costs and expenses it had incurred in proceedings brought in the non-contractual forum, but also an indemnity in respect of *future* costs and expenses. In his decision, Julian Flaux QC (sitting as a Deputy High Court judge) read *Union Discount* broadly, opining that its application was not "dependent upon the claimant showing that the relevant expenses [were] irrecoverable in the foreign proceedings".[75] Similarly, in *National Westminster Bank plc v Rabobank Nederland* ("*Rabobank*"), Colman J awarded the innocent party costs as damages for breach of an anti-claim clause, notwithstanding that the foreign court had already made a limited costs award, and might possibly make a costs order in the future.[76] In *Compania Sud Americana De Vapores SA v Hin-Pro International Logistics Ltd*[77] ("*Hin-Pro*"), Cooke J awarded the innocent party damages not only for the costs of defending the foreign proceedings, but also for any *substantive liability* imposed by the foreign court. This was in relation to sums that had already been paid as well as sums that might be incurred in the future. In quantifying the amount of damages, Cooke J held that the court "[would] not engage in consideration of what hypothetically might happen if the claims had been brought [in England]", but would

72 Ibid, at [75].
73 Ibid, at [48].
74 Briggs, supra n 66, at para 8.14.
75 *A/S D/S Svenborg D/S af 1912 A/S Bodies Corporate trading in partnership as "Maersk Sealand" v Akar and others* [2003] EWHC 797 (Comm) at [37].
76 *National Westminster Bank plc v Rabobank Nederland* [2007] EWHC 1056 (Comm) at [439]–[440].
77 [2015] 1 Lloyd's Rep 301.

simply award the sums that the innocent party had been found liable for in the non-contractual forum.[78]

The position in Singapore

[53] The question for consideration is whether the Singapore courts should follow in the footsteps of the English courts and adopt a liberal approach to damages claims for breach of forum agreements. Although there are some *obiter* remarks by the High Court in *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits*[79] which ostensibly endorse the approach taken in *Union Discount* and *Rabobank*, this was in the context of analysing the rule precluding recovery of unrecovered costs. The High Court did not specifically consider the question whether the breach of a forum agreement could sound in damages. As it stands, therefore, it remains an open question whether a claim for damages for breach of a forum agreement is permissible under Singapore law.

[54] In considering this question, I note that *Union Discount* was relatively restricted in its finding that damages claims could be brought for breach of forum agreements. As I have mentioned, the English Court of Appeal was careful to emphasise the "unusual features" of that case.[80] Furthermore, *Union Discount* involved an appeal against summary judgment, where the lower court had summarily disallowed the costs claim. Therefore, the appellant needed only to show that its claim for costs as damages was not unarguable.[81] Similarly, the observations by the House of Lords in *Donohue* were made in circumstances where the counsel had conceded the point.[82] However, it appears that subsequent English cases have not paid much attention to these aspects of *Union Discount* and *Donohue*. Instead, they have taken a robust approach to applying and extending *Union Discount*, without closely examining its underlying reasoning. I therefore propose to take a closer look at the underlying principles and legal issues surrounding the question whether damages may be awarded for breach of a forum agreement.

78 Ibid, at [37]–[39]. See also *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm).

79 [2014] 1 SLR 245 at [235]–[237], [244].

80 *Union Discount*, supra n 69, at [18].

81 Daniel Tan, "Damages for Breach of Jurisdiction Clauses" (2002) 14 SAcLJ 342 ("*Damages for Breach of Jurisdiction Clauses*") at para 7.

82 *Donohue*, supa n 71, at [48].

Preliminary issue: the governing law

[55] A preliminary issue that arises is which law governs the forum agreement. In the context of a claim for breach of contract (possibly accompanying an anti-suit injunction application), the governing law of the forum agreement is relevant as it determines, *inter alia*, the question of whether the damages remedy is available at all for the breach of the forum agreement or whether particular heads of damage are claimable.[83]

[56] In relation to arbitration clauses specifically, this raises the interesting question of how the governing law of the arbitration agreement is to be identified. In Singapore, several principles are well established.[84] To determine the governing law of the arbitration agreement, the court will apply a three-stage test. First, the court will look at whether the parties have made an *express* choice as to the governing law. If not, the court will consider whether the parties have made an *implied* choice. Finally, in the absence of any express or implied choice, the governing law is that with which the arbitration agreement has the closest and most real connection. At the second stage, the *expressly* chosen law of the *underlying* contract is a strong indicator of the parties' *implied* choice of law for the *arbitration agreement*. This is even if the parties have chosen a seat with a different law.

[57] The question that merits further consideration pertains to the third stage of the three-stage test: where there is no express or implied choice of law, which has the closest and most real connection to the arbitration agreement – the law of the underlying contract or the law of the seat? This issue was recently considered in *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"*[85] ("*Enka*"), where the majority of the United Kingdom Supreme Court preferred the view that the law of the seat was the most closely connected to the arbitration agreement. This issue has yet to be determined in Singapore, as all of

83 Elan Krishna and Yi-Jun Kang, "Damages for Breach of an Arbitration Agreement: An Available Remedy under Singapore Law?" *Singapore Academy of Law Journal* (published on e-First May 11, 2021) ("Krishna and Kang") at para 25; see also *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 at [16], [22] and [24], where the Court of Appeal referred to the House of Lords decision in *Harding v Wealands* [2007] 2 AC 1 and, in the context of a tortious claim, left as an open question whether the *lex causae* applies also to the quantification of damages.

84 See *BCY v BCZ* [2017] 3 SLR 357 ("*BCY*") at [40].

85 [2020] UKSC 38.

the cases so far have been decided either on the first or second stages, so that there was no need to resort to the third stage. While there are some *obiter* remarks by the High Court in *BNA v BNB* ("*BNA*") which support the approach taken by the majority in *Enka*,[86] it bears note that *BNA* was reversed on appeal, although the Court of Appeal did not comment on the High Court's analysis of the third stage of the test.[87] There is also much force in the dissenting judgments of the minority judges in *Enka*. One might question why there should be such a great difference in the default position that applies at the second and third stages of the test.[88] Nevertheless, this is by no means a straightforward inquiry and, as the decision in *Enka* shows, there is room for reasonable disagreement. It therefore remains to be seen which approach the Singapore courts will adopt.

The legal basis for the court's power to award damages

[58] I turn now to the analysis of damages claims proper. Assuming Singapore law applies, one must first identify the legal basis for the court's power to award damages for breach of a forum agreement. As one legal commentator observes, "[r]emedies are legal responses to wrongs" and it is necessary to ascertain the nature of the wrong before one can determine what remedies are triggered by the same.[89]

[59] I note that some authors have suggested that a claim for damages may be sought on the basis of a *tortious* or *non-contractual* wrong.[90] Although this article focuses on contractual wrongs, I will briefly allude to some examples to illustrate how a tortious wrong for inducing breach of a forum agreement can arise. Two English cases come to mind: *Kallang Shipping SA Panama v Axa Assurances Senegal and another (The Kallang (No 2))*[91] and *Sotrade Denizcilik Sanayi ve Ticaret SA v Amadou Lo and others (The Duden)*.[92] In both cases, efforts were made by cargo insurers to intervene actively to ensure that cargo claims were heard

86 *BNA v BNB and another* [2019] SGHC 142 at [119].
87 *BNA v BNB and another* [2020] 1 SLR 456 at [62]–[63], [94].
88 See *BCY*, supra n 84, at [61]; *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102 at [26].
89 Daniel Tan, "Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers" (2007) 47 Va J Intl 545 ("*Enforcing International Arbitration Agreements*") at 549.
90 Briggs, supra n 66, at para 8.52.
91 [2009] 1 Lloyd's Rep 124.
92 [2009] 1 Lloyd's Rep 145.

in the cargo owners' jurisdiction. Both cases arose separately, but on rather similar facts. The vessels each carried a cargo of rice to Dakar, pursuant to the terms of bills of lading which incorporated London arbitration clauses. Disputes arose with regard to the quantity of rice discharged by the vessels at Dakar and the cargo receivers demanded security for their claims for short-landed cargo. In both cases, the policy under which the cargo was insured provided for the cargo insurer, Axa Assurances Senegal ("Axa Senegal"), to take the place of the assured to take "mitigating measures to prevent damage or losses". Letters of undertaking were offered by the vessels' P&I Club to secure the release of the vessels. Axa Senegal refused to accept the P&I Club's letters of undertaking that were answerable to English law and London arbitration. The cargo receivers then applied to arrest the vessels at Dakar. In accordance with local procedures, a *huissier* attended on board the vessels and demanded payment of the cargo receivers' claim plus a figure for interest and costs, failing which the vessels would be arrested. Payments were not made, and the vessels were arrested. The owners of the vessels commenced proceedings in London claiming that the arrest in Dakar was a breach of the governing law and jurisdiction clauses in the relevant bills of lading, and further claimed that the breach was induced or procured by Axa Senegal against whom they claimed damages. In addition, the owners alleged that Axa Senegal interfered with their business relations with the cargo receivers and that both defendants conspired to do those things.

[60] The English court delivered judgments on the two cases simultaneously. It held that Axa Senegal was the driving force behind the efforts to displace London arbitration. The main reason for doing so was that Axa Senegal believed that having claims determined in Senegal where the Hamburg Rules applied would be more favourable to cargo interests than if the claims were decided in London arbitration under the Hague-Visby Rules (which were incorporated in the bills of lading). The English court found that Axa Senegal's conduct was such as to amount to the tort of wrongful inducement or procurement of a breach of contract (i.e. the London arbitration clause), for which it was liable to the owners for damages. These cases make clear that third-party insurers or assignees who receive the benefit of a contract containing an arbitration or jurisdiction clause must commence claims in accordance with the arbitration or jurisdiction clause in that contract.

[61] Apart from tortious wrongs, assertions of *equitable* wrongs have also formed the basis for obtaining monetary relief. An interesting case in this regard is *Argos*, a 2021 case in which equitable compensation was awarded for the breach of what was termed an "equitable obligation" to sue only in a particular forum. In this case, a dispute arose after defects were found in a shipment of frozen fish and squid onboard the vessel *Frio Dolphin*. By virtue of subrogation, the consignee's insurer brought proceedings in the Spanish court against the owner's manager and charterer of the *Frio Dolphin*, Lavinia Corp ("Lavinia"), under the mistaken belief that Lavinia was the carrier. Lavinia successfully challenged jurisdiction in Spain and was awarded part of its costs. The owner of the *Frio Dolphin* subsequently pursued, by way of arbitration, a claim to recover the irrecoverable costs paid by Lavinia. This was allowed by the tribunal, who held that by suing Lavinia, the insurer was in breach of an equitable obligation equivalent to contract. In other words, the insurer owed an equitable obligation to the owner not to sue the owner otherwise than in accordance with the arbitration clause, and *also* not to sue a third party (i.e. Lavinia) in respect of a dispute falling within the arbitration clause. This was referred to as an "extended" derived rights obligation.[93] On appeal to the English High Court, this finding by the tribunal could not be challenged. Instead, the English High Court gave permission for only two questions to be considered: (a) whether equitable compensation was available in respect of the breach of such an equitable obligation; and (b) whether the owner could rely on the principle of transferred loss to claim such equitable compensation in respect of legal costs incurred by a third party (i.e. Lavinia), when the owner itself did not suffer any such loss.[94] Sir Michael Burton GBE (sitting as a judge of the High Court) answered both questions in the affirmative, upholding the tribunal's decision. I shall discuss his decision in greater detail later. Suffice to say, *Argos* suggests that the English courts are likely to be receptive to the notion that equitable compensation may be awarded in response to a breach of an equitable obligation not to sue otherwise than in accordance with a forum agreement contained in a contract.

[62] I now return to the discussion on claims that are premised on *contractual* wrongs. Primarily, the contractual wrongs are between direct parties to the forum agreement as well as third-party insurers

93 *Argos*, supra n 68, at [9], [12]–[13].
94 Ibid, at [4].

as subrogees who receive the benefit of a contract containing a forum clause. The starting point is that forum agreements are contractual in nature – they embody a mutual promise by the parties to sue each other only in the agreed forum.[95] It follows that, applying ordinary contractual principles, damages should be available for the breach of a forum agreement.[96] Indeed, the traditional rationale for the grant of a contractual anti-suit injunction is that damages would be insufficient to vindicate the breach of a forum agreement.[97] This presupposes that damages are an available remedy for breach of forum agreements, although the court does not typically examine the potential for a damages remedy before deciding whether to grant an anti-suit injunction.[98] It should also be noted that, while a court will not award specific performance via an injunction when damages would be adequate, the reverse is not necessarily true. In other words, it is not the case that damages should not be awarded when an injunction is available and ordered. On this basis, the court may award common law damages *as well as* grant an injunction when damages alone would not be an adequate remedy.[99]

[63] Furthermore, according to the Supreme Court of Judicature Act, the court has the "[p]ower to grant all reliefs and remedies at law and in equity, including damages in addition to, or in substitution for, an injunction".[100] As such, it is arguable that in a proper case when it would be equitable to grant an anti-suit injunction, the court has a corollary power to supplement or substitute the injunction by an award of equitable damages if the injunction is inappropriate or

95 Albert Dinelli, "The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law" (2015) 38(3) *Melb Univ Law Rev* 1023 ("Dinelli") at 1025; Takahashi, supra n 41, at 69–70. See also *Enforcing International Arbitration Agreements*, supra n 89, at 600–601 and 549–550 for the US position in relation to arbitration agreements.

96 *Enforcing International Arbitration Agreements*, ibid, at 551, 597, 603; Dinelli, Ibid, at p 1032; Krishna and Kang, supra n 83, at para 32.

97 *The Angelic Grace*, supra n 49 at 96; *Damages for Breach of Jurisdiction Clauses*, supra n 81, at para 33.

98 Daniel Tan, "Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation" (2005) 40 Tex Int'l LJ 623 ("*Damages for Breach of Forum Selection Clauses*") at 646–647; Takahashi, supra n 41, at 70; *MPVF Lexington Partners, LLC v W/P/V/C, LLC* 148 F Supp 3d 1169 ("*MPVF*") at [12].

99 *Versatile Housewares & Gardening Systems, Inc v Thill Logistics, Inc* 819 F Supp 2d 230 at [8].

100 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), First Sch, para 14.

ineffectual.[101] For these reasons, it would appear that the court does have the power at common law and/or in equity to award damages *in addition* to or *in lieu* of an anti-suit injunction.

Whether the court should award damages

[64] On this view, the next question is whether the court *should* exercise its power to award damages in addition to or in lieu of an anti-suit injunction. There are several reasons to support allowing the damages remedy. I note that these reasons may apply even to monetary remedies founded upon tortious or equitable wrongs, although my discussion primarily adopts a contractual perspective.

[65] First, allowing the damages remedy is in line with the general approach in favour of upholding the parties' agreement. In Singapore, the courts have frequently emphasised "that the primacy of party autonomy requires them to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends the law".[102] If a party is aware of the financial consequences of proceedings in a non-contractual forum, it is less likely that such a course of action will be adopted. In this way, the damages remedy could serve as a powerful deterrent against forum shopping. In turn, this may give the parties more predictability in their commercial affairs.[103] As one US court has observed, the damages remedy is often sought when other remedies, such as a stay of proceedings or an anti-suit injunction, are unavailable or ineffective. If no damages remedy existed in these circumstances, there would be nothing to stop parties from violating the forum agreement with impunity.[104]

[66] Second, the damages remedy may offer the court greater remedial flexibility, in two ways. First, it broadens the range of remedial options that the court can have resort to when faced with a breach of

101 *Damages for Breach of Jurisdiction Clauses*, supra n 81, at para 34; *Enforcing International Arbitration Agreements*, supra n 89, at 603; Dinelli, supra n 95, at 1032–1033; *Damages for Breach of Forum Selection Clauses*, supra n 98, at 646.

102 Krishna and Kang, supra n 83, at para 76; *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28].

103 *Enforcing International Arbitration Agreements*, supra n 89, at 604–605; Dinelli, supra n 95, at 1033; *Damages for Breach of Forum Selection Clauses*, supra n 98, at 641–642; Richard Frimpong Oppong and Shannon Kathleen Clark Gibbs, "Damages for Breach and Interpretation of Jurisdiction Agreements in Common Law Canada" (2017) 95(2) Can B Rev 383 ("Oppong and Clark Gibbs") at 391.

104 *MPVF*, supra n 98, at [12].

a forum agreement, so that it can "fashion appropriate relief to better enforce [forum] agreements".[105] Second, the damages remedy itself is particularly flexible. Based on the circumstances of each case, the quantum of damages can be adjusted having regard to the recoverable heads of damage and the appropriate measure of damages. This "gives the courts flexibility to better effect fact-sensitive remedies".[106] In contrast, other remedies such as a stay of proceedings and the anti-suit injunction are relatively blunt tools in so far as they possess an "all-or-nothing" nature.[107]

[67] Third, the damages remedy can enable the court to balance between the private interest of a party in ensuring that a forum agreement is upheld, and the public interest in ensuring that disputes are channelled to the appropriate fora. For instance, despite being the agreed forum, the court may find that circumstances are such that it would be more appropriate for the dispute to be heard in another forum. Accordingly, it may order a stay of its proceedings and/or decline to grant an anti-suit injunction. However, in order to vindicate the party's private interest in ensuring that the forum agreement is upheld, the court may award damages for any additional costs which the party has been put to in relying on the forum agreement.[108] Indeed, this was the situation in *Donohue* – the House of Lords considered that notwithstanding the exclusive English jurisdiction clause, the ends of justice would be better served by a single composite trial in New York. This constituted strong reason not to give effect to the exclusive jurisdiction clause. Nevertheless, the House of Lords left open the possibility of a claim for damages should the innocent party incur a greater liability or be put to a greater expense in New York than would have been the case in London.[109]

[68] Finally, the damages remedy can fill in the gaps occasioned by the limitations of the anti-suit injunction. As I will discuss in greater

105 *Enforcing International Arbitration Agreements*, supra n 89, at 611.

106 *Enforcing International Arbitration Agreements*, ibid, at p 604.

107 *Damages for Breach of Forum Selection Clauses*, supra n 98, at 645; Oppong and Clark Gibbs, supra n 103, at 391.

108 Dinelli, supra n 95, at 1033; Edwin Peel, "Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws" [1998] LMCLQ 182 at 225–226; *Damages for Breach of Forum Selection Clauses*, ibid, at pp 649–650; Takahashi, supra n 41, at 83.

109 *Donohue*, supra n 71, at [36], [48].

detail below, not only may the anti-suit injunction be ignored by litigants and foreign courts, it is also limited in its reach as third-party courts are unlikely to enforce it. In contrast, the damages remedy gives rise to a monetary judgment, which is much easier to enforce in foreign jurisdictions. In light of these limitations of the anti-suit injunction, employing the damages remedy *in tandem* with the anti-suit injunction may prove more effective in dealing with breaches of forum agreements.[110]

[69] On the other hand, the strongest argument against allowing the damages remedy is that it could potentially have drastic effects on any substantive liability that has been imposed by a foreign court, which in turn raises concerns regarding judicial comity.[111] As I have mentioned, the English cases contemplate that damages may cover even the substantive liability incurred by the innocent party in foreign proceedings. This would effectively "unwind" the decision of the foreign court and render the foreign judgment nugatory. While the same argument that is raised in the context of anti-suit injunctions may be raised here – that the damages award is a response to a party's conduct rather than a criticism of the foreign court[112] – the truth is that, as with the anti-suit injunction, the damages award would constitute indirect interference with the decision of the foreign court. Furthermore, the damages award may be considered more egregious than an anti-suit injunction in so far as it "undo[es] the effect of the foreign decisions after a lot of time, costs and adrenalin have been spent to obtain them".[113] In that sense, it is more akin to the anti-enforcement injunction, with all of its attendant comity concerns (see [86] below). It is therefore unsurprising that allowing a damages award in such circumstances has been described as a "grave infringement of comity".[114]

[70] However, as I have mentioned, there are many different "permutations" of factual circumstances that can give rise to a damages claim. On one hand, there are cases such as *Union Discount* where the

110 *Damages for Breach of Forum Selection Clauses*, supra n 98, at 644–645; Oppong and Clark Gibbs, supra n 103, at 391; Takahashi, supra n 41, at 83.

111 *Enforcing International Arbitration Agreements*, supra n 89, at 604–605; Dinelli, supra n 95, at 1033.

112 Briggs, supra n 66, at para 8.58.

113 Takahashi, supra n 41, at 82.

114 *Damages for Breach of Jurisdiction Clauses*, supra n 81, at para 46; *Damages for Breach of Forum Selection Clauses*, supra n 98, at 657; Takahashi, ibid, at p 80.

foreign court struck out the proceedings and could not have awarded any costs. On the other hand, there are cases such as *Hin-Pro* where the foreign court proceeded to judgment and damages were sought for the substantive liability thereby imposed. It is thus clear that comity concerns are not the same throughout all the cases. Instead, there are "degree[s] of implications for international comity",[115] depending on the factual matrix of the case.

Developing principled limits to the damages remedy

[71] In these circumstances, rather than shutting out the possibility of a damages remedy altogether, the court will need to work out principled limits to the remedy.[116] In my view, the starting point is that a forum agreement is *procedural* in nature, not substantive. I have alluded to this point earlier in the discussion on anti-suit injunctions and non-parties. Again, I reiterate that by referring to a forum agreement as being procedural in nature, I mean that a forum agreement gives rise to rights and obligations pertaining to the *procedure* of dispute resolution (see [23]–[27] above).[117] Although the cases and the commentaries have not explored this point in much detail, it is apposite in light of the recent decisions in *VKC* and *Fortress*. On this basis, I turn to discuss three possible ways in which the damages remedy can be limited in a principled and coherent manner.

[72] First, the view that a forum agreement confers a procedural right may affect how causation principles are applied to a claim for damages. It is trite that when determining *factual* causation, the court will apply the "but for" test,[118] which would presumably be satisfied in most cases involving the commencement of proceedings in a non-contractual forum in breach of a forum agreement.[119] However, the

115 Takahashi, ibid, at p 78.

116 *Damages for Breach of Jurisdiction Clauses*, supra n 81, at para 48; *Enforcing International Arbitration Agreements*, supra n 89, at 605–606.

117 See Takahashi, supra n 41, at 69 for examples of other "procedural contracts", including choice of law agreements, anti-suit agreements, agreements to discontinue an action, etc.

118 *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 ("*Sunny Metal*") at [64].

119 Taking the example where a party sues in a non-contractual forum and succeeds on its claim – if the breaching party had not brought proceedings in the non-contractual forum, the innocent party would not have incurred costs in defending these proceedings, and would not have had substantive liability imposed on it by the non-contractual forum. In other words, the "but for" test is satisfied.

