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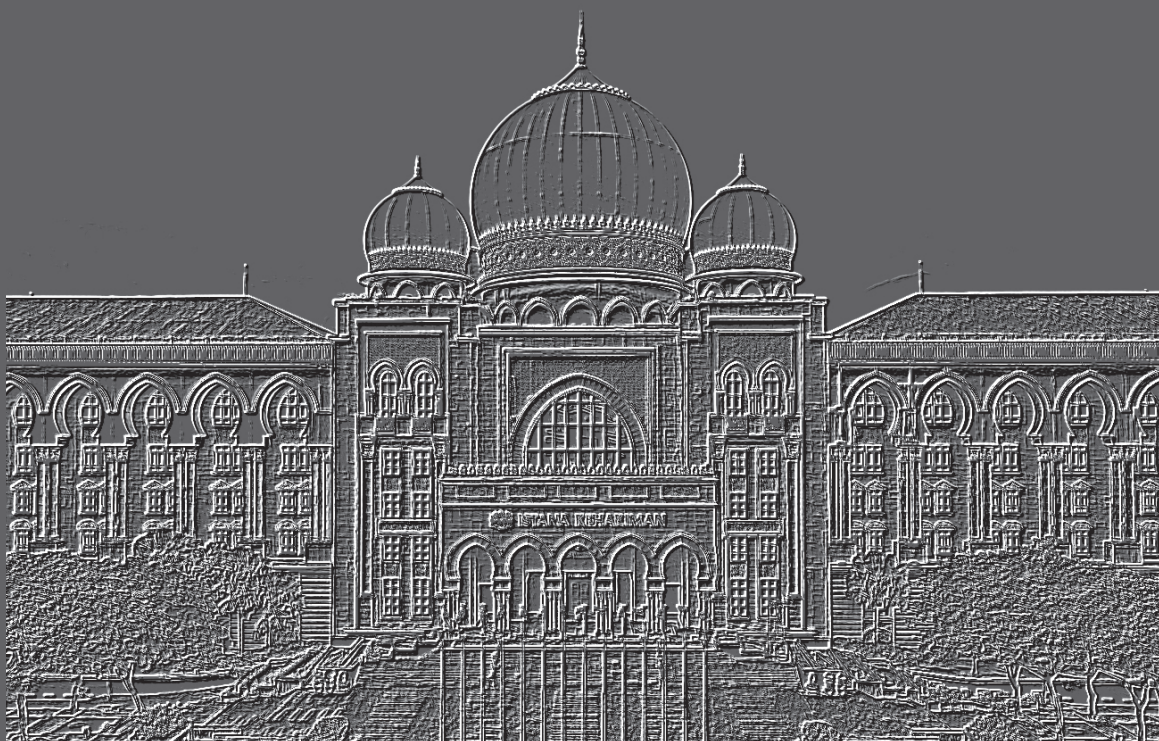

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PREFACE

We are pleased to showcase this compilation of speeches and articles, marking the Journal's 15th edition, on behalf of the Judiciary. It is always a privilege to curate these articles, and we extend our sincere gratitude to the authors for their dedicated efforts. Our aspiration is that readers will enjoy this captivating collection of legal insights, and then be encouraged to delve deeper into one or more of the diverse subjects covered in this edition.

The July 2023 edition opens with a keynote address by The Right Honourable Chief Justice of Malaysia, Tun Tengku Maimun binti Tuan Mat, delivered at the 23rd Commonwealth Law Conference in Goa, India. The address highlights the paramount importance of upholding and strengthening judicial independence within a democratic governance. The Chief Justice explores the constitutional foundations of judicial independence, discussing the interplay of the doctrine of the separation of powers, judicial power, and judicial review. Her Ladyship acknowledges the historical and contemporary challenges to judicial independence, including undue criticism and attacks on judges. In response, her Ladyship calls for collaborative efforts among stakeholders, including the Attorney General's Chambers and the Bar, to ensure the sanctity of the Malaysian Judiciary.

During the Tan Sri Harun M Hashim Memorial Lecture 2023, The Right Honourable Chief Justice of Malaysia, Tun Tengku Maimun binti Tuan Mat, addressed the intricate relationship between judicial integrity and interconnected factors: individual mindset and external influences. Her Ladyship stresses the vital role of maintaining judicial integrity in upholding the Rule of Law within a democratic governance framework. The address highlights the significance of judicial independence, ensuring unbiased decisions and encompassing all legal participants. Collaboration among justice system stakeholders and government branches is emphasised as essential to preserve judicial integrity. The speech provides a profound perspective on safeguarding judicial integrity and is valued for its insightful content.

The Right Honourable Chief Judge of Sabah and Sarawak, Tan Sri Abdul Rahman bin Sebli, contributed a timely keynote address, presenting an insightful exploration of the impact of the COVID-19 pandemic on Malaysia's construction industry. His Lordship highlighted the introduction of the Temporary Measures for Reducing the Impact of COVID-19 Act 2020, which played a pivotal role in mitigating the economic fallout and rejuvenating the sector. Through a comprehensive analysis, the keynote address delved into the challenges faced by major construction projects, detailing delay analysis, extension of time, and the utilisation of alternative dispute resolution methods such as mediation, arbitration, and adjudication.

Another significant addition to this edition is "The Fortuna Injunction" authored by Justice Wan Muhammad Amin bin Wan Yahya. This paper presents an in-depth and instructive exploration of the various facets of the law associated with the Fortuna injunction. The article focusses on the use of this injunction in the areas of arbitration and CIPAA decisions, and to this end provides guidance from a new perspective.

Further enriching this edition is an article penned by Justice Su Tiang Joo, who dissects the intricate role of witnesses in the Malaysian judicial system. Stressing their significance in truth-seeking and impartial justice, the essay contemplates the potential risks and advantages of summoning the opposing party as a witness. Justice Su urges a reinvigoration of the witness's primary allegiance to the court, proposing amendments to subpoena forms to underscore this principle and enhance the administration of justice.

It is a privilege for us to publish an enlightening article by Justice Teresita Asuncion M Lacandula-Rodriguez of the Metropolitan Trial Court of Valenzuela City on climate justice and litigation in the Philippines. The piece emphasises the profound impact of fossil fuel burning on climate change and explores climate change litigation as a potential avenue for seeking reparation and justice. Discussing challenges and goals in climate litigation, the article envisions the attainment of climate justice through proposed judicial reforms that provide relief to those adversely affected by climate change.

Datuk Vernon Ong Lam Kiat, a former Judge of the Federal Court, delivered a compelling keynote address during a Law Seminar at Multimedia University, underscoring the grave issue of human trafficking and migrant smuggling. Analysing legal frameworks, Datuk Vernon expounds upon the critical role of the court in addressing these offences and maintaining justice. Noteworthy is the emphasis on the issuance of protection orders for victims, which is integral to safeguarding their rights and well-being.

The edition concludes with an article by Mr. Kho Feng Ming, delving into the evolving domain of cross-border insolvency law. The article captures the transformation of this once arcane subject into a focal point in today's global economy, where polycentric businesses have become the norm. Mr. Kho underscores the law's role in sustaining trust within this context, particularly as digital globalisation persists. He advocates for the alignment of commercial and legal aspects to instil confidence in businesses venturing abroad. Through meticulous analysis, he examines legal principles, scholarly debates, and global laws, offering readers an insightful perspective on cross-border insolvency.

We trust that you will find pleasure in reading this edition. On behalf of the Editorial Committee, I express gratitude to the authors once more for dedicating substantial time and effort to author these commendable legal essays.

On behalf of the Editorial Committee
Nallini Pathmanathan

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Safeguarding and Strengthening the Independence of the Judiciary*

by

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

Introduction

[1] I would like to begin by thanking the organisers for giving me the honour and privilege of participating in this Plenary Session at the 23rd Commonwealth Law Conference.

[2] May I take this moment to express my heartfelt congratulations to the Commonwealth Lawyers Association for their exceptional efforts in bringing together this biennial conference. It is a testament to the enduring spirit of collaboration and mutual respect that binds the Judiciary and the legal profession throughout the Commonwealth.

[3] At a time when the rule of law and the independence of the Judiciary are under attack in many parts of the world, it is imperative that we come together to reaffirm our commitment to safeguard and strengthen the independence of the Judiciary.

[4] I stepped in as the Chief Justice of Malaysia at a challenging time when the courts' image has been battered with disgraceful allegations of abuse of power and also controversies involving top judges. The allegation against the Judiciary then was that the Judiciary was subservient and beholden to the Executive. I therefore made it my mission, upon my appointment in 2019, to defend the independence of the Malaysian Judiciary. I am grateful for this opportunity to offer some reflections on this subject and to share some perspectives from the Malaysian context.

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* Keynote speech by The Right Honourable The Chief Justice of Malaysia on the occasion of the 23rd Commonwealth Law Conference, Wednesday, March 8, 2023 at The Grand Hyatt Hotel, Goa, India.

Safeguarding and strengthening the independence of the Judiciary: The Malaysian perspective

[5] The starting point on safeguarding and strengthening the independence of the Malaysian Judiciary is the constitutional and legal framework contained in the Federal Constitution and the Judicial Appointments Commission Act 2009 ("the Act"). In the interest of time, I will focus my speech firstly on the constitutional safeguard of judicial independence and its sub-topics of judicial power and judicial review; secondly, on the process of appointment and promotion of judges; and thirdly, on challenges to judicial independence.

Constitutional safeguard of judicial independence

[6] Coming from a country with a written constitution, I can attest to the crucial role that constitutionalism plays in our work. While constitutionalism connotes in essence limited government or a limitation on government, one important characteristic or feature of constitutionalism is an independent Judiciary. The spirit of constitutionalism in Malaysia safeguards judicial independence through the following two aspects: first, the separation of powers doctrine; and second, judicial review.

Separation of powers/judicial power/judicial review

[7] Like most Commonwealth jurisdictions which are based on the Westminster model of government, the approach to separation of powers that the Malaysian Federal Constitution takes is that there is some degree of fusion between the Executive and the Legislature on the one side, and complete separation of the Judiciary on the other. The crucial significance of the separation of powers doctrine is entrenched in Article 4(1) of the Federal Constitution which stipulates that the Federal Constitution is the supreme law of the Federation of Malaysia and that all laws passed after Merdeka (Independence) Day shall, if inconsistent with the Federal Constitution, be void. Because the Federal Constitution is not self-executing and cannot protect itself proactively from breach, it relies on the Judiciary to ensure that Article 4(1) is given effect to. The Judiciary undertakes to exercise this role and functions through Article 4(1) read with Article 121 of the Federal Constitution which vests the Judiciary with judicial power.

[8] Recently, in *Dhinesh Tanaphll v Lembaga Pencegahan Jenayah & Ors*[1] and *SIS Forum (Malaysia) v Kerajaan Negeri Selangor*,[2] the Federal Court reaffirmed that the doctrine of separation of powers is part and parcel of our Federal Constitution and that the doctrine is also housed in Article 4(1). Thus, by constitutional design, the Judiciary is completely independent of the Executive and the Legislature.

[9] Further, in *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors (and Other Appeals)*,[3] judicial independence and separation of powers are recognised as features in the basic structure of the Federal Constitution. This means that the concepts of judicial power, judicial independence and separation of powers are sacrosanct in our constitutional framework. And inextricably linked to the concept of judicial power is the concept of judicial review.

[10] The power of the Malaysian Judiciary to review the legitimacy of Legislative and Executive actions is an essential component of its independence from these other branches of government. It is a power that enables the Judiciary to perform its inherent function of checks and balances.

[11] The power of constitutional judicial review is ingrained in Article 4(1) of the Federal Constitution of Malaysia. If a law is found to be unconstitutional, the Judiciary has a duty to strike it down as being void to ensure that the Federal Constitution remains the supreme law of the land.[4]

[12] My discussion on judicial review naturally brings me to the topic of "ouster clauses". An "ouster clause" is a provision included in a legislation which seeks to limit or exclude judicial review of acts or measures undertaken by the Executive. The power of the Judiciary to independently review government actions or measures can be severely curtailed or even entirely eliminated by means of an "ouster clause" in a legislation. Last year, the Malaysian Federal Court handed down two important judgments declaring "ouster

1 [2022] 5 CLJ 1.
2 [2022] 3 CLJ 339.
3 [2018] 3 CLJ 145.
4 *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)* [2022] 2 MLJ 356.

clauses" to be unconstitutional.[5] Both of these decisions observed that "ouster clauses" sought to limit the exercise of the Judiciary's essential function or power to check and balance the exercise of Executive's actions, measures, and power. This was found to have amounted to an incursion into the very essence of the judicial power itself, which was found to be in violation of Article 4(1) of Malaysia's Federal Constitution. The "ouster clauses" were accordingly struck down as being void by the Malaysian Federal Court.

[13] The principles that I have discussed so far clearly reflect the constitutional safeguard of the independence of the Malaysian Judiciary in relation to its judicial power. I now move to the other aspects of constitutional safeguard.

[14] Undeniably, one of the main factors to safeguard and strengthen the independence of the Judiciary is that there must be security of tenure of office and remuneration of judges. In Malaysia, this security is prescribed in Article 125 of the Federal Constitution. Malaysian judges shall hold office until he attains the age of 66 years or such later time, not being later than six months after he attains that age, as the King may approve (see Article 125(1)). Grounds of removal prior to retirement age is based on well-defined circumstances under the law. The Judges Remuneration Act 1971 established salaries and pensions of judges. By clause (7) of Article 125, the remuneration and other terms of office (including pension rights) of a judge shall not be altered to his disadvantage after his appointment.

[15] The next constitutional safeguard is specified in Article 126 of the Federal Constitution. This relates to the power conferred on the courts to punish for contempt any person who, by word or deed, interferes with the administration of justice or challenges the dignity or independence of the courts.

[16] Another safeguard is provided by Article 127 of the Federal Constitution which stipulates that the conduct of a judge of the Federal Court, the Court of Appeal or a High Court shall not be discussed in either House of Parliament except on substantive motion of which

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

notice has been given by not less than one quarter of the total number of members of that House, and shall not be discussed in the Legislative Assembly of any state.

[17] Another important aspect of judicial independence is judicial immunity. Several legislations confer immunity to judges from the law of torts. Section 5 of the Government Proceedings Act 1956 provides for the liability of the government in tort for any wrongful act done or neglect or default committed by any public officer. Under section 6(3), no proceedings shall lie against the government by virtue of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him; or any responsibilities which he has in connection with the execution of judicial process. And pursuant to section 14 of the Courts of Judicature Act 1964, no judge or any person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty. Also, reports of judicial proceedings including judgments, sentences or findings enjoy absolute privilege under section 11(1) of the Defamation Act 1957 (Revised 1983).

Appointment and promotion of judges

[18] Objectively speaking, although the Executive arm plays a vital role in the appointment of judges of the superior courts in Malaysia, there are constitutional safeguards. Article 122B of the Federal Constitution sets out a comprehensive and multi-tiered process of consultation between the Prime Minister, top judges, the Judicial Appointments Commission, the King and the Conference of Rulers preceding every judicial appointment.

[19] To safeguard the independence of the Malaysian Judiciary, the Judicial Appointments Commission was established *vide* the "Act". Essentially, the Act was promulgated to improve and complement the constitutional method of appointing judges of the superior courts. The Act ensures that only those with proper qualification, integrity and calibre are appointed to the Judiciary. The process and criteria for selection of candidates are enumerated. It is worth mentioning that section 2 of the Act speaks of upholding the independence of the Judiciary, where it states, *inter alia*, that the Prime Minister must uphold the continued independence of the Judiciary and must have regard to the need to defend that independence.

[20] As set out in the Act, appointments to the Judiciary are based on identified criteria (see section 23 of the Act), namely:

(i) integrity, competency and experience;

(ii) objective, impartial, fair and good moral character;

(iii) decisiveness, ability to make timely judgments and good legal writing skills;

(iv) industriousness and ability to manage cases well; and

(v) physical and mental health.

[21] In addition, a serving judge will not be eligible for promotion if he has three or more pending judgments or unwritten grounds of judgments that are overdue by 60 days or more from the date they are deemed to be due.

[22] To strengthen the independence of the Judiciary in terms of appointment of judges, the Act requires that the Judicial Appointments Commission takes into account the need to encourage diversity in the range of legal expertise and knowledge in the Judiciary.

[23] Another pertinent provision in the Act which serves to safeguard and strengthen the independence of the Judiciary is section 34 which provides that any person, who otherwise than in the course of his duty, directly or indirectly by himself or by any other person in any manner whatsoever influences or attempts to influence any decision of the Judicial Appointments Commission or any member thereof, commits an offence and shall, on conviction, be liable to a fine not exceeding RM100,000 or to imprisonment for a term not exceeding two years or to both.

[24] That said, the proposed changes to the Act and the Federal Constitution to remove the role of the Prime Minister in the appointment of judges would, in my view, further strengthen the independence of the Judiciary.

[25] Continuing legal education to the judges is crucial in ensuring that the Judiciary safeguards its independence. To achieve this, although we have yet to establish a properly structured institution to train the judges, the Malaysian Judiciary has set up a Judicial Academy in 2012 under the Judicial Appointments Commission to, *inter alia*,

plan, organise and conduct training programmes for the superior court judges.

[26] Significantly, standards of judicial conduct affect the independence of the Judiciary. In this regard, Malaysia's measure in safeguarding and strengthening the independence of the Judiciary is encapsulated in the Judges Code of Ethics 2009 ("the Code") and the establishment of the Judges' Ethics Committee under the Judges' Ethics Committee Act 2010.

[27] Paragraph 5 of the Code provides that a judge shall exercise his judicial function independently on the basis of his assessment of the facts and in accordance with his understanding of the law, free from any extraneous influence, inducement, pressure, threat or interference, direct or indirect from any quarter or for any reason. The Code requires that a judge shall act at all times in a manner that promotes integrity and impartiality of the Judiciary. There is also a provision requiring a judge to declare his assets to the Chief Justice and to adhere to the administrative directions issued by the "Top 4" in the hierarchy of the Malaysian Judiciary, i.e. the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Court in Malaya and in Sabah and Sarawak, respectively.

[28] At this juncture, I would like to share with the esteemed audience my reminder to the Malaysian judges, i.e. that the top judges are only the first among the equals and that judges are not expected to display their loyalty to these "bosses" but only to the law. It is my hope that this kind of reminder will assist in safeguarding and strengthening the independence of the Malaysian Judiciary.

Challenges to judicial independence

[29] The year of 1988 has been dubbed as the eclipse of the Malaysian Judiciary as it marks the most devastating attack on the independence of the Malaysian Judiciary. The 1988 episode began when several important decisions of the court were seen to go against the government of the day.[6] The tension in the relationship between the Executive

6 The decisions included: *Berthelsen v Director General of Immigration, Malaysia* [1987] 1 MLJ 134; *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at 27; *Public Prosecutor v Yap Peng* [1987] 2 MLJ 311 at 316; *Mohamed Noor bin Othman v Mohamed Yusof Jaafar* [1988] 2 MLJ 129.

and the Judiciary led to the unprecedented removal of the then Lord President, the late Tun Salleh Abas and the suspension of five Supreme Court judges. Two of the five suspended judges were subsequently dismissed.

[30] Judicial independence and public confidence in the Judiciary suffered greatly after the 1988 constitutional crisis. Judicial prestige and independence were also eroded by several constitutional amendments which attempted to circumscribe the judicial power, to which judges acquiesced until recently.

[31] In recent years, there have been further attempts to undermine the independence of the Judiciary through unwarranted criticism and intimidation towards judges. Today, innocent and honest judges who diligently perform their duty are targeted by criminals and their cohorts. With the advent of technology, more damage has been done through social media by people out to advance their own interest at the expense of judicial independence.

[32] For me, each attack on a judge for a decision delivered by him is a direct attack on the independence of the Judiciary because it represents an attempt on the part of those in the abode of the guilty to navigate and coerce judicial conformity with their own preconceptions.

[33] It must be remembered that judges, by the nature of their work, do not respond to criticisms or engage in public debates of their decisions. Judges only speak through their judgments. This is a convention intended to preserve judicial dignity and impartiality.

Conclusion

[34] To conclude, I would postulate that the duty to safeguard and strengthen the independence of the Judiciary does not lie solely on the Judiciary but the stakeholders of the justice system, in particular the Attorney General's Chambers and the Bar. While I would work to ensure the independence of the Judiciary, in the event that spurious allegations are made against the judges and by extension the Judiciary, it falls on the Attorney General and the Bar to come to its defence.

Thank you.

Judicial Integrity in Strengthening the Nation*

by

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

Introduction

[1] All praises be to Allah SWT for it is only with His Blessings and Mercy that we are able to gather here today on this august occasion of the 3rd Tan Sri Harun M Hashim Memorial Lecture 2023. This has been a longstanding invitation since February 2021 but the pandemic brought us other plans. Alhamdulillah, more than two years later, we are here.

[2] It is truly an honour for me to speak in memory of the late Tan Sri Harun Hashim who is heralded as a humble, patient, and incorruptible figure. It seems only right that he was appointed the first head of the then Anti-Corruption Agency prior to his elevation to the Bench.

[3] One example, in my view, of one of the late Tan Sri Harun's remarkable decisions that exudes his integrity (in his own right) is his dissenting judgment in *Manjeet Singh*.[1] Briefly, the Attorney General moved the Supreme Court to commit a lawyer, Manjeet Singh Dhillon, for alleged contemptuous comments he had made in another case against the then Lord President Abdul Hamid Omar for matters relating to the 1988 Judicial Crisis.

[4] Writing for the minority, his Lordship Harun Hashim drew an important distinction between defamatory and contemptuous statements. Without implying anything untoward about the rest of the panel, I take the view that his Lordship clearly showed his integrity and independence when he arrived at the conclusion that

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* Speech by The Right Honourable The Chief Justice of Malaysia on the occasion of the Tan Sri Harun M Hashim Memorial Lecture 2023, Wednesday, May 17, 2023 at the Muhammad Abdul-Rauf Building, International Islamic University, Gombak Campus.

1 *Attorney General, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 167.

the statements, though possibly defamatory, were not contemptuous. I do not mean to say that the other learned Justices lacked integrity. I am merely trying to highlight that Justice Harun was not afraid to dissent and was not swayed by any other considerations than the law in deciding such a sensitive issue when his Lordship Abdul Hamid Omar was still the serving Lord President.

[5] Given the tense political and social climate of Malaysia today, I must congratulate the Dean and the Faculty of the Ahmad Ibrahim Kulliyyah of Laws for their dedication in hosting this timely event to remember the paragon of integrity, the late Tan Sri, no less with the apt theme of "Judicial Integrity in Strengthening the Nation".

[6] Indeed, one might make the case that those in power today, not just here, but around the globe, especially in some enforcement agencies, have much left to be desired in their emulation of Tan Sri Harun's incomparable levels of integrity. He has left us with big shoes to fill.

[7] I am most obliged and grateful for the invitation to share my views on this subject. The theme is a broad one and so perhaps I might be permitted to narrow down the subject by identifying certain areas of interest. In this regard, in the time that I have, I would like to share with you, the following four aspects I have sought to carve out:

A. A definition – Certain concepts and aspects of integrity;

B. The Judiciary and the concept of integrity;

C. How, in the context of an adversarial justice system, integrity cannot just be confined to the Judiciary and judges; and

D. Finally, how integrity forms the very bedrock of a strong nation.

A. Judicial integrity – Concepts and aspects

[8] Before I venture into the academic side of things, please allow me to share some personal thoughts. "Integrity" is a concept easy enough to understand, better appreciated by example and harder to explain in clear words. But what I can say is that, in my view, integrity is defined by its two equally significant and interrelated components that feed off each other.

[9] The first of these components has to do with oneself: the psyche. Sometimes, a thing may be legal but not necessarily moral or vice versa.

[10] Take this simple example. A tenant struggles to pay rent for six months because his becoming partially paralysed affects his ability to generate income. The landlord accepts the tenant's rent every month for each of those months but also with severe delay in payments each month. In this example, the landlord is fully cognizant of the tenant's plight but elects to remain silent or passive. The landlord, having found a better tenant, moves to evict the existing tenant for late payment after having accepted the late rent payments. Let us assume the landlord has every full legal right. But what about his own integrity? His morality?

[11] In this regard, the internal aspect of integrity adjudges the individual on how best he translates his psyche's response to an external situation in a manner that is not just legally tenable but morally correct as well from an objective standpoint.

[12] The second aspect of that moving equation is thus, the external factors. We are all impacted by extraneous situations at times and it is when they emerge that our adherence to our own integrity is tested. Financial, political and personal biases that come into play every now and then test the limits of our integrity.

[13] I now suggest that you elevate these two moving parts in the example just now to a higher level – the level of an independent adjudicator. And so, from a judicial standpoint, the two moving parts come together to evaluate how the judicial or legal mind responds to his own convictions and inhibitions in light of external stimuli that poke at the mind of the decision maker, lawyer or enforcement agency – all of whom play a crucial role in our adversarial justice system.

[14] As such, on a macro level, one can appreciate that integrity and justice are intertwined. Without integrity, justice will not prevail. And judicial integrity is not merely a virtue but a prerequisite to upholding the Rule of Law in a democratic system of government without which we cannot build a properly functioning nation.

[15] With that, allow me to now move to the more academic definitions.

[16] A variety of meanings have been given to the word "integrity". In *Black's Law Dictionary*, the term "integrity" is defined as follows:[2]

> INTEGRITY. As occasionally used in statutes prescribing the qualifications of public officers, trustees, etc., this term means soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with "probity," "honesty," and "uprightness." *In re Bauquier's Estate*, 88 Cal. 302, 26 Pac. 178; *In re Gordon's Estate*, 142 Cal. 125, 75 Pac. 672.

[17] Integrity is sometimes seen in a very narrow perspective, i.e. whether or not a judge is corrupt and corruption is generally viewed from the monetary aspect. Of course, corruption in the monetary sense erodes integrity and undermines justice, its effective and efficient administration and the rule of law as well as credibility of the justice system as a whole. If corruption permeates the Judiciary, the poor and the vulnerable would suffer the most.

[18] In this regard, article 11 of the United Nations Convention Against Corruption refers to judicial integrity as the ability of the judicial system or members of the Judiciary to resist corruption, while fully respecting the core values of independence, impartiality, personal integrity, propriety, equality, competence and diligence.

[19] Hence, judicial integrity relates not only to the ability of members of the Judiciary to resist corruption which falls under the aspects of probity, honesty and uprightness, but the term judicial integrity covers all those core values of judicial ethics that correlate to the notion of judicial integrity. The values mentioned in article 11 of the United Nations Convention Against Corruption as set out in the Bangalore Principles of Judicial Conduct, have also been codified in our Judges Code of Ethics 2009 ("the Code"), namely, in respect of: (i) upholding the integrity and independence of the Judiciary; (ii) avoiding impropriety and the appearance of impropriety in all judicial activities; performing judicial duties fairly and efficiently; and minimising the risk of conflict with the judges' judicial obligations while conducting his extra-judicial activities. Apart from the principles enumerated above, I would add that judicial integrity also includes intellectual honesty, accountability and transparency.

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2 BA Garner and HC Black, *Black's Law Dictionary*, 4th edn (St Paul, MN, West, 1968).

[20] A Judiciary of unquestionable integrity is the cornerstone of democracy and the rule of law. It acts as a bulwark against any encroachment of rights and freedom under valid law even when all other protections fail.

[21] Thus, and properly so, the Federal Constitution and the Judicial Appointments Commission Act 2009 ("JAC Act 2009") (without going into specifics) contain provisions on the appointment of judges of the superior courts in Malaysia. The process of appointment puts candidates through a vigorous vetting by the police, the Malaysian Anti-Corruption Commission, the Companies Commission of Malaysia and the Insolvency Department, before they may even be considered for appointment to the Bench. An absence of any one of these aspects denotes an integrity vacuum and belies any appointment outright.

[22] Viewed in this way, I think it is fair to state that once appointed, the integrity of judges cannot therefore be the subject of discussion or question unless, of course, credible and supervening evidence surfaces to warrant such an inquiry. With such evidence, and not mere conjecture or bare allegations, the corrupt judge is liable to answer to the full brunt of the law and will be dealt with in accordance with the law.

[23] Having said that, I will now share some of my views on integrity and the Judiciary in the main aspects of the core values highlighted earlier.

B. Integrity and the Judiciary

Judicial independence

[24] The first aspect of judicial integrity which I would like to allude to is judicial independence, which is a rudimentary notion of judicial integrity. Housed in paragraph 5 of the Code, a judge shall exercise his judicial function independently by assessing the facts and understanding of the law, free from any extraneous influence, inducement, pressure, threat, or interference, direct or indirect from any quarter or for any reason. Independence of the Judiciary calls for individual judges and the Judiciary as a whole to remain impartial and independent of all external pressures and of each other, so that those who appear before them and the wider public have confidence that their cases will be decided fairly, free from any interference, be

it from litigants, the Executive, the media, powerful individuals or entities or from other judges.

[25] In other words, in deciding cases, judges are answerable to no one, except their conscience and their learning, where decisions are made solely on the evidence presented in court by the parties and in accordance with law. In short, individually, an independent judge decides a case on its merits, without regard to personalities involved, with no fear of any kind of threat or sanction. An independent judge will not succumb to any kind of pressure nor be lured by any kind of reward or promise.

[26] You will find that this is something very basic yet it still needs to be stated. Why is it pivotal that the Judiciary remains independent? It is to ensure that judicial processes and the administration of justice is not compromised. Because if it is compromised, justice will never be done. Looking from the Islamic perspective, Buraydah reported: The Prophet, peace and blessings be upon him said "The Judges are three kinds: two Judges are in hellfire and one Judge in paradise. A Judge who judges without the truth while he knows it, he is in hellfire. A Judge who has no knowledge and violates the rights of the people, he is in hellfire. A Judge who judges with the truth, he is in paradise."[3]

[27] A judge can only decide with the truth if he is completely free to decide based on the evidence and his understanding of the law, without any interference from any quarters. If there is interference and he is not independent, his decision will no longer be based on the truth but based on or rather coloured by the interference. This will then put him in the first category of the three kinds: he knows the truth but because of the interference, decides not based on the truth.

Judicial propriety and impartiality

[28] Paragraph 6 of the Code prescribes that a judge shall act at all times in a manner that promotes integrity and impartiality of the Judiciary. In upholding these principles, a judge shall not allow any relationship to influence his judicial conduct or judgment; shall not lend the prestige of his judicial office to advance his or others' private interest; and shall not convey or permit others to convey the impression to any person that they are in a special position to influence him.

3 Source Sunan Al-Tirmidhi 1322 Grade: Sahih according to Al-Albani.

[29] The principle of impartiality to a certain extent overlaps with judicial independence as it dictates that in deciding cases, the judicial mind must be free from bias, as bias can sway or colour judgment, rendering a judge unable to exercise his or her functions impartially in a given case.[4] In this regard, we are not only concerned with the actual absence of bias, but also the perception of its absence. This dual aspect is captured in the principle that justice must not only be done, but must be seen to be done.

[30] Tied to the point of bias, is this. A judge's demeanour is crucial to maintaining his or her impartiality because it is what others see. Improper demeanour can undermine judicial integrity and the judicial process by conveying an impression of bias or indifference. Disrespectful behaviour towards a litigant infringes on the litigant's right to be heard, and compromises the dignity and decorum of the courtroom. Lack of courtesy also affects a litigant's satisfaction with the handling of the case. In summary, it impacts on judicial integrity and creates a negative impression of the courts in general. Patience, dignity and courtesy are essential attributes of a judge which lend to the virtue of judicial integrity.

[31] Indeed, it is also the duty of a judge to see that lawyers keep to the rules laid down by law and to maintain order and decorum in court. This is important so that the business of the court will be accomplished in conformity with the rules governing the proceeding and with the dignity the legal profession demands.

Competence and diligence

[32] The values of competence and diligence are codified in paragraph 7 of the Code. Subparagraph (4) stipulates that a judge shall dispose of all his judicial duties fairly, efficiently, diligently and promptly while subparagraph (7) provides that a judge shall endeavour to diligently and efficiently hear and complete the cases in his court and promptly write his judgments. A competent judge is a judge who has sufficient legal knowledge and possesses skills to overall manage his cases. In terms of legal knowledge, a judge should be well-versed with established legal principles as well as evidentiary and procedural rules. In terms of management, section 23(2)) of the JAC Act 2009

4 *R v S* [1997] 3 SCR 484, Supreme Court of Canada at [106].

requires judges to deliver timely judgments, display industriousness and ability to manage cases well. Various administrative directions have been issued in this respect. A judge must have strong work ethics and good organisational skills.

[33] No one can deny that judges have a very heavy workload. In this regard, I would like to refer to an article entitled "Time to Rebuild the Malaysian Judiciary" written by a lawyer, GK Ganesan Kasinathan, which was published in *Malaysiakini News* on May 19, 2018. Among others, he said:

> On a daily basis, a Judge has to read some 20 main submissions and 10 replies. Each would be about 20 pages long. Every single day, a Judge has to read not only the cause papers but also 200 pages of arguments. He or she has to analyse case law. These run into tens of pages. That is at least 600 pages. Additionally, at the end of an exhausting day, he or she has to write a Judgement from 10 to 30 pages long. It cannot be done. No one can do it. I defy any member of the Bar to try it.
>
> So Judges don't usually read. …

[34] While he is correct on the volume of work, he is not quite correct to say that "Judges don't usually read". Contrary to what he said, and I can vouch for many of my sister and brother judges, we do read the cause papers and the submissions. And judges, like lawyers, are also assisted by "associates", our registrars, in some aspects of our work. It might seem like an impossible task but we manage. It is dishonest for us to decide without understanding the matter before us and understanding must surely begin with reading.