"but for" test "is a necessary but not a sufficient condition of legal responsibility". In addition to *factual* causation, the claimant must also show *legal* causation.[120] This is where the inquiry becomes slightly less straightforward. In relation to legal causation, it has been observed that "the courts have avoided laying down any formal tests for causation in contract; instead, they have relied on common sense as a guide to decide whether a breach of contract is a sufficiently substantial cause of the claimant's loss".[121] In the present case, on the view that a forum agreement is procedural in nature, while its breach may reasonably be said to have caused a party to incur the *costs* of resisting or defending proceedings in a non-contractual forum, common sense dictates that the same cannot be said as regards the incurring of *substantive liability*. In this regard, Glidewell LJ's observation in *Galoo Ltd v Bright Grahame Murray* is apposite: "it is necessary to distinguish between a breach of contract which causes a loss to the plaintiff and one which merely gives the opportunity for him to sustain the loss".[122] The bringing of proceedings in breach of a forum agreement merely provides the *opportunity* for the innocent party to incur substantive liability; it should not be regarded as the *effective cause* of such liability. Accordingly, substantive liability incurred in the non-contractual forum should not form the basis for the quantification of damages. This would go some way towards assuaging the concern that an award of damages for breach of a forum agreement would be overly expansive and an infringement of comity. For completeness, I note that this argument from causation is made from a contractual perspective. While the approach to causation in tort is generally the same as in contract,[123] the approach to causation for equitable compensation is slightly different.[124]

[73] Second, the damages remedy may also be limited by way of the measure of damages used by the court to quantify the loss suffered by the innocent party. In most cases, it would likely be difficult to award damages based on the expectation measure. This would entail a comparison of what occurred (or might occur) in the foreign jurisdiction, and what would have occurred if the action had been

120 *Sunny Metal*, supra n 118, at [53], [64].
121 Ibid, at [62].
122 *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 at [74].
123 *Sunny Metal*, supra n 118, at [63].
124 *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] 1 SLR 1199 (*"Winsta Holding"*) at [254].

brought in the agreed forum.[125] However, this is a highly speculative and time-consuming exercise, not to mention that it may often be challenging for a court to apply foreign procedural and substantives rules in an attempt to pre-empt the foreign court's decision.[126] In these circumstances, the reliance measure may be more appropriate. In other words, the innocent party would be awarded damages for the costs that it had incurred in relying on the forum agreement. This may encompass the costs of staying the foreign proceedings or seeking an anti-suit injunction from the agreed forum. Such costs are more easily ascertainable and this approach will also operate as a limiting mechanism on the potentially over-expansive nature of the damages remedy.[127] Furthermore, if the court finds that the circumstances of the case are such that it is impracticable to award damages either based on the expectation measure or reliance measure, then it is also open to the court to award nominal damages.[128]

[74] Finally, to the extent that a claim for damages for breach of a forum agreement is essentially a contractual claim, other contractual or equitable doctrines may also apply to limit the claimant's recovery.[129] I set out a few examples here.

(a) First, the doctrine of mitigation. It has been suggested that an innocent party's omission to apply for an anti-suit injunction or for a stay of proceedings, or to defend the substantive proceedings in the non-contractual forum, may amount to a failure to mitigate.[130]

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125 See, e.g. *MPVF*, supra n 98, at [13]–[14], where the court considered that damages should be awarded for the fees and expenses incurred above what the innocent party would have incurred anyway had the action been filed in the contractual forum from the outset.

126 *Damages for Breach of Jurisdiction Clauses*, supra n 81, at para 41; *Damages for Breach of Forum Selection Clauses*, supra n 98, at 653–654; Oppong and Clark Gibbs, supra n 103, at 393; Briggs, supra n 66, at para 8.25.

127 Dinelli, supra n 95, at 1036; Nik Yeo and Daniel Tan, "Damages for Breach of Exclusive Jurisdiction Clauses" in Sarah Worthington (ed), *Commercial Law and Commercial Practice* (Hart Publishing, 2003), pp 420–422; *Damages for Breach of Forum Selection Clauses*, ibid, at pp 658–659.

128 See, e.g. *Luv N' Care, Ltd v Groupo Rimar, aka Suavinex* 2015 WL 9463189 at 3, where the court awarded the claimant nominal damages of $500 for lost time and effort.

129 *Enforcing International Arbitration Agreements*, supra n 89, at 601–602.

130 *Rabobank*, supra n 76, at [439]; Paul D Friedland and Kate Brown, "A Claim for Monetary Relief for Breach of Agreement to Arbitrate as a Supplement or Substitute to an Anti-Suit Injunction" in Albert Jan Van den Berg (ed), *International Arbitration 2006: Back to Basics?* (Kluwer Law International, 2007) ("Friedland and Brown"), p 279; Takahashi, supra n 41, at 86–87.

Of course, the success of such arguments will depend very much on the factual circumstances of each case.

(b) Second, the doctrine of waiver. In certain cases, it may be argued that by litigating in the non-contractual forum, especially on the merits of the claim, the innocent party has waived the breach of the forum agreement and can no longer claim damages for its breach.[131] On the other hand, it has also been argued that an appearance before a foreign court does not constitute conduct which makes it plain to the reasonable observer that the right under the forum agreement has been given up. If the foreign court ruled that there was no right in the first place, then the party's subsequent defence of the proceedings should not be interpreted as a giving up of a right which that court said it never had.[132]

(c) Third, the doctrines of estoppel and *res judicata*. Three issues bear highlighting in this regard and, again, I note that the following discussion is from a contractual perspective.

(i) The first issue is whether the decision of a foreign court regarding the existence or validity of a forum agreement will result in issue estoppel or *res judicata*, thereby preventing the agreed forum from adjudicating again on the same dispute.[133] It has been argued that, by analogy to applications for an anti-suit injunction, no issue estoppel should arise and the court in the agreed forum should be able to consider the forum agreement afresh. Furthermore, a distinction ought to be drawn between considering a forum agreement for the purposes of assuming *jurisdiction*, and considering a forum agreement for the purposes of awarding *damages* for its breach. The former should not give rise to an issue estoppel in respect of the latter.[134]

(ii) The second issue also pertains to issue estoppel, but in relation to a claim for costs. Specifically, the question is whether the costs determination of the foreign court

131 Friedland and Brown, ibid, at p 280.
132 Briggs, supra n 66, at para 8.38.
133 Dinelli, supra n 95, at 1039; Takahashi, supra n 41, at 77; Briggs, ibid, at para 8.17.
134 *Damages for Breach of Jurisdiction Clauses*, supra n 81, at para 20; Briggs, ibid, at para 8.34.

precludes a subsequent damages claim for costs by way of issue estoppel.[135] In *Rabobank*, this question was answered in the negative, with Colman J opining that the foreign costs determination did not constitute a final judgment on costs and, in any case, the costs issue in the foreign court was completely different from the damages issue before the English court.[136] Similarly, Professor Briggs argues that the costs decision of the foreign court is "irrelevant" to a breach of contract claim, except in so far as the claimant must "give credit for the sums recovered under the foreign costs order".[137]

(iii) The third issue concerns a situation where the successful party failed to seek costs even though costs were realistically obtainable in the foreign court. In these circumstances, the argument could be made that the claimant is precluded by a *Henderson v Henderson*[138] estoppel from seeking to recover the same in a subsequent action for damages. In *Union Discount*, the English Court of Appeal rejected this argument,[139] although some commentators have raised forceful arguments to the contrary.[140]

(d) Finally, the rule against recovery of unrecovered costs may also apply to limit a damages claim. This rule was set out by the Court of Appeal in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals*[141] ("*Maryani*"). One ought to consider whether the rule in *Maryani* will preclude a claim for legal costs as damages for breach of a forum agreement. It would appear that, as a matter of authority and principle, the *Maryani* rule will not apply. In the first instance decision, the High Court had opined that the rule would not apply "where a party seeks

135 Takahashi, supra n 41, at 75.
136 *Rabobank*, supra n 76, at [441]. See also Krishna and Kang, supra n 83, at paras 48–49 for a discussion of this question in the context of an arbitration agreement.
137 Briggs, supra n 66, at para 8.18.
138 (1843) 3 Hare 100 at 114–115; *Turf Club Auto Emporium Pte Ltd and others v Ye Boong Hua and others and another appeal and other matters* [2017] 2 SLR 12 at [82], [85].
139 *Union Discount*, supra n 69, at [28].
140 *Damages for Breach of Jurisdiction Clauses*, supra n 81, at para 23.
141 [2015] 1 SLR 496.

to litigate in an inappropriate forum in breach of an exclusive jurisdiction clause or in breach of an arbitration clause".[142] This was not rejected by the Court of Appeal, who accepted that there could be exceptions to the general rule but left their scope an open question.[143] Furthermore, where a *foreign* court makes the costs order, or where *no costs order was made* by the foreign court, it is arguable that the policy considerations underlying the rule in *Maryani* do not arise and there is no resultant need to disallow a subsequent action for damages.[144]

[75] Ultimately, the damages remedy in the context of breach of forum agreements must be refined and delimited so as to strike a balance between the benefits of allowing the damages remedy and its potential pitfalls. The complexity in this area arises from the fact that the damages remedy stands at the intersection of contract law and private international law. Although contractual principles dictate that parties should generally be held to their promises, private international law goes beyond the interests of the contracting parties to consider wider issues of public interest and policy.[145] Thus, ordinary principles of contract law may not apply in such a straightforward manner. As one commentator succinctly describes, "comity and other private international law policies demand that limits be placed" on an innocent party's right to damages, "even where domestic law principles would readily award a remedy to him".[146] Accordingly, the development of the damages remedy in this context ought to be done carefully and in a manner that accords with both principle and policy.

[76] Finally, as alluded to earlier, a distinction should be drawn between the derived rights cases, the inconsistent contractual claims cases, and even cases where there is no clear-cut forum agreement binding the parties as a matter of contract law but the anti-suit respondent is nevertheless required to comply with it. In the latter

142 *Then Khek Koon*, supra n 79, at [228].

143 *Maryani*, supra n 141, at [53].

144 This finds support in the High Court's observation in *Then Khek Koon*, supra n 79, at [228] that the general rule against recovery may not apply "where the costs were incurred in proceedings in a forum other than the forum considering the claim for those costs as damages". Similarly, see Briggs, supra n 66, at paras 8.18, 8.56–8.57.

145 Dinelli, supra n 95, at 1026; *Damages for Breach of Forum Selection Clauses*, supra n 98, at 626.

146 *Damages for Breach of Forum Selection Clauses*, ibid, at p 637.

situations, a claim for damages is probably dubious and should be strenuously resisted. Taking *Argos* as an example, that case involved an *extended* derived rights obligation – the insurer was required to comply with the arbitration clause not only in relation to the carrier (who *was* a contracting party under the bills of lading), but also in relation to a third party (who was *not* a contracting party). In the first place, it is questionable whether the derived rights obligation should have been extended by the tribunal in that manner. There is much force in the argument raised by counsel for the insurer that this "extension" is simply a conflation of the derived rights cases and the inconsistent contractual claims cases. Nevertheless, this part of the tribunal's decision was not appealable to the English High Court in *Argos*. Instead, what was appealed was the question whether equitable compensation was available for the breach of the extended derived rights obligation, and whether the owner could recover such equitable compensation for losses suffered by a third party. In answering these questions in the affirmative, the English High Court appears to have further expanded the existing jurisprudence on non-party cases and damages for breach of a forum agreement.

[77] Is such an expansion justifiable? One might argue that any unrecovered costs should have been borne by Lavinia itself, as part of the ordinary incidents of international commercial litigation, or recovered by Lavinia directly from the insurer pursuant to an independent cause of action, such as negligence. Furthermore, the award of equitable compensation in these circumstances seems somewhat artificial. On the one hand, the English High Court recognised that if this had been a case involving inconsistent contractual claims, Lavinia would not have been entitled to equitable compensation, nor damages in lieu of an injunction. On the other hand, the court then reasoned that *because* Lavinia was unable to obtain such relief, a legal "black hole" arose which justified the application of the principle of transferred loss to enable the owner to recover Lavinia's loss.[147] Thus, although the substance of the claim remained the same, switching the identity of the claimant was somehow able to lead to a diametrically different outcome. I also question the basis for a claim for equitable compensation in respect of a breach of an "equitable obligation" arising in the context of anti-suit jurisdiction, as that is distinct from the equitable obligations that are

147 *Argos*, supra n 68, at [26]–[27].

traditionally recognised as giving rise to equitable compensation. I prefer the arguments of counsel for the cargo interest and insurer who said that equitable compensation is confined to special relationships akin to trust. Claims arising from such special relationships are for breach of trust, breach of fiduciary duty, breach of confidence, and dishonest assistance of a breach of trust. A derived rights obligation and an inconsistent contractual claims obligation do not constitute such a special relationship akin to trust to found equitable compensation. This is all the more so having regard to the origins of the language of equitable rights and obligations in the anti-suit injunction context, which I have discussed earlier (see [42] above). By recognising derived rights obligations and inconsistent claims obligations as "equitable obligations" which justify the grant of equitable compensation, *Argos* takes the language even further than in the *quasi*-contractual anti-suit injunction cases and applies it to an entirely new area of jurisprudence. It stretches the concept of an equitable right, arguably beyond that which is permitted by principle and authority.

[78] As a relatively recent decision, *Argos* stands at the forefront of the jurisprudence on non-parties and damages for breach of forum agreements, and it is by no means the last word on this. Will the Singapore courts follow in the footsteps of the English courts in this regard? I would suggest not. In *Winsta Holding*, the Singapore Court of Appeal clarified that the term "equitable compensation" ought to be used *only* to refer to compensation for loss in the case of a non-custodial breach of a fiduciary duty.[148] In other words, "equitable compensation" is not a catch-all term for all compensatory awards the court might make in equity. Nor do all acts considered wrongful in equity attract the grant of equitable compensation. This is quite different from how the terms "equitable compensation" and "equitable obligation" have been used in English jurisprudence, particularly in the derived rights cases and inconsistent contractual claims cases. As *Argos* shows, the oft-used language of "equitable obligation" in such cases has gradually paved the way for equitable compensation to become an available remedy. Given the Court of Appeal's observations in *Winsta Holding*, it seems unlikely that the Singapore courts will adopt such an approach. That would require recognising derived rights obligations and inconsistent claims obligations as "equitable

148 *Winsta Holding*, supra n 124, at [126].

obligations", the breach of which will lead to the grant of equitable compensation. On both counts, the present state of Singapore's jurisprudence suggests that the Singapore courts will be slow to reach such a conclusion.

[79] To summarise the discussion on the damages remedy, in the straightforward cases involving direct contracting parties and in the derived rights cases involving subrogees, the damages remedy either in contract or in tort is possible provided that principled limits can be imposed to avoid an over-expansive award of damages. The situation becomes murkier when it comes to *quasi*-contractual cases, that is, cases involving inconsistent contractual claims. These types of cases are one step removed from the situation where the parties share a direct contractual relationship or a relationship akin to a direct contractual relationship. Under English jurisprudence, the remedy employed here is equitable compensation, pursuant to a breach of a so-called equitable obligation. I have expressed my reservations about such an approach.

[80] Taking a step back, one may discern a similar trend here as in the discussion regarding anti-suit injunctions and non-parties. That is, the further the facts veer from the situation concerning direct contracting parties, the more cautious the court ought to be about imposing contract-based remedies, either directly or by analogy, and be it in common law or in equity. Across the discussion on non-parties and the damages remedy, we see also how the use of the language of equitable rights and obligations has gradually morphed – from an expression of unconscionable behaviour to a substantive and enforceable equitable right – so as to justify the imposition of a *quasi*-contractual anti-suit injunction or the award of compensation, as the case may be. I have suggested that such an approach may be stretching the concept of an equitable right.

Enforcement of anti-suit injunctions

[81] I now come to the final topic which is the enforcement of anti-suit injunctions. This goes towards the practical utility of the anti-suit injunction – without the ability to enforce the anti-suit injunction against the intended respondent, there would not be much point in obtaining it. Furthermore, in so far as the purpose of enforcing the anti-suit injunction is ultimately to ensure compliance with a forum agreement, I also discuss some of the ways this objective can be achieved in the

event that an anti-suit injunction proves to be of limited effectiveness. In this regard, this section on enforcement brings together nicely the discussion so far by highlighting the interplay between the anti-suit injunction and the damages remedy.

[82] When considering the enforcement of the anti-suit injunction and ensuring compliance with forum agreements, there are at least three perspectives to consider: (a) the perspective of the court that has issued the anti-suit injunction; (b) the perspective of the foreign court whose proceedings are indirectly affected by the anti-suit injunction; and (c) the perspective of a third-party court who may be asked to enforce an anti-suit injunction issued by another court.

Court issuing the anti-suit injunction

[83] Turning first to the perspective of the court issuing the anti-suit injunction, the effectiveness of the anti-suit injunction will vary depending on the parties' identities and the geographical scope of their activities. An anti-suit injunction issued by the Singapore court is likely to be most effective when the anti-suit respondent is resident in Singapore or has assets in Singapore. In order to effectively enforce the anti-suit injunction, it should contain a penal notice. If the anti-suit respondent is a legal entity, the penal notice should be addressed to directors and officers of the company. Non-compliance may result in committal proceedings, with the anti-suit respondent eventually being found guilty of contempt. The practical implication of a penal notice is that the directors could face a fine or a custodial sentence for contempt arising from non-compliance with the anti-suit injunction order. Settlements could come about for fear of sanctions for contempt. No doubt committal proceedings for contempt are a useful means of ensuring that the foreign proceedings commenced in breach of a forum agreement are promptly stayed or discontinued.

[84] That being said, it is not uncommon that an anti-suit respondent chooses not to comply with the anti-suit injunction even when faced with the threat of committal proceedings for contempt. If the impact of any such committal proceedings is low, the anti-suit respondent may very well decide that it is better off continuing with the proceedings in the non-contractual forum. In these circumstances, the anti-suit applicant will have to come up with more creative methods of ensuring compliance with a forum agreement. Gee QC points to English public policy as a strong reason to refuse recognition of the

foreign judgment that was obtained abroad in breach of the anti-suit injunction order.[149] This refusal comes from an indirect enforcement of the anti-suit injunction order by the English court refusing on the grounds of English public policy to recognise or enforce any judgment obtained abroad in breach of the anti-suit injunction. For such a prospect to be viable, I would agree, is a question of public policy to be answered by reference to the facts and whether contempt of court has resulted in the obtaining of the foreign judgment. Gee QC argues that public policy would take into account the need for an effective deterrent against breaching an anti-suit injunction. A party should not be allowed to obtain an advantage over the other party resulting from its contempt of court.

[85] Another possibility could be to seek an anti-*enforcement* injunction. This would usually be done in the situation where the non-contractual forum has already issued its judgment against the anti-suit applicant. In this regard, the critical questions are these – does it necessarily follow that the failure to abide by the anti-suit injunction will provide a legal basis to seek an anti-enforcement injunction to resist enforcement in Singapore or elsewhere of any foreign judgment or award obtained in breach of that anti-suit injunction? Would an anti-enforcement injunction serve as a means to protect against an abuse of the process of the Singapore court arising from a breach of the anti-suit injunction order? Would breach of an anti-suit injunction order qualify as an exceptional circumstance as required in *Sun Travels*?[150] The concern in *Sun Travels* was the indirect interference with the execution of the judgment in the country which pronounced the judgment. The question posed here concerns the enforcement of the foreign judgment obtained in breach of the anti-suit injunction ordered by the Singapore court. Would such a breach in and of itself create the necessary equity of the case to favour the grant of an anti-enforcement injunction?

[86] The anti-enforcement injunction and the anti-suit injunction are similar in that both seek to enjoin the anti-suit respondent from pursuing a suit or enforcing a judgment, as the case may be, when the anti-suit respondent had agreed that the dispute would be resolved by a different method.[151] Nevertheless, there remain significant differences

149 Gee, supra n 22, at para 14-020.
150 *Sun Travels*, supra n 3, at [83].
151 *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309 ("*Ecobank*") at [81].

between these two injunctions. In particular, an applicant is likely to face additional hurdles in seeking an anti-enforcement injunction than an anti-suit injunction. This is because the anti-enforcement injunction has typically been perceived as a greater interference with the processes of a foreign court, thereby warranting a more cautious approach.[152] If the applicant is before the court that granted the anti-suit injunction, an anti-enforcement injunction could interfere with the law on recognition and enforcement of a foreign judgment.

[87] It is evident from English jurisprudence that anti-enforcement injunctions are very rarely granted. So far, the few examples include the following:

(a) *Ellerman Lines Limited v Read and others*,[153] where the foreign judgment was obtained by fraud;

(b) *Bank St Petersburg OJSC and another v Arkhangelsky and another*,[154] where there were allegations of fraud and the parties had agreed specifically not to enforce the foreign judgment after it was delivered; and

(c) *SAS Institute Inc v World Programming Ltd*[155] ("*SAS Institute*"), where the court partially granted an injunction enjoining the respondent from taking steps to obtain orders from the US courts which required the applicant to assign certain debts and to turn over certain payments. Notably, the injunction did not prevent enforcement of the US judgment entirely; it only prevented the respondent from seeking certain orders which were viewed as exorbitant by the English court.

[88] The English courts have reiterated the need for caution in granting anti-enforcement injunctions.[156] However, due to the dearth of cases in which anti-enforcement injunctions have actually been granted,

152 *Sun Travels*, supra n 3, at [90].
153 [1928] KB 144.
154 [2014] 1 WLR 4360.
155 [2020] EWCA Civ 599. It is noted that at the time of writing this decision was pending appeal.
156 *ED & F Man (Sugar) Ltd v Yani Haryanto (No 2)* [1991] 1 Lloyd's Rep 429 at 437, 440; *Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The Eastern Trader)* [1996] 2 Lloyd's Rep 585 at 603; *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90 at 108; *Ecobank*, supra n 151, at [136].

while there is some guidance as to when the court may or may not grant an anti-enforcement injunction, the precise requirements for its issuance are not entirely clear. For instance, although Lawrence Collins LJ observed in *Masri* that the power to grant an anti-enforcement injunction "will only be exercised in exceptional circumstances",[157] Males LJ opined in *SAS Institute* that there is no distinct jurisdictional requirement of exceptionality.[158] It therefore remains to be seen how the English courts will continue to develop the principles surrounding the grant of the anti-enforcement injunction in the future.

[89] In Singapore, the anti-enforcement injunction was dealt with in some detail by the Court of Appeal in *Sun Travels*. In that case, the Court of Appeal held that in order for an anti-enforcement injunction to be granted, the applicant must show exceptional circumstances over and above the usual requirements for the granting of an anti-suit injunction. Such exceptional circumstances include fraud, or where the applicant could not have sought relief before the judgment was given because he had no means of knowing that the judgment was being sought until it was served on him. The court explained that this high standard is imposed because, not only does the anti-enforcement injunction "preclude foreign courts from their prerogative to consider whether the judgment in question should be recognised or enforced", the grant of an anti-enforcement injunction "is comparable to *nullifying* the foreign judgment *or stripping the judgment of any legal effect* when only the foreign court can set aside or vary its own judgments" (emphasis in original).[159]

[90] Based on the tenor of the Court of Appeal's decision in *Sun Travels*, it would appear that the threshold for the grant of an anti-enforcement injunction is quite high. It seems unlikely that the mere breach of an anti-suit injunction ordered by the Singapore court would amount to an "exceptional circumstance" justifying the grant of an anti-enforcement injunction. Otherwise, it would be in almost every case where an anti-suit injunction had been ordered and subsequently breached that an anti-enforcement injunction would be granted. One might also query whether non-compliance with an anti-suit

157 *Masri*, supra n 8, at [94].
158 *SAS Institute*, supra n 155, at [93].
159 *Sun Travels*, supra n 3, at [97]–[99], [101], [105].

injunction will automatically amount to an abuse of the process of the Singapore court. As far as abuse of process is concerned, it may well be that much will depend on the actual conduct of the parties in the circumstances of each case. Furthermore, the Court of Appeal in *Sun Travels* was evidently concerned about interfering with the foreign court's prerogative to consider whether the judgment in question should be recognised or enforced. From that perspective, it is arguable that whether or not a judgment should be enforced notwithstanding that it had been obtained in breach of an anti-suit injunction ordered by another court is properly a matter for the foreign court itself to decide. In other words, the mere fact that a judgment or award has been obtained in breach of an anti-suit injunction may not be sufficient in itself to ground an anti-enforcement injunction.