[35] I now move to the aspect of judicial accountability. To ensure that the administration of justice runs smoothly, it is vital that the Judiciary be accountable to the public. After all, the larger purpose of the justice system is to do justice to and by the citizenry. An element of accountability is transparency. Accountability and transparency also dictate that judges provide reasons or grounds of judgment for their decisions. In this regard, an important aspect of accountability and transparency of the judicial system is the accessibility of the public, not only to court proceedings but to grounds of judgments.

[36] Apart from upholding the principles of accountability and transparency, there are other reasons why it is important for judges

to write grounds of judgment. First, writing grounds would lead to an increased care in dealing with submissions and analysis of evidence, giving rise to sounder decisions. Second, providing grounds would ensure that parties knew why they had lost or won and from a broader perspective, the legal profession and the community might also have a legitimate interest in knowing these reasons as it enabled them to ascertain the basis upon which like cases would probably be decided in the future. Third, it would ensure that the appellate courts have the proper material to understand and do justice to the decisions taken at the first instance. Fourth, providing grounds would serve as a means of curbing arbitrariness.[5] All the above lend to the integrity of the decision-making process.

[37] Also related to the notion of judicial integrity, is that judges are guided by established principles and the doctrine of *stare decisis* in arriving at their decisions. Where the law provides for the exercise of discretion, it must be exercised judiciously, not capriciously or arbitrarily. Reasons must be given for accepting or rejecting any evidence; decisions must not be made on issues not in dispute between parties or issues not canvassed or ventilated by parties; and decisions must not be against the weight of evidence. In short, rules and procedure and legal principles must be adhered to and intellectual honesty must be observed. A judgment rendered not based on facts and established legal principles but based on irrelevant considerations threatens judicial integrity; will be incoherent and will not add value to the jurisprudence. Inconsistencies in the arguments will be apparent and the judgment will be a mark of shame.[6]

[38] There are many other legal rules, formalities and traditions in place that ensure that decisions are consistent, such as principles on appellate intervention and the exercise of first instance discretion.

[39] Another aspect of judicial integrity which relates to accountability and transparency concerns the complaint mechanism against judges as contained in the Code. Paragraph 12 of the Code prescribes the procedure on breach. It is important to highlight that the mechanism for disciplining members of the Judiciary under the Code is free from

5 *Thong Ah Fat v PP* [2012] 1 SLR 676.

6 "The Road to Judicial Integrity", interview with Dr Lothar Jahn, Senior Planning Officer, Rule of Law, GIZ.

the influence of the Executive. The Code stipulating mechanisms of integrity and discipline would be rendered redundant if we do not implement or enforce it should an occasion warrants it. It is in the public knowledge that this Code has in fact been enforced against a sitting judge.

C. Integrity and the justice system – Other key actors

[40] The words "judicial integrity" at first blush seem to refer singularly to judges or the courts. This is logical and reasonable as the Judiciary plays a key role in upholding the rule of law. The Judiciary is the organ of government empowered to review and ultimately invalidate decisions of the Executive or the Legislature which impinge on the rule of law. Without integrity, for example, the Judiciary would not be able to hold offenders accountable; without integrity, embezzled public money would remain lost and unrecoverable; and without integrity, human rights would serve as mere pious platitudes.

[41] The administration of justice system however does not begin and end with the judges. Viewed in a proper perspective, "judicial integrity" does not and could not be confined only to judges or court administrators, but includes every actor in the administration of justice system, namely, the enforcement officers, prosecutors, accused persons, litigants, witnesses and lawyers. Justice truly prevails only when integrity percolates throughout all these levels of actors. I will in the later part of this speech, demonstrate that justice was not served due to lack of integrity on the part of such non-judicial actors.

[42] There is no doubt that the public look up to judges to dispense justice. But judges are not omniscient. Judges are human beings who are not infallible. Judges decide on a dispute and dispense justice according to the law as we understand the law to be. And we decide on the facts based on the evidence as led by witnesses. Witnesses are also human beings. Despite taking the oath to tell the truth, a witness may not be telling the truth after all, or may conceal some material facts which will affect our determination of the dispute.

[43] If a litigant comes to court as a plaintiff pursuing a particular claim, or as a defendant raising a particular defence, only the plaintiff would know whether what he is claiming for is rightfully or genuinely his. And only the defendant would know whether the defence that he is putting up is a *bona fide* or a sham defence. In the context of a

criminal case, barring the evidence of a truthful eyewitness, only the accused person would know whether he is indeed guilty of the offence charged.

[44] Talking about other actors in the administration of justice, again from the Islamic perspective, it is interesting to note that where the holy Quran prohibits bribery, the prohibition is directed towards the givers and there is an emphasis on witnesses, where witnesses are commanded to speak the truth. For example, in Surah Al-Baqarah: verse 188:

> And eat up not one another's property unjustly (in any illegal way, e.g. stealing, robbing, deceiving), nor give bribery to rulers (Judges before presenting your cases) that you may eat up a part of the property of others sinfully.

Al-Baqarah: verse 282:

> O you who believe! When you contract a debt for a fixed period, write it down. Let not the scribe refuse to write down as Allah has taught him, so let him write. Let him (the debtor) who incurs the liability dictate, and he must fear Allah, his Lord, and diminish not anything of what he owes. But if the debtor is of poor understanding or weak, or is unable to dictate for himself, then let his guardian dictate in justice. And get two witnesses out of your own men. And if there are not two men (available), then a man and two women, such that you agree for witnesses, so that if one of them (two women) errs, the other can remind her. And the witnesses should not refuse when they are called (for evidence). You should not become weary to write it (your contract) whether it be small or big, for its fixed term, that is more just with Allah; more solid as evidence, and more convenient to prevent doubts among yourselves, except when it is a present trade which you carry out on the spot among yourselves, then there is no sin on you if you do not write it down. But take witnesses whenever you make a commercial contract. Let neither scribe nor witness suffer harm, but if you do (such harm), it would be wickedness in you. So be afraid of Allah; and Allah teaches you and Allah is all-Knower of everything.

[45] This particular verse reminds me of the case of *Tindok Besar Estate Sdn Bhd v Tinjar Co*,[7] the oft-quoted authority on the principle that

7 [1979] 2 MLJ 229.

contemporaneous documents carry more evidential weight than the oral evidence of witnesses.

[46] Verse 283 of Surah Al-Baqarah is another authority which touches on the integrity of a witness. It says:

> And if you are on a journey and cannot find a scribe, then let there be a pledge taken (mortgaging), then if one of you entrusts the other, let the one who is entrusted discharge the trust (faithfully), and let him be afraid of Allah, his Lord. And conceal not the evidence, for he who hides it, surely, his heart is sinful. And Allah is All-Knower of what you do.

An-Nisa': verse 135:

> O you who believe! Stand out firmly for justice, as witnesses to Allah, even though it be against yourselves, your parents or your kin, be he rich or poor, Allah is a better protector to both (than you). So follow not the lusts (of your hearts), lest you avoid justice, and if you distort your witness or refuse to give it, verily, Allah is ever Well-Acquainted with what you do.

Al-An'am: verse 152:

> And come not near to the orphan's property, except to improve it until he (or she) attains the age of full strength, and give full measure and full weight with justice. We burden not any person, but that which he can bear. And whenever you give your word, say the truth even if a near relative is concerned, and fulfil the Covenant of Allah. This He commands you, that you may remember.

[47] Permit me to share a few cases to shed some light on how the administration of justice has been undermined due to the lack of integrity of some actors in the administration of justice.

[48] The first case that I wish to share is about an attempt to bribe a judge that has gone awry. Four men, acting in concert, killed Heng Pang Kiat ("Heng") and also almost killed Chong Chiew Nam ("Chong"). Chong, who was a former government servant, attached to the High Court, was slashed at the front and rear of the neck. He survived to tell the following tale.

[49] Foo Sam Ming ("Foo") was a lawyer. He was also a businessman and a former police officer. Foo was personally sued by a firm of architectural and development consultants. Foo lost the suit in the

High Court. Dissatisfied with the High Court's decision, Foo filed an appeal to the Court of Appeal. And Foo wanted a favourable outcome in the Court of Appeal.

[50] Foo approached Chong to arrange for the fixing of a suitable panel in the Court of Appeal who could decide in his favour. Foo agreed to pay Chong RM10,000. After the appeal was heard and while the decision was pending, Foo again approached Chong and asked whether Chong could arrange for a favourable decision. As consideration for a favourable decision, Foo offered to pay upfront RM200,000 and a deposit of RM300,000 in Oriental Bank Johor Bahru.

[51] Chong collected the upfront payment of RM200,000 from Foo at Ampang Condominium, Kuala Lumpur. The amount of RM300,000 was placed by Foo in a safe deposit box in Oriental Bank Johor Bahru in the joint account of Chong and Jagjeet Singh a/l Mewa Singh. Jagjeet Singh was an employee of Foo.

[52] While the decision of the Court of Appeal was still pending, Heng, a good friend of Chong, managed to persuade Chong to withdraw the deposit. With the help of a Sikh imposter, Chong and Heng deceived the Oriental Bank's officer who allowed them to open the safe deposit box and to take out the RM300,000. RM107,000 was taken by Heng and the balance by Chong, who thereafter gambled it away.

[53] The above facts are reported in *Manikumar a/l Sinnapan & Ors v PP*[8] where four accused persons were charged with Foo for the murder of Heng and for the attempted murder of Chong. The four were convicted and sentenced to death by the High Court. The convictions and sentences were affirmed by the Court of Appeal and Federal Court. Foo did not stand trial. He died a month after the murder. It was said that Foo fled to Australia and committed suicide.

[54] The facts revealed above are a clear example that while the integrity of judges has always been the focus of discussion, in reality, it starts with the litigants, who perhaps being very much aware that they did not have a good case, attempted to circumvent the judicial process. In the result, the judges' integrity and reputation were tarnished owing to no fault of their own and with no clue that monies had been paid purportedly for them to decide in a certain way.

8 [2017] 3 CLJ 505.

[55] As demonstrated in Foo's case, it was not the judges who were corrupt but it was the litigant, Foo. Foo had offered to bribe the judges to obtain a favourable outcome for his appeal in the Court of Appeal. God knows, in how many other cases had monies passed hands, not because judges had asked for the bribe but because the givers had been hoodwinked by some dishonest people using judges' names. Whoever the givers are, they are utterly under the wrong belief that money could determine the outcome of their cases. Just for the record, in Foo's case, his appeal was unanimously dismissed by the Court of Appeal.[9]

[56] The then Chief Justice, Tun Arifin Zakaria, at the Opening of the Legal Year in 2013, had asked lawyers and the public to "restrain from corrupting" the Judiciary, stressing that both the giver and the taker were equally guilty.

[57] Clearly, to ensure that justice is truly served, it is not enough to only have judges with impeccable integrity. We need litigants, witnesses and lawyers who are not corrupt, not only in the monetary sense but in the broader sense of the word.

[58] The more senior ones among us might also recall the events surrounding the murder of beauty queen Jean Pereira in 1979 where her brother-in-law, Karthigesu, was charged with the offence. The prosecution's case against Karthigesu rested mainly on circumstantial evidence and the statements of Bhandulananda Jayatilake, where Bhandulananda's testimony provided the main link which implicated Karthigesu in the murder. The High Court found Karthigesu guilty and sentenced him to death.

[59] When Karthigesu's appeal came up before the Federal Court, he successfully obtained leave to adduce fresh evidence. The fresh evidence was to come from Bhandulananda. Whilst giving fresh evidence, Bhandulananda confessed that he had told lies when implicating Karthigesu in the High Court trial. He said that he was asked by Jean Pereira's mother and brother and by a police officer and said that he agreed to lie in court because he was then under mental stress. The Federal Court allowed Karthigesu's appeal and set aside the orders of the High Court.

9 See *Foo Sam Ming v Archi Environ Partnership* [2004] 1 CLJ 759.

[60] Bhandulananda Jayatilake was later charged with giving false evidence with intent to procure Karthigesu's conviction. He pleaded guilty to the charge.[10] In imposing a sentence of 10 years' imprisonment, the learned judge considered the seriousness of the offence. His Lordship Ajaib Singh J said:

> Witnesses giving evidence in court must never underrate the importance of speaking the truth. A court of justice is the sanctuary of truth where serious issues of law and fact are heard and determined. The law prescribes that witnesses on oath must tell the truth, the whole truth and nothing but the truth. True testimony alone will assist the court in arriving at a true verdict. It is most important therefore that people who appear as witnesses in court should never deviate from the truth for otherwise they would be polluting the administration of justice and thus committing a serious wrong to the court and society. The obligation imposed on a witness to speak the truth under oath has the sanction
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> Of law. And very likely of religion as well. An oath which a witness takes in court is a solemn declaration by which the witness may well be invoking the wrath and vengeance of God in addition to any punishment which may be inflicted on him under the laws of the land if he does not speak the truth.
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> The accused was bound under oath to speak the truth. But he obviously had no intention whatsoever of respecting the sanctity of oath. Instead he deliberately perverted the cause of justice by deceiving and misleading the Judge and jury with his false evidence.

[61] Bhandulananda was not happy with the sentence. He appealed to the Federal Court.[11] In dismissing Bhandulananda's appeal, Raja Azlan Shah Ag LP said:

> It cannot be gainsaid that the appellant had shown a wanton disregard for truth. The sanctity of an oath meant nothing to him. We therefore conclude that he had acted with malice and with the direct object of bringing the administration of justice into disrepute.
>
> … it is a serious offence to give false evidence, for it is in the public interest that the search for truth should, in general and always, be unfettered.

10 *Public Prosecutor v Bhandulananda Jayatilake* [1981] 2 MLJ 354.
11 [1982] 1 MLJ 83.

[62] In *Bok Chek Thou & Anor v Low Swee Boon & Anor*,[12] both the plaintiffs were found guilty and fined RM300 each for contempt in the face of the court. Both had admitted to having lied when giving evidence in court, in utter disregard for the truth, calculated to interfere with the due administration of justice.

[63] I now move to the other actor in the justice system, i.e. lawyers. We have reported cases on lawyers who lacked integrity and who deceived. The court and in so doing had broken the trust and confidence which the court placed on them as lawyers.

[64] In *Jaginder Singh*,[13] three appellants who were lawyers and defendants in the High Court appealed to the Federal Court against their convictions and sentences for contempt of court for misleading the trial judge. Although the Federal Court set aside the order of contempt of court due to, among others, the learned judge's failure to make plain to the appellants the specific nature of the charges and the opportunity to give them a fair hearing, I find the following reproduction by Raja Azlan Shah Acting LP of the judgment of the High Court worth quoting:

> The defendants' misdeeds are acts of contempt of the worst kind that the Court can possibly think of, because in seeking to achieve their evil and insatiable greed they made the Court the subject of their deception and mischief … The Court can dispense with justice only if Counsel will not mislead, otherwise justice will suffer from infirmity of the Court itself being devoid of justice. People seldom pause to ask sometimes what safety the ordinary individual has in the hands of the lawyers if the Court itself, in which he seeks redress is no longer safe to be in the same hands. To me, the defendants' act is even more despicable because it is an expressed advocates and solicitors rule that Counsel should not practice deception on the Court.

[65] In *Cheah Cheng Hoc*,[14] Lee Hun Hoe CJ (Borneo) said:

> It is very important for counsel to remember that whatever may be his duty to his client his duty to the court remains paramount in the administration of justice.

12 [1998] 4 MLJ 342.
13 *Jaginder Singh & Ors v Attorney-General* [1983] 1 CLJ 69.
14 *Cheah Cheng Hoc v Public Prosecutor* [1986] 1 MLJ 299.

[66] Lawyers are governed by a comprehensive code of conduct provided by rules promulgated under the Legal Profession Act 1976. Their level of integrity is measured by their adherence to the said code of conduct and lawyers must also not abuse the process of the court.

[67] The circumstances in which the court's process may be abused are varied and numerous and the categories of such cases are therefore not closed. Essentially, the process of the court must not be used to accomplish some ulterior purpose. The process of the court must be used properly, honestly and in good faith. The court will certainly not allow itself to be misused. And, once an abuse of process has been detected, the court must intervene and this would be the very essence of justice.[15]

[68] Indeed, lawyers play a very significant role in the dispensation of justice. In the most recent judgment of the Federal Court in the *Taman Rimba* case, the Federal Court stated:[16]

> [559] In order to dispense justice fully and properly, our adversarial system depends entirely on counsel to conduct themselves with candour, courtesy and fairness. Ours is a practice, where counsel owe, a primary duty to the court besides duty to their client.
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> [560] The duty of counsel to his client is *subject* to his overriding duty to the court, because it is in the public's interest that there is "a speedy administration of justice" and thus, a counsel's duty to the court "epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case" to quote from *Giannarelli and Others v Wrath and Others* (1888) 81 ALR 417 (per Mason CJ, High Court of Australia).
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> [561] Our adversarial system can only properly function to administer justice, if there is full disclosure by all parties in their capacities as officers of the court. If the court's hands are tied to the selective and piecemeal extraction of facts and law, the result is an artificial advancement of our law based on the private interests of a select few at the expense of justice for all.

15 *Ganad Media Sdn Bhd v Dato' Bandar Kuala Lumpur (No. 2)* [2002] 1 MLJ 508.
16 *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises* [2023] 4 AMR 221.

[69] When we speak of lawyers, we mean not just those from the Bar, but also from the Service. This includes federal counsel and the deputy public prosecutors. While their duties are to defend the state or state interests, they do so in the public interest and not in the interest of their divisions or any particular member of government. In this sense, I can do no better than quote from the Federal Court in *Rosli bin Yusof*,[17] when it said:

> [29] We begin with the discussion on the proper role of the prosecutor. The prosecutor in a criminal trial occupies a special position. His or her role is unlike the counsel for a party in a civil trial or counsel for the accused. Unlike other clients who have interest in securing a conviction at all costs, prosecutors are often called "minister of justice" and their role is to present the whole case to the court and assist the court in finding out where the truth lies. Due to their special role in criminal trials, the prosecutors are under several well-defined duties including: (i) duty of disclosure (see s 51A of the CPC); (ii) duty to call all credible and relevant witnesses; and (iii) duty to conduct the case fairly …

[70] There could be rare instances, perhaps in this country or other jurisdictions, in which prosecutors know that they have no case. But rather than making the decision not to prosecute, they leave it to the court to make the acquittal. In a case of public interest and at the risk of public outrage, the idea behind this is to "pass the blame" to the courts who are merely performing their functions under the law. The basis for "passing the blame", it seems, is so that the prosecuting officer's image is not tarnished. One wonders whether this is the standard of integrity we wish to set where the liberty of a person is at stake and the Rule of Law reigns paramount.

D. Integrity and strengthening the nation

[71] As observed by the Federal Court in *PCP Construction*, the courts of justice are the bulwark of a nation. The independence, impartiality and integrity of judges are thus critically important in the administration of justice. Alexander Hamilton famously recognised, in the doctrine of separation of powers, that the Legislature controls money, the Executive controls force and the Judiciary controls nothing. It is on

17 *Rosli bin Yusof v Public Prosecutor* [2021] 4 MLJ 479.

public confidence that the Judiciary depends, for the general acceptance of its judicial decisions, by both citizens and the government.[18]

[72] Given its critical importance, we must all strive to preserve judicial integrity. Preserving judicial integrity requires a concerted effort by all actors in the administration of justice system as well as all branches of the government.

[73] In my view, one of the measures to preserve judicial integrity is for everyone to respect the decision of the court. A losing party may not agree and will be unhappy with the court's decision rendered against him. But in the pursuit of law and order and in avoiding an anarchic state, the judicial process must be respected and decisions of the court must be accepted, regardless of whether one agrees with it or not.

[74] Linked to the need to respect and accept court decisions would be the need to observe the doctrine of separation of powers. As decided by the Federal Court in the case of *Dhinesh*,[19] the doctrine of separation of powers is housed in Article 4 of the Federal Constitution.

[75] In fact, Article 4 is a very powerful constitutional provision from which, among others, the Judiciary derives its judicial power, which includes power to judicially review acts of the Executive and Legislature that transgress the Federal Constitution. In the context of the primary function of the Judiciary, once a matter has been brought to and ultimately decided by the court, no other branch of government has to right to deliberate and canvass the matter or to ignore the decision of the court. That deliberation and decision making rightfully belong to the domain of the Judiciary. For the other branches of government to deliberate on a matter already decided by the court would be to usurp the function of the Judiciary and is tantamount to encroaching upon the doctrine of separation of powers.

[76] The Legislature serves as a crucial source of oversight and legitimacy of the Judiciary. However, a pertinent point to note is that the Legislature, in exercising this power, must support the independence of the Judiciary and not meddle with the judicial power and process.

18 *PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd* [2019] 6 CLJ 1.
19 *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356.

It is also for this reason that the Federal Constitution makes it clear that neither House of Parliament shall discuss the conduct of a judge of the Superior Court except on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that House.[20]

[77] The Code is testament to the Legislature's support of judicial independence and integrity in Malaysia. In providing for a specific mechanism to deal with the judges' conduct and discipline, the Code aims to "enhance transparency and to improve the image and integrity of the Judiciary."[21] Undoubtedly, the Code is a significant tool in establishing and preserving judicial integrity.

[78] Political interference is a form of corruption that undermines judicial integrity. Political interference may take place through appointment of judges and/or intimidation of judges. As one may observe, the Prime Minister has much power in appointing judges as the current system of appointment is a converge between the selection of candidates by the Judicial Appointments Commission and the approval /advice of the Prime Minister.

[79] For our purpose today, I will deal briefly with intimidation of judges. Without alluding specifically to the various statements made by some members of the Executive post the Federal Court's decision in SRC's case[22] in August 2022, it is apparent that they had complete disregard of the judicial process, and by extension, the Federal Constitution. It is perhaps timely that every member of the Executive, Legislature as well as the Judiciary be reminded of their oath of office to protect, preserve and defend the Federal Constitution and behave in a manner consistent with that oath.

[80] A strong, independent and impartial Judiciary is the cornerstone of the rule of law and of a democratic state while judicial integrity acts as a formidable foundation for strengthening Malaysia, nurturing a just society and charting a course towards a thriving future for every citizen. The impact of judicial integrity on our nation can be seen through the following dimensions:

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20 Federal Constitution, Article 127.

21 Parliamentary debates: Penyata Rasmi Parlimen Dewan Rakyat, Parlimen Kedua Belas Penggal Kedua Mesyuarat Kedua, DR (December 15, 2009), 22.

22 *Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya (and 2 Other Appeals) (No. 4)* [2022] 6 AMR 144.

(i) by safeguarding the fundamental rights/liberties of the citizens;

(ii) by fostering social harmony of the society; and

(iii) by contributing to the economic stability of the country.

[81] The first dimension, i.e. safeguarding the fundamental liberties, is especially pertinent when courts adjudicate cases involving human rights and fundamental liberties as encapsulated in Part II of the Federal Constitution. In this regard, judicial integrity demands that we construe constitutional provisions which safeguard fundamental liberties less rigidly, more generously than ordinary legislation, broadly and in a prismatic fashion so as to give effect to those fundamental liberties.[23] Judges with unimpeachable integrity will uphold these trite principles and interpret the law in a manner that upholds fundamental liberties even when such interpretation is met with controversy or disapproval.

[82] On the second dimension, judicial integrity plays a pivotal role in fostering social harmony in Malaysia by judges undertaking the judicial tasks without identification of any particular race, religion or gender. By steadfastly adhering to these core values, society is assured that the principles of justice are consistently applied and the judicial process is grounded in fairness. The likelihood of social discord borne out of perceived or actual prejudices and/or injustices is significantly diminished. This, in turn, fosters a sense of unity, solidarity and cohesion, reducing the potential for social unrest among Malaysia's multi-racial and multi-religious population.

[83] Moving on to the third dimension of economic stability, judicial integrity also contributes to the betterment of governance and the delivery of public services. When there is access to justice; when contractual terms and obligations are enforced; when rights of investors and other minorities are protected and when judges are honest, fair and impartial, it will create a stable and predictable environment, which promotes better business environment which in turn attracts investors and leads to economic stability.

23 *Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29; *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; and *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71.

[84] The absence of arbitrariness and the presence of a reliable legal framework and an effective forum for resolving disputes that protects the investors' rights will invariably be conducive to strengthening the nation.

Conclusion

[85] To conclude, I would reiterate firstly that it is not only judges, but every actor in the administration of justice system as well as members of the other organs of government who need to uphold the value of integrity; secondly, that judicial integrity depends to a large extent on the Executive respecting the principle of judicial independence, and thirdly, it goes without saying that public confidence in the integrity of the Judiciary would erode if judges were to be constantly exposed to ill-founded and unjustified comments.

[86] I think it is opportune that I quote His Royal Highness, the Sultan of Selangor from a statement issued dated September 12, 2022, which in its original language reads, in part:

> *Perlembagaan Persekutuan telah meletakkan martabat Institusi Kehakiman di satu tahap yang tinggi sebagai sebuah badan yang bebas dan berwibawa. Badan Kehakiman merupakan benteng terakhir yang perlu dipertahankan bagi memastikan pentadbiran keadilan dapat dilaksana dengan sebaiknya.*
>
> *Rakyat perlu mengambil maklum bahawa Hakim-hakim Mahkamah Persekutuan, Mahkamah Rayuan dan Mahkamah Tinggi adalah dilantik oleh Yang di-Pertuan Agong setelah mendapat nasihat daripada Perdana Menteri dan selepas berunding dengan Majlis Raja-Raja sebagaimana peruntukan Perkara 122B Perlembagaan Persekutuan. Malah Perdana Menteri sebelum memberikan nasihat kepada Yang di-Pertuan Agong berkaitan dengan pelantikan seseorang Hakim hendaklah terlebih dahulu berunding dengan Ketua Hakim Negara dan perlu mendapat pengesyoran dari Suruhanjaya Pelantikan Kehakiman. Proses lantikan seseorang hakim yang perlu melalui proses yang teliti ini menunjukkan Badan Kehakiman berbeza dengan institusi-institusi kerajaan yang lain dan menggambarkan betapa pentingnya peranan Badan Kehakiman di dalam sistem pemerintahan negara.*
>
> *Kebebasan kehakiman membawa pengertian bahawa para hakim yang mengadili sesuatu kes dapat mentafsirkan undang-undang bersandarkan semata-mata kepada fakta dan keterangan tanpa rasa takut, pilih kasih dan bebas daripada sebarang pengaruh yang tidak diiingini. Seseorang Hakim*

telah mengangkat sumpah untuk mengamalkan kesamarataan, memelihara, melindungi dan mempertahankan Perlembagaan serta bebas dari segala bentuk tekanan dalaman dan luaran. Perlembagaan Persekutuan dengan jelas telah memperuntukkan bahawa semua rakyat adalah sama rata di sisi undang-undang. Ini bermakna bahawa rakyat, tidak mengira status, jawatan, bangsa dan keturunan adalah tertakluk dan bertanggungjawab kepada undang-undang yang sama.

… Setiap rakyat di Negara ini berkehendakkan keadilan, kesaksamaan serta ketelusan daripada Badan Kehakiman atas sesuatu kes yang diadili. Oleh itu adalah menjadi tanggungjawab semua pihak untuk sentiasa memelihara nama baik Badan Kehakiman agar ianya tidak tercemar dari sebarang bentuk pengaruh dan tekanan. Beta mengambil kesempatan di sini untuk mengingatkan pihak Eksekutif agar sentiasa mendukung penuh prinsip kebebasan kehakiman dan mengelak dari sebarang cubaan untuk mempengaruhi proses pentadbiran keadilan Badan Kehakiman.

(Translation)

The Federal Constitution accords the Judicial Institution a high degree of respect as an independent and authoritative body. The Judiciary is the final bastion that must be defended to ensure that the administration of justice can be carried out in the best possible manner.

The People should take cognizance that the judges of the Federal Court, the Court of Appeal, and the High Court are appointed by the *Yang di-Pertuan Agong* upon the advice of the Prime Minister and after consulting the Conference of Rulers, as provided for in Article 122B of the Federal Constitution. In fact, before advising the *Yang di-Pertuan Agong* on the appointment of a judge, the Prime Minister must consult the Chief Justice and obtain a recommendation from the Judicial Appointments Commission. The appointment of a judge which undergoes a detailed process demonstrates that the Judiciary is distinct from other government institutions and envisions the importance of the Judiciary in the country's system of government.

Judicial independence means that judges who decide a case can interpret the law solely on the basis of facts and evidence, without fear, favouritism, and free of undesirable external influence. A judge has taken an oath to uphold equality, preserve, defend, and protect the Constitution, and be independent of all forms of internal and external pressures. The Federal Constitution clearly stipulates that

> all citizens are equal before the law. This means that all citizens, regardless of their status, position, ethnicity, or lineage, are subject and answerable to the same laws.
>
> … The need for justice, fairness, and transparency from the Judiciary is shared by all citizens of this nation in every decided case. Hence, it is incumbent upon all stakeholders to consistently uphold the reputation of the Judiciary, so that it is not tarnished by any form of influence or coercion. *Beta* (meaning "I" in royal parlance) wish to take this opportunity to remind the Executive to always fully uphold the principle of judicial independence and abstain from any endeavour to exert influence over the Judiciary's administration of justice.

[87] It would do well for the nation if everyone takes heed of what His Royal Highness has said for, I am sure that if the late Tan Sri Harun Hashim was here with us today, he would have respectfully concurred.

[88] I would like to end by leaving you with this. The members of the justice system (with all its actors) are seen to be the more virtuous ones in society. They are thus entrusted with the highest level of integrity. If the Judiciary, the Bar, Chambers or even law enforcement lack integrity, it provides little to no encouragement to those who are guided by our decisions to respect them, or worse still, to maintain their own sense of integrity. And so, ours is not the case where the pot can afford to call the kettle black.

[89] On my part, I shall continue to do my utmost to keep the Judiciary on the path of integrity. I truly believe that if the Judiciary remains strong, all the other branches of government will continue to adhere to the rule of law. The nation will, consequently, be strong.

[90] I thus enjoin all of you to continue to support me and the Judiciary, in this pursuit.

Thank you.

Keynote Address at the Construction Claims and ADR Conference Sabah & Sarawak 2023*

by

The Right Honourable The Chief Judge of Sabah and Sarawak,
Tan Sri Dato' Abdul Rahman bin Sebli

Introduction

[1] It is a pleasure to be in the presence of such distinguished individuals. And it is certainly an honour to be asked to deliver the keynote address for this prestigious conference on Construction Claims and Alternative Dispute Resolutions.

[2] I for one am glad that we are able to gather here after spending more than two years in disquietude since early 2020. As you are all aware, the threat of COVID-19 infection loomed large for several months, especially in workplaces which required physical presence because physical contact posed a risk of COVID-19 transmission.

[3] In response to the increasing risks and dangers of infection, the governments of the world had imposed stringent regulations and restrictions on its citizens and economies. Much of these restrictions, which lasted for several months, had taken a toll on various industries worldwide.

[4] In Malaysia, the COVID-19 pandemic left the construction industry in the doldrums. With the sudden enforcement of the movement control order ("MCO") on March 18, 2020, construction sites nationwide were forced to close[1] and work had to be halted for months.

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* Keynote address by The Right Honourable the Chief Judge of Sabah and Sarawak at the Construction Claims and ADR Conference 2023 held at the RAIA Hotel & Convention Centre, Kuching, May 12, 2023.

1 Kadhim Ghaffar Kadhim *et al*, "The Measures to Overcome the Impact of Covid-19 on Malaysia (2021) 12(8) *Turkish Online Journal of Qualitative Inquiry* 6719–6730, available at https://www.researchgate.net/publication/357648952_The_Measures_to_Overcome_the_Impact_of_Covid-19_On_Malaysia_Economy.

[5] The disruptions caused by the pandemic compelled the Malaysian Government to take measures aimed at mitigating the risks of economic collapse. One such measure was the introduction of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ("COVID-19 Act").

[6] Section 7 of the COVID-19 Act, in particular, states that where a party to any of the categories of contracts specified in the Act is unable to perform any of its contractual obligations in the light of the regulations and restrictions imposed by the government in order to curb the spread of COVID-19, the other party shall not act on his rights under the contract.

[7] Had this not been put in place, the construction industry would be taken to bits with the volume of penalty claims for delays and terminations of contract by frustration, which would have the consequence of pushing many contractors into insolvency. Fortunately, this extreme worst-case scenario did not take place.

[8] In 2022, the construction industry was reinvigorated and had contributed to the national gross domestic product ("GDP") with an annual share of 3.5%,[2] while the economy expanded by 8.7%[3] as Malaysia entered its recovery phase post-COVID-19 lockdown.

[9] Although the contribution is nominal compared to pre-COVID-19 periods, the numbers indicate gradual but consistent progress considering the announcements of the revival and continuation of major infrastructure projects in the country.[4]

[10] This brings us to the first topic for discussion.