[91] Apart from committal proceedings, resisting enforcement of foreign judgments and seeking anti-enforcement injunctions, what else can a party do to ensure compliance with a forum agreement? The case of *London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain (The MT Prestige) (No 3)*[160] gives a flavour of the range of options that might be available. In that case, the parties' dispute arose from a serious marine pollution incident involving the vessel, *Prestige*. The *Prestige* broke in two and consequently discharged oil causing significant pollution to parts of the shorelines of France and Spain. Initially, the P&I Club, which provided pollution cover to the owners of the *Prestige* and its managers, commenced London arbitration proceedings against Spain and France pursuant to an arbitration agreement in the contract of insurance. The tribunal found, *inter alia*, that in the absence of any prior payment by the owners to Spain, the P&I Club was not liable to Spain in respect of its claims due to the "pay to be paid" clause in the insurance contract. Spain did not participate in the arbitration proceedings but instead commenced court proceedings in Spain, which eventually led to the Spanish court finding the P&I Club liable for up to US$1bn.

[92] At this point, one might think that the resolution of the dispute would simply be a matter of ensuring that the arbitral award was enforced and resisting the enforcement of the Spanish judgment.

160 [2020] EWHC 1582 (Comm).

However, the P&I Club took a slightly different approach. It commenced a *further* arbitration seeking a whole host of relief, including a declaration that Spain was and would be in breach of its obligation not to pursue the claims made in the Spanish proceedings other than by way of London arbitration. The P&I Club also sought equitable compensation for breach of the equitable obligation to arbitrate the claims brought in the Spanish proceedings, in the amount of any liability and costs incurred by the P&I Club arising from Spain's pursuit of those proceedings. In addition, the P&I Club sought contractual damages, an anti-suit injunction and an order enjoining Spain from taking any steps to have the Spanish judgment recognised or enforced in any jurisdiction worldwide. Essentially, it took a belt and braces approach to ensuring compliance with the forum agreement. In the English High Court, Henshaw J held that the P&I Club had a good arguable case in respect of some of these claims and partially allowed the P&I Club's application for the court to appoint an arbitrator. Henshaw J's decision was upheld by the English Court of Appeal in *London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain; London-Steam-Ship Owners' Mutual Insurance Association Ltd v French State*.[161] Notably, the English Court of Appeal endorsed the principle that "a third party to a contract containing an arbitration clause, who claims a right under such contract, whether by assignment or statutory entitlement, takes that right subject to the arbitration clause which regulates the means by which the transferred right is to be enforced". This "obligation to arbitrate the dispute relating to the asserted claim" was said to be "an equitable obligation imposed by the conditional benefit principle".[162] These are familiar principles already traversed in the discussion above. Of course, it remains to be seen whether the P&I Club will be successful in its claims before the tribunal. Potential impediments to its claims include *res judicata*, waiver, and arguments regarding the effect of the Spanish judgments on the tribunal. Nevertheless, this case is a useful illustration of the *range* of procedural tools which are available to a party seeking to ensure compliance with a forum agreement.

161 [2021] EWCA Civ 1589 ("*The Prestige (CA)*") at [94].
162 Ibid, at [62].

Court whose proceedings are indirectly affected by the anti-suit injunction

[93] Next, I discuss the enforcement of the anti-suit injunction from the perspective of the foreign court whose proceedings are indirectly affected by it. In certain cases, it is possible that the foreign court will respect the anti-suit injunction and stay its own proceedings in favour of the court which has issued the anti-suit injunction. Indeed, that was what the Canadian court did in response to the decision of the English Court of Appeal in *OT Africa Line Ltd v Magic Sportswear Corp*.[163]

[94] However, an anti-suit injunction may not always be well-received by the foreign court whose proceedings are indirectly affected by it. Indeed, the foreign court need not recognise the anti-suit injunction and may well choose to ignore it entirely.[164] The foreign court may even issue what is known as an "anti-anti-suit injunction" – an injunction restraining a party from seeking or continuing to seek an anti-suit injunction in another court. This was in fact what happened in 2017 in a case involving the Wuhan Maritime Court and the Hong Kong High Court.[165] In that case, the Chinese court granted a cargo insurer's application to arrest a vessel in order to secure a cargo claim under a bill of lading. The cargo insurer then commenced substantive proceedings in the Chinese court against the shipowner, and the Chinese court accepted jurisdiction. In response, the shipowner applied to the Hong Kong High Court for an anti-suit injunction, which was granted on the basis of an arbitration clause in the bill of lading. On the cargo insurer's application, the Chinese court then issued a maritime injunction against the shipowner, ordering the shipowner to withdraw the Hong Kong proceedings. Notably, the Chinese court considered that the insurer could not be bound by the arbitration clause as it was not a party to the bill of lading contract.

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163 *OT Africa Line Ltd v Magic Sportswear Corp and others* [2006] 1 All ER (Comm) 32; see *OT Africa Line Ltd and others v Magic Sportswear Corp and another* [2007] 1 Lloyd's Rep 85 for the decision of the Canadian Federal Court of Appeal.

164 *Enforcing International Arbitration Agreements*, supra n 89, at 589.

165 Yu Feng, Steven Zhou and Stephen Du, "Maritime Injunctions – A Weapon Against Anti-Suit Injunctions?", https://www.kwm.com/en/knowledge/insights/maritime-injunctions-a-weapon-against-anti-suit-injunctions-20171023 (accessed on November 1, 2021). See also *Swissmarine Services SA v Gupta Coal India Pte Ltd* [2015] EWHC 265 (Comm).

This divergence of perspectives between the Hong Kong court and the Chinese court thus led to the issuance of competing injunctions.

[95] A more recent example of when an anti-anti-suit injunction was issued is *Specialised Vessel Services Ltd v MOP Marine Nigeria Ltd*.[166] This case concerned a dispute under a bareboat charterparty which provided for London arbitration. After the vessel was involved in a collision in waters close to Nigeria, the bareboat charterer commenced proceedings in Nigeria seeking, among other things, a negative declaration regarding liability. The owner then sought a stay of the Nigerian proceedings in favour of London arbitration and commenced London arbitration against the bareboat charterer. Subsequently, the bareboat charterer obtained an *ex parte* injunction from the Nigerian court preventing the owner from pursuing the arbitration. The owner then sought an anti-anti-suit injunction from the English court, which was granted. In doing so, Calver J opined that the anti-suit injunction issued by the Nigerian court was "not a factor of any great weight against the granting of an injunction", because the obtaining of the anti-suit injunction constituted a breach of the arbitration clause, as well as "an egregious attempt to prevent [the owner] from exercising its contractual right to arbitrate in London".[167] In Calver J's view, the grant of an anti-anti-suit injunction was therefore justified.

[96] Arbitral awards containing anti-suit injunctions may face similar difficulties. There have been cases where the foreign court refused to recognise and enforce an award because the award contained an anti-suit injunction in relation to proceedings commenced in that foreign court.[168] This is of practical significance especially where a party intends to eventually seek enforcement of the award in that foreign jurisdiction. Commentators have observed that arbitrators are legitimately concerned that an award containing an anti-suit injunction will be unenforceable in a foreign jurisdiction where anti-suit injunctions are not a recognised remedy, or are against public policy.[169]

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166 *Specialised Vessel Services Ltd v MOP Marine Nigeria Ltd* [2021] EWHC 333 (Comm) ("*Specialised Vessel Services*").

167 Ibid, at [48]–[51].

168 Turangga Harlin, "Indonesia: Enforceability of Foreign Anti-Suit Injunctions under Indonesian Law", http://arbitrationblog.kluwerarbitration.com/2018/03/03/indonesia-enforceability-foreign-anti-suit-injunctions-indonesian-law/ (accessed on November 1, 2021).

169 Friedland and Brown, supra n 130, at p 269.

This may discourage arbitrators from issuing awards containing anti-suit injunctions altogether.

Third-party court

[97] Finally, I turn to the perspective of a third-party court. The enforcement of an anti-suit injunction by a third-party court is highly unlikely, as comity generally requires that the forum should have a sufficient interest or connection with the matter in order to justify intervention.[170] Interestingly, however, third-party courts may be more open to enforcing monetary judgments that award damages for breach of a forum agreement than to enforcing an anti-suit injunction.

[98] The decision of the Hong Kong Court of Final Appeal in *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd*[171] provides an interesting case study which highlights the difference between the anti-suit injunction and the damages remedy. This case involved several cargoes shipped under bills of lading containing an exclusive English jurisdiction clause. The shipper alleged that the cargo had been wrongfully delivered and commenced proceedings against the carrier in the Chinese courts. In response, the carrier sought and obtained an anti-suit injunction from the English court. However, that did not stop the shipper, who continued to pursue the Chinese proceedings and even obtained judgment in respect of some of them. Nor was the shipper deterred by the fact that the English court had found it in contempt of court for ignoring the anti-suit injunction. In other words, the English anti-suit injunction had proved ineffectual. The carrier then commenced a second English action seeking damages for the breach of the exclusive jurisdiction clause. While this action was pending, the carrier obtained from the English court a worldwide freezing order against the shipper in respect of the sums claimed by the shipper in the various Chinese proceedings. The carrier then applied to the Hong Kong court for a *Mareva* injunction in aid of the English action and to give effect to the English worldwide freezing order. By the time the matter was heard by the Hong Kong Court of Final Appeal, the English court had allowed the carrier's claim for breach of the exclusive jurisdiction clause, and had awarded damages

170 *People's Insurance Co Ltd v Akai Pty Ltd* [1997] 2 SLR(R) 291; *Airbus Industrie GIE v Patel and others* [1999] 1 AC 119.

171 *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* [2017] 4 HKC 379.

amounting to the sums that would be awarded to the shipper by the Chinese court.

[99] The first instance court (whose decision was upheld by the Hong Kong Court of Appeal) had initially declined to grant the *Mareva* injunction sought by the carrier. On further appeal, however, the Hong Kong Court of Final Appeal allowed the appeal and granted the *Mareva* injunction. In doing so, the Court of Final Appeal observed that the Hong Kong court was not being asked to assist the English court to enforce an exclusive jurisdiction clause, which would constitute an intervention in a conflict as to jurisdiction between the English and Chinese courts and thereby involve a breach of comity. Instead, it was being asked to assist in enforcing an award of damages by the English court for breach of the exclusive jurisdiction clause. There was no public policy reason barring such enforcement. Accordingly, the *Mareva* injunction was granted.

[100] This case demonstrates the interplay in practice between the anti-suit injunction and the damages remedy. It reveals how, in certain circumstances, the anti-suit injunction may be limited in its utility. Indeed, despite two anti-suit injunctions having been issued by the English court, the shipper remained undeterred in pursuing its claims in the Chinese courts. One might surmise that even an anti-*enforcement* injunction if granted would have been ineffectual as well. This case also demonstrates that, while it would be extremely challenging to enforce an anti-suit injunction or an exclusive jurisdiction clause in third-party courts, a judgment for damages is likely to face much less difficulty in comparison. This reveals the usefulness of a damages claim for breach of a forum agreement, and perhaps explains why, as I have discussed earlier, this has become a burgeoning area of jurisprudence, with parties eager to seek a damages remedy in addition to or in lieu of more traditional remedies.

Conclusion

[101] To conclude, it is apparent that there has been a significant expansion in the scope of the anti-suit injunction, primarily spearheaded by the English courts. This robust development is unsurprising; as disputes become more complex and international, especially in the maritime context, and as parties become increasingly sophisticated and well-advised, it is essential that the courts continue to develop the anti-suit injunction so that it meets the needs of international

commercial litigation and arbitration. That being said, as we venture into these largely unchartered waters, it is critical that we do not lose our "north star" – ensuring that the anti-suit injunction serves the ends of justice rather than becoming a litigation tactic and procedural weapon where satellite litigation and legal costs distract parties' attention from the main event. Moreover, it may be worth revisiting the historical origins of the anti-suit jurisdiction and examining how the contractual basis became an independent ground for the grant of an anti-suit injunction. In the past, the breach of a forum agreement provided the requisite "equity" justifying the court's exercise of its anti-suit jurisdiction. Would inconsistent conduct by a party claiming in contract suffice for such an "equity" to be established? A closer look at the historical development of the anti-suit injunction may help to shed some light on this inquiry.

[102] Furthermore, while the anti-suit injunction has generally been the principal remedy used to vindicate breaches of forum agreements,[172] this should not constrain the development of other types of remedies. As one commentator observes, the failure to consider and develop a range of remedies will leave the courts "with a less sophisticated mechanism for enforcing [forum] agreements that fetter their ability to render appropriate and fact-sensitive remedies".[173] In this regard, a remedy with potential for further development is the damages remedy. However, for the reasons I have mentioned, care ought to be taken that we do not become overzealous about the protection of forum clauses. As I alluded to at the beginning of this article, anti-suit injunctions and the damages remedy are powerful tools at the disposal of common law courts and tribunals, which are likely to ensure that forum agreements in favour of such courts or tribunals are complied with. While upholding party autonomy is important, it does not give parties *carte blanche* to assert the imposition of an anti-suit injunction or an award of damages in all cases where there is a forum clause which is somehow connected to the parties' dispute, no matter how remote that connection. Indeed, party autonomy cuts both ways – it may be *contrary* to party autonomy to require compliance with a forum clause when the party did not agree to be so bound. Furthermore, as far as damages are concerned, it is apposite to bear in mind the

172 *Enforcing International Arbitration Agreements*, supra n 89, at 561; Dinelli, supra n 95, at 1028.

173 *Enforcing International Arbitration Agreements*, ibid, at p 549.

oft-mentioned principle that damages are not meant to be used as a punitive tool; they are simply the means by which the court gives effect to the bargain that has been struck by both parties.[174]

[103] Finally, in developing the anti-suit injunction and the damages remedy, it is crucial that we do not miss the wood for the trees. Ultimately, the anti-suit injunction and the damages remedy are merely two out of several "interlocking" remedies available to enforce a forum agreement. Their individual development must therefore be undertaken with a view to this overarching framework of remedies and their ultimate purpose, in order to establish a "principled set of remedial responses" which is coherent, consistent and ultimately directed towards serving the interests of justice.[175]

174 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] 2 SLR 129 at [71]–[72], [135]; *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 at [154].

175 *Enforcing International Arbitration Agreements*, supra n 89, at 610, 613; *Damages for Breach of Forum Selection Clauses*, supra n 98, at 660.

The Judicial Mask: A Happy Judge?

by

*Justice Choo Han Teck**

[1] There is no such thing as a happy judge; or, at least, there shouldn't be. The judge deals with the unhappiness, misery, and despair of other people. Almost all of them appear before him because of a dispute, hoping that the judge will resolve their dispute and problem for them. In the end, not everyone, including the judge, might have left the courtroom entirely happy. No one who lives through so much sorrow and desolation that unhappy litigants bring with them into the courtroom, can truly find joy himself. The judge lives through the lives of all the unhappy litigants through their affidavits, the second-hand, embellished tales of woe that their lawyers will tell the judge, and most searing of all, the face-to-face encounters in which sad eyes catch those of the judge, hoping that he has the magical power to see the reflection of their lives and problems in them. The disappointment they often feel, intensifies the gloom that shrouds the room where the judge works. In the age of Zoom, the courtroom is no longer the sole chamber of despair. This now extends to the judge's private chambers, or his "office" as it is now commonly called, or even his study at home. The judge is constantly under pressure to make the right decision. The intensity of this stress-inducing factor is better understood when one appreciates that in coming to the right decision at the end of the trial, the judge has to make innumerable right decisions along the way.

[2] Outside of work, that same judge can be a happy, bouncing young man (or woman), full of joy even though chronologically, it would be fake news for him to assert that he is young. The object of this article is to reconcile the two disparate sides of the same person, and to show that it is not a condition of schizophrenia, but of necessity. Partly in recognition of the dark side of judicial activities, and partly as a light-hearted introduction to young (the chronologically young) judges and judicial officers when they are newly appointed, there are now courses and seminars on how judges should conduct themselves,

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how they should prepare themselves each day before trial, and even on how to preserve themselves in the time of the Coronavirus pandemic. Such courses can be useful, of course, but they are sometimes task-specific, and sometimes regaling in the benefits of drinking fruit and vegetable juices.

[3] The question we need to concern ourselves with here is: how does anyone reconcile the idea of an unhappy judge in the courtroom and the happy one outside it? The work of the judge is straightforward. He listens to the disputes that the litigants bring to his court, and he assesses the evidence, analyses the law and, applying it, arrives at his verdict in which he makes the orders necessary to dispose of the case. This is what he does. How he does it is the more complicated part of his work. How do judges go about their work, and more importantly, how can they be enlightened in the approach they take to discharge their judicial functions? When a judge enters the courtroom, he can sweep his gaze from left to right and absorb the vast domain of his personal empire – the court secretary and the Justices' law clerk sitting just below him, counsel, and their entourage of "chairs" (no one really knows when the lead counsel and his assisting counsel became known as "first chair" and "second chair", but we know that the first chair is a term used in the music world long before it became a noun in court. The first chair is the lead musician, seated closest to the audience). Behind the "chairs" sit the litigants; and behind them is the public gallery where anxious relatives of the litigants sit.

[4] What the judge rarely thinks about, is the view from the other side – what everyone else but the judge, his secretary, and clerk, sees. It is true that the view the people in the courtroom have of the judge is of no consequence to the verdict, but if a judge can see how the others see him, he may gain a better insight into his conduct as a judge. Generally, everyone else just wants the judge to listen to what they and their counsel have to say and then to determine who has the better case. They want the judge to listen and understand their problems and the solution that they and their counsel propose. They will look at the judge and hope that he does not have biases and prejudices that are detrimental to his appreciation of their case. They hope that the judge will not be openly harsh with them, or intervene in the proceedings to assist the other side. In other words, they just want the judge to be fair.

[5] The judge sometimes cannot overcome his feelings of indignation at the conduct of the litigants, or sometimes their witnesses, or their counsel, and sometimes, at all of them. From the lofty heights of the Bench, the judge often has a clear view of where the justice of the case lies. It is in such moments that he has to control himself because he cannot possibly be impartial when he is petting one party and slapping the other. More importantly, training himself to be impartial ameliorates the joylessness of a trial.

[6] Every life is led accumulating bias and prejudice along the way. This accumulation will coagulate with one's rational thoughts, as well as the feelings each of us have towards others, but it is the judge who has to suppress his personal feelings if he cannot leave them outside his courtroom. This is a trainable part. One can train himself to weigh evidence, and assess the credibility of witnesses dispassionately. The judge needs to remind himself that he has no personal stake in the case. He must remind himself that his duty is to administer justice according to law, and that means that he should have no one party that he prefers to see succeed. He should just call it as he sees it.

[7] Sometimes a judgment might be reversed on appeal, but it is not the judge's job to guess what the appellate court would do. The appellate court has its job, as does the first instance court. No matter how long one has been a judge, every case is unique, and demands the same attention and the same scrutiny that is expected of the judge. This, naturally, takes a toll on the judge and is a source of mental exhaustion – a factor affecting the happiness of a judge. Thus, a desire for happiness in the judge's job is a distraction that can lead to a loss of focus, and, eventually, to disappointment. The strain of a judge's work comes from concentrating fully on each and every case, year in and year out, but there is no alternative.

[8] Throughout his tenure, the judge has just to focus on how best he can discharge his judicial functions. They are not many. Listen, assess, decide. Thus, the basic nature of his functions is simple, but the quality of his performance is a challenge. A judge must not only listen, but listen patiently; he must not only assess but also assess fairly; he must not only decide, but he must decide without delay and let the litigants know the reasons for his decision.

[9] The judge is first judged by how he conducts himself in court, the forum in which he has to justify the saying that some claim to

have originated in the 17th century – to be "as sober as a judge". The experienced lawyers tend to be poker-faced in court. They will not betray what they know and what they do not know. Judges are required even more so to remain expressionless so as not to display any hint of bias. Of course, a judge is not a mannequin. Occasionally he needs to let the court know that he is alive, if not awake. Sometimes he needs to do something about the lawyer who goes on endlessly, and often, on the wrong track. How the judge handles these situations varies from judge to judge, and also, from counsel to counsel. Sometimes, a gentle shake of the head will suffice; sometimes a glare and a grunt will be sufficient to ensure compliance by counsel. A judge will have ample opportunities to hone the skill of crafting such responses. He can be stern and harsh with counsel (less so with the witnesses), but he should never shout lest he loses the moral high ground to tell him, "If I do not raise my voice, no one in this court should either", and that is often an effective way of calming a lawyer enraged by an uncooperative witness.

[10] The ecosystem of a trial is efficient. Counsel, especially the cross-examiner, controls the witness, and the judge controls counsel. The judge should not be seen to tamper with a witness's testimony, cajoling or bullying him to say things he might not wish to say. That is counsel's job. Should counsel overstep the limits of propriety, the judge must be firm and reign him in. This way, justice is best done and is seen to be done. But there is no need to rush. Most witnesses, especially the lying ones, are made of stern stuff. The experienced judge prefers to wait, and watch how a witness performs under pressure. Witnesses should not be coddled for many are sharper than we think. They can size up the judge sometimes better than the judge assesses them. They pick up hints of the judge's thoughts from his questions and adjust their evidence accordingly. Give them enough rope, and they may hang themselves. The judge has the last word in the trial. That is generally enough.

[11] Sometimes, there may be gaping holes in the story, which if not filled, may result in justice not being done. These are the occasions when the judge must find his voice, not to fill the gap, for that is counsel's job, but to ensure that counsel does his job. A gentle inquiry by way of an open-ended question is usually enough.

[12] Before the intervention of technology, the handwritten notes of the judge would form the record of the proceedings. Even in those days,

judges rarely recorded questions, and the answers of the witnesses, verbatim. Now, all court proceedings are digitally recorded and there is even less reason for the judge to make a verbatim record of the proceedings in his own hand. Yet there are judges who still incline to do that. When counsel records the answers to his questions, he is distracted from a visual and aural appraisal of his prey and so may not even realise that he had made his escape. Similarly, the judge loses the advantage of observing the demeanour of the witness (and also of counsel) when he distracts himself by making a superfluous recording of the proceedings.

[13] Experienced judges spend more time watching the goings-on in his court than the writing on their pad, whether paper or electronic. Many advocacy trainers will declare that a witness's demeanour is not everything, but none will dare say that it means nothing. Judging a witness by his demeanour is not the same as judging a book by its cover. Demeanour is presentation, and how a sentence is constructed, how one paragraph flows into the next, are not just substance. They are also part of the author's presentation. There is, therefore, another reason why judges need to be calm and dispassionate. They need their minds to be clear of distractions and emotions in order to compare the story being told to him with the credibility of the storyteller. A bad story may be salvaged by a good storyteller, and likewise, a bad storyteller may be redeemed by a good story. Given all the different shades of good and bad, it becomes all the more important that the judge keeps his focus in order to judge.

[14] It is not easy to follow the injunction to focus unless the judge knows what he has to focus on. Remember, the judge's main function is to decide. Thus, he must quickly understand what it is in the case that he has to decide, and that is what he has to focus on. The role of counsel is to help the judge see this point and thus express the question of what the court has to decide as the foremost signpost. That is usually done by telling the court what the party's story is. At the end, the judge will have two competing stories. The story is what the parties have to prove. Evidence is what they show the judge to convince him that their story is true. The judge's perspective, therefore, is to see what reasonable conclusions drawn from the evidence, as they fall, may lead him to choose which of the competing stories is the more plausible. That, is how a judge usually arrives at his decision.

[15] Coming to a decision and explaining it are two different exercises. Some have less difficulty with one than the other. In the first case, the learned judge must keep learning. So far as the law is concerned, he learns the law as law students would – from the cases; but unlike a law student, the judge learns cases first hand. Furthermore, in a trial, the lawyers will tell the judge what to look for, the witnesses will tell him the story, and the Court of Appeal will tell him what the law is; but only the judge can tell the world what the verdict will be. His decision and his judgment, right or wrong, appreciated or not, is always unique, like a work of art. Like a work of art, it can be adored today only to be scorned tomorrow.

[16] There is another side to keeping himself learned. It is the well-rounded education that leads to wisdom. That sort of learning comes from life – the knowledge of how people, far different from the judge himself, live. That education includes an understanding of what drives people differently; it is an enlightenment that leads to the cultivation of an empathetic mind – the bedrock of wisdom. It may, however, be asking a little too much for a judge to visit a bordello, for instance, to experience forbidden pleasures. Though life itself is the best teacher, books are the next. Hence, a judge's work cannot truly be said to be done when he steps down from the courtroom after a case, for much learning awaits him still. Each book that he reads prepares him for the experiences that he may encounter in the cases to come.

[17] It is partly this learning that girds the judge long into the night as he drafts his judgment. Another source of fortitude comes from the experience of writing itself. As in art, the judge, like the artist, gets better with practice. Ultimately, he understands how to mesh knowledge, experience and the craftsmanship of writing. Even so, decisions have to be made, this time, in respect of how best he explains his decision. If a judgment has to tell a story, could it not be a pictorial one, dabbed with charts and diagrams, laying out the plots and subplots, the twists and turns, in colours of various shades – or just the black print on white paper?

[18] Should a judgment be neatly paragraphed and embellished with helpful headings? Or should it be done Kerouac-style – not that the judge writes as he rides, but that the judgment flows with no paragraphs or page numbers? Although judges generally try to keep their judgments under fifty pages, some judgments require just seven pages, others seventy, for the judge to explain his decision. A

judgment should go on and last while it lasts. Seven or seventy, the judge decides.

[19] Much of how a judge writes have to do with style, and so, to each his own. But judgment writing is a craft in which style and form must not stray from function. In this regard, judges value precision, but they know and constantly warn themselves of what they wish for. Precision means that one must not only be accurate, he must also be correct. It means that a sentence must not carry one word less nor one word more than it needs. Emphasis is a matter of style, but it can sometimes be indistinguishable from surplus information. Surplus information does not indicate a depth of knowledge, but the breadth of distraction.

[20] The last factor that creates tension for a judge is the unseen but palpable pressure of completing the trial and delivering the court's decision, without delay. This stress comes in two parts. Many things can slow down an action from the commencement to the end of the trial. Some, like the death of an expert witness, are outside the court's control. Nowadays, with the increasing use of the docketing system, the judge has a much greater control of the speed of the action. He may, for example, dock unnecessary applications, and set deadlines for the ones he allows. He may refuse leave to appeal, or direct that the action continues its course even though the matter under appeal is pending.

[21] When a claim is properly pleaded, it will not only be a matter of pride for the plaintiff's lawyer, but this will also save the need for requests for further and better particulars. Why then have such requests increased in numbers, and why do lawyers fight acrimoniously over them? There are several reasons. The first is poor drafting. The lawyer does not know how to apply the rule that requires the pleadings to include only such facts as will establish the cause of action. Many lawyers get carried away. They become too anxious to put their client's strongest case in the statement of claim. But that is not the function of the statement of claim. Law need not be pleaded (except in cases where a specific law is relied upon for the cause). Evidence should not be pleaded for their turn will come when the parties file their affidavits of evidence-in-chief. When a lawyer includes evidence in the statement of claim, it is likely that he is only pleading a half-baked story with gaps and omissions that almost invariably invite opposing counsel to ask for particulars. The practice of voluminous pleadings

billowing to excess may be due to senior lawyers not supervising the junior ones doing the draft. It is thus left to the judge to enforce basic discipline on pain of costs.

[22] Another reason for the proliferation of applications for further and better particulars is that the defence lawyer is himself too anxious to know everything about the plaintiff's case. The result of not following the interlocutory procedures step by step is that everyone gets bogged down when the process should flow quickly and smoothly from one stage to the other. This sort of applications springs from the same well of ignorance as that of the lawyer who does not know the basics of such applications. Much like George Mallory who, when asked why he climbed Mount Everest, replied, "Because it's there", such lawyers apply for further and better particulars just because the rules allow it.

[23] One other tack that the judge has to shorten a trial, is to compel the parties, as early as possible, to state what exactly they are disputing. Lawyers often misunderstand the phrase, "putting to strict proof". It is a privilege, not an injunction, to require a claimant to prove that which he alleges. In most cases, the crucial differences are few and can easily be identified. A lawyer who rejects every point just so as to put the other side to strict proof, drags a trial unnecessarily. As it is, much talk, both by the witness as well as counsel, goes on in a trial. The judge who has ascertained what the issues really are, can let some claims, even extravagant ones, pass. Something does not become an issue just because a lawyer asserts that he wishes to put the opposing party to strict proof thereof.

[24] There are cases in which a lawyer makes unnecessary applications just for the sake of costs, whether from the other party, or to justify the bills he gives to his own client. In either case, poetic and equitable justice will deny him. These days, it is not uncommon for lawyers to file applications so close to the trial that the registry has to fix them for hearing before the trial judge. But this has a fundamental problem. All trials (except those ordered to be heard *in camera*) are public trials and the public has a right to attend. When a trial has been fixed to commence on a given date, all interlocutory matters should have ended. Thus, any application that has to be made, would be directed by the judge to be made orally in open court. That means that the lawyer would have wasted his client's money filing court papers for the application. Counsel seem to have forgotten that the way to do

this right is to write to the opposing counsel to give him the details of the application which he hopes to make at the opening of the trial.

[25] So long as the interlocutory matters are properly and expeditiously settled, the trial should not take long. The days in which a lawyer has to lead his own witnesses through an oral examination-in-chief, are over. Evidence-in-chief are admitted by way of affidavits, and therefore, judges may justifiably stop counsel when their cross-examination consists of reading parts of the affidavits of evidence-in-chief, and asking whether that is the witness's evidence. This can shorten a trial tremendously especially in cases where counsel has no other cross-examination. That brings us to the prickly question of a judge intervening in the cross-examination on substantive matters. Almost all well-prepared, competent counsel would not welcome judicial intervention because when counsel has done his work well, the only reason a judge might interfere is to help the other side. From the judge's point of view, it is a necessary evil in order that justice might be done. Judicial intervention of this sort can be debated at length and might fill another article.

[26] For present purposes, we can say that some judges intervene more than others, but whether justice has been done is a question, the answer to which should be deferred. What can be said is that an experienced judge would have learnt to intervene without appearing to intervene, or at least, ensure that he has not lost his impartiality. Thus, the simplest and least offensive way a judge might intervene is by asking an open-ended question and to do so without any hint of harshness in his tone. The judge may also induce compliance with just an inquisitorial glare of his eyes.

[27] Before moving to the next aspect of judging, which is judgment writing, we can end this part with the idea of decorum in the courtroom. Lawyers, witnesses, and occasionally, members of the public, are chastised for disorderly and indecorous conduct in the courtroom. Decorum requires that not only should people not raise their voices in court, they also ought not to speak rudely, or behave with conduct unbecoming of a person in a courtroom. The judge must rule his province with a firm hand remembering that he does not have to appear gentle and kind all the time. Disrespectful behaviour in a courtroom is disrespect to the institution of the court, not the judge himself – because the judge is just representative of the court. When

he deals with misconduct in his court, he is defending the honour of the court, not his personal self. Therefore, it follows that the judge must himself behave with decorum. The rule of thumb here, and it is an easy one to remember, is that, in court, the judge must be sober.

[28] The judge completes his work on a case when he signs off his order or judgment of that case. A judgment may be handed down orally in court to the parties and their counsel. If the oral judgment is handed down at the same sitting, it is traditionally referred to as an *ex tempore* judgment. If it is delivered on another day, it is just an oral judgment. When a judge decides to release a written judgment, he will notify the parties. If it is likely to take more than a week or two, he will usually tell them that judgment is reserved.[1]

[29] Since this wraps up the case, the requirements demanded of the judge are that the judgment is complete and honest, that it is fair and balanced, and that it is temperate. Technically, a judgment differs from an order in that the former must include the salient facts upon which the court based his decision, the issues in dispute, the judge's decision on those issues, and the reasons for his decision.

[30] After a judgment has been handed down, the judge's work is done and he is *functus officio*, the Latin term signifying that the judge's mandate is over. He may not, unless the law allows in specific instances, hear further arguments or embellish his judgment. Furthermore, since a judgment comes with the reasons for it, it is incongruous for a judge to deliver further reasons after the judgment. It is also based on those reasons that the litigant makes his decision whether to appeal.

[31] For a judgment to be fair and balanced, it generally requires the judge to be temperate. It is, of course, inevitable not to declare a party a fraud if fraud was pleaded and proved. Beyond that, a judge can show restraint in his judgment by the degree and extent of his condemnation of the wrongful conduct. He learns, in due course, the difference between judging and being judgmental. Counsel live in trepidation of the intemperate judge. Irascibility and harshness during the course of a trial is hard on counsel, but to render it indelible in a written judgment requires a judge to think long before he does so. Once a judgment is released, the judge's work for that case is largely done, and the judge should not make his own life unhappier thinking if he

1 *Curia advisori vult* (or *cur adv vult* or *CAV* for short).

ought to have decided in some other ways, nor should he be affected by comments on his judgment. This is one aspect that has increased in the past decade and a half because social media has made it so much easier to criticise, not just judgments of a court, but everything else. That is what the judge has to remember, and develop a tougher skin coated with extra Teflon.

[32] That brings us to the last part of this article. What makes a temperate judge? A judge, frustrated by incompetent counsel is more likely to become bad-tempered. Going back a little to what was said above, the judge may be able to make counsel more competent by early and constant case management, making sure that what the judge expects to be done for a smooth and expeditious trial is properly understood.

[33] There are other ways for a judge to maintain equanimity in his work, the most effective of which is to remind himself that he has no stakes in the case. Accepting that whoever wins is of no consequence to the judge enables him to think freely and calmly. Sometimes the law may favour a person, in the judge's opinion, unfairly or undeservedly, but his duty as a judge is to call it as he sees it. He may declare what it is that troubles him about the law, and if the evidence is clear, so let it be. There is no reason for a judge to be emotional about his case lest his judgment becomes clouded by a desire to reach a conclusion he prefers than the one that he ought to make.

[34] The private life of a judge is where he should find his happiness. He needs time to rest, and enjoy his family and friends, and his pastimes, be they a sport or a hobby, so that he is mentally re-energised to continue his work. When he finally retires, he may look back with a sense of happiness that he had discharged his judicial duties professionally.

[35] A judge does not become calm and imperturbable as if by magic when he steps into the courtroom, or when he picks up his pen to write; he must bring those qualities of equanimity and patience with him when he is elevated to the Bench, and he has to continually to develop them in his career. As was once said by Chief Justice Charles Evans Hughes, of the United States of America, that "honour does not come from the office, but from the qualities the judge brings to that office".[2]

2 *The Autobiographical Notes of Charles Evans Hughes* (Harvard University Press, 1973).

Arbitration in Malaysia – An Assessment of the Judicial Approach to the Application and Construction of Section 8, Section 37 and Section 42 of the Arbitration Act 2005

by

*Tan Sri Dato' Cecil Abraham**

[1] Over the past few decades, Malaysia has sought to develop a refined and efficient system in so far as alternative dispute resolution is concerned. Today, Malaysia has a relatively robust arbitration ecosystem.

[2] From a historical perspective, in 1950, the Arbitration Ordinance 1950 ("1950 Ordinance") replaced the 1890 Arbitration Ordinance for all the States of the then Federation of Malaya. The 1950 Ordinance was based on the English Arbitration Act of 1889. British North Borneo and Sarawak adopted the English Arbitration Act of 1950 as their respective Ordinance in 1952. In 1963, North Borneo and Sarawak joined the Federation of Malaysia. On November 1, 1972, Malaysia adopted the arbitration laws prevailing in Sabah and Sarawak and it became known as the Arbitration Act 1952 ("1952 Act"), which is based on the English 1950 Act.

[3] Thereafter, an amendment to the 1952 Act on February 1, 1980 gave special status to arbitrations held under the Convention on the Settlement of Investment Disputes between the States of Nationals and other States 1965 ("ICSID") under the United Nations Commission of International Trade Law ("UNCITRAL") and the Rules of Arbitration for the Kuala Lumpur Regional Centre for Arbitration ("KLRCA") (now known as the Asian International Arbitration Centre ("AIAC"). Pressure to replace the 1952 Act by the Malaysian Bar Council and the arbitral community with the Model Law resulted in the enactment of the Arbitration Act 2005 ("2005 Act"). The 2005 Act, based largely on the Model Law and the New Zealand Arbitration Act of 1996, came into effect on March 15, 2006.

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[4] There were still omissions in the 2005 Act, and the arbitral community, including the Malaysian Bar Council and the Attorney General's Chambers of Malaysia, collaborated to ensure that these omissions were addressed by way of the Arbitration (Amendment) Act 2011 ("2011 Act") which came into force on July 1, 2011.

[5] Then, two pieces of legislation were passed in 2018 which made several key changes to arbitration in Malaysia under the scheme of the 2005 Act. The first being the Arbitration (Amendment) Act 2018 (No. 1), which renamed the KLRCA to the AIAC, and that all legal references to the former KLRCA (under the 2005 Act and the existing KLRCA Rules) remain in full force subject to the change in name.

[6] The second amendment in 2018 was the Arbitration (Amendment) Act 2018 (No. 2) (the "2018 Amendment Act"), which brought significant changes to the substantive rules of law on arbitration under the scheme of the 2005 Act which came into force on May 8, 2018. The 2018 Amendment Act was passed with a view of ensuring that Malaysian arbitration laws reflect the 2006 amendments to the UNCITRAL Model Law, and to mirror arbitral legislations of leading arbitral jurisdiction in the region and worldwide.

[7] The principal amendments which were introduced by way of the 2005 Act were with regard to sections 8, 10, 11, 30, 37, 39, 42 of the 2005 Act. Section 8 of the 2005 Act deals with court intervention and the amendment made it clear that court intervention should be confined to situations specifically covered by the 2005 Act so that there would be no application of the common law or statutory concepts of inherent powers of a court of law. The amendment to section 10 of the 2005 Act was with regard to the court's power to grant stay of court proceedings, whilst the amendment to section 11 of the 2005 Act addressed the court's power to grant interim relief, which would apply even if the seat of arbitration was a foreign one. Section 42 of the 2005 Act which is premised on the 2011 amendment, is in respect of the reference of a question of law by a party to a court of law for determination.

[8] This article will consider how the courts in Malaysia have construed and interpreted sections 8, 37 and 42[1] of the 2005 Act.

1 This subject is extensively dealt with in the book *Arbitration in Malaysia: A Practical Guide*, Editor-in-chief, Tun Arifin Zakaria; General Editors, Datuk Professor Sundra Rajoo and Philip Koh and a team of expert contributors (Sweet & Maxwell/ Thomson Reuters, 2017).

Section 8: The judicial approach to minimal court intervention

[9] The courts recognise that party autonomy is the hallmark of arbitration. This principle was given statutory force by way of the original wording of section 8 of the 2005 Act, which was based on Article 5 of the Model Law. Section 8 was initially worded as follows:

> Unless otherwise provided no Court shall intervene in any of the matters governed by this Act.

[10] This section was construed by Justice Mary Lim J (as her Ladyship then was) in *AV Asia Sdn Bhd v Pengarah Kuala Lumpur Regional Centre for Arbitration & Anor*,[2] in the following manner:

> [10] In my view, the second defendant is correct. The intention of Parliament in relation to the object of Act 646 is evident in the opening long title of the Act. It is an Act "to reform the law relating to domestic arbitration, provided for international arbitration, the recognition and enforcement of awards and for related matters". From its structure, it is quite evident that the role of the court has been spelled out early in s. 8 which provides that:
>
> "Unless otherwise provided, no Court shall intervene in any of the matters governed by this Act."
>
> [11] *This is intentional and deliberate. This reflects the policy and general principle of non-intervention; respecting party autonomy, and protecting parties who have chosen arbitration from unnecessary delay and expense. This provision shows support for arbitration.* The terms of the provision indicate that unlike other matters where the court assumes jurisdiction, and then *there may be provisions attempting to oust that jurisdiction; here, there is no jurisdiction to intervene in matters governed by the act "unless otherwise provided".* In other words, consistent with the principle accorded by many jurisdictions around the globe, that in arbitration and matters relating to arbitration, *the courts have a healthy respect for party autonomy or party choice on dispute resolution.* It is not lip service but a real conscious approach as can be seen from the decisions of our apex court. In fact, the Act is filled with the phrase "unless otherwise agreed by the parties". It is used no less than 20 times throughout the legislation. This is quite apart from other words which may arguably draw the same conclusion; words or terms such as "the parties are free to" or "the parties may agree".

2 [2013] 10 CLJ 115.

[11] The current section 8 of the 2005 Act was amended in 2011 in the following manner:

> No Court shall intervene in matters governed by this Act except where so provided in this Act.

[12] The Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals*[3] ("*Far East Holdings*") construed section 8 of the 2005 Act in the following manner:

> [114] *The AA 2005 is devoid of a provision in the words of s 81(2) of the UK Arbitration Act 1996. But the AA 2005 is nonetheless clear that "No court shall intervene in matters governed by this Act, except where so provided in this Act". Pertinent to "where so provided in this Act", the AA 2005 provides for court intervention in the matters stated in ss 10, 11, 13(7), 15(3), 18(8), 29, 37, 41, 42, 44(1), 44(4), 45, and 46 of the AA 2005. "Where a party seeks intervention is one of those situations, the court is permitted to intervene only in the manner prescribed by the model law, and in the absence of any express provision the court must not intervene at all.* By contrast, where the situation is not of a type to which the model law is addressed, the court may intervene or decline to intervene in accordance with the provisions of the relevant domestic arbitration law" (A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary *by Howard M* Holtzmann and Joseph E Neuhaus, published in 1994 at p 224). Accordingly, s 8 "would … not exclude court intervention in any matter not regulated by (the AA 2005)" (The Arbitration Act 2005 at p 8.17); matters which are not governed by the Model Law include the following areas: the inherent jurisdiction in the court to grant an injunction to stay arbitral proceedings; and the whole topic of confidentiality of arbitral proceedings (for a non-exhaustive list of matters not governed by the Model Law, see A Guide to the UNCITRAL Model Law on International Commercial Arbitration at p 218).
>
> [115] *But "… in situations expressly regulated by the Act, the courts should only intervene where so provided in the Act …" (LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal [2012] SGCA 57 per Sundaresh Menon JA, as he then was, delivering the judgment of the court). Since the setting aside of an award is a matter governed by the AA 2005, the court is permitted to set aside an award only in manner*

3 [2018] 1 MLJ 1.

prescribed by the AA 2005. The court is not permitted to set aside an award in manner not prescribed by the AA 2005. "Error of fact or law on the face of the award" is not prescribed as a ground for court intervention. Hence, under the AA 2005, there is no jurisdiction to set aside an award on the ground of "error of fact or law on the face of the award". It is accepted that under the AA 1952, the jurisdiction for court intervention stemmed from both common law and statute. But under the AA 2005, "the common law ground of setting aside an award for 'error on the face of the award' no longer exists" (The Arbitration Act at p 8.23(b)).

[13] There are also other decisions of the Federal Court of Malaysia, the Court of Appeal of Malaysia and the High Court of Malaya[4] which recognise the principle of party autonomy and the concept of non-intervention by the court as embodied in section 8 of the 2005 Act. The purpose of enacting section 8 of the 2005 Act was to ensure that the courts in Malaysia adopt a minimalistic approach to arbitration where the arbitrators shall remain the sole determiners of fact and the findings of the arbitrators on legal principles should not be interfered with unless the decision is perverse.

[14] The issue of whether common law concepts and inherent jurisdiction have a role to play in the light of the enactment of section 8 of the 2005 Act was dealt with in the decisions in *JHW Reels Sdn Bhd v Syarikat Borcos Shipping Sdn Bhd*[5] ("*JHW Reels*"), *Albit Resources Sdn Bhd v Casaria Construction Sdn Bhd*,[6] and *Kembang Serantau Sdn Bhd v Jeks Engineering Sdn Bhd*[7] ("*Kembang Serantau*"), where the High Court took a narrow approach and interpreted section 8 of the 2005 Act strictly and held that although the applicant was late by only one day in filing its application under section 37 of the 2005 Act to set aside an arbitral award, the court did not have the power to extend time.

4 *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 9 CLJ 1; *Jan De Nul (Malaysia) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 1 CLJ 1; *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617; *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872; *Magnificient Diagraph Sdn Bhd v JWC Ariatektura Sdn Bhd* [2009] MLJU 583; *Taman Bandar Baru Masai Sdn Bhd v Dindings Corp Sdn Bhd* [2009] MLJU 793; *Twin Advance (M) Sdn Bhd v Polar Electro Europe BV* [2013] 7 MLJ 811; *Kembang Serantau Sdn Bhd v Jeks Engineering Sdn Bhd* [2016] 2 CLJ 427; *Emerald Capital (Ipoh) Sdn Bhd v Pasukhas Sdn Bhd & Anor* [2019] MLJU 181.

5 [2013] 7 CLJ 249.

6 [2010] 3 AMR 721; [2010] 7 CLJ 785.

7 [2016] 1 AMR 261 (upheld on appeal).