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2 Baharudin Mohamad, Quarterly Construction Statistics, Fourth Quarter 2022, Department of Statistics Malaysia (2023), available at https://www.dosm.gov.my/.

3 Bank Negara Malaysia, "Economic and Financial Developments in Malaysia in the Fourth Quarter of 2022" (February 10, 2023), available at https://www.bnm.gov.my/.

4 BERNAMA, "Budget 2023: RM95b For Development, The Biggest Ever" (October 7, 2022), *The Malay Mail*, available at https://www.malaymail.com/news/malaysia/2022/10/07/budget-2023-rm95b-for-development-the-biggest-ever/32331; Priyatharisiny Vasu, "Revised Budget 2023: MBAM Urges Govt to Commence MRT3 Project to Revive Construction Sector", The Edge Markets (February 24, 2023), available at https://www.theedgemarkets.com/node/656749.

[11] In the aftermath of the COVID-19 lockdown, *what are the major projects, key challenges and recommendations in the construction industry in Sabah and Sarawak?*

[12] This is a rich topic for discussion.

[13] The MRT2 Putrajaya line was recently launched and began full operations on March 16, 2023,[5] demonstrating recuperation and foreshadowing growth in the Malaysian construction industry.

[14] Recovery in the industry is further evidenced by the announcements of upcoming mega infrastructure projects. In the Peninsular, the open tender process for the MRT3 Circle line is ongoing and the project is expected to have five Tier 1 main contractors to lead the implementation.[6] This will provide plenty of opportunities for local construction players of all sizes. The East Coast Rail Link project is also well underway with the successful breakthrough of 12 tunnels out of 59 tunnels designated for excavation and breakthrough.[7]

[15] Over in Sabah and Sarawak, the Federal Government had also recently approved two mega infrastructure projects.[8] They are the Phase 2 of the Sarawak-Sabah Link Road ("SSLR") and the Trans Borneo Highway project ("LTB") which will be connecting Miri, Limbang and Lawas to Sabah.

[16] In addition, the Federal Government has also given authority to the Sabah and Sarawak State Governments to decide on the implementation of any infrastructure projects under RM50 million in their respective states.[9] Against this backdrop, it would not be off

5 MYRAPID, "*MRT Laluan Putrajaya Dibuka Speenuhnya*" (March 16, 2023), available at https://myrapid.com.my/ms/mrt-laluan-putrajaya-dibuka-sepenuhnya/.

6 BERNAMA, "Progressive Journey For Transportation Sector, MRT Projects On Track", *The Malaysian Reserve* (December 12, 2022), available at https://themalaysianreserve.com/2022/12/12/progressive-journey-for-transportation-sector-mrt-projects-on-track/.

7 Ibid.

8 Margaret Ringgit, "Two Mega Projects to Ensure Better Connectivity", *New Sarawak Tribune* (August 7, 2022), available at https://www.newsarawaktribune.com.my/two-mega-projects-to-ensure-better-connectivity/.

9 Ainin Wan Salleh, "Sabah, Sarawak to Decide On Any Projects Under RM50mil", *Free Malaysia Today* (January 4, 2023), available at https://www.freemalaysiatoday.com/category/nation/2023/01/04/sabah-sarawak-to-decide-on-any-projects-under-rm50mil/.

the mark to say that the construction industry in Sabah and Sarawak will be bustling with activities in the near future.

[17] Of course, the execution of these mega infrastructure projects will certainly not be a walk in the park. Implementing a big-scale project comes with its fair share of challenges.

[18] As alluded to earlier, the construction industry was stagnant when the MCO was enforced. The standstill left many without income[10] and had forced over 700,000 foreign workers in Malaysia to return to their home countries.[11] As a result of this exodus, we have been facing manpower shortage in the construction industry.

[19] To curb this problem, the Malaysian Government introduced an initiative to speed up the hiring process for foreign workers for specific industries through the Foreign Worker Centralised Management System ("FWCMS") platform under the FWe Approval Module.[12] Under the initiative, employers in the construction industry are allowed to hire foreign workers without going through the preconditions of employment and quota eligibility.

[20] Foreign workers are crucial in the construction industry because they are dependable to fill the dirty, dangerous and difficult (3D) jobs at constructions sites. Although there was a recent influx of foreign workers in Sarawak thanks to the expedition of hiring processes, it may have been too late to make a difference for some projects which were already underway.[13]

[21] Aside from worker shortage, the rising costs of logistics and operations also perturbs many contractors. After COVID-19 restrictions were loosened, prices of raw building materials shot up globally and

10 Kadhim Ghaffar Kadhim *et al*, supra n 1.

11 BERNAMA, "Entry of 500,000 Foreign Workers Won't Affect Job Opportunities For Malaysians – Minister", BERNAMA (January 16, 2023), available at https://www.bernama.com/en/business/news_pemerkasa.php?id=2156502; PP Goh, "Challenges Facing the Construction Industry", *New Sarawak Tribune* (January 16, 2023), available at https://www.newsarawaktribune.com.my/challenges-facing-the-construction-industry/.

12 BERNAMA, "Govt to Speed Up Hiring of Foreign Workers in Five Critical Sectors – Minister", The Edge Markets (January 17, 2023), available at https://theedgemalaysia.com/node/652082.

13 PP Goh, supra n 11.

are now fluctuating.[14] This spells trouble for contractors in Sabah and Sarawak because of geographical factors.[15]

[22] In remote and rural areas, material procurement and logistics pose the greatest obstacle to the construction industry and is complicated by several factors including limited availability of certain materials, high transportation costs and a lack of reliable suppliers. This leads to increase in costs and delays in project completion. The construction industry in Sabah and Sarawak is also facing environmental challenges. Due to the region's unique and fragile ecosystems, construction activities must be conducted in a way that minimises damage to the environment.

[23] Another challenge which has increasingly become a menacing threat to the industry is exceptionally inclement weather. Climate change is materialising globally. Its effect is seen in the extreme weather phenomenon that has caused recent flooding in areas that are not historically prone to floods.

[24] During exceptionally inclement weather, it is unsafe for construction works to be carried out. Employers who insist on sending their men to work risk legal repercussions.[16] Furthermore, the backwash of the flood will likely leave trails of debris if construction sites are hit. When this happens, precious time will be expended for the purpose of cleaning, salvaging, and restoring damaged materials and tools. All these together lead to costs overrun and eventually, further delays.[17]

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14 Asila Jalil, "Steel Bar Prices Maintain Price Downtrend, Cement Prices to Stay Elevated", *New Straits Times* (January 10, 2023), available at https://www.nst.com.my/business/2023/01/868889/steel-bar-prices-maintain-price-downtrend-cement-prices-stay-elevated.

15 JA Gara, R Zakaria, E Aminudin, K Yahya, ARM Sam, NVN Loganathan, V Munikanan, MA Yahya, N Wahi and SM Shamsuddin, "Effects of the COVID-19 Pandemic on Construction Work Progress: An On-Site Analysis from the Sarawak Construction Project, Malaysia" (2022) 14(10) *Sustainability* 6007, available at https://doi.org/10.3390/su14106007.

16 BERNAMA, "Working in Bad Weather Conditions: Bosses Can Be Penalised", *New Straits Times* (June 24, 2022), available at https://www.nst.com.my/news/nation/2022/06/807719/working-bad-weather-conditions-bosses-can-be-penalised.

17 Ahmed Mohammed Kamaruddeen *et al*, "A Study on Factors Causing Cost Overrun of Construction Projects in Sarawak, Malaysia" (2020) 8(3) *Journal of Civil Engineering and Architecture* 191–199, available at https://pdfs.semanticscholar.org/67fc/a4b4bc2a116bb84be7dbd861298674319a2f.pdf.

[25] The shift towards sustainable development has also become more significant as the high depletion rate of natural resources coupled with the increasing consumption of non-renewable resources, particularly in the construction industry, have led to environmental deterioration. Sustainability seeks to balance the economic, social, and environmental impacts, thus allowing population growth to continue. The benefits are indefinite, considering what it can give, particularly in the long run.

[26] Sustainable development brings a new evaluation of project design in construction industries, where these projects can be associated with renewable energy such as solar, wind, biomass, biodiesel, hydropower, geothermal and also employment of other energy efficient products. Green construction is a construction practice that recognises the interdependence of the natural and built environment.

[27] However, green technology itself is not sufficient in moving towards sustainable development. Awareness, education and also extensive training are also important to develop the workforce in the clean energy industry. This could be the start of a new era, where developers and contractors need to be more creative, innovative and also motivated to change from conventional construction into a more beneficial yet still profitable project with their style and management.[18]

[28] The construction industry plays an important role in Malaysian economic development and growth. We have to create awareness, foster resilience, connote preventive measures, avert delays, and manage progress control in Sabah and Sarawak in order to be better prepared to deal with any potential economic disruptions on a global scale in the future. Preparing the construction industry with new norm construction methods and adopting new guidelines and standard operating procedures ("SOP") at project sites are essential steps.

Construction project management good practices

[29] The construction industry in Malaysia is a crucial contributor to the country's economy. However, it has been plagued by negative publicity regarding cost overruns, unrealistic schedules, accidents, poor workmanship, conflicts among project team members, and abandoned

18 ANA Ali, NA Jainudin, R Tawie and I Jugah, "Green Initiatives in Kota Kinabalu Construction Industry" (2016) 224 *Procedia – Social and Behavioral Sciences* 626–631, available at https://doi.org/10.1016/j.sbspro.2016.05.453.

construction projects both private and public. Unfortunately, instances of collapsing structures, cracked roads, and collapsing bridges have become increasingly common, leaving a negative impression on the public. There is an urgent need to prevent project failures, especially those resulting from poor project management practices in the industry. Nowadays, projects have become increasingly complex due to substantial capital investments, involving multiple disciplines, participants spread across different locations, tighter schedules, stricter quality standards, rising costs, environmental shocks, greater stakeholder influence, and advancements in information and communication technology.[19]

[30] Research conducted in recent years has demonstrated that crucial factors associated with project success, commonly known as CSFs, encompass clear project management goals, support from top management, efficient communication and information sharing, skilled project team members, effective risk management, satisfactory customer outcomes, and the optimal selection and use of technology. Given the numerous challenges confronting the construction sector, it is essential to embrace a more comprehensive framework to enhance project success rates, particularly since many organisations are increasingly managing multiple projects to gain a competitive edge. Further, the construction sector has a greater environmental impact compared to other industries, emphasising the pressing need to implement sustainable development principles in construction practices.[20]

[31] An article published in the Institution of Engineers Malaysia Journal in October 2019 identified the causes of delays in Malaysian Government projects. The article stated that the main reasons for these delays were attributed to contractors, clients, and consultants. In particular, consultants and clients were ranked as the top two causes due to their involvement in all stages of the project, while contractors were identified as being involved only in the implementation stage.

[32] The article also suggested that the implementation of good project management involves a combination of competent people who are

19 NA Haron *et al*, "Project Management Practice and its Effects on Project Success in Malaysian Construction Industry", IOP Conf Ser Mater Sci Eng 291 012008 (2017).

20 Ibid.

knowledgeable and have practised such knowledge successfully and having a set of project management tools and techniques (e.g. ICT applications) in place, which operates within a conducive culture that fosters the inclusiveness of project management values within the government project environment.

[33] It is worth noting that the local construction industry's largest client is the Malaysian Government. However, despite receiving significant funding, delays caused by inadequate project management in government projects are a significant issue that requires attention.

Delay analysis and extension of time

[34] The construction industry is facing a widespread issue of time overruns despite significant efforts to prevent them. Construction delays had led to an increased need for extensions of time to complete projects, which are often provided for in standard contracts through provisions outlining relevant events for which a contractor can apply. However, the assessment of these claims is not clearly defined, leaving it up to the professionals involved in the project. This lack of clear guidelines can lead to delayed submission of claims, further exacerbating the issue, especially when the responsibility for assessing claims falls on inexperienced individuals. As a result, contract administrators may also face delays in assessing claims.

[35] Delay analysis is a crucial way to identify and calculate the construction delay, and determine attribution to each party in reaching a decision on time and/or cost compensation.[21] This usually involves, among others, questions of what was supposed to happen; what actually happened; what were the variances; and how did they affect the project.

[36] There are various delay analysis techniques including non-Critical Path Method ("CPM")-based techniques and CPM-based techniques. It is worth noting that construction delay is a common case in developing countries. There are widely known types of delay which

21 N Braimah, "Construction Delay Analysis Techniques – A Review of Application Issues and Improvement Needs" (2013) 3(3) *Buildings* 506–531, available at https://doi.org/10.3390/buildings3030506.

are, critical or non-critical, excusable or non-excusable, compensable or non-compensable, and concurrent or non-concurrent.[22]

[37] Delay factors have been widely studied by many researchers. The construction industry, however, continues to struggle with the effects of delays in different magnitudes. I believe that there is no direct solution to solve delays in a construction project. Nonetheless, by conducting a delay analysis, certain measures can be taken to minimise the negative impacts from delays in order to avoid any catastrophic outcome.

[38] Extension of time is defined as "the additional time granted to the contractor to provide an extended contractual time period or date by which work is to be, or should be completed and to relieve it from liability for damages for delay (usually liquidated damages)".[23]

[39] It is common for contracting parties to agree on certain provisions on the extension of time as set out in the contract. It varies depending on the situations where a contractor is allowed to apply for a time extension. An application for an extension of time must be submitted by the contractor to the employer, requiring a complete and thorough documented analysis of the delay.[24]

[40] Time is always of the essence in the construction industry. Regardless of the complexity of a construction project, an application for a time extension is unavoidable. Hence, it is crucial to find effective ways in dealing with such matters to ensure fairness to all contracting parties and stakeholders.

22 NA Romzi and DS Ing, "Underlying Causes of Construction Project Delay: A Review" (2022) 2(2) *Construction* 7–11, available at https://doi.org/10.15282/construction.v2i2.7775.

23 NM Yusuwan and H Adnan, "Extension of Time Claim Assessment in Malaysian Construction Industry: Views From Professionals" (2018) 3(10) *Asian Journal of Environment-Behaviour Studies* 28–35, available at https://doi.org/10.21834/aje-bs.v3i10.310.

24 Kadhim Ghaffar Kadhim *et al*, supra n 1.

ADR in Sabah and Sarawak

[41] The alternative dispute resolution ("ADR") scene typically includes mediation, arbitration, and adjudication, offering alternative options for resolving disputes based on the parties' preferences and mutual understanding.

[42] In Malaysia, arbitration proceedings are governed by the Arbitration Act 2005. The Act was initially modelled after the English Arbitration Act 1952. Now, it is primarily based on the UNCITRAL Model Law and the New Zealand Arbitration Act 1996.

[43] Big corporations tend to add arbitration clauses in their construction contracts primarily for the confidentiality they provide. Unlike court processes, documents filed in arbitration are privileged. This ensures that information about the dispute is not made public, especially if the companies involved are listed publicly. The inclusion of sections 41A and 41B in the Arbitration (Amendment) (No. 2) Act 2018 ("2018 Amendments") was aimed at enhancing the confidentiality of arbitration proceedings in Malaysia.

[44] Arbitration attracts entities and corporations because it provides them with autonomy, which includes the ability to choose the seat of arbitration, the arbitrators, the governing law, and the language used in the proceedings. This autonomy allows the parties to select highly-experienced industry professionals to act as arbitrators, which is a highly desirable feature. This means that arbitrators do not necessarily have to be lawyers or former judges, but anyone with the relevant industry expertise can be selected as an arbitrator.

[45] Although arbitration offers autonomy, there is often a dispute over the finality of awards. Prior to the implementation of the 2018 Amendments, dissatisfied parties used to flood the court registry with applications to refer questions of law arising from the award, as provided under sections 42 and 43 of the Arbitration Act 2005. However, the 2018 Amendments put an end to this practice by repealing those provisions.

[46] The removal of sections 42 and 43 of the Arbitration Act 2005 was intended to diminish judicial interference in arbitration awards. However, the removal gave rise to further legal disputes, with parties arguing that the removal does not bar them from referring questions

of law if the arbitration was commenced before the 2018 Amendments came into force.[25] Many of you may be wondering if the removal of these provisions is a positive change.

[47] Under the current framework, challenges to arbitral awards can only be made on the grounds as set out in sections 37 and 39 of the Arbitration Act 2005. This is in line with the New York Convention and the UNCITRAL Model Law.

[48] In Singapore, there are two different laws that govern domestic arbitration and international arbitration. The Singapore Arbitration Act 2001, which governs domestic arbitration, contains the Singapore equivalent of our repealed sections 42 and 43, giving the right to appeal on questions of law arising from the award. However, this right may be excluded by agreement.[26]

[49] On the other hand, the Singapore International Arbitration Act 1994 does not have a similar provision. Awards for international arbitration in Singapore under the Act may only be set aside on grounds of fraud or corruption, or a breach of natural justice.