[15] In *JHW Reels*,[8] the High Court followed the Singapore High Court's decision in *ABC Co v XYZ Ltd*[9] to say that there was no room to extend time. Justice Mohamad Ariff Yusof J (as he then was) in *JHW Reels* held as follows:

> [19] Having considered the submissions and the provisions in our Arbitration Act, I tend to be of the view that on a proper reading of s. 37(4) the time limit imposed is mandatory. This view accords with the generally accepted view that under the Model Law, the time limit is strict and express power must be given under the law itself before the court can extend time. This view also accords with the principle of minimal intervention by the courts of law as strongly underlined in our s. 8 of the Act. Support for this strict reading can be found within the four corners of s. 37 itself. Unlike art. 34 of the Model Law which provides no exceptions, our s. 37(5) provides two exceptions:
>
> > "(5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption."
>
> [20] Thus, *expressio unius est exclusio alterius.*
>
> [21] The appearance of the words "may not" in s. 37(4) cannot reasonably be read as denoting a merely directory requirement. In the total scheme of our Arbitration Act and bearing in mind the full provision of s. 37, this will be a case where "may" should be read as "must" or "shall" to effectuate the legislative intent. To this extent, I have to say, with due respect to my learned brother judge in *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor*, I differ in my reading of s. 37(4). I note however that even in that decision the learned judge took a very limited and narrow view of the court's power to extend time in this context. Indeed the High Court dismissed the application for leave to file the setting aside outside the time limit.
>
> [22] In reaching this court's decision in favour of a strict reading of s. 37(4) and exclusion of a power to extend time, I have also taken note of the persuasive High Court of Singapore decision in *ABC Co v. XYZ Ltd* [2003] SGHC 107; [2003] 3 SLR(R) 546, where the court inter alia opined:

8 [2013] 7 CLJ 249.
9 [2003] SGHC 107.

> "The starting point ... must be the Model Law itself. On the aspect of time, art 34(3) is brief. All that it says is that the application may not be made after the lapse of three months from a specified date. Although the words used are "may not" these must be interpreted as "cannot" as it is clear that the intention is to limit the time during which an award may be challenged. This interpretation is supported by material relating to the discussions amongst drafters of the Model Law. It appears to me that the court would not be able to entertain any application lodged after the expiry of the three-month period as art 34 has been drafted as the all-encompassing, and only, basis for challenging an award in court. It does not provide for any extension of the time period and as the court derives its jurisdiction to hear the application from the article alone, the absence of such a provision means the court has not been conferred with the power to extend time (per Judith Prakash J at page 550 of the report)."
>
> [23] I do not see why the Malaysian approach to the same broad issue should be any different, particularly in light of the express wording of our own statutory provision which I have alluded to earlier.

[16] The time limit under section 37(4) of the 2005 Act is not only mandatory but is also not amenable to any judicial extension of time. That said, there exists an outlier of a decision in the form of the Court of Appeal's judgment in *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co, Ltd ("TLL"), A Thai Co & Anor*[10] ("*Thai-Lao Lignite*"), which took the position that the time limit set out under section 37(4) of the 2005 Act can be extended by a Malaysian court by way of the Rules of Court, specifically Order 3 r 5 of the Rules of the High Court 1980 (now Order 3 r 5 of the Rules of Court 2012).

[17] The decision in *Thai-Lao Lignite*[11] in this author's view is incorrect in law as there was a failure on the part of the Court of Appeal to consider the effect of section 8 of the 2005 Act in seeking to assert that the court could extent time by reference to a subsidiary legislation in the form of the Rules of Court 2012 when the provisions of section 37 of the 2005 Act do not contain any express power to extend time to file an application to set aside an arbitral award beyond the prescribed time limit.

10 [2011] 1 LNS 1903.
11 Ibid.

[18] In fact, the High Court in *Kembang Serantau* alluded to the *per incuriam* nature of the decision in *Thai-Lao Lignite* as follows:

> [6] The material provision is sub-s. 37(4). The operation of this provision was considered in three cases: *Dato' Dr Muhammad Ridzuan Mohd Salleh & Anor v. Syarikat Air Terengganu Sdn Bhd* [2012] 6 CLJ 156; [2012] 3 MLJ 737; *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor* [2012] 10 CLJ 399; and *JHW Reels Sdn Bhd v. Syarikat Borcos Shipping Sdn Bhd* [2013] 7 CLJ 249. In the first two decisions, the court was of the view that the court had jurisdiction to extend time while the court in the third case disagreed; after having had the opportunity to consider the first two cases. Discretion was exercised to allow extension in the first of the two cases but not in the second.
>
> [7] The first two decisions went on appeal. Both decisions were overturned by the Court of Appeal. The written grounds of the Court of Appeal's decision in *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd ("TLL"), A Thai Company & Anor* [2011] 1 LNS 1903 is available for assistance. The Court of Appeal agreed with the High Court that there is jurisdiction but disagreed on the exercise of discretion; hence the appeal was allowed. The plaintiff has relied on these decisions where both High Court was of the view that there was jurisdiction to extend time under s. 37 although both judges departed on their exercise of discretion because of the prevailing facts. The defendant relied on the third case. This court agreed with the defendant.
>
> [8] The primary issue is whether on a proper reading of sub-s. 37(4), the court has discretion to extend the prescribed 90 day period.
>
> …
>
> [21] With respect, the construction of sub-s. 37(4) depends to a large extent, the approach the courts wish to adopt when dealing with arbitration and arbitration related matters. That construction and interpretation also depends on how the court views the relevance and role of Uncitral Model Law. In the last ten years since its enactment, the courts have acknowledged and recognised that Act 646 takes its roots from the Uncitral Model Law despite the fact that Malaysia has yet to accede to that Convention. The inclusion of particular regimes for domestic arbitrations, that is, Part IV of the Act, which may be adopted or opted in for international arbitrations does not affect

the approach taken. The inclusion is a drafting tool of legislating for both domestic and international arbitrations in a single statute as opposed to separate legislations for the two; as is the case with certain jurisdictions such as Singapore and India.

[22] On this question of how the courts are to receive Model Law, the Court of Appeal observed that the High Court had:

> "… relied so much on the UNCITRAL Model Law in coming to his decision that the prayer for extension of time in arbitration matter ought not to be condoned by the Court. He expressed his view that 'it is trite that the Arbitration Act 2005 has prima facie accepted the UNCITRAL Model Law and the judicial sentiment here as well as other countries which have adopted the same is inclined towards the jurisprudence relating to "minimum intervention of the Court" in matters governed by the Act'.
>
> 31. With respect, we are not in agreement with the learned judge on this point. Our view is that, even though the Malaysian Arbitration Act 2005 had prima facie accepted the UNCITRAL Model Law, it does not in any way take away the powers of the Court in dealing with any application for extension of time. There is no express provision to that effect, the Model Law, particularly Article 34(2) thereof, provides for the grounds under which an arbitral award may be set aside by the Court. They relate to the substantive application to set aside the award. There is no mention about an extension of time to file the said application. Even section 37 of the Arbitration Act 2005 does not expressly prohibit the powers of the Court to extend time in appropriate case."

…

[24] The position of s. 8 was discussed in *JHW Reels Sdn Bhd v. Syarikat Borcos Shipping Sdn Bhd*. In this decision, the High Court similarly had to consider sub-s. 37(4); whether it was directory or mandatory in intent. Both decisions of *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor* and *Dato' Dr Muhammad Ridzuan Mohd Salleh & Anor v. Syarikat Air Terengganu Sdn Bhd* were brought to the court's attention and relied on by the plaintiff to find that the court had discretion to extend time under sub-s. 37(4). The plaintiff in that instant case also submitted that the six day delay was not inordinate delay unlike the delay on the facts in the two cited

cases. Aside from these two cases, the plaintiff had also relied on the Courts of Judicature Act and the court's inherent jurisdiction under O. 92 r. 4 of the Rules of the High Court 1980.

[25] The plaintiff's submission was rejected by the court. After examining art. 34(3) of the Model Law which deals with the same, the court opted for a strict reading of sub-s. 37(4) and concluded that it had no jurisdiction to extend time under sub-s. 37(4). These were his reasons:

> "[15] The 'explanatory note' to the Model Law refers to art. 5 and highlights that all instances of possible Court intervention are to be found within the confines of the Model Law. See explanatory note 16. Article 5 reads:
>
> 'Article 5. Extent of court intervention
>
> In matters governed by this Law, no court shall intervene except where so provided in this Law.'
>
> [16] The intent and purpose of art. 5 is captured in our s. 8 of our Arbitration Act. This section previously read:
>
> '8. Extent of court intervention
>
> Unless otherwise provided, no court shall intervene in any of the matters governed by this Act.'
>
> [17] It has now been amended by the Arbitration (Amendment) Act 2011 to read:
>
> '8. Extent of court intervention
>
> No court shall intervene in matters governed by this Act, except where so provided in this Act.'"

[19] In the premises, the Court of Appeal's decision in *Thai-Lao Lignite*[12] is not only unpersuasive but is also irreconcilable with the scheme of the 2005 Act. In *Kembang Serantau*, Justice Mary Lim J (as her Ladyship then was) held that "[t]he appearance of the words 'may not' in s. 37(4) could not reasonably be read as denoting merely a directory

12 The decision in *Thai-Lao Lignite* was not followed by the High Court in *Triumph City Development Sdn Bhd v Kerajaan Negeri Selangor Darul Ehsan* [2017] 1 LNS 511. The appeal arising therefore filed by the Kerajaan Negeri Selangor Darul Ehsan was dismissed by way of Court of Appeal Civil Appeal No B-01(IM)(NCC)-48-02/2017.

requirement". In this vein, it cannot be said that time can be extended by the court. The decision of the High Court in *Kembang Serantau* was upheld by the Court of Appeal. Leave to appeal to the Federal Court was subsequently refused.[13]

[20] Due cognizance ought to be given to the fact that the approach adopted in *JHW Reels*[14] and in *Kembang Serantau*[15] is very much consistent with the approach in Hong Kong by reference to the decisions handed down by Justice Mimmie Chan in *A & Ors v D*[16] and *AW v PY*.[17]

[21] Arising from the above, in the light of the philosophy of the Model Law, the Malaysian courts may now avoid reliance on the inherent jurisdiction and hence, the pre-Model Law philosophy of the High Court in *Sarawak Shell Gas Sdn Bhd v PPES Oil and Gas Sdn Bhd*[18] should no longer be followed in view of the provisions of section 8 of the 2005 Act. The courts ought also not follow the common law concept of error, "of law on the face of the record" which was deeply entrenched in Malaysian arbitration law in the light of the decision in *Majlis Amanah Rakyat v Kausar Corp Sdn Bhd*.[19] The better view was expressed in the decision of Justice Nallini Pathmanathan J (as her Ladyship then was) in *Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd*[20] which was adopted by the Court of Appeal in *Kerajaan Malaysia v Perwira Bintang*.[21] As such, the doctrine of error of law on the face of the record would no longer be applicable by the Malaysian courts. This concept was endorsed in part by the Federal Court in *Far East Holdings*.[22]

[22] The principle of minimalistic court intervention becomes apparent especially when one is dealing with the challenges to the arbitration

13 Upheld on appeal in *Kembang Serantau Sdn Bhd v Jeks Engineering Sdn Bhd* (Court of Appeal Civil Appeal No W-02(IM)(c)-1769-10/2015) (unreported). Leave to appeal was refused in *Kembang Serantau Sdn Bhd v Jeks Engineering Sdn Bhd* (Federal Court Civil Application No 08-169-04/2016(W) (unreported).
14 [2013] 7 CLJ 249.
15 [2016] 1 AMR 261 (upheld on appeal).
16 [2020] HKCU 4001.
17 [2022] HKCFI 1397.
18 [1998] 2 AMR 1914; [1998] 2 MLJ 20, CA.
19 [2011] 3 AMR 315.
20 [2014] 1 AMR 253.
21 [2014] AMEJ 1550; [2015] 1 CLJ 617.
22 [2018] 1 MLJ 1 at 48, [110].

awards and the approach of the courts have been to preserve the integrity of the arbitral process unless there is patent injustice wherein a number of authorities have followed this approach.[23]

[23] The general non-interventionist approach is captured in the judgment of the Federal Court in *Government of India v Cairn Energy India Pty Ltd & Anor*[24] where the Federal Court held as follows at paragraph [53]:

> … and as Scrutton LJ put it "if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator you choose makes a mistake in law that if your look-out for choosing the wrong arbitrator; if you choose to go to Caesar, you must take Caesar's judgment".

[24] These decisions of the Malaysian courts indicate that the national courts have embraced the doctrine of a minimalistic or non-interventionist approach to arbitration. This augurs well as Malaysia attempts to promote itself as a preferred arbitration seat or venue in which the national courts are generally perceived as being supportive of the arbitration ecosystem as a whole.

Section 37: Setting aside of arbitral awards

[25] A substantial part of the development of the law of arbitration in this country involves challenges to the arbitral awards pursuant to section 37 of the 2005 Act.

[26] Section 37(1) reads as follows:

> 37. *Application for setting aside*
>
> (1) An award may be set aside by the High Court only if –
>
> (a) the party making the application provides proof that –

23 *Kerajaan Malaysia v Perwira Bintang* [2014] AMEJ 1550; [2015] 1 CLJ 617; *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd & Anor* [2013] 2 AMR 375; [2013] 3 MLJ 409; *AJWA For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd and another appeal* [2013] 2 CLJ 395; *Taman Bandar Baru Masai Sdn Bhd v Dindings Corp Sdn Bhd* [2010] 2 AMR 151; [2010] 5 CLJ 83; *Rmarine Engineering (M) Sdn Bhd v Bank Islam Malaysia Bhd* [2012] 7 CLJ 540; *Chain Cycle Sdn Bhd v Kerajaan Malaysia* [2016] 1 MLJ 681.

24 [2011] 6 AMR 573; [2011] 6 MLJ 441, FC.

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected if, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the High Court finds that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

[27] The courts do not interfere with an award of an arbitrator unless the award is tainted with infirmities which are identified pursuant to section 37(1)(a)(i) to (vi) and (1)(b) of the 2005 Act. There must be clear, definitive and specific allegations spelt out for the application to succeed. Section 37 of the 2005 Act vests discretionary powers in the court whether or not to accede to an application to set aside the award.

[28] In this subsection, a critique of how the Federal Court appears to have taken what some may argue as diametrically opposite approaches in *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd*[25] ("*Master Mulia*") and *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal*[26] ("*Pancaran*") in interpretating and applying section 37 of the 2005 Act, will be considered.

Master Mulia

[29] The dispute in *Master Mulia* was whether the alleged negligence by a charterer had caused damage to an owner's vessel. This issue was dependent on how the damage was caused. Extraneous evidence was therefore the central issue of causation and the Federal Court, having heard arguments, set aside the award.

[30] The Federal Court held that the High Court retains a residual discretion not to set aside an arbitral award notwithstanding the fact that a ground for setting aside the arbitral award has been made out. The Federal Court set out the following guiding principles on the exercise of residual discretion:

> [46] In our considered view, *the opening words of sub-s 37(1) which employs the terms 'may be set aside' is plain and unambiguous. Subsection 37(1) clearly provides that the High Court retains a residual discretion not to set aside an award even though a ground for setting aside may be made out. What is important is to ascertain the principles applicable to the exercise of such discretion in cases where an application is grounded on breach of the rules of natural justice.*
>
> …
>
> [53] In the light of the above, we think that the *guiding principles on the exercise of residual discretion when an application for setting aside an award is grounded on breach of natural justice may be stated as follows:*
>
> (a) *first, the court must consider: (a) which rule of natural justice was breached; (b) how it was breached; and (c) in what way the breach was connected to the making of the award;*
>
> (b) *second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding;*

25 [2020] 12 MLJ 198, FC.
26 [2021] 1 MLJ 1, FC.

(c) *third, if the breach is relatively immaterial or was not likely to have affected the outcome, discretion will be refused;*

(d) *fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion the court may refuse to set aside the award;*

(e) *fifth, where the breach is significant and might have affected the outcome, the award may be set aside;*

(f) *sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;*

(g) *seventh, the discretion given the court was intended to confer a wide discretion dependent on the nature of the breach and its impact. Therefore, the materiality of the breach and the possible effect on the outcome are relevant factors for consideration by the court; and*

(h) *eighth, whilst materiality and causative factors are necessary to be established, prejudice is not a pre-requisite or requirement to set aside an award for breach of the rules of natural justice.*

[54] Underlying these guiding principles is the policies and objectives of the New York Convention and the Model Law. As a matter of principle and policy, the courts will seek to support rather than frustrate or subvert the arbitration process. The role of courts in the arbitral regime in general is one of assistance supportive of the arbitral process and not one of interference with it. Bearing in mind the two primary objectives of the Model Law (respect for and preservation of party autonomy and ensuring procedural fairness), the courts do not review the merits of the arbitral tribunal's decision.

[55] In the present appeal before us, the High Court had made a clear finding that there were the two breaches of the rules of natural justice. That finding stands unchallenged in the Court of Appeal. However, the High Court judge declined to set aside the award on the ground that the respondent was not prejudiced by the breaches. *The Court of Appeal set aside the award on the ground that once a breach of natural justice has been established, the whole award must be set aside; reading sub-ss 37(1)(b)(ii) with (2) of the AA 2005. The Court of Appeal held that the terms of s 37 do not appear to allow for severance, especially in view of the terms of sub-s 37(3) read with sub-s 37(1)(a)(v).*

[31] The Federal Court also held that whilst section 37 of the 2005 Act should be interpreted in a manner consistent with the underlying policies and objectives of the New York Convention and the Model Law, the courts must be mindful in importing principles advocated by foreign jurisdictions without careful consideration of the foreign law in question and the provisions of the 2005 Act and this is apparent from the judgment which is set out below:

> [56] In our view, the High Court judge adopted the Singapore position as propounded in *Soh Beng Tee* and subsequently adopted in *AKN* which requires an applicant to show "actual or real prejudice" in that "it must be established that the breach of the rules of natural justice must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way". *Whilst we appreciate the appellant's arguments that s 37 should be interpreted in a manner consistent with the underlying policies and objectives of the New York Convention and the Model Law, the courts must be mindful against importing principles advocated by foreign jurisdictions without careful consideration of the foreign law in question and our AA 2005.* In this respect, we are bound to agree with the submission of the respondent that the Singapore position is not applicable in Malaysia. We say this because sub-ss 37(1)(b)(ii) and (2)(b)(ii) do not require prejudice to be established; unlike s 48(1)(a)(vi) of the Singapore Act which requires the applicant to show that the rights of any party have been prejudiced.

[32] The Federal Court was also of the view that although the court's discretion to set aside an arbitral award under section 37(1) of the 2005 Act is unfettered, it must nevertheless be exercised with regard to the policies and objectives underpinning the 2005 Act. The Federal Court held that due cognizance ought to be paid to the purpose of encouraging arbitration as a method of dispute resolution and facilitating the recognition and enforcement of arbitral awards and this is reflected in the judgment in the following manner:

> [59] *Although the court's discretion to set aside an award under s 37(1) is unfettered, it must nevertheless be exercised with regard to the policies and objectives underpinning the AA 2005. In particular, due cognizance must be taken of the purposes of encouraging arbitration as a method of dispute resolution and facilitating the recognition and enforcement of arbitral awards.*

[33] The Federal Court held that the dispute concerned, amongst others, whether the damage was caused by the negligent acts of the

respondent. The arbitrator, in coming to a determination, relied on extraneous evidence in concluding that the damage was sustained due to continuing operations of the stinger and the vessel in severe weather conditions by the respondent. The Federal Court held that the arbitrator's reliance on extraneous evidence without affording the parties the opportunity to address the same is a breach of natural justice as the arbitrator would not have reached that conclusion but for this extraneous evidence and held as follows:

> [60] Whilst the appellant's argument focused on paras [34]–[35] of the Court of Appeal's written judgment, we think it is also necessary to advert to paras [87] and [90]–[92] of the written judgment which dealt with the two pieces of extraneous evidence. *The Court of Appeal found that the two pieces of extraneous evidence were relevant and material to the issue of causation of the damage to the stinger hitch, and the evidence in question were considered by the arbitrator without informing the parties until the award was rendered, by which time it was too late. As such, the case which had been submitted for arbitration had been redefined by the arbitrator without giving the parties the opportunity to present their responses. We are therefore in agreement with the views expressed by the Court of Appeal in paras [90]–[92] of the written judgment: that without these two pieces of extraneous evidence which were never put to the parties, the arbitration would also have reached a different outcome. As such, the Court of Appeal was correct in setting aside the entire award on the basis that the breach had materiality and causative effect on the outcome of the arbitration.* On the established facts and on a perusal of the evidence on the appeal record, we are satisfied that the High Court judge erred and that appellate intervention was warranted.
>
> …
>
> [62] … As stated, *a mere finding of a breach of the rules of natural justice is in itself insufficient. It must be shown that the breach was significant or serious such as to have an impact on the outcome of the arbitration.* Prejudice, though, a relevant consideration, is not a requirement.

Pancaran

[34] In *Pancaran*, the dispute concerned a subcontractor who sought loss of profit at a margin of 25%. The main contractor contended that nominal damages should be awarded because the subcontractor had not proved its alleged profit margin of 25%. The arbitrator awarded 10% and 7.5% profit margins for different parts of the subcontract and

it was based on the arbitrator's own experience that 10%–15% for profit and attendance to manage a nominated subcontractor was a norm in the construction industry. The Federal Court held that this issue was reasonably foreseeable even though both parties to the dispute had submitted only on loss of profit for an appointed subcontractor and not on profit and attendance for a nominated subcontractor.

[35] The Federal Court in *Pancaran* held as follows:

> [10] *The principle is trite that courts do not exercise appellate jurisdiction over arbitration awards*: See *Pembinaan LCL Sdn Bhd v. SK Styrofoam (M) Sdn Bhd* [2007] 3 CLJ 185; [2007] 4 MLJ 113. The only provisions in the Act that provide for the setting aside of domestic awards are s. 37(1) *and* s. 42(1) to (4) of the Act *(before its deletion).*
>
> …
>
> [82] *In cases where an arbitrator is appointed for his or her special knowledge and skill or expertise, such arbitrator is entitled to draw those sources for the purpose of determining the dispute and need not advise the parties that he or she is doing so*: See *Mediterranean and Eastern Export Co and Checkpoint Ltd v. Strathclyde Pension Fund* [2003] EWCA Civ. 84.
>
> …
>
> [89] The demarcation of what is general and what is special knowledge is not always easy to draw. This is how Ward LJ expressed the difficulty in *Strathclyde Pension Fund* (supra):
>
> > *"It will not always be easy to determine when special facts relating to a special or particular case become subsumed within the general knowledge that a busy and experienced expert is bound to acquire. The best I can do to provide an acceptable test is to reformulate the question in this way: is the information upon which the arbitrator has relied information of the kind and within the range of knowledge one would reasonably expect the arbitrator to have acquired …* If he uses knowledge of that kind he acts fairly; if he draws on knowledge outside that field, then the rule is quite clear." (Emphasis added.)
>
> …
>
> [108] Given the evidence before the arbitral tribunal, the question of the arbitrator having relied on "extraneous evidence" which he "invented" or "thought up" of the 10–15% no risk profit norm for P&A in the Malaysian construction industry as alleged by the

respondent does not arise at all. As such, *the question of the arbitrator having breached the rules of natural justice by failing to give the parties the opportunity to submit on the norm also does not arise.*

[109] *Even if the learned arbitrator was wrong in not giving the parties the opportunity to submit on the 10–15% no risk profit norm for P&A, we do not consider the breach to be of such gravity and materiality that the respondent can be said to have been denied due process under s 20 of the Act. It would not in our view have affected the outcome of the learned arbitrator's decision on the loss of profit award.*

[110] *It is clear to us that the arbitrator's loss of profit ruling was based on evidence before him and the inferences to be drawn therefrom. Both courts below were therefore wrong in setting aside the loss of profit award, either under s 37 or under s 42 of the Act or under both ss 37 and 42.*

[36] The Federal Court then dealt with the threshold requirements for setting aside awards pursuant to sections 37 and 42 of the 2005 Act in the following manner:

[137] We shall now deal with leave question 1, which arose from the decisions of the Court of Appeal in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697 and *Sigur Ros* where it was held that *the threshold requirement stipulated by s 37 of the Act to set aside an award is "very low" (although the courts are slow in setting aside the award) as opposed to a "very high" threshold under s 42.* The effect of the decision is that if a party cannot succeed under s 37, an application under s 42 will be futile as s 37 relates to arbitral process whereas s 42 relates to arbitral award.

[138] It is relevant to note that this court in *Jan De Nul* acknowledged and did not disturb the low threshold test laid down in *Petronas Penapisan*. Therefore the answer to leave question 1 should be obvious. We wish to add however that whether the threshold is "very low" or "very high", *a wide discretion is vested in the court by s 37 of the Act and the decision to set aside an award is not an automatic outcome of a finding that there had been a breach of the rules of natural justice. The court will still have to evaluate whether the discretion should be exercised in the applicant's favour in all the circumstances of the case.*

[139] Like any other exercise of discretion, *the discretion to set aside an award for breach of the rules of natural justice must be exercised judiciously and only when it is just to do so.* The authorities are clear that in considering whether the discretion should be exercised, *the court*

must undertake an evaluation of relevant factors such as those identified in *Kyburn*, amongst which would be the *seriousness, magnitude or materiality of the breach, its nature and its impact, whether the breach would have any effect on the outcome of the arbitration and leaving room for "casual breach or occasional error"*. Costs of rehearing and delay in raising the complaint are further relevant factors to be taken into account in the evaluation process.

…

[141] The "very low" threshold for s 37 as decided in *Petronas Penapisan* and *Sigur Ros* must be understood in the context it was made, ie that compared to s 42, the threshold under s 37 is "very low". In other words, *it is "very low" relative to the threshold under s 42. It must be remembered that the grounds enumerated in s 37 are exhaustive and as such the court cannot set aside an award for reasons other than those that are listed.*

[142] The *grounds enumerated in s 37 need to be construed narrowly as they represent exceptions to the finality of arbitration awards (s 36). This is to avoid devaluing the arbitration agreement that arbitral awards are final and binding and also to preserve the autonomy of the forum selected by the parties by minimising judicial interference in arbitral awards*: *Jan De Nul.*

[37] The decision in *Pancaran* raises the following issues of concern:

(a) The arbitrator was not appointed in the arbitration for his special knowledge or skill or expertise and hence, he was not entitled to draw on his own resources to determine the dispute. The arbitration clause did not provide for a specialist arbitrator to be appointed, for instance, in commodity arbitrations like PORAM arbitrations, where the arbitrator has to be someone who is familiar with the palm oil trade. This is specifically provided for in section 1-11-2 of the PORAM Rules, which reads as follows:

> 2. Persons approved to serve as Arbitrators shall be an employee of a member of PORAM who is known to have relevant experience in the trade or those who are directly connected with the trade of those who are known to have had considerable experience and background of the trade or in the related matters.[27]

27 *PT Permata Hijau Sawit & 2 Ors v Pacifik Inter-Link Sdn Bhd* [2011] 1 AMR 343.

(b) The failure on the part of the arbitrator to give the parties an opportunity to submit on the "10-15 no risk profit norm P & A in the Malaysian construction industry" gives rise to the notion of a breach of the rules of natural justice.

[38] The decision in *Pancaran* also had to deal with the leave question whether the threshold requirement stipulated by section 37 of the 2005 Act to set aside an award as "very low" as set out in the cases of *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* ("*Petronas Penapisan*") and *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd*[28] is indeed the correct test in the light of the various other provisions of the 2005 Act.

[39] The Federal Court relied on the decision in *Petronas Penapisan*, in particular, the judgment of Justice Hamid Sultan JCA, who delivered a supporting judgment where his Lordship held at p 416 as follows:

> The threshold to satisfy under s 37 is very low (though the courts are slow in setting aside the award) and upon proof if successful, the court has an option to send back the matter to the arbitral tribunal to eliminate the grounds for setting aside, as set out in s 37(6). This was not done in this case. To put it in another way when a party to the arbitration complains of breach related to s 37(1)(a)(iv) and/or (v) etc, he must invite the courts attention to s 37(6) and cannot rely on s 42 as it will be an abuse of process, as he is relying on omission or excess of jurisdiction which is covered under s 37 and not s 42 of the AA 2005.

[40] It should be noted that no authority was cited in support of the contention that the threshold to satisfy an application under section 37(1) is very low. Justice Prasad Abraham JCA (as his Lordship then was) delivered the judgment of the court, which was agreed to by the other member of the Court of Appeal, namely, Justice Rohana Yusof JCA (as her Ladyship then was). Justice Prasad Abraham JCA (as his Lordship then was) in his judgment made no reference to the threshold being "very low".

[41] The Federal Court in *Pancaran* also referred to the decision in *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd*[29] ("*Sigur Ros*"), where Justice

28 [2018] 8 CLJ 291.
29 Ibid.

Mary Lim JCA (as her Ladyship then was) in delivering the judgment of the Court of Appeal, held that:

> [37] This brings us to the fifth point. In the same decision of the Court of Appeal in *Petronas Panapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd*, is the view expressed that the threshold to satisfy under s. 37 is "very low (though the courts are slow in setting aside the award) and upon proof if successful, the court has an option to send back the matter to the arbitral tribunal to eliminate the grounds for setting aside, as set out in s. 37(6)".

[42] The Court of Appeal in *Sigur Ros* was addressing the threshold requirements of section 37 of the 2005 Act as compared with that in section 42 of the 2005 Act. However, the Court of Appeal then reminded itself in paragraph [39] as follows:

> [39] Further, however "low" the threshold to be met under s. 37(1)(b)(ii) or 37(2) (see *Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd*), it can only be on a balance of probabilities, that there has been a breach of the rules of natural justice either during the arbitral proceedings or in connection with the making of the award.

[43] In *Jan De Nul (Malaysia) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor*,[30] the Federal Court held as follows:

> [56] Even though the court finds that a breach of the Rules of Natural Justice has been established or that an arbitral award is in conflict with the public policy under s. 37 of the AA 2005, it does not necessarily mean that the award must be set aside as a matter of course. The power of the court to set aside an award under s. 37 is discretionary and will not be exercised automatically in every case where the complaints are established. (see: *Kyburu Investment Ltd v. Beca Corporate Holdings Ltd* [2015] 3 NXLR 644; *Sigur Ros Sdn Bhd* (supra).
>
> [57] The court must evaluate the nature and impact of the particular breach in deciding whether the award should be set aside under s. 37. The court must also consider the background policy of encouraging arbitral finality and minimalist intervention approach to be adopted in line with the spirit of UNCITRAL Model law. The effect of ss. 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in

30 [2019] 1 CLJ 1 at 15.

interfering with or setting aside an arbitral award. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote on-stop adjudication in line with the international practice.

[44] Section 68 of the English Arbitration Act 1996 ("English Arbitration Act") sets out the procedure to challenge an award for serious irregularity and the House of Lords in *Lesotho Highlands*[31] held that section 68 of the English Arbitration Act requires a "high threshold", as their Lordships were of the view that this was necessary to drastically reduce the extent of intervention of courts in the arbitral process.

[45] Equally concerning is the fact that these two cases were heard one after the other in view of the substantial similarities in the issues raised by reference to the application of section 37 of the 2005 Act and the breach of natural justice arguments. These two decisions of the Federal Court were delivered on the same day by the same quorum. The judgment in *Master Mulia*, was delivered by Justice Vernon Ong FCJ and the judgment in *Pancaran* was delivered by Justice Abdul Rahman Sebli FCJ. The Federal Court came to diametrically opposing conclusions on the issue of the arbitrator's knowledge and the test of setting aside an arbitral award under section 37 of the 2005 Act. The two judgments are difficult to reconcile. There is also an absence of cross-reference in the two judgments to each other. It is also imperative to note that the arbitrator in *Pancaran* was not appointed because of his specialist knowledge in the construction industry by the parties. These two judgments therefore cause concern to the arbitral community, and it is important to see how the Malaysian courts will apply these two contradictory decisions moving forward and moreover how this conundrum will eventually be resolved by the Federal Court.

[46] The Malaysian courts in dealing with setting aside of arbitral awards have generally taken an arbitration-friendly approach in line with international best practices. The recent judgments of the Malaysian courts, save for perhaps the decision in *Pancaran*, demonstrate an arbitration-friendly philosophy. It may therefore be said that Malaysia remains a relatively attractive jurisdiction for arbitration and is generally perceived as a safe seat.

31 *Lesotho Highlands Development Authority v Impreglio SpA* [2006] 1 AC 221.

Section 42: The notion of a question of law to be referred to a court of law for determination

[47] Section 42(1) of the 2005 Act was initially enacted as follows:

> Any party may refer to the High Court any question of law arising out of an award.

[48] Section 42(1) of the 2005 Act was amended on July 1, 2011 and the amended section 42(1) of the 2005 Act reads as follows:

> Any party may refer to the High Court any question of law arising out of an award.
>
> Under subsection (1A), there is a distinct requirement that the High court shall dismiss that reference unless the question of law "substantially affects the rights of one or more of the parties".

[49] It should be noted that there is no equivalent of section 42 of the 2005 Act in the Model Law.

[50] The court's jurisdiction under section 42 of the 2005 Act is a discretionary one and an applicant would have to identify or formulate questions of law and these questions of law have to arise from the arbitral award and should substantially affect the rights of the parties.

[51] Justice Mary Lim J (as her Ladyship then was), in *MMC Engineering Group Bhd v Wayss & Freytag (M) Sdn Bhd*[32] set out a number of guidelines which may be summarised as follows:[33]

(a) the court's ever-awareness of minimalistic intervention in arbitration matters;

(b) that the general principle that the arbitral tribunal is both the master and final arbiter of the facts applies and there is no reason why any broad approach should be adopted just because one is now pondering a question of law arising out of an award;

(c) that the court should look beyond the award, but where necessary, the documents and correspondence referred to in the award may be examined for context and proper appreciation;

32 [2015] 10 MLJ 689.
33 Ibid, at [88].

(d) that the absence of an appeal or leave mechanism advocates for a strict approach;

(e) that the power under section 42 of the 2005 Act is limited and should not be lightly exercised save in clear and exceptional cases;

(f) the court should first determine whether questions of law have been properly identified;

(g) these questions of law must arise out of the award and not from the arbitral proceedings;

(h) these questions of law must not be academic but be questions of practical importance requiring the opinion of the court;

(i) these questions of law cannot be the same questions that were referred to the arbitral tribunal for determination;

(j) the determination of the questions of law must substantially affect the rights of the parties;

(k) grounds for referring these questions of law must be given;

(l) the interpretation of the applicable law by the arbitral tribunal is obviously wrong;

(m) public law principles are not in play in what is otherwise a private contractual dispute; and

(n) the award must be viewed in its entirety in a fair and reasonable manner.

[52] Justice Hasnah Mohamed Hashim J (as her Ladyship then was) in *Tune Insurance Malaysia Bhd & Anor v Messrs K Sila Dass & Partners*[34] set out a comprehensive list of consideration that would be applicable in an application under section 42 of the 2005 Act and the list is as follows:[35]

(a) the question of law must be identified with sufficient precision (*Taman Bandar Baru Masai Sdn Bhd v Dindings Corp Sdn Bhd*;[36] *Maimunah Deraman v Majlis Perbandaran Kemaman*);[37]

34 [2015] 4 AMR 741; [2015] 9 CLJ, HC.
35 [2015] 4 AMR 741; [2015] 9 CLJ, HC at [42], *per* Hasnah Hashim J. See also *Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd* [2013] 5 MLJ 98.
36 [2010] 5 CLJ 83.
37 [2011] 9 CLJ 689.

(b) the grounds in support must also be stated on the same basis;

(c) the question of law must arise from the award, not the arbitration proceeding generally (*Majlis Amanah Rakyat v Kausar Corp Sdn Bhd*;[38] *Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd*);[39]

(d) the party referring the question of law must satisfy the court that a determination of the question of law will substantially affect his rights;

(e) the question of law must be a legitimate question of law, and not a question of fact "dressed up" as a question of law (*Georges SA v Thammo Gas Ltd (The Belarus)*);[40]

(f) the court must dismiss the reference if a determination of the question of law will not have a substantial effect on the rights of parties (*Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd*);[41]

(g) this jurisdiction under the said section should be exercised only in clear and exceptional cases (*Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd*);[42]

(h) the intervention by the court must only be if the award is manifestly unlawful and unconscionable;

(i) the arbitral tribunal remains the sole determiners of questions of fact and evidence (*Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*);[43] and

(j) while the findings of facts and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law), the court should not intervene unless the decision is perverse.

[53] The underlying basis for section 42 of the 2005 Act was also analysed by Justice Varghese George JCA in the Court of Appeal in *Chain Cycle Sdn Bhd v Kerajaan Malaysia*.[44]

38 [2011] 3 AMR 315.
39 [2014] 1 AMR 253.
40 [1993] 1 Lloyd's Rep 2015.
41 [2014] 1 AMR 253.
42 [2013] 8 CLJ 655.
43 [2000] 3 NZLR 318.
44 [2015] AMEJ 1479; [2015] MLJU 557, CA.

[54] The courts in Malaysia had therefore set out a number of guidelines with regard to the interpretation of section 42 of the 2005 Act. These guidelines, whilst not comprehensive, were helpful to determine questions of law under section 42 of the 2005 Act at that point in time.

[55] The Federal Court in *Far East Holdings* had occasion to interpret section 42 of the 2005 Act and the Federal Court took the view that the question of law must be one of law and not fact and set out a non-exhaustive list which would meet the paradigm of "any question of law" in section 42 of the 2005 Act in the following manner:

(a) a question of law in relation to matters falling within two of Mustill J's three-stage test;

(b) question as to whether the decision of the tribunal was wrong (*The Chrysalis*[45]);

(c) a question as to whether there was an error of law, and not an error of fact (*Micoperi*[46]): error of law in the sense of an erroneous application of law;

(d) a question as to whether the correct application of the law inevitably leads to one answer and the tribunal has given another (*MRI Trading*[47]);

(e) a question as to the correctness of the law applied;

(f) a question as to the correctness of the tests applied (*Canada v Southam*[48]);

(g) a question concerning the legal effect to be given to an undisputed set of facts (*Carrier Lumber*[49]);

(h) a question as to whether the tribunal has jurisdiction to determine a particular matter (*Premiums Brands*[50]): this may also come under section 37 of the 2005 Act; and

(i) a question of construction of a document (*Intelek*[51]).

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45 *Vinava Shipping Co Ltd v Finelvet AG (The Chrysalis)* [1983] 2 All ER 658.
46 *Micoperi SRL v Shipowners' Mutual Protection & Indemnity Association (Luxembourg)* [2011] EWHC 2686.
47 *MRI Trading AG v Erdenet Mining Corporation LLC* [2012] EWHC 1988.
48 *Canada v Southam Inc* (1997) 144 DLR (4th) 1 (SCC).
49 *Carrier Lumber Ltd v Joe Martin & Sons Ltd* [2003] BCJ No. 1602, SC (BC).
50 *Premium Brands Operating GP Inc v Turner Distribution Systems Ltd* [2010] BCJ No. 349, SC (BC).
51 *Intelek Timur Sdn Bhd v Future Heritage* [2004] 2 AMR 481; [2004] 1 MLJ 401, FC.

[56] This *dicta* of the Federal Court is somewhat controversial because it threatens the finality of arbitral awards and also the concept of the policy of minimal court intervention as provided for in section 8 of the 2005 Act.

[57] When one construes section 42 of the 2005 Act (prior to its repeal), the prerequisites are, it must relate to "any question of law arising out of the Award but the application must be dismissed if the reference with regard to the question of law does not substantially affect the rights of one or more parties."

[58] The Federal Court in *Far East Holdings* merely decided that section 42 of the 2005 Act would be applicable because of the words "any question of law" and did not construe the words brought about by the amendment on July 1, 2011.

[59] In the light of the decision of the Federal Court in *Far East Holdings*, the floodgates were opened when the Federal Court decided that "any question of law would be the basis for setting an award under section 42". The decision of the Federal Court by laying down the test of "any question of law" undermined section 42 of the 2005 Act and section 8 of the 2005 Act especially as the courts had been following the various tests and guidelines previously laid down by the courts. In this regard, it is the author's respectful view that the Federal Court ought to have been more circumspect in its judicial analysis, choice of language and general approach before seeking to stating that "any question of law" could form that basis of setting aside an award under section 42 of the 2005 Act. Regard ought to have been had to practical considerations. The ingenuity of lawyers enables them to formulate "so-called questions of law" which are questions of fact in disguise so as to pass the hurdle imposed by test laid down in *Far East Holdings*. The immediate consequence of this decision in *Far East Holdings* was that sections 42 and 43 of the 2005 Act were repealed. Some take the view that the expeditious nature in which sections 42 and 43 of the 2005 Act were repealed is indicative of the Government of Malaysia's strong support from a policy perspective of a non-interventionist court-driven approach to arbitration proceedings, whilst others have taken the view that the approach of the Government of Malaysia at the material time was too drastic.

[60] There is presently a view amongst some within the arbitral community that the act of repealing sections 42 and 43 of the 2005

Act ought to be reviewed. In particular, the Malaysian Bar Council, has suggested that the way forward is to reinstate section 42 of the 2005 Act by incorporating a leave provision into the said section 42 of the 2005 Act, following the practice and procedure in the United Kingdom, Singapore and Hong Kong, where leave is required in order to state the question of law.

[61] This proposal by the Malaysian Bar Council and the arbitral community would bring the 2005 Act in line with the legislation in countries like Singapore, United Kingdom and Hong Kong, which are centres which presently attract a considerable amount of arbitration. As to whether the approach adopted in these other jurisdictions ought to be applied in Malaysia remains to be seen. There needs to be dialogue between all stakeholders with the Judiciary in ascertaining what the best approach is for Malaysia as a whole. Only then, should measures be taken to amend the 2005 Act *vis-à-vis* the possible re-introduction of sections 42 and 43 of the 2005 Act (prior to repeal) with appropriate safeguards in place.

Conclusion

[62] In conclusion, it may be summarised that the courts in general have adopted a pro-arbitration and non-interventionist approach. This is apparent from the judicial approach to the construction of sections 8 and 37 of the 2005 Act, in particular, the discrepancies in judicial approach by the Federal Court in *Master Mulia* and *Pancaran* ought to be corrected in due course by way of a subsequent decision of the apex court.

[63] In so far as the discussions pertaining to section 42 of the 2005 Act are concerned *vis-à-vis* its possible re-introduction, there is a clear need for careful consideration in this regard given the "local conditions" that prevail in Malaysia and the judicial approach that is to adopted which in itself may require a revisiting of part of the decision in *Far East Holdings* so as to provide clarity to users within the Malaysian arbitration ecosystem.

[64] In summation, it is clear that Malaysia is on the right path to being considered one of Asia's preferred arbitration jurisdictions of choice. It is likely that this journey will require time as well as significant effort from all the stakeholders with the Malaysian arbitration ecosystem. In this regard, the Judiciary will be called upon to play a determinative

road in how successful this journey will be by virtue of the judicial pronouncements coming out of the national courts. Only time will tell how successful Malaysia will be in positioning itself as a preferred seat or venue for arbitration, particularly, international arbitration disputes.

Private Judging – Are We Ready?

by

Low Chee Keong, Low Tak Yip*** and *Low Tak Hay****

Introduction

[1] Change and adaptation are the only constancies in life and this is no different for the Malaysian system of the administration of civil justice which has always been on the move. The mechanisms for the resolution of inter-party disputes have always been a topic of constant review as Malaysia tries to adapt to new circumstances to promote its role as a leading international centre for dispute resolution.

[2] Since the revolutionary Woolf Reforms in England, an increasing number of jurisdictions have readily embraced and encouraged various forms of alternative dispute resolution ("ADR") mechanisms that range from the informal to formal, and from the unbinding to binding. Their unique characteristics as well as methods and means encompass the whole spectrum and afford the modern disputant a wealth of possible avenues from which to seek the proper resolution of their disputes.

[3] In this march towards the comprehensive adoption of various forms of ADR within its system of civil justice, a key alternative – which is already practised in some Anglo-American jurisdictions – has not been engaged in Malaysia. In fact, there seems to be a veritable lacuna in the debate on the prospects of the implementation of private judging as a whole, and it is in this context that this article attempts to initiate discussions on the viability of this very foreign concept within the institutions of Malaysian civil justice.

[4] To this end, the discussion that follows will take the following form: Part I will briefly define what private judging is and contextualise this within its historical development. Part II will then outline and

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explain the advantages and disadvantages of private judging in a general and all-encompassing way while Part III addresses the issue of compatibility regarding the adoption of private judging from the standpoint of the English conception of the rule of law. In Part IV the article considers whether, in totality, the advantages of private judging outweigh the disadvantages that would otherwise be caused by its adoption.

[5] Drawing upon the prior discussion, Part V attempts to demark the proper types of disputes that private judging is aptly suited to resolve, providing a nuanced and appropriate scope for its potential implementation. The article concludes with Part VI by arguing that the adoption of private judging – albeit in a limited field of disputes initially – will be a welcome addition to the civil justice regime. Ultimately, we would do well to remind ourselves of the famous words from *The Leopard*, "for things to remain the same, everything must change".[1]

I. Private judging defined and a brief history

[6] Private judging, also commonly known as "rent-a-judge", typically is defined as "a private trial conducted by a former judge and is most similar to a conventional trial in that judgment may be appealed for errors of law or as against the weight of the evidence".[2] While susceptible to local variations, several core features are readily identifiable:

> First, it is the parties who choose the judge, and the consent of both parties is an essential precondition to the process. Secondly, it is usually a retired judge or former senior lawyer who acts as a third-party decision-maker. Thirdly, both parties present their evidence and arguments to the private judge who then delivers a reasoned judgment on the basis of factual evidence and the applicable law … while the decision of the private judge is binding, it may be appealed against in a regular state court, unlike in an arbitration. In California, the parties select the judge and agree the basic processual features including when and where to have the trial.[3]

1 Giuseppe Tomasi di Lampedusa, *The Leopard* (*Il Gattopardo*), (Feltrinelli, 1958).
2 JAMS Mediation, Arbitration and ADR Services, ADR Glossary, https://www.jamsadr.com/adr-glossary/.
3 Michael Palmer and Simon Roberts, *Dispute Processes: ADR and the Primary Forms of Decision-Making*, 3rd edn (Cambridge: Cambridge University Press, 2020), p 269.