[50] In 2019, the Singapore Ministry of Law held a public consultation on proposals to amend the Singapore International Arbitration Act 1994. One of the proposals was to allow parties to appeal on questions of law arising from the international arbitral awards, on an opt-in basis.[27] This did not materialise.[28] The reason for the lack of success of this provision may be attributed to concerns that an additional appeal could contradict the principle of finality in arbitration.

[51] Mediation proceedings are governed by the Mediation Act 2012. Unlike arbitration proceedings, mediation can run concurrently with court proceedings as well as arbitration proceedings.

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25 *Pembinaan Limbongan Setia Bhd v Josu Engineering Construction Sdn Bhd* [2020] MLJU 192.

26 Singapore Arbitration Act 2001, s 49.

27 Singapore Ministry of Law, Public Consultation on International Arbitration Act (2019), available at https://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-international-arbitration-act.

28 Lakshanthi Fernando, "Amendments to Singapore's International Arbitration Act to Enhance Statutory Regime", CMS Holborn Asia (2020, December 14), available at https://cms-lawnow.com/en/ealerts/2020/12/amendments-to-singapore-s-international-arbitration-act-to-enhance-statutory-regime.

[52] In 2020, the Federal Government appointed the Sabah Law Society to provide mediation services through accredited mediators under the COVID-19 Mediation Centre. The Centre was established to assist members of the public to resolve disputes arising from the inability to perform contractual obligations due to the pandemic, subject to certain requirements. The Centre was abolished in October 2022.

[53] The opening of the first Asia Mediation Centre ("AMC") for Sabah and Sarawak in Sabah indicates a clear potential for ADR to be developed and utilised in the construction industry in East Malaysia. The AMC provides dispute resolution services as well as accreditation training for professionals seeking to practise as accredited mediators.

[54] A recent notable development in the local ADR scene is the establishment of the Borneo International Centre for Arbitration and Mediation ("BICAM"). Formed in 2023 through the efforts of the Sabah Law Society and with the backing of the Sabah State Government, it offers customised dispute resolution services to cater to the growing demand for alternative paths to resolve business-related conflicts. The BICAM primarily focuses on arbitration and mediation to provide neutral, impartial and cost-effective assistance in reaching a mutually acceptable settlement. This alternative approach offers benefits such as confidentiality, flexibility in customised dispute resolution and the selection of experts with specialised knowledge relevant to the particular dispute. At present, it seems that discussions are ongoing between the Advocates Association of Sarawak and the Sabah Law Society regarding the potential partnership of the Advocates Association of Sarawak with the BICAM.

[55] Since the implementation of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA 2012") on April 15, 2014, adjudication has become a common method of resolving construction claims.

[56] The Federal Court's decision in the case of *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd (and Another Appeal)*[29] recognised that

29 [2019] 8 CLJ 433.

the CIPAA 2012 gives the right to progress payment and was enacted to facilitate prompt resolution of construction disputes related to payment for work done under a construction contract. The court also acknowledged that adjudication provides a temporary finality to such disputes.

[57] In short, the ultimate purpose of its design is to speed up payment claims processes. This can be seen in section 12 of the CIPAA 2012 which states that decisions ought to be made within 45 working days from the service of the adjudication response or reply.

[58] It is important to note that statutory adjudication was not intended to displace all other ADR methods in the construction industry. This was made clear in *Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd (and Other Appeals)*[30] where the Federal Court aptly held:

> [62] … with the advent of the CIPAA, the claimants in the construction industry now have an additional avenue, a new regime or an additional alternative access to existing dispute resolution forums to claim for their contractual fees.

[59] However, according to the AIAC Report 2021, the AIAC noted a decline in the number of registered adjudication cases which they have postulated to be "resultant from the increasing sentiments amongst industry players relating to practical difficulties in CIPAA for the resolution of payment disputes in the construction industry".

[60] In addition, there is an interesting development in the ADR landscape for Sabah and Sarawak. In the case of *Samsuri bin Baharuddin & Ors v Mohamed Azahari bin Matiasin (and Another Appeal)*,[31] the Federal Court affirmed the ruling of the High Court which held that foreign lawyers who are not advocates within the meaning of the Advocates Ordinance (Sabah Cap 2) are prohibited by the same from representing parties in arbitration proceedings in Sabah.

[61] This principle was adopted by the High Court case of *Tekun Cemerlang Sdn Bhd v Vinci Construction Projets Sdn Bhd*.[32]

30 [2020] 1 MLJ 311.
31 [2017] 2 MLJ 141.
32 [2021] 11 MLJ 50.

[62] The corollary to this development is that legal practitioners without a practising certificate from the High Court of Sabah would be precluded from representing their clients in ADR proceedings in Sabah.[33] This decision raises the issue of whether it would impede the growth of ADR in the local scene.

[63] Given the development of infrastructure and construction projects in Sarawak, as well as the establishment of a new capital city in Kalimantan, there is a growing need to use ADR in the state. The efficient resolution of domestic and foreign disputes through ADR may support Sarawak's Strategic Thrust of the Post COVID-19 Development Strategy ("PCDS") 2030, which focuses on attracting domestic and foreign investors.[34]

[64] It is now necessary to promote and apply ADR extensively in Sabah and Sarawak. The expansion of infrastructure and construction in both regions necessitates a range of conflict resolution methods that can stimulate economic growth while minimising legal risks.

Conclusion

[65] In conclusion, I hope that today's keynote address has provided you with valuable insights and practical solutions to some of the most pressing issues in construction claims and ADR. As we have seen, the construction industry is constantly evolving and adapting to new challenges, and it is up to us as professionals to keep up with the changes and stay ahead of the curve.

[66] ADR has become an increasingly popular method of resolving construction claims, and for good reasons. It is cost effective, efficient, and can help to preserve important business relationships. However, it is important that we also recognise the importance of proactive claims management and avoiding disputes before they even arise.

[67] Through collaboration, communication, and a commitment to best practices and continuous improvement, we can reduce the

33 G Chaw, "Statutory Adjudication in Malaysia and 'Sabah Proceeding': A Paradox?" (2021) 3 *Malayan Law Journal* cdlxxxviii.

34 M Ten, "Hasidah: Alternative Dispute Resolution Can Ease Way of Doing Business", *The Borneo Post* (June 15, 2022), available at https://www.theborneopost.com/2022/06/16/hasidah-alternative-dispute-resolution-can-ease-way-of-doing-business/.

number of constructions claims and increase the success rate of ADR. I encourage all of you to take the knowledge and insights gained from this conference and apply them in your own work, to contribute to the growth and success of the construction industry.

[68] I thank you for your attention.

The Fortuna Injunction

by

*Justice Wan Muhammad Amin bin Wan Yahya**

Introduction

[1] The *Fortuna* injunction is essentially a prohibitory injunction which is specifically designed to restrain the presentation of a winding-up petition and with it, the prevention of abuse of the process of court. The *Fortuna* injunction is derived from the Australian Supreme Court of Victoria case of *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia* ("*Fortuna Holdings*").[1]

[2] As we emerge from the COVID-19 pandemic and given the financial difficulties companies are facing, the *Fortuna* injunction has gained popularity. It is usually sought by an applicant/plaintiff ("applicant") who has been served with a section 466 notice under the Companies Act 2016 ("CA 2016") (formerly section 218(2) of the Companies Act 1965).

[3] The *Fortuna* injunction may not, on the face of it, appear complicated, however, there are many facets of a *Fortuna* injunction and a closer examination of this injunction will show that below the surface there is more than meets the eye.

Principles governing a *Fortuna* injunction

[4] Upon receiving the threat of a winding-up petition being presented commonly via a statutory notice under section 466 of the CA 2016 ("statutory notice") the applicant will hasten to court to move the court usually on a certificate of urgency for an interim or interlocutory *Fortuna* injunction.

[5] Under section 466(1)(a) of the CA 2016, the plaintiff has 21 days from the date the said statutory notice is served on him to pay the issuer of the notice/creditor ("creditor") the sum demanded or to

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* Judge of the High Court of Malaya.

1 [1978] VR 83.

secure or compound for it to the satisfaction of the court. The current threshold for winding-up petitions is RM50,000[2] and the creditor would be entitled to present the petition if the debt is above RM50,000. The creditor need not show the exact sum as at the date of the demand as long as it exceeds the current threshold applicable at that time.[3]

[6] As the applicant only has 21 days to prevent the intended winding-up petition from being presented, the application will normally be made via originating summons and usually with a notice of application for an *ex parte* interlocutory *Fortuna* injunction.[4] This does not mean that the applicant cannot initiate proceedings via a writ action but it would be impractical to do so as well as time consuming. Further, if the applicant is primarily seeking a *Fortuna* injunction with or without other reliefs associated with a *Fortuna* injunction then, as will be seen later, a writ action would not be in line with the grounds in support of the injunction. As will be elaborated later in this article, in a *Fortuna* injunction application the court does not make a determination or finding on the creditor's alleged debt.

[7] The considerations for a perpetual *Fortuna* injunction and an interim *Fortuna* injunction are different. The principles governing a *Fortuna* injunction in *Fortuna Holdings* were referred to by the Court of Appeal in *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* ("*Mobikom*").[5] These principles were then succinctly summarised in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* ("*Pacific & Orient Insurance*")[6] where the principles were categorised into two branches. An applicant seeking a *Fortuna* injunction will have to satisfy the following:

> First branch of the principle
>
> (i) the intended petition has no chance of success, as a matter of law as well as a matter of fact; and
>
> (ii) the presentation of such petition (which has no chance of success) might produce irreparable damage to the company.

2 Federal Government *Gazette* Notification No. 4159 dated March 22, 2021.
3 *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437.
4 *Sime Engineering Sdn Bhd v RM Leopad Sdn Bhd* [2005] 5 CLJ 274 ("*Sime Engineering*").
5 [2007] 3 MLJ 316.
6 [2011] 1 CLJ 947.

Second branch of the principle

(iii) where a petitioner proposing to present a petition has chosen to assert a *disputed claim, by a procedure* which might produce irreparable damage to the company, *rather than by a suitable alternative procedure*.) (Emphasis added)

[8] The applicant must primarily satisfy the court that *the debt is bona fide disputed on substantial grounds*.[7]

[9] On the other hand, for an interim or interlocutory *Fortuna* injunction, the applicant needs to satisfy the general requirements for an interlocutory injunction under Order 29 of the Rules of Court 2012 ("ROC") and basically the general test as laid down in *American Cyanamid Co v Ethicon Ltd* ("*American Cyanamid*")[8] would apply, that is:

(i) whether there is a serious question or issue to be tried;

(ii) whether the balance of convenience lies in favour of the applicant; and

(iii) whether damages are an adequate remedy.

[10] The test for an interlocutory injunction in *American Cyanamid* does not apply to a perpetual *Fortuna* injunction. In *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd*,[9] the Court of Appeal held that the principle relating to the test of "serious question to be tried" in *American Cyanamid* as applied in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors*[10] is not applicable to applications to restrain winding-up petitions or proceedings.

[11] The Order 29 of the ROC provisions apply only because the applicant is seeking for an interlocutory injunction and on an urgent basis. Thereafter, the requirements of the *Fortuna* injunction as laid down in *Fortuna Holdings* will apply in respect of the perpetual or final *Fortuna* injunction sought in the action.

7 *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd* [2007] 4 MLJ 355 ("*Tan Kok Tong*").
8 [1975] AC 396; [1975] 1 All ER 504.
9 [2007] 4 MLJ 355.
10 [1995] 1 MLJ 193.

The two broad categories of cases of a *Fortuna* injunction

[12] A *Fortuna* injunction is sought in two broad categories of cases and they are as follows:

(i) where there is a judgment debt which loosely includes, *inter alia*, an arbitration award, a Construction Industry Payment and Adjudication Act 2012 ("CIPAA") decision or an Industrial Court award ("judgment debt"); and

(ii) debts which have not been determined by the court or any tribunal and otherwise those which do not fall within the category of cases referred to above ("non-judgment debt").

[13] Unlike bankruptcy proceedings, a winding-up petition is not predicated on a judgment or order of court. There is no requirement for a petitioner to obtain a judgment or order of court before he can file a winding-up petition.[11]

[14] The category of cases which involve a judgment debt is perhaps easier to determine rather than a non-judgment debt. Nevertheless, notwithstanding which category of cases the applicant falls under, the applicant must still satisfy the requirements for the grant of a *Fortuna* injunction as stated above.[12]

[15] The applicant also needs to show that the creditor is trying to assert a disputed claim which might produce irreparable damage to the applicant-company, rather than by a suitable alternative procedure.[13] What this means is that the debt could be more appropriately determined by way of a civil suit or arbitration for example, rather than through winding-up proceedings.

[16] It is for this reason that the application for a *Fortuna* injunction is more appropriately made by way of an originating summons because in determining whether to grant a *Fortuna* injunction or not, the court does not decide on the *merits* of the creditor's or defendant's claim or the alleged debt against the applicant.

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11 *Lafarge Concrete (Malaysia) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2011] 1 LNS 1763; [2012] 6 MLJ 817; *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd (and Other Appeals)* [2001] 3 CLJ 248 ("*Maril-Rionebel*").

12 See para 7 above.

13 *Pacific & Orient Insurance*, supra n 6.

Judgment debt – Civil cases

[17] The category of cases that fall under a judgment debt may be easier to determine because the alleged debt had *already* undergone another procedure and has been determined by that procedure. The most common issue that is raised is that the judgment debt is currently being challenged. For example, for a judgment in civil cases, by way of an appeal to a superior or appellate court or in the case of an arbitration award or CIPAA decision, an application to set aside the award or CIPAA decision has been made.

[18] In *Fortuna* injunction applications involving a judgment debt, decided cases lean towards not granting the injunction in particular in respect of cases involving judgments in civil cases and CIPAA decisions.

[19] Below are cases on *Fortuna* injunctions which involve debts that have been determined in civil suits where judgments had been obtained. The passages from the various courts in these cases do not support the grant of a *Fortuna* injunction:

(i) The Court of Appeal in *Pacific & Orient Insurance* held as follows:

> [29] This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not consequence whether or not it will cause irreparable damage to the company, if presented. A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point. Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle.

(ii) The Court of Appeal in *Sri Jeluda Sdn Bhd v Pentalink Sdn Bhd*[14] agreed with the following passage of the High Court judge's grounds:

> … A judgment remains regular and enforceable until it is set aside by the court. Although the Respondent had filed an appeal against the judgment, the judgment remains a good judgment until it is set aside on appeal. Until a judgment is set aside, the claim by

14 [2008] 3 MLJ 692.

> the petitioner based on the said judgment cannot be regarded as a bona fide disputed debt. The fact that the Respondent had lodged an appeal against the judgment merely means that he still disputed the debt but does not establish that the debt is bona fide disputed.

(iii) In *Melawangi Sdn Bhd v Lim Kian Hian*,[15] the High Court observed the following:

> [24] It is trite law that a judgment so long has not been set aside or stayed by the Court will remain valid and subsisting between the parties. The law also trite that the procedural aspect of the law must be followed strictly by the parties. Failure to comply with the rule will resulting the order obtained thereafter is subjected to a removal.

(iv) The High Court in *SBSK Plantations Sdn Bhd v Dynasty Rangers (M) Sdn Bhd*[16] held as follows:

> Upon the defendant obtaining the judgment, the debt ceases to be a disputed debt. Thereafter, the question whether the debt is a bona fide disputed debt becomes a non-issue. This is so even though the plaintiff has filed an appeal against the judgment because the filing of an appeal does not have the effect of reverting the status of the judgment debt to its original status as a disputed debt before judgment was obtained. …

(v) The case of *Ahmad Zaki Sdn Bhd v Meor Hamzah (M) Sdn Bhd*[17] in which the High Court held:

> [24] The courts has [*sic*] expressed in unequivocal terms a winding up court is not the forum to challenge the validity of a court order or judgment. A winding up court therefore cannot go behind the judgment even if it is irregularly obtained except where there was fraud or illegality involved.

[20] However, it is still possible for the debt to be *bona fide* disputed where the terms of the judgment or order obtained are not clear or the subsequent conduct of parties post-judgment affects the judgment itself.[18]

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15 [2016] 1 LNS 1293.
16 [2002] 1 MLJ 326.
17 [2016] MLJU 1391.
18 *Pengkalen Holiday Resort Sdn Bhd v Perbadanan Pengurusan Paradise Lagoon Apartment (North) & Anor* [2016] 1 LNS 1114; [2016] MLJU 939 at [12].