[7] Private judging shares many similar elements with arbitration as a hybrid litigation process, as both processes involve a neutral "third-party decision maker and the dispute resolution process are chosen after the problem between the parties has emerged, and is the parties themselves who pay the fees for the service of private judging".[4]

[8] In essence, the choice between arbitration and private judging is largely decided by the key difference between them, that being the fact that the latter "is an official element of the state court system and a judgment arrived at through the rent-a-judge process has the same legal effect as a judgment from other state courts".[5]

[9] With benefits such as reduced costs, enhanced quality of service and efficiency over government-provided services,[6] it should not come as a surprise that numerous states in the United States of America have adopted this mechanism. The genesis of private judging may be traced back to 1872 in California, where a procedure of referring cases to a retired judge for trial was codified in reference statutes such as section 638 of its Code of Civil Procedure.[7] Historically, use of this reference procedure was generally confined to the "non-consensual portion of the statute – that is, to the hearing and determining of specific issues or questions of fact, especially in cases involving 'examination of a long account'".[8]

[10] The appointment of senior lawyers and retired judges as temporary judges was mainly used to deal with single, specific issues in civil claims. However, in the early 20th century, the American legal system was overwhelmed through a crisis of litigiousness and the "courts were congested, delay was endemic, and costs were high".[9]

4 Ibid.

5 Ibid.

6 See *inter alia* Calvin A Kent, *Entrepreneurship and the Privatizing of Government* (Quorum Books, 1987); Randall Fitzgerald, *When Government Goes Private: Successful Alternatives to Public Service* (Universe Books, 1988); David F Linowes, Report of the President's Commission on Privatization, "Privatization: Toward More Effective Government" (1988).

7 Barlow F Christensen, "Private Justice: California's General Reference Procedure" (1982) 7(1) *American Bar Foundation Research Journal* 79 at 79–81.

8 Ibid, at p 80.

9 John W Whittlesey, "Private Judges, Public Juries: The Ohio Legislature Should Rewrite R.C. 2701.10 to Explicitly Authorize Private Judges to Conduct Jury Trials" (2007) 58(2) Case W Res L Rev 543 at 543; Jerold S Auerbach, *Justice Without Law* (Oxford University Press, 1983), p 95.

Thus, options to litigation were sought and from this institutionalisation and promotion of ADR processes grew an innovative modification which ultimately evolved into consensual private judging thereby "fitting the forum to the fuss".[10]

[11] Section 638(1) of the Californian Code of Civil Procedure states that with agreement and consent from the parties, a reference may be ordered to a referee "to try any or all of the issues in the action or proceeding, whether of fact or of law, and to report a finding and judgment thereon". While the procedure of private judging is quite flexible under Californian statute, a claim is issued with the court in the standard fashion through normal civil litigation.

[12] The consent of the parties is required to have the claim referred to a "referee" under the statutory procedure, and the parties must indicate the basis on which the case is to be referred, whether its scope is to be for the entire claim or limited specifically to identified issues.

[13] While the qualifications of the referee are not defined under California's Code of Civil Procedure – which would theoretically mean that the case could be referred to anyone – in practice the parties are seeking a judicial determination and thus retired judges with expertise in the area of dispute are often selected.[11] The referee has full power to determine the claim as "trials by referees are conducted as proper judicial trials, following the traditional rules of procedure and evidence".[12] Hence, he or she can conduct trials similarly to how public judges do,[13] though restrictions on calling juries may vary from state to state.[14]

[14] The parties agree on the judge, how much the judge is to be paid, and the time and place of the trial. The parties bear the costs of all aspects of this adjudicative process; they pay the judge, and for the necessary facilities, equipment and personnel.[15] Thus, by definition

10 Palmer and Roberts, supra n 3, at p 271.
11 Christensen, supra n 7, at 81.
12 Ibid.
13 See, e.g. *Clark v Rancho Santa Fe Ass'n* (1989) 265 Cal Rptr 41 at 51; *Ellsworth v Ellsworth* (1954) 269 P.2d 3 at 3 (Cal); *Re Burns' Estate* (1888) 2 Cof 39; *Plant v Fleming* (1862) 20 Cal 93.
14 Whittlesey, supra n 9, at 544.
15 Ibid, at p 548.

no state resources is utilised for this civil claim. Once all is mutually agreed, the parties file the agreement with the clerk or presiding judge of the court. When the judge approves of and orders the claim to continue in accordance with the agreement, proceedings can forthwith be initiated with the private judge.

[15] The normal rules of civil procedure apply and accordingly the applicable substantive and procedural law, and the judgments, findings and conclusions of the private judge "have the same force and effect as if made by an active judge. Any appeal is to be made as if the private judge were an active judge of the court".[16] As the case is subject to appeal with the normal court system, it can and does set precedent and as the judgments are subject to public scrutiny, they can contribute to the development of the common law.

II. Advantages and disadvantages of private judging

Advantages

[16] The ensuing paragraphs summarise some of the key advantages that private judging can potentially bring to the dispute resolution table over traditional litigation through the courts.

Expediency and timeliness

[17] The ability to avoid delays inherent in the court system – which is of particular value given that many parties will want to have their trial resolved promptly – is probably the key advantage. The lengthy litigation process can be greatly reduced by avoiding the backlog and the consequential wait for the case to be listed for hearing. This is particularly beneficial in jurisdictions with long delays in their justice system, some of which may be for up to five years.[17] Furthermore, it is submitted that the nature of the process may increase cooperative conduct by the parties. As they are paying for the process and making the arrangements together with a common goal of expediency, they tend to avoid tactical skirmishing, procedural applications and costly strategic manoeuvring that delay and frustrate the parties.[18]

16 Ibid, at p 550.
17 Christensen, supra n 7, at 83.
18 Whittlesey, supra n 9, at 551.

Flexibility

[18] Since the parties get to choose when and where claims are heard, the distinct benefits of flexibility and convenience are on offer. Hearings can be scheduled to suit the parties, their witnesses and lawyers, in stark contrast to the normal course of events in regular court proceedings where the parties and the people involved must accommodate themselves to the schedule of judges and availability of courtrooms, often to the detriment of their own schedules and issues.[19] Moreover, the hired private judges are acknowledged to be "highly responsive to the needs of counsel".[20]

[19] With the timing and location entirely up to the parties and not restricted to the normal working hours of public courts, the search for and the agreement on a suitable time period can include evenings and/or over weekends. Furthermore, the premises can be any convenient and comfortable location with all of its attendant useful facilities and access to technology of a commensurate level of security included, luxuries that may not be readily available in public courts.[21] This is of particular benefit during the COVID-19 pandemic as private hearings can be held remotely with the consent of both parties, using the abundance of mobile and video technology to communicate with each other from home during the lockdown measures, further helping to avoid the resulting public court delays caused by the Coronavirus.

Freedom of choice

[20] Unlike in a regular public trial with its inherent lottery-style luck of the draw where the judge assigned to the case varies in experience or knowledge for the matters at hand, the private judging reference procedure allows for an experienced judge who is conversant in the technical field of the claim to be chosen. Therefore, parties can benefit from retired judges who not only have the necessary judicial temperament but also the technical knowledge of the issues on trial which are critical factors in influencing the outcome.[22]

19 Christensen, supra n 7, at 83.
20 Winslow Christian, "Private Judging" in Bette J Roth, Randall W Wulff and Charles A Cooper (eds), *The Alternative Dispute Resolution Practice Guide 2* (2006), p 6.
21 Christensen, supra n 7, at 83.
22 Ibid.

[21] Moreover, as the private judge will not have to juggle between the multitude of responsibilities – both judicial and administrative – that are common of a public court, the case will be his or her priority and focus. This will allow the private judge more time and opportunity to thoroughly engage the parties and to fully understand the issues of the claim. In addition to reassuring parties that their case will be competently tried with a well-reasoned decision, it also adds to the expediency of the trial as the heart of the matter can be addressed immediately, skipping the basics required for getting judges unfamiliar with the area up to speed.[23] In short, the judicial expertise of the selected expert private judge saves time and money in addition to providing legitimacy and confidence for the parties in the outcome.[24]

Privacy

[22] In the United States of America, private judging is generally a much more private process in practice than a standard litigation in public courts. Although the judgment is public, the proceedings can be "confidential until a judgment is rendered".[25]

[23] However, there are exceptions. For example, all original pleadings submitted to the private judge in Los Angeles County must also be filed with the Superior Court and trials by a private judge must allow reasonable accommodation for the presence of the public and media. Since all pleadings must be filed with the court, "private judging may lose some of its privacy appeal".[26] This requirement sits alongside some notice provisions available to the public such as rule 2.833 of the Californian Rules of Court Governing Temporary Judges. Nonetheless, counsel can agree to "handle motions and ex parte matters on a more informal basis so there are no pleadings and more privacy",[27] and the parties do not have to explicitly notify the public or press of the proceedings, thereby reducing the likelihood of attendance by the public.[28]

23 G Christian Hill, "Rent-A-Judge: California is Allowing its Wealthy Litigants to Hire Private Jurists", *Wall Street Journal*, 1980; Ronald Yates, "State's Rent-a-Judge Plan Offers Speedy Justice", *Chicago Tribune*, 1980, p 22, col 4.

24 Whittlesey, supra n 9, at 522.

25 Christian, supra n 20, at p 6.

26 Jill S Robbins, "The Private Judge: California Anomaly or Wave of the Future?", https://www.iafl.com/media/1123/the_private_judge_california_anomaly_or_wave_of_the_future.pdf, p 8.

27 Ibid.

28 Ibid, at p 9.

Costs

[24] Even though one might reasonably assume that the hiring of a good private judge is expensive, this cost may be greatly offset by the benefits of expediency. The time taken to wait for the trial to commence in a congested civil docket and the trial time itself can be substantially reduced through the "sharp focus and practiced informality of private judging",[29] resulting in a lower total cost. Indeed, some commentators have noted that this procedure "saved 80% of the delays, 80% of the legal fees and 80% of the aggravation"[30] when compared to a standard trial in the regular courts.[31]

[25] Public court trials can be beset by delays with the judge having to call other matters – such as *ex parte* applications – and cases often have to be tried on non-consecutive days with months in between to fit within the public court schedules resulting in additional re-preparation time and its associated costs.[32] All these wasted time, such as that spent on out-of-court proceedings, simply contributes towards increasing the legal fees which quantum could be more than sufficient to cover the cost of a private judge for a more expeditious consecutive several-day trial.

Benefit of "appealability"

[26] As the judgments of private judges are equivalent to court judgments, they are subject to appellate review as per the traditional court system[33] which further ensures the quality of decisions. This pre-empts a major criticism that other ADR processes are susceptible to since using private judging does not completely prevent the courts from properly carrying out their judicial role of developing the law and precedent. Though it is noted that few parties seem inclined to take advantage of this right to appeal – due to it frustrating the very reasons of speed and economy of process that incentivise public judging in the first place[34] – the fact that such

29 Christian, supra n 20, at p 6.
30 Hill, supra n 23, at p 12.
31 Eric D Green, "Avoiding the Legal Log Jam – Private Justice, California Style" in Center for Public Resources (ed), *Corporate Dispute Management* (1982), p 65.
32 Robbins, supra n 26, at pp 13–14.
33 Whittlesey, supra n 9, at 552.
34 Anne S Kim, "Rent-a-Judge and the Cost of Selling Justice" (1994) 44(1) *Duke Law Journal* 166 at 171.

an option exists for parties involved to utilise can nonetheless be viewed positively.

Public benefit

[27] The advantages can also extend to the public court system which indirectly benefits other litigants who do not have the financial means to access the private system. As the public court's workload is reduced by claims being diverted out of the system, the backlog of cases is reduced, resulting in other litigants receiving speedier access to trial. This is especially so as the diverted cases could involve complex, specialist matters which would take up a considerable amount of court time to try.

[28] The resulting reduction in case load will provide the Judiciary with some breathing room to operate more efficiently and effectively "as public court administrators and officials struggle to cope with budget cuts, longer trials, and a shortage of well-trained staff".[35] Alongside standard processes of private dispute resolution such as negotiation, mediation and arbitration, private judging can help resolve cases that would otherwise continue to float around awaiting definitive resolution in the public court system. Additionally, as the parties pay for the whole process of private judging, none of these civil claims will use up any of the state's resources.

Private judge benefit

[29] The obvious advantages and incentives provided to the private judge include the provision of interesting and well-remunerated work in retirement. In fact, as the private judge would most likely choose cases which facts align best with his or her skillset and expertise, these may be even more fascinating than those during their time on the bench. Furthermore, the private judge may derive personal non-pecuniary satisfaction from a role that allows them to continue playing a part in civic society by taking part in the justice system at their leisure, accepting as many or as few references as they wish.[36]

35 Sheila Nagaraj, "The Marriage of Family Law and Private Judging in California" (2006–2007) 116 Yale LJ 1615; Judicial Council of California, 2005 Annual Report: Cornerstones of Democracy: California Courts Enter a New Era of Judicial Branch Independence (2005), pp 23–28.

36 Christensen, supra n 7, at 84.

Disadvantages and criticisms

[30] Despite the increasing popularity of private judging and its spread across jurisdictions over the past few decades, the rent-a-judge process is not without its persistent critiques, the principals of which are highlighted below.

Public accountability

[31] Concerns of public accountability have been expressed about the inherent risks of privatising justice, including the lack of disclosure requirements and a rigorous framework to ensure the impartiality and behaviour of judges are benchmarked against appropriate standards.[37]

[32] One very strong reservation is that the process is essentially a form of private dispute resolution which is too closely associated with the public power of the courts. There are serious worries that since judges are creatures of public law with authority to impose a binding decision that is appealable to the state courts, it is not appropriate for them to be chosen by private agreement between the parties. The main external check on their conduct is the "market" – thus, despite their public or "quasi-public" role, rent-a-judge lacks public accountability, carrying out their business with the authority of the state but in truth lacking a public mandate.[38]

[33] Such concerns recognise that private judges may be considered "an inextricable part of the official state judicial system",[39] enjoying the powers of a public judge and the judicial power of the state, even being able to be cited as precedent, as permitted – for instance – under section 645 of the Californian Civil Procedure Code.

[34] Furthermore, it is argued that private judging may be in breach of the fundamental "constitutional principle of open justice".[40] As Lady Hale explained in the recent decision of *Cape Intermediate Holdings v Dring*, the principal purposes of open justice are to ensure judges are held accountable for their decisions, giving the public confidence that justice is being served properly, and enabling "the public to understand how the justice system works and why decisions are taken. For this

37 Kim, supra n 34, at 167.
38 Palmer and Roberts, supra n 3, at p 270.
39 Kim, supra n 34, at 187–189.
40 *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 at 41, *per* Lady Hale.

they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases".[41] By having the trial private, the very principle of open justice – the public's right to know – and freedom of information is subverted.

Impartiality

[35] Another criticism of private judging is the question of the judge's impartiality. As the outcome is adjudicative, there is the conceivable danger of "judge-shopping"[42] to suit the private interests of parties. As private judges are fully funded by the parties involved – and since the parties' primary concern would be securing a favourable result, this situation may draw parties into selecting private judges who have a history of past decisions that "are strongly indicative of how she or he will read the case to which she or he might be invited to sit".[43] Furthermore, there is an inherent risk of potentially inducing private judges to be more inclined to decide in favour of parties who are "more likely to bring cases to them in the future",[44] incentivised by the prospects of steady business and repeat customers.

Wealth discrimination

[36] Critics fear that private judging may create a two-tiered system of justice where the ability to rent a judge serves as an unjust privilege for the wealthy who can afford their services to the detriment of the socio-economically disadvantaged, who have to use legal aid or appear as a litigant in person, and are denied of this option.[45]

[37] Put another way: Is the process of fast-tracking justice with its accompanying benefits of efficiency and expediency only for those who can afford a private judge? Is the convenience of a private court trial not just a clear application of the legal maxim of "justice delayed is justice denied" for the under-privileged by or under a more fancy name?

41 Ibid, at p 43.
42 Palmer and Roberts, supra n 3, at p 270.
43 Ibid.
44 Note, "The California Rent-a-Judge Experiment: Constitutional and Policy Considerations of Pay-as-You-Go Courts" (1981) 94 Harv L Rev 1592; Christensen, supra n 7, at 90.
45 Palmer and Roberts, supra n 3, at p 270.

III. Private judging's compatibility with the development of civil justice

[38] Notwithstanding the clear benefits of private judging, institutional safeguards to the rule of law as enshrined within the Federal Constitution stand somewhat in the way of the wholesale adoption of a comprehensive regime within the sphere of civil justice. That said, the authors aver that the specific jurisprudential circumstances of the common law make it an appropriate and uniquely nuanced avenue dispute resolution method that can be greatly beneficial.

[39] In England with her uncodified Constitution, the provision of civil justice by the state is seen as a public good that secures the rule of law as opposed to a mere public service.[46] The court plays a central and irreplaceable role in upholding the rule of law that largely cannot be usurped.[47] This is made emphatically clear in the case of *Unison*,[48] where Lord Reed stated that:

> Indications of a lack of understanding [of the rule of law] include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the "users" who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings.[49]

[40] While the primary function of the law is dispute settlement is doubtless, English jurisprudence and larger attitudes towards civil justice point towards the conclusion that even *inter partes* justice goes well beyond a consumer service. It is more than a mere private good to individual litigants as it is also a means by which the state can ensure that its citizens are fully able to vindicate and enforce their rights, obligations, benefits and burdens available and recognised

46 Hazel Genn, *The Hamlyn Lectures 2008: Judging Civil Justice* (Cambridge University Press 2008), pp 16–17; John Sorabji, *English Civil Justice After the Woolf and Jackson Reforms* (Cambridge University Press, 2014), pp 10–11.

47 See, e.g. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, HL; *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262; *AXA General Insurance Ltd v The Lord Advocate* [2011] UKSC 46.

48 *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2017] WLR 409.

49 Ibid, at [66].

under the auspices of the law.[50] As Professor Dame Hazel Genn points out, the law:

> … can be used for social engineering to change social conditions, and to regulate economic behaviour. It also has a facilitative function, as an enterprise for facilitating voluntary arrangements.[51]

[41] As such, at the outset, the broader "social good" achieved by the law seems incompatible with the implementation of a subordinate scheme of private judging. It privatises what is ostensibly a public function, erodes the development and articulation of new law, and turns into a service available to those who can afford it. In this fundamental sense, private judging appears to be antithetical to the normative foundation of English rule of law.

[42] However, a few ripostes can be dealt to this. First, the courts neither have a monopoly on the means by which individuals decide to resolve their own disputes nor over social control.[52] Individuals are free to employ whatever lawful method they desire, in the manner and time they choose. Even where parties have committed to litigation, they can settle or withdraw the case at any time before the final judgment is entered. It is trite that there is nothing to stop individuals from pursuing resolution or redress outside the formal institutions of the Judiciary.

[43] Secondly, a myriad of accepted methods of ADR co-exist with the courts. There are the traditional forms of ADR offered by the likes of adjudication, arbitration, mediation and conciliation, early neutral evaluations, as well as private and public ombudsmen, tribunals, and sectoral regulated schemes. Any of these options may draw cases away from the courts, offering an alternative avenue for the parties to seek a resolution of their disputes. There is no substantial opposition to the availability of such alternatives, which are instead seen largely as a means to effecting increased access to justice which in turn supports – as opposed to detracts from – the rule of law.[53] In fact, in recent times

50 Ibid, at [67].

51 Hazel Genn, *Understanding Civil Justice* (OUP, 1997), p 163.

52 Ibid, at p 162; E Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge, Mass, 1936).

53 Lord Woolf MR, Access to Justice: Interim Report, Lord Chancellor's Department (1995); Access to Justice: Final Report, Lord Chancellor's Department (1996); Modernising Justice, A Consultation Paper, Lord Chancellor's Department (November 1998); Access to Justice Act 1999.

ADR has been championed extensively by both the courts and policy makers as the proper avenue to resolve many disputes.[54]

[44] Thirdly and relatedly, private judging, in comparison to all other forms of ADR, coheres most closely with the norms, rules and principles that underlie conventional court proceedings. In essence, the same rules of court and procedure apply, along with the same institutional safeguards. The court in cases of private judging are empowered by the same inherent and statutory jurisdiction and can even, if the situation demands, uphold their position as *parens patriae*, in the case of vulnerable jurisdiction.[55] Consequently, the possible argument that the implementation of private judging will constitute an impermissible encroachment on the "public good" function of the law is unfounded and is not an adequate objection to its adoption as a potential option to disputants to resolve their disputes.

[45] Additionally, another aspect of the rule of law constantly cited as incompatible with private judging and other forms of confidential ADR generally is open justice.[56] The importance of this principle was stressed by Lord Hewart LCJ in *R v Sussex Justices, Ex p McCarthy*,[57] when his Lordship expressed in the great aphorism that "It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done".[58] The centrality and primacy of the feature of open justice has been identified as a "fundamental feature" in Sir Jack Jacob's Hamlyn Lecture on the Fabric of English Civil Justice.[59] As such, subject only to rare exceptions,[60] civil justice should be administered

54 See, e.g. Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters; *Cowl and others v Plymouth City Council* [2001] EWCA Civ 1935; *Dunnet v Railtrack* [2002] EWCA Civ 302; Civil Procedure Rules 1988, r 1.1.

55 Margaret Hall, "The Vulnerability Jurisdiction: Equity, *Parens Patriae*, and the Inherent Jurisdiction of the Court" (2016) 2 CJCCL 185 at 192–195.

56 See, e.g. Laurie Kratky Dore, "Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement" (1999) 74 *Notre Dame L Rev* 283; Joseph Anderson, "Hidden from the Public by Order of the Court: The Case Against Government Enforced Secrecy" (2004) 55 SC L Rev 711; Jack Weinstein, "Secrecy in Civil Trials: Some Tentative Views" (2000) 9 JL & Pol 53.

57 [1924] 1 KB 256.

58 Ibid, at p 259.

59 Jack Jacob, *The Fabric of English Civil Justice* (London: Stevens & Sons, 1987), p 22.

60 For a brief overview, see David Burrows, "Where open justice may be closed …" (2020) NLJ 15.

transparently before the full view of the public and press. There is no shelter from public accountability which is an essential feature of democratic control.[61]

[46] Significantly, the process and outcome of private judging is arguably less cloistered than other forms of ADR. The judgment is fully public unlike most arbitral awards which are oftentimes subject to confidentiality and/or non-disclosure clauses. Consequently, the result and the fully articulated reasons are available to the public for inspection, thereby enhancing both transparency and accountability. Concerned stakeholders or general members of the public can readily scrutinise the administration of justice in the final product.

[47] Unlike the secrecy generated by the contemporary push of disputants away from courts to confidential ADR proceedings, the public is not shut out of important information and the public interest has become more readily observed.[62] As a result, private judging serves as an alternative halfway-house that allows parties to avail themselves of many of the advantages cited as defining attributes of ADR while upholding, to a greater degree, the principle of open justice which rests as an important cornerstone in the administration of the rule of law.

IV. Do the benefits outweigh the costs?

[48] Whilst the practical benefits of private judging might be more apparent in the United States of America given its statistically more litigious nature,[63] the benefits of implementing the same in Malaysia may still be immediately noticeable for the reasons as set out in the ensuing paragraphs.