[21] Having said this, the merits of an appeal against a judgment are not a consideration in a *Fortuna* injunction application nor will the court look behind the decision or judgment that was given.[19] It is not the function of a court hearing a *Fortuna* injunction application to consider the merits of another case or the appeal arising therefrom.

[22] Just as an appeal does not operate as a stay of execution under the decision appealed against,[20] in the context of a *Fortuna* injunction application, an appeal does not mean that the debt becomes disputed. This then raises the question as to whether a stay of a judgment would prevent the creditor from presenting a winding-up petition.

[23] The short answer to this question is that it does not. The explanation for this can be found in, *inter alia*, the following passage from the High Court case of *Klass Corporation (M) Sdn Bhd v MKRS Management Sdn Bhd* ("*Klass Corp*"):[21]

> [30] It is correct, for it is already trite, that a stay cannot operate to restrain the execution of the judgment debt should the mode of enforcement is by way of a winding-up action. Equally significantly, it is for this same basis – in that a winding-up is not a form of an execution of judgment – such that, a creditor is not required to obtain judgment before serving a statutory demand for the winding-up of a debtor company. A judgment is thus not a prerequisite for the institution of a winding-up proceedings (see the Court of Appeal decisions in *Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2011] 1 LNS 1763; [2012] 6 MLJ 817 and in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248).

[24] However, based on *Klass Corp* a stay is relevant in an application for a *Fortuna* injunction because of:

> … the *effect* it has on the *question* of whether the judgment debt (if there is one) is *bona fide* disputed. For the stay operates to suspend a judgment of the court and deprives it from being one that is not *bona fide* disputed. In other words, with a stay in place, the argument that there is no bona fide dispute over a debt demanded in a winding-

19 *Lion Pacific Sdn Bhd v Pestech Technology Sdn Bhd* [2021] MLJU 1399 at [33] and [34].
20 ROC, O 55 r 16; Rules of the Court of Appeal 1994, r 13.
21 [2018] 7 CLJ 303; [2018] 9 MLJ 305.

> up notice given the judgment debt, like the case presently, would potentially be unsustainable.
>
> (Emphasis added)

[25] The enforcement procedures under Order 45 r 1 of the ROC do not take away the right of the creditor as judgment creditor to "enforce" the judgment by way of a winding-up petition under the CA 2016.[22]

[26] Ultimately, where the applicant has obtained a valid and enforceable judgment, the position taken in the above cases and in particular *Pacific & Orient Insurance* is that:

(i) the intended petition, if presented, is not bound to fail or otherwise has a reasonable likelihood of succeeding;

(ii) therefore, whether or not the petition causes irreparable damage is of no consequence; and

(iii) the second principle that the applicant has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the applicant-company, rather than by a suitable alternative procedure, does not apply. The principle applies only to disputed debts and does not apply to cases where the debt in question is undisputed. A valid and enforceable judgment of the court (unless set aside or stayed) cannot be considered a disputed debt.

Judgment debt – Arbitration awards

[27] With regard to an arbitration award, the case of *Mobikom* held that the application by the plaintiff to set aside the award constitutes a *bona fide* dispute of the alleged debt. The Court of Appeal agreed with the High Court's decision in *Malayan Flour Mill Bhd v Raja Lope & Tan Co*[23] which held, *inter alia*, as follows:

> On the strength of the above authorities, I am of the opinion that an Arbitrator's award is not final and binding and thus can still be challenged by any of the parties, until it is registered and accepted as a judgment by leave of the High Court. In this case, the defendant's action to issue notice under s. 218 of the (Companies) Act to the plaintiff

22 *Pacific & Orient Insurance*, supra n 6, at [31] and [32].
23 [2000] 7 CLJ 288.

without first registering the award under s. 27 of the Arbitration Act 1952, is premature, in the context of the present proceeding.

[28] The following passage from *Mobikom* seems to suggest that unless the arbitration award is registered, a challenge by the applicant to set aside the award is tantamount to a *bona fide* dispute of the debt alleged by the creditor/defendant:

> [15] I entirely agree with the law as stated by the learned judge and his approach. I would apply it here. Here too the defendant has no registered award. All it has is a cause of action at common law to enforce the award in the usual way by means of a civil suit. The application by the plaintiff to set aside the award constitutes, in my judgment, a *bona fide* dispute of the alleged debt. The present case, in my view, comes within the second branch of the Fortuna principle.

[29] Conversely, if the applicant does not challenge the arbitration award, it may be precluded from raising that the debt is *bona fide* disputed or that it would cause irreparable damage similar to the case of a judgment debt where a court judgment had been obtained.[24]

Judgment debt – CIPAA decisions

[30] With regard to CIPAA decisions, the following Court of Appeal cases do not support the granting of a *Fortuna* injunction and take a somewhat different approach compared to *Mobikom*:

(i) In *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd*,[25] the Court of Appeal held:

> [20] … In the premises, we were of the view that such an adjudication decision was good and proper as a basis upon which a winding up petition notice against the appellant may be filed for a debt in the amount, as stated in the said adjudication decision against the appellant. Armed with an adjudication decision, as it were, the respondent petitioner in the instant case stands on a stronger footing than a petitioner, say in the *NCK Wire Products Sdn Bhd* case. As such, we were inclined to agree with the proposition that, for the purpose of filing a notice to wind up under s 465 of the Companies Act 2016, a successful litigant

24 *Pacific & Orient Insurance*, supra n 6.
25 [2019] 3 MLJ 244.

> in an adjudication proceeding need not have to register the said adjudication decision under s 28 of the CIPAA. …

(ii) Further, in S*ime Darby Energy Solution Sdn Bhd v RZH Setia Jaya Sdn Bhd*,[26] the Court of Appeal held:

> [50] With respect, to our minds, this does not equate to entitling the party ordered to make payment under the AD to an order to restrain the successful party from presenting a winding up petition as the former has a statutory right to challenge the statutory notice or petition before the winding up Court. Until and unless the AD is set aside, it can in law form the basis for the statutory notice which was the position in the present instance. Whether or not the Respondent had a bona fide cross claim against the Appellant on merits to challenge the petition is a matter to be adjudged by the winding up Court. We are not convinced that an unproven cross-claim can be the basis for restraining the filing of a winding up petition based on a valid and enforceable AD …
>
> …
>
> [59] In the circumstances, our decision would be that the LJC had erred in principle in failing to consider or correctly apply established principles and criteria for the grant of a FI against the enforcement of a proven judgment debt based on an AD contrary to the object and intention of the CIPAA for expeditious payments of proven construction claims. In our view, the LJC was plainly wrong in failing to strictly apply the principle expressly pronounced in *Likas Bay* (supra) on the basic premise of the right of the Respondent as the losing party in the Adjudication Proceeding to pursue Court action or Arbitration that may eventually prevail over or reverse the AD. This is an uncertain event that should not be used to preclude the statutory right of the Appellant to pursue a winding up action.

[31] Thus, based on the above Court of Appeal cases, unlike the case of *Mobikom*, neither the non-registration to enforce the CIPAA decision nor an application to set it aside would be considered a *bona fide* dispute of the debt claimed by the creditor/defendant.

Non-judgment debt

[32] *Fortuna* injunction applications involving non-judgment debts are perhaps more difficult to determine. This is because the courts

26 [2021] 9 CLJ 880.

will need to examine the facts of the dispute more closely, unlike judgment debts where the debt has been determined by another court or tribunal.

[33] In *BDG v BDH*,[27] a case involving a *Fortuna* injunction application, the Singapore High Court held that "Going into the merits or otherwise of the respective parties' claims would be to apply something other than a *prima facie* standard" and that "the general approach to determine the existence of a *bona fide* dispute was whether a *triable issue* had been made out. The court was required to examine the affidavit evidence, and consider whether on such material, an arguable case could be made, meriting the holding of a trial of the issues. That standard would require more inquiry and assessment than a standard requiring only making out that a dispute existed *prima facie*."

[34] It must also be noted that the debt must not only be *bona fide* disputed but disputed on *substantial grounds*.[28]

[35] In dealing with a winding-up petition, the Singapore Court of Appeal case of *Pacific Recreation Pte Ltd v Technology Inc (and Another Appeal)*[29] laid down the standard of proof for determining the existence of a substantial and *bona fide* dispute, which standard is similar to that which was taken in *BDG v BDH.* The Singapore Court of Appeal held as follows:

> [23] With regard to the applicable standard for determining the existence of a substantial and *bona fide* dispute, it was our view that the applicable standard was *no more than that for resisting a summary judgment application*, ie, the debtor-company need only raise *triable issues* in order to obtain a stay or dismissal of the winding-up application. …
>
> (Emphasis added)

[36] If in a winding-up proceeding the petitioning creditor is unlikely to succeed in winding up the respondent/applicant, applying the above standard for determining whether there is a substantial and *bona fide* disputed debt, it is likely that the same petitioner/creditor would be restrained from presenting the winding-up petition if the respondent/applicant applies for a *Fortuna* injunction.

27 [2016] SGHC 211; [2016] 5 SLR 977.
28 *Tan Kok Tong*, supra n 7.
29 [2008] SGCA 1.

[37] The cases which involve non-judgment debts commonly arise in situations where there is, *inter alia*, a settlement between parties, an agreement by the applicant to pay or an admission of the debt by the applicant. The creditor will essentially attempt to disprove the applicant and show he has an undisputed debt. However, this will require the court to go through the affidavit evidence in cases where the *Fortuna* injunction application is made by way of an originating summons or tried by way of affidavit evidence.

[38] The court will then have to determine based on the documents and averments in the affidavits whether there is a *bona fide* disputed debt and more so whether it can be said that the intended winding-up petition has little or no chance of success. In this regard, in *Sime Engineering*,[30] a case involving a non-judgment debt, the High Court held that the onus on the company sought to be wound up to satisfy the court that the creditor's claim is "bound to fail" is a heavy onus and that the test is *lower* than that of a summary judgment application under Order 14 of the then Rules of the High Court 1980 (now the ROC).[31] The High Court also disapproved the "short cut" taken by the creditor to seek to wind up the company instead of proceeding by way of a civil action and held as follows:

> Should this court rule that, to secure an injunction against the filing of a winding-up petition, the onus is on the company sought to be wound-up to satisfy the court that the creditor's claim is "bound to fail", most litigants who claim to be creditors would take the short-cut petition for winding-up route to enforce their claims rather than to have recourse to the common law courts. Indeed, such heavy onus of proof if placed on the company would result in the companies court being inundated with a welter of winding-up petitions, which may lead to irretrievable damage to a company's business and reputation, and far-reaching effects consequential upon the ensuing mandatory gazettal and advertisement entailed in a petition. The courts must firmly deprecate such proclivity for shortcuts in normal recovery of debts. Surely, the punch-line of this judgment could be stated thus: in a common law civil action the standard of probity and cogency required of a plaintiff (the defendant here) *in order to succeed in his O. 14 application for summary judgment is markedly higher than the "bound to fail" test if*

30 *Sime Engineering*, supra n 4.
31 Rules of Court 2012.

the onus of such test is instead thrown upon a defendant (the plaintiff here) in a civil action. …

(Emphasis added)

[39] If the court arrives at the conclusion that there are issues concerning the alleged debt which cannot be determined by way of affidavit evidence or that the matter ought to be determined by way of a more suitable alternative procedure,[32] for example, via a civil suit, the court then grants the *Fortuna* injunction.

Cross-claims or counterclaims

[40] There are situations where the applicant in a *Fortuna* injunction application relies on a cross-claim or counterclaim, as the case may be, equal to or exceeding the creditor's debt to prove that the debt is *bona fide* disputed on substantial grounds and that the intended winding-up petition would cause the applicant irreparable damage.

[41] The applicant does not dispute the creditor's debt *per se*.

[42] In *Fortuna Holdings*, the Australian Supreme Court of Victoria held that the cross-claim is treated as a matter which is proper for consideration in the exercise of the discretion to order winding up, and in dealing with the considerations relevant to their exercise of discretion on a winding-up petition, the courts have looked at the substance and not the form of the cross-claim. The court was not concerned to distinguish whether the cross-claim was a set-off or a counterclaim or some other form of cross-claim.

[43] What is interesting in this situation is that the debt claimed by the creditor is in itself *not* disputed and this would therefore negate the issue of there being a *bona fide* disputed debt. However, the courts have approached this situation in the following manner:[33]

(i) The genuineness of the cross-claim that is whether it is genuine based on substantial grounds.

(ii) Whether the intended winding-up petition would cause irreparable damage to the applicant.

32 *Megasteel Sdn Bhd (No. Syarikat 181104-T) v Perwaja Steel Sdn Bhd (No. Syarikat 187922H)* [2008] MLJU 252, CA.

33 *Fortuna Holdings*, supra n 1; *Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd* [2014] 11 MLJ 916 ("*Josu Engineering*"); *ASM Development (KL) Sdn Bhd v Econpile Sdn Bhd* [2021] 8 MLJ 99 ("*ASM Development*").

[44] The High Court in *Josu Engineering*[34] summarised the considerations the court takes into account in a *Fortuna* injunction application where the applicant has raised a cross-claim but does not dispute the creditor's debt, as follows:

> [49] From the above cases, it can first of all be said that where a debt is undisputed, an injunction to restrain the presentation of a petition to wind up a company upon failure to pay upon the debt demanded is generally refused. The arguments challenging the issuance of the s 218 notice should also be made in the winding up court. Otherwise, the only viable option is to pay up. Secondly, where a debt is undisputed, an injunction may nevertheless be ordered where a genuine cross-claim based on substantial grounds is raised. In such a case, the courts recognise that the presentation of such a petition might produce irreparable damage to business and reputation. Thirdly, the burden of proof in both instance of disputed debt and undisputed debt is whether there is a likelihood that the petition to wind up may fail or that it is unlikely that a winding up order would be made; as opposed to a test that the petition is bound to fail.

[45] Therefore, in short, the issue of whether there is a *bona fide* disputed debt does not appear to be a consideration in this situation and what the applicant will need to show the court is that:

(i) the presentation of the winding-up petition may cause irreparable damage to the applicant-company; and

(ii) the likelihood the said petition may fail or that it is unlikely that a winding-up order would be made.

Arbitration agreements and reference of the dispute to arbitration

[46] There are also applications for a *Fortuna* injunction which are made on the basis that there is either:

(i) an arbitration agreement between parties to refer their dispute to arbitration; or

(ii) that the dispute has already been referred to arbitration but the creditor still issued a threat to wind up the applicant via a statutory notice of demand.

34 *Josu Engineering*, ibid.

[47] It is clear from *Mobikom* that the arbitral award itself does not prevent the applicant from presenting a winding-up petition. Therefore, the question is:

(i) what is the effect of an arbitration agreement on a *Fortuna* injunction application; and

(ii) can a creditor *still* be restrained from presenting a winding-up petition where the dispute has already been referred to arbitration.

[48] The contention is that the parties had agreed via an arbitration agreement or clause to refer their dispute to arbitration but despite this agreement the creditor then proceeds to initiate winding-up proceedings by issuing the statutory notice to the applicant.

[49] A winding-up petition or proceeding is *sui generis*. It is a class of its own and therefore the creditor is not *ipso facto* prohibited from presenting a winding-up petition even if the dispute has been referred to arbitration or the arbitration proceedings are already underway.

[50] In *NFC Labuan Shipleasing I Ltd v Semua Chemical Shipping Sdn Bhd* ("*NFC Labuan*"),[35] a case where the respondent had applied for a stay of winding-up proceedings pending reference to arbitration pursuant to section 10 of the Arbitration Act 2005 as well as an application to strike out the winding-up petition, the High Court held, *inter alia*, as follows:

> [32] … Winding-up proceeding is plainly a class of its own. It is *sui generis*. It is primarily regulated by the provisions of the law enacted specifically to govern such proceedings.
>
> …
>
> [34] It bears repetition that the petition is *sui generis* as winding-up proceedings feature a distinct characteristic of a wider legal process. … It must be recognized that a winding-up petition is not a claim for payment. It is, instead, what may be regarded as a class action in the public interest which brings into operation the statutory regime for realising and distributing the assets of a company for the benefit of its creditors. This is manifestly not the objective of having the alleged dispute referred to arbitration. The reliefs are certainly not

35 [2017] 1 LNS 943.

> the same and the end results, of a successful civil dispute subject to arbitration and a winding-up petition, if granted, could not be more different and are miles apart.
>
> …
>
> [49] As such, a winding-up petition is not a "proceeding" that is susceptible to a stay pending arbitration under Section 10 of the AA. Equally significantly, neither does the petition concern a "matter" that is subject to an arbitration agreement. …

[51] *NFC Labuan* referred to the Australian High Court case of *Community Development Pty Ltd v Engwirda Construction Co*[36] which ruled that winding-up proceedings did not fall within the scope of an arbitration agreement/clause.