The statistics

[49] Anecdotally, there can be no doubt that delays in the access to justice have been further worsened by the COVID-19 pandemic. With the reduced number of civil justice actions filed during the imposition

61 *Scott v Scott* [1913] AC 417, HL at 477, per Lord Shaw: "publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial".

62 Stephanie Brenowitz, "Deadly Secrecy: The Erosion of Public Information Under Private Justice" (2004)
19 Ohio St J on Disp Resol 679 at 693.

63 J Mark Ramseyer and Eric B Rasmusen, "Comparative Litigation Rates", Harvard John M Olin Discussion Paper Series, No 681 (2010).

of the various mandatory movement control orders ("MCO"), it is not unreasonable to project a further deterioration of the already lengthy congestion and waiting lists once some degree of normalcy is achieved.

[50] As the Malaysian Judiciary does not provide equivalent statistics, some reference on this issue may be gleaned from its counterparts in the United Kingdom where the mean time taken from claim to hearing is 51.2 weeks and 73.9 weeks for small claims and multi/fast track claims respectively. The fact that these are respectively 14.1 weeks and 13 weeks longer than for the comparable period in 2019[64] – and on the reasonable assumption that the corresponding statistics in Malaysia are not significantly or materially different – provides sound justification to warrant, at the very least, due consideration of private judging as a potentially viable alternative route to more expeditious or timely dispute resolution against the unenviable background of an increasing backlog of cases.

[51] Providing an outlet by way of private judging to help avoid further delays in and to alleviate fears that the justice system may have become excessively overburdened is a distinct advantage of its implementation. It will contribute by dealing with the backlog of cases accumulated from the lockdown procedures when many of the court buildings were shut down, further reducing court capacity. This diversion of cases – especially those involving complex specialist knowledge or where privacy is the primary overriding concern – to the private system will mutually benefit both private and public litigants.

[52] While the latter may not have the means to access private judging, they are nonetheless "indirect beneficiaries" given that court resources will be "released and made available" as private judges step in to take up cases. In short, both private and public litigants can mutually enjoy more expedient access to trial as a consequence of the reduction of the immense number of outstanding cases across all first instance courts.[65] Significantly, this enhances the basic principles of having access to the due process of the law and the right to a fair trial.

64 National Statistics, Civil Justice Statistics Quarterly: October to December 2020, Ministry of Justice(published March 4, 2021).

65 Her Majesty's Courts & Tribunals Service, Weekly operational management information March 2020 to February 2021, Statistical Data Set (published March 11, 2021).

Affordability and accessibility

[53] Contrary to common belief that private judging is the exclusive domain of a select club, it has been reported that in the state of Ohio in the United States of America, "many privately-judged proceedings involve personal injury or domestic relations disputes where the amount in controversy is below fifty-thousand dollars",[66] emphasising the real possibility that private judging is generally accessible to the average litigant, and it is not dominated by the wealthy at the cost of the poor.

[54] As highlighted above, the process of private judging is affordable – and possibly cheaper overall when various opportunity costs are factored in – than normal litigation in public courts. It has even been submitted that "private judging and other ADR techniques may be the only cost-effective dispute resolution forum for litigants with limited means".[67] By creating a competitive market of private judging, it is likely that judges will have specialisations in different claims for different prices, thereby potentially contributing significantly towards enhanced access to justice.

[55] Additionally, wealth inequalities exist even in the traditional public court system itself as wealthier litigants have access to exclusive procedures and services that litigants of lesser means cannot afford.[68] Examples of such inequalities include the wealthier litigant's ability to afford more expensive lawyers whose skill should be representative of their higher rates, have access to expert advisers or witnesses to consolidate their case, as well as to file higher value claims in the High Court instead of the Sessions Courts. Despite these obvious divergences, they have not been explicitly or commonly recognised as, or held to represent, a breach of the right to trial or a denial of due process.

[56] Moreover, with the "loser pays" basis of litigation in our adversarial system, the financial burdens of losing can be significant as the loser would generally have to cover a substantial portion of

66 Whittlesey, supra n 9, at 554–555.

67 Ibid, at p 554; Richard Chernick, Helen I Bendix and Robert C Barrett with Roger Clegg (ed), *Private Judging: Privatizing Civil Justice* (National Legal Center for the Public Interest, 1997).

68 Whittlesey, supra n 9, at 555.

the costs for the trial – not only for his or her legal team but also that of the victor. Thus the effect of formal justice is that the winner takes everything and the losing party loses it all. Private judging can contribute to and assist with "cost-shifting" where the costs of the proceedings are borne equally between the parties or within the framework of an agreed formula thereby allowing for more certainty whilst managing "downside risks".

[57] While it is conceivable that private judging will likely result in better reasoned judgments – given the specialist knowledge, time and attention given to the case as compared to the overburdened public courts – there is little cause for concern that this would be unjust and unconstitutional, or discriminatory against the less well off. It would be fallacious to argue that the public courts fail to provide a meaningful and/or inadequate opportunities to be heard as both public and private judges must ensure that the law is applied both impartially and fairly. They are bound to follow, interpret and apply the same substantive law as well as legal rules of procedure and evidence. Furthermore, both public and private judgments are subject to appeal and review by appellate courts.[69]

Resource allocation

[58] As implementation of private judging would help divert cases away from the congested public court system with its thousands of outstanding cases across the board, public court litigants without the financial means to utilise the private system can benefit from judges and state resources that are "released" and made available to focus on a smaller number of incoming cases. Consequently, one should expect positive results including expediency with better public decisions. More cases can be handled by effectively utilising the public and private spheres simultaneously and in parallel with the choice being determined by the circumstances of the case.

[59] While private judging offers the aforementioned benefits of speed, convenience and privacy, the less well-off litigant is not denied access to a claim at the same trial level in the public domain.[70] Thus, allowing for private judging cannot be equated with the creation of a two-tiered, dual justice system, or the denial of the right to a fair trial

69 Christensen, supra n 7, at 100.
70 Ibid.

or a contravention of the rule of law. In fact, once the private judging system is in place any surplus arising from the resources saved by the public courts due to a reduction of cases can be specifically earmarked to support and/or to further enhance access to justice schemes.

[60] Evidence for the foregoing can be seen from the historical development of private judging in the United States of America where the processual innovation was developed out of a need to provide more means to help divert disputes from the courts which were overburdened and under-resourced. It was also seen to achieve another important policy objective, namely, to provide a means of resolving disputes with greater expediency, efficiency, cost-effectivity, privacy, convenience and flexibility.

[61] It is trite that private judging is particularly useful to certain types of actions such as family disputes which are elaborated in greater detail in the next section. As evident with the increasing acceptance in England of ADR as a legitimate method to resolve cases,[71] and with greater familiarity with lawyers and parties, there has emerged greater awareness of the benefits of different approaches and of the cross-fertilisation of dispute resolution methods.[72] Given the various infrastructure that have been set up and/or are available there is no reason why these results cannot be repeated in Malaysia.

Market forces

[62] It has been argued that the implementation of private judging could lead to injustice as private parties may try to influence judges and by doing so contravene their impartiality. Alternatively the parties could actively undertake an open process of "judge-shopping" in a bid to tilt cases in their favour. However, this view is strained and unconvincing as unlike in a public trial where the defendants are forced to defend themselves involuntarily, the parties to a private trial under the reference procedure are both there voluntarily and by agreement. Consequently, "any danger of impairment of the judge's impartiality would seem to be remote if not non-existent".[73]

71 Hogan Lovells, "Alternative Dispute Resolution in England and Wales" (October 2017), pp 2–3.

72 See, *e.g. Lomax v Lomax* [2019] EWCA Civ 1467; Palmer and Roberts, supra n 3, at Ch 10.

73 Christensen, supra n 7, at 91.

[63] If a private judge has a history of past decisions leaning a particular way, or is perceived to subtly favour a "repeat customer", it would logically follow that the judge risks being subject to significant reputational repercussions for being biased or unfair, which would greatly hinder his or her career prospects as a private judge. As both parties must agree to the selection of the judge, reputation as being impartial, knowledgeable, expedient and fair will be of paramount importance to developing a successful private practice. Moreover, "today's one-time user may become tomorrow's frequent user",[74] dissipating any temptation to favour a particular party as it would be best to be impartial to ensure a steady flow of customers.

[64] In short, unlike public court systems, private judges have to attract business and are susceptible to market pressures, and must develop a reputation for being skilled in a particular speciality – applying that particular body of law with expertise transparently and with rigour – as well as being impartial in deciding cases on their merits whilst maintaining the highest standards of integrity. Notwithstanding, to ensure confidence in the system, private judges must still be subject to strict sanctions should they breach their duty to perform their judicial duties impartially without bias or prejudice as set out under the Judges' Code of Ethics 2009 in Malaysia.

Transparency and accountability

[65] Any concerns that first time and/or financially less well-off private litigants would not have the means to obtain adequate knowledge about selectable private judges could be addressed by the effective use of information technology to reduce the incidence of information asymmetry. This would include the implementation of a database, which would display the "curriculum vitae, organizational affiliations, and a list of the litigating parties in all past decisions"[75] and perhaps even innovatively providing for "customer reviews".

[66] Having public access to information on potential conflicts of interests, reputation, past decisions and expertise would not only ensure impartiality but would also facilitate a transparent selection process of finding an experienced or the most well-suited judge to

74 Ibid.
75 Whittlesey, supra n 9, at 558.

address the peculiarities of any particular dispute.[76] Consequently, this process "simply affords litigants who can make use of it an alternative-but equivalent-hearing at the trial level; those who cannot use it may still obtain an equivalent hearing, at the same level, in the regular courts".[77]

Brain drain

[67] Concerns that the introduction of private judging would cause a massive brain drain of skilled judges from the public Judiciary are perhaps over-done. This is due to the pecuniary employment benefits and pension, in addition to the potential non-pecuniary benefits of prestige, status and power associated with the office of the latter. This is evident from reports of highly-qualified lawyers voluntarily becoming a judge despite the substantial difference in earning power. In addition, public judges who are held in high regard may be acknowledged with appropriate honorifics for their contributions and service, and may gain prominence associated with being elevated to higher courts. Their passion for the law continues unabated with the making of important, precedent-setting decisions in appellate courts thereby making substantial contributions to shaping and further developing the common law.

[68] A survey of retired judges in the United States "found that money-making opportunities as rent-a-judge or as arbitrators and mediators ranked below other reason for retiring, such as 'desire for rest and relaxation, and dissatisfaction with service in the public justice system'".[78] This is further supported by the result of Chief Justice Ronald George's ultimatum directive in Californian courts, where retired judges had to decide between volunteering for fill-in assignments on the bench or being a private judge. Only 27% of the retired judges chose the more lucrative path of private judging, clearly highlighting that factors such as prestige of being able to "preside over public courts outweighed the financial rewards of what some call the 'rent-a-judge' game".[79]

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76 Ibid.

77 Christensen, supra n 7, at 93.

78 Janice Roehl, Robert Huitt and Henry Wong, *Private Judging: A Study of Its Volume, Nature, and Impact on State Courts* (Institute for Social Analysis, 1993), p 13; Kim, supra n 34, at 176.

79 Martin Kasindorf, "Rent-a-judges forced out of California courts", *USA Today*, 2003.

[69] The foregoing results can likely be extrapolated or may at least be somewhat broadly representative of the sentiment of Malaysian judges. Either way, "'retention of valued public servants should be achieved by offering appropriate job conditions, benefits, and compensation' – not by scapegoating 'a service which is beneficial to and desired by litigants'".[80]

Arbitration and private judging

[70] Due to processual innovation, private judging is comparable to a number of other forms of ADR mechanisms such as arbitration. It has evolved from primary processes, inserting benefits and overcoming problems inherent in the original form, providing a different method of dispute resolution. Through the use of many elements and benefits in arbitration combined with the litigation process, this hybrid system enhances standard litigation. "In some ways, the rent-a-judge system seems to be an ideal hybrid of public and private justice. It offers the speed, efficiency, and convenience of arbitration and mediation along with an enforceable, appealable state court judgment."[81]

[71] Arbitration and private judging share many similarities. The former is very well established and has seen an increasing use in Malaysia which commitment is evident with the establishment – and subsequent rebranding – of the Asian International Arbitration Centre in Kuala Lumpur. Both share consensual processes that can deal with a virtually limitless range of disputes and issues. The arbitrators are similarly generally chosen by agreement between the parties and fully paid for, and they likely also have been chosen for their expertise over the subject-matter involved in the dispute. Flexibility and convenience is similarly shared as parties can agree on the time and place of the arbitration, and the hearings are correspondingly conducted in private.

[72] However, there are also important differences between the two. For arbitration, an arbitral award is filed often not subject to review by the Judiciary, whilst a private judge delivers a formal judgment just as if it was a judicial proceeding, applying substantive law and rules of procedure and evidence. The judgment is liable to being

80 Whittlesey, supra n 9, at 561; Chernick et al, supra n 67, at p 45.
81 Kim, supra n 34, at 189.

reviewed and appealed for errors of fact and law, unlike the finality of an arbitral award, which is only appealable on narrow grounds.[82]

[73] Additionally, such processual development can be argued to be largely done by legal professionals, detracting from the original values of the ADR movement; "allowing parties to retain control over the process of resolving their dispute, and to relate to each other – in some cases at least – in a way that would facilitate good relations in the future".[83] However, the implementation of private judging just provides another avenue for dispute resolution, and does not prevent the use of more cooperative methods such as negotiation or mediation. Indeed, it may be argued that some of the original values of the movement include the flexibility of dispute resolution methodology.

[74] Importantly, private judging could go some way towards addressing two key "real world" issues that are perceived to be common amongst practitioners of arbitration in Malaysia namely the enforcement of awards and the not infrequent delays that are encountered. Unlike arbitration – which award may have to be enforced by way of a court order – private judges are official elements of the state court system who exercise the same powers as public judges. The issue of delays with impunity by one party designed to slow down the process – which arbitrators may not be able to effectively direct – is addressed by the giving of directions by the private judge. As with a public court, any party that fails to adhere to such instructions risks their case being struck off with possible sanctions on counsel who may be complicit in the process.

[75] Ultimately, private judging is very similar to arbitration – with many analogous features – resulting in similar vulnerabilities to many of the above criticisms such as privacy concerns. Nonetheless, the practical implications and the merit of these disadvantages have to be questioned given the overall success and promotion of arbitration regionally in Malaysia, Hong Kong as well as Singapore. For example, if it is perfectly fine that parties can choose to arbitrate instead of following standard litigation in public courts, it is unclear as to why private judging should be restricted given its similarities.[84]

82 See, e.g. the Arbitration Act 1996 (UK), s 69.
83 Palmer and Roberts, supra n 3, at p 271.
84 Christensen, supra n 7, at 95.

Role of courts and open justice

[76] Some have argued that processual innovation and the promotion of ADR methods, competing against civil justice, have moved the understanding of the court's function from being a determiner of rights, expressive of current public values, to now simply managing dispute resolution.[85] However, this is not particularly persuasive, as the vast majority of claims still go through the public courts, and without ADR processes diverting claims from the public domain, the courts would simply be excessively overburdened and be unable to efficiently carry out its function in determining rights and expressing public values on cases of real significance. Thus, the two regimes should logically and reasonably be viewed as being complementary rather than being mutually exclusive.

[77] To address the concerns that the role of the Judiciary – and the development of the common law – would be stunted by the implementation of private judging, a simple solution can be considered. Private judging cases can be restricted to issues concerning only the parties themselves, with minimal social impact, and as suggested by Christensen:

> When parties petition for a case to be referred to a private judge for trial, a presumption should arise that the case contains matters of public interest and that the trial should be open to the public. The burden would then be on the parties to demonstrate that no compelling public interest exists and that they have legitimate reasons for secrecy.[86]

[78] Contrary to claims that private judging interferes with the constitutional principles of open justice, the judgments delivered by the private judge are available in the public domain and are subject to appeal in the normal judicial process. The rented judge is bound to apply the substantive law and given their speciality, expertise and experience, there should be little doubt that justice will be properly served, possibly providing excellent precedent that greatly helps the public in understanding how that body of law functions and why such decisions are made.

[79] However, there should be reasonable restrictions in certain cases on what documents used in a private judgment can be publicly accessed.

85 Judith Resnik, "Managerial Judges" (1982) 96 *Harvard Law Review* 374.
86 Christensen, supra n 7, at 99.

There should be a balance struck, as Lady Hale succinctly put, citing *Kennedy v The Charity Commission*[87] and *A v British Broadcasting Corp*:[88]

> … on the one hand will be "the purpose of the open justice principle and the potential value of the information in question in advancing that purpose". On the other hand will be "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others". There may be very good reasons for denying access.[89]

[80] It is therefore not a foregone conclusion that a breach of the principle of open justice will automatically arise if there is a level of privacy in private judging as this must be commensurate with the requirements of the case as balanced out against the public interest.[90] Indeed, legitimate reasons for non-disclosure in the context of private judging can include family disputes where the interest of vulnerable children should be protected, the protection of commercial confidentiality and trade secrets, and general privacy interests. As discussed in the section below, these areas and specialist fields deal with uncontroversial, private issues which would greatly benefit from the implementation of private judging.

V. What type fits?

[81] A significant advantage of private judging is ensuring that the referee's experience and knowledge in the substantive area of law involved is of great value, as eloquently put by Robbins:

> Family law, for example, has become so sophisticated that the attorney must have a working knowledge of juvenile dependency, bankruptcy, general corporate formation, business transactions and valuation techniques, cash flow analysis, security and enforcement methodology for future payments, and behavioural sciences, to name a few. This knowledge, of course, is in addition to the substantive area of family law and all its intricacies. Some family law judges never practiced family law before their appointment. Accordingly, the selection of a private judge with expertise in the applicable area or areas provides a significant advantage, not only in reducing "education time" but in

87 [2014] UKSC 20 at 113.
88 [2014] UKSC 25 at 41.
89 *Cape Intermediate Holdings Ltd v Dring*, supra n 40, at 45–46.
90 Ibid, at p 45.

providing the attorney and client with the certainty that the private judge will understand the evidence presented.[91]

[82] From the factors as discussed above – even if it is suggested that private judging may generally be unamenable – it is submitted that having this option for qualified use in smaller specific subsets of civil law is still beneficial especially for areas including "intricate intellectual property issues, arcane accounting principles, or other issues requiring special expertise".[92] Other types of cases that could be especially appropriate for private judging include commonplace, standard run-of-the-mill single-plaintiff tort cases that will likely only entail the application of existing standards and which are unlikely to create new precedent and/or be of any public significance. [93]

[83] Additionally, cases involving complex commercial litigation with a dispute between wealthier parties such as corporations that involves a lot of money and which burns through a lot of public court time would be much better suited for private judges, especially given their specialist expertise.[94] Similar advantages are clearly evident for cases dealing with patents and/or any other areas where expediency, privacy and expertise are particularly valued, especially where the case has mainly private implications just between the parties to the action, devoid of and/or be of any interest to the public.

[84] As such, "according to some sources, rent-a-judge are most popular in two types of cases: complex commercial litigation and divorces",[95] with over half the cases being referred to private judges in Los Angeles being divorce proceedings. It is clear that the benefits of private judging such as the expediency and specialised knowledge of the judges are a major attraction and Malaysia could reap significant benefits in these fields if private judging were to be implemented.

[85] There is much to be gained, especially in cases of family disputes such as divorces. There are few parties involved as it is in essence an entirely private family matter, and the issues at stake are very rarely of any public significance.[96] Given the flexibility, convenience, and

91 Robbins, supra n 26, at p 3.
92 Helen I Bendix and Richard Chernick, "Renting the Judge" (1994) 21 Litig 33.
93 See, *inter alia*, Palmer and Roberts, supra n 3, at p 270.
94 Kim, supra n 34, at 195.
95 Ibid, at p 174.
96 Ibid, at p 195.

privacy offered by private judging, it "fills a particularly worrisome gap between public adjudication and arbitration in the family law context".[97] It is well suited to deal with all the major issues of family law and provides a far better setting for these disputes which arguably belong more in the private than the public courts.

[86] This benefit has clearly been recognised in Hong Kong which shares many legal and cultural characteristics with Malaysia given that both were former colonies of the United Kingdom. Initiatives such as the Pilot Scheme on Private Adjudication of Financial Disputes in Matrimonial and Family Proceedings, Practice Direction SL9 which was implemented in Hong Kong in January 2018 has since been extended.[98] The ability to avoid public scrutiny and scorn through privacy, protecting children from the potentially traumatic and harmful legal process, as well as the flexibility and convenience private judging offers can help counter the animosity inherent in family disputes, lending greater legitimacy to its implementation in Malaysia.

[87] Probate, intellectual property and civil proceedings for breaches of securities laws – if the last were to be implemented[99] – may also be fertile areas that can spur the growth of private judging. At the end of the day it is likely to be a "win win" situation. By tapping into a pool of recognised and independent expertise, private judging will maximise resource allocation and serve the interests of justice by simultaneously alleviating some of the pressures that are faced by the Judiciary whilst availing an appropriate audience to the benefits of expedient justice that is both transparent as well as subject to rigorous appeal processes.

VI. Conclusion

[88] In summary, the implementation of private judging could be highly effective, especially in certain specialist areas that can fully take advantage of the benefits the process provides, such as the privacy,

97 Nagaraj, supra n 35, at 1615.

98 See https://legalref.judiciary.hk/lrs/common/pd/pdcontent.jsp?pdn=PDSL9.htm&lang=EN.

99 For example, Hong Kong runs a parallel but alternative regime whereby actions for the six defined market misconduct may be pursued either civilly through the Market Misconduct Tribunal or criminally through the courts: see Securities and Futures Ordinance (HK), Part XIII and Part XIV for the virtually identical civil and criminal provisions respectively.

expertise, expediency, flexibility, convenience and freedom of choice it offers. The specific jurisprudential circumstances of the common law make it an appropriate dispute resolution method and as a result of processual innovation, it provides a unique and nuanced avenue for dispute resolution that can be greatly beneficial.

[89] The authors do not suggest that the implementation of a private judging framework in Malaysia will be an easy process and indeed it is an idea that will take considerable time and effort to bring to fruition especially since it requires an amendment to the Federal Constitution. However, as the central objective of this article is to address a veritable lacuna in the debate on the prospects of the implementation of private judging as a whole, we would do well to remind ourselves of the famous words from *The Leopard*, "for things to remain the same, everything must change".[100]

[90] With an appropriate framework, private judging could be a viable option as a mechanism for ADR especially in areas where specialisation and/or privacy is of particular concern. This may include disputes arising within the rubric of family law, complex commercial litigation or the enforcement of contractual rights in private securities law where time may be of the essence. Apart from the speed at which such cases may be adjudicated, private judging may also appeal for various commercial agreements where privacy concerns are paramount, including the areas of patent, copyright or trade mark, thereby providing a viable alternative to parties as well as assisting with an alleviation of the significant case load that burdens the public court system with its limited public resources.

[91] On balance – for the reasons as articulated above – the introduction of private judging could be a positive change and should accordingly be carefully evaluated and considered. If effectively implemented, it may well prove to be a significant boon to Malaysia's role in and contribution towards enhancing mechanisms for alternative dispute resolutions regionally.

100 di Lampedusa, supra n 1.

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