[52] It is important to note that a winding-up petition is not part of a mode of enforcing a judgment or order under Order 45 r 1 of the ROC. It is not an execution proceeding and this was made clear by the Court of Appeal in *Maril-Rionebel*.[37]

[53] The application of the principles in the above cases would essentially mean arbitral proceedings can exist and proceed concurrently with winding-up proceedings and that neither an arbitration agreement nor arbitral proceedings prohibit the presentation of a winding-up petition.

The effect of an arbitration agreement on a *Fortuna* injunction application

[54] Given that the creditor is entitled to initiate winding-up proceedings despite an arbitration agreement or arbitral proceedings, how then would the arbitration agreement affect a *Fortuna* injunction application?

[55] The arbitration agreement affects a *Fortuna* injunction application in this way: the applicant can still show that the debt is *bona fide* disputed by establishing a "*prima facie* dispute that the debt fell within the arbitration agreement/clause". This is known as "the lower threshold *prima facie* test" in *PRPC Utilities and Facilities Sdn Bhd v PBJV Group Sdn Bhd & Anor* ("*PRPC Utilities*").[38]

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36 (1966) 120 CLR 455.
37 *Maril-Rionebel*, supra n 11.
38 [2022] 2 CLJ 276.

[56] *PRPC Utilities* was referred to and applied in *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd*[39] and later in *Setia Fontaines Sdn Bhd v Pro Tech Enterprise Sdn Bhd*[40] (Anand J) and *Setia Fontaines Sdn Bhd v Pro Tech Enterprise Sdn Bhd*[41] (Quay J).

[57] The test stated in *PRPC Utilities* is based on *BDG v BDH* and *Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd* ("*Awangsa*")[42] which in turn is premised upon the decision of the English Court of Appeal case of *Salford Estates (No. 2) Ltd v Altomart* ("*Salford Estates (No. 2)*")[43] where it was held as follows:

> [40] … *It would be anomalous, in the circumstances, for the companies' court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration*. Exercise of the discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement – as a standard tactic – to by-pass the arbitration agreement and the 1996 Act by presenting a winding up petition. *The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition, of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds. That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act*.
>
> [41] *There is no doubt that the debt mentioned in the Petition falls within the very wide terms of the arbitration clause in the Lease*. The debt is not admitted. … For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion under IA 1986 s 122(1)(f), it was right for the court either to dismiss or to stay the Petition *so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds*.
>
> (Emphasis added)

39 [2022] 10 CLJ 313.
40 [2023] 5 CLJ 814.
41 [2023] 1 LNS 559.
42 [2019] 1 LNS 590.
43 [2014] EWCA Civ 1575.

[58] *Salford Estates (No. 2)*, similar to *NFC Labuan*, is a case involving a stay of a winding-up petition. A stay was granted by the English High Court and the decision was upheld on appeal to the Court of Appeal. In applying the decisions of *Salford Estates (No. 2)*, *BDG v BDH* and the Hong Kong Court of First Instance case of *Lasmos Ltd v Southwest Pacific Bauxite (HK) Limited*,[44] the High Court in *Awangsa* dismissed the winding-up petition and concluded as follows:

> [28] However, applying the lower threshold of merely showing a *prima facie* dispute, since the debt here is the subject matter of an arbitration clause, I am of the view that the Respondent has discharged the burden of showing a prima facie dispute, bearing in mind that a denial of the indebtedness constitutes a dispute. *The merits or otherwise of the dispute are matters to be decided by the arbitrator and not by this Court and the Respondent had given notice of arbitration to the Petitioner*. Accordingly, I would not stay the winding up petition pending arbitration under section 10 of the Arbitration Act 2005 but, in the exercise of my discretion under section 465 of the Companies Act 2016, I would dismiss the winding up petition on the ground that the Respondent has shown the existence of a *prima facie* dispute which ought to be referred to arbitration.
>
> (Emphasis added)

[59] As such, an applicant applying for a *Fortuna* injunction can still obtain the injunction based on an arbitration agreement if the applicant can establish a *prima facie* case that the dispute on the debt falls within the arbitration agreement. The merits of the dispute itself would be the subject-matter of the arbitration process.

[60] The rationale behind the "lower threshold *prima facie* test" is that parties to an arbitration agreement must honour the agreement and it would be unconscionable for the creditor to renege on the said agreement. Thus, a court determining whether to grant a *Fortuna* injunction only needs to be satisfied that the dispute is *prima facie* within the arbitration agreement. If this is proven, then the proper forum for the dispute to be determined is by way of arbitration.

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44 [2018] HKCFI 426.

Irreparable damage

[61] Generally, the presentation of a winding-up petition would cause irreparable damage to a company in terms of its business as well as reputation.[45] The following are some irreparable damage a company could face if a winding-up petition is presented:

(i) the freezing of its accounts by the banks or financial institutions;

(ii) the suspension of its financing facilities;

(iii) the suspension or termination of projects or contracts as in some cases the presentation of a winding-up petition could constitute an event of default under the contract; and

(iv) the reputation and credit rating of the company could fall drastically.

[62] It is thus not difficult to satisfy this branch of the principle governing a *Fortuna* injunction. However, this principle is dependent on the first principle being satisfied in that if the applicant cannot show that he has a *bona fide* disputed debt on substantial grounds, whether or not the presentation of the winding-up petition would cause the applicant harm would not apply.[46]

[63] In connection to this, in *Bakti Dinamik Sdn Bhd v Bauer (Malaysia) Sdn Bhd*,[47] the High Court observed:

> [59] … It was further held by the High Court that the injunction was also allowed to prevent irreparable damage to the plaintiff in that case. However, as referred to earlier in this judgment, in *Pacific & Orient Insurance*, the Court of Appeal was clear in stating that the question of whether there was irreparable damage was wholly irrelevant when there is a judgment debt, as a petition would thus be bound to fail. Any fears of damage should be avoided by settling the judgment debt (see the Court of Appeal decision in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380).
>
> …

45 *Fortuna Holdings*, supra n 1; *Mobikom*, supra n 5; *Sime Engineering*, supra n 4.
46 *Pacific & Orient Insurance*, supra n 6.
47 [2016] 10 CLJ 247.

[64] The applicant can prevent the presentation of the winding-up petition by paying or securing or compounding the sum claimed under the statutory notice based on section 466(1)(a) of the CA 2016. This is an option available to the applicant.[48]

[65] Therefore, the issue of irreparable damage would probably be more relevant in situations where there is a cross-claim against the debt owed by the applicant as discussed earlier.

Solvency of the applicant

[66] In *Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd*[49] which was approved in *Tan Kok Tong*, the High Court held that "Illustration of a *prima facie* case may be provided by necessary evidence that there is a *bona fide* dispute by the plaintiff in relation to the statutory demand or that the plaintiff is solvent."

[67] The solvency of the applicant becomes a consideration because of section 465(1)(e) of the CA 2016 read together with section 466(2) of the CA 2016, which deal with the definition of the applicant-company's "inability to pay debts."

[68] It was held in *Triterra Metropolis*[50] that while the solvency of the applicant/plaintiff is a relevant consideration in an application for a *Fortuna* injunction, however, there is a difference between the "inability" to pay and the "refusal" to pay. The applicant/plaintiff may be in a position to pay the sum demanded in the statutory demand but refuses to do so. If the applicant is unable to prove that he has a *bona fide* disputed debt then the applicant may still be wound up and it would not make a difference that the applicant is solvent. This was made clear in *Pacific & Orient Insurance* where the Court of Appeal held as follows:

> [38] When the debt is clearly established it follows that the court would not in general at any rate, interfere even though the company would appear to be solvent. …

48 *Triterra Metropolis Sdn Bhd v Qingjian Holding Group (Malaysia) Sdn Bhd* [2022] 1 LNS 966; [2022] MLJU 947 ("*Triterra Metropolis*").

49 [2003] 6 MLJ 311.

50 *Triterra Metropolis*, supra n 48.

[69] In *Klass Corp*, the High Court dealt with the meaning of commercial solvency and held as follows:

> [69] But as I have discussed, *the excuse of the solvency of a judgment debtor cannot be accepted as of right to be a basis justifying the grant of an injunction preventing a judgment creditor from exercising its statutory right to present a winding-up petition* against the judgment debtor for the debtor's failure to pay on the winding-up notice. I would think it correct in principle that as a general rule, a debtor *cannot legitimately hide behind the shield of solvency* to stave off threat of winding-up but at the same time conveniently and unfairly refuse settlement of an undisputed debt.
>
> [70] It is, in any event, now settled law that the issue on the inability to pay debt is to be considered in commercial context, which is *the neglect to pay current demands regardless of whether the debtor is in possession of assets which, if realised would permit it to discharge its liabilities*. The test of commercial insolvency simply means that the respondent company is not able to meet current debts when they fall due (see *System Communication Engineering Sdn Bhd v. Zabidin Sdn Bhd* [1999] 1 LNS 79; [1999] 1 AMR 1187).
>
> (Emphasis added)

[70] Hence, even if the applicant is solvent it would not have much of an impact on the applicant's application for a *Fortuna* injunction if it cannot satisfy the burden of proving that the debt is *bona fide* disputed on substantial grounds.

Reliefs associated with a *Fortuna* injunction – To prevent abuse of process

[71] The primary relief of a *Fortuna* injunction is to restrain the creditor from presenting a winding-up petition. However, the courts have wide powers to grant other reliefs with the view of preventing an abuse of process.

[72] On the issue of the powers of the court to grant reliefs associated with a *Fortuna* injunction, the Australian Supreme Court of Victoria in *Fortuna Holdings* held as follows:

> When a court restrains the presentation of a winding up petition to that court it exercises part of its inherent jurisdiction to prevent

> abuse of its process. *Mann v. Goldstein*, [1968] 1 W.L.R. 1091, at pp. 1093-4; [1968] 2 All E.R. 769. Usually a court acts against abuse of its process after proceedings have been commenced. Thus, existing proceedings may be stayed or dismissed, or documents delivered as a step in the proceedings may be struck out. …

[73] Further, in *Mobikom* the Court of Appeal held as follows:

> [11] For the reasons given, the first ground of objection is without merit. In my judgment, this court has ample power, upon reversing orders of the judge, to *restore the status quo ante that prevailed immediately prior to the presentation of the petition*. However, Mr Rasa-Ratnam took an extremely reasonable position in that he did not press for the discontinuance of the petition. He however asked for the relief in the second prayer of his summons, namely that the *further prosecution of the petition and the interim orders thus far obtained on it be stayed*.
>
> (Emphasis added)

[74] The usual reliefs prayed for in a *Fortuna* injunction application are, *inter alia*, essentially as follows:

(i) A declaration that the statutory notice issued under section 466 of the CA 2016 is null and void or otherwise invalid.

(ii) An injunction to restrain the presentation of a winding-up petition based on the said statutory notice and debt for which the notice is issued.

(iii) In the alternative, if the winding-up petition has been presented, an injunction to restrain the creditor from advertising the said petition and to stay the petition from proceeding.

[75] The reliefs sought by the applicant may vary depending on the circumstances. The reliefs sought, though they may not appear to be problematic at first glance, are not without their complications.

[76] Even the primary relief of restraining the winding-up petition itself can be problematic. The applicant must be able to plead its reliefs clearly and concisely. For example, there are often times where the applicant prays for an *open-ended Fortuna* injunction in that:

(i) The creditor is restrained from presenting *any* winding-up petition *regardless* of the debt (which may be different than that for which the statutory notice was issued).

(ii) The creditor is restrained from presenting a winding-up petition in *perpetuity* or the creditor is restrained from issuing *any* statutory notice in the future.

[77] There are several variations of the above problematic *Fortuna* injunction reliefs but the above are some of the main ones.

[78] Firstly, the *Fortuna* injunction cannot be in perpetuity.[51] It has to either be connected to the statutory notice issued or the debt for which that notice was issued. It cannot be for all debts or a different debt not related to the statutory notice that was issued. The *Fortuna* injunction must be conditional upon the dispute being determined by a suitable alternative procedure.[52] For example, by way of a civil suit or arbitration.

[79] Secondly, there have been arguments on whether the court can restrain the advertising of a winding-up petition which is specifically provided for and is mandatory under the CA 2016 and the rules made thereunder (the former Companies Act 1965 and the Companies (Winding Up) Rules 1972).

[80] The earlier cases such as the High Court case of *Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn Bhd*[53] which was referred to in the Court of Appeal case of *People Realty Sdn Bhd v Red Rock Construction Sdn Bhd*[54] appear to take the position that the court is precluded from granting an injunction against the advertising or gazetting of a winding-up petition. The same position was taken by the Supreme Court in *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* ("*Chip Yew Brick*").[55] However, all these cases were in the context of an application made to restrain the advertising of a winding-up petition *in* the winding-up proceedings themselves. These cases do not involve an application for a *Fortuna* injunction by way of a separate action.

51 *Triterra Metropolis*, supra n 48 above.
52 *Pacific & Orient Insurance*, supra n 6.
53 [2002] 4 MLJ 390.
54 [2008] 1 MLJ 453.
55 [1997] 2 MLJ 447.

[81] On the other hand, the later cases of *Mobikom*, *ASM Development*[56] and *Volkswagen Group Malaysia Sdn Bhd v Loo Chay Meng*[57] which specifically involved *Fortuna* injunction applications have decided that the courts have the power to restrain the advertising of a winding-up petition.

[82] The Court of Appeal in *Mobikom* distinguished *Chip Yew Brick* as it was a case which no *quia timet* injunctive relief was sought to restrain the presentation of a winding-up petition.

[83] In this regard, the *Fortuna Holdings* case itself has also held that the courts have the power to grant such injunctive reliefs where the presentation of the winding-up petition would amount to an abuse of process:

> The decisions of the courts have established the principle that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of the process of the court. The courts apply this principle similarly to restrain the advertisement of a petition already presented. The principle enables companies to be protected from threatened or apprehended oppression and damage from abuse of court process.

[84] Thirdly, there is the issue of whether the courts can stay the winding-up proceedings. The High Court case of *Permata Trans Offshore Sdn Bhd v New Wing Energy Sdn Bhd* ("*Permata Trans Offshore*")[58] seems to suggest that the courts have the power to stay winding-up proceedings in a *Fortuna* injunction application. The High Court in *Permata Trans Offshore* relied on the Court of Appeal case of *International Construction & Civil Engineering Sdn Bhd v Jittra Sdn Bhd & 2 Ors*[59] and held as follows:

> [31] Further, in *International Construction & Civil Engineering Sdn Bhd v. Jittra Sdn Bhd & 2 Ors* [2018] MYCA 290 ([2028] 1 LNS 1252), the Court of Appeal recognised the existence of the winding up court's inherent jurisdiction to stay the proceedings before it if there is an abuse of process. The Court of Appeal however cautioned that "the court will not exercise its inherent jurisdiction to stay a proceeding unless there are extremely compelling reasons to do so."

56 *ASM Development*, supra n 33.
57 [2016] 9 MLJ 191.
58 [2019] MLJU 922.
59 [2018] MYCA 290; [2018] 1 LNS 1252.

[85] Whilst the above cases such as *Mobikom* and *Permata Trans Offshore* support the contention that the courts can restrain the advertising of a winding-up petition or to even stay the petition itself, as a matter of practicality, perhaps it is more appropriate for the applicant to just oppose the winding-up petition if it has already been presented. This is because the main purpose for which the *Fortuna* injunction was sought would have, to a certain extent, become academic or redundant.

[86] In addition, there will be multiplicity of proceedings where two courts are tasked to hear the same dispute though different considerations may apply.

[87] It may also be somewhat unusual for a court of concurrent jurisdiction to stay the proceedings of another court even though it may have the power to do so.

Conclusion

[88] A *Fortuna* injunction is essentially sought because it is alleged that the creditor is attempting to assert a disputed claim by way of a procedure which is likely to cause irreparable damage to the applicant-company rather than by a suitable alternative procedure.

[89] Due to the severe or harsh effects the presentation of a winding-up petition would have on the applicant-company, a creditor may find this to be the most effective way to extract payment from the applicant.

[90] If the debt is a judgment debt, as discussed above, the winding-up process intended to be initiated by the creditor may be justified depending on the facts of the case. This is because the creditor is said to have already proven his debt via a suitable procedure. He is therefore entitled to now resort to the winding-up process.

[91] However, if the debt is a non-judgment debt, the creditor will have to prove that his debt is undisputed by way of affidavit evidence and this may be more difficult as compared to proving a debt based on a judgment.

[92] Therefore, a creditor must carefully evaluate the suitability of asserting his claim by way of a winding-up petition. It is sometimes curious as to why a creditor would resort to initiating winding-up proceedings to extract payment from the applicant when there are other methods available. If the creditor is successful in winding up

the applicant, unless he is a secured creditor, his debt or claim ranks *pari passu* with the other unsecured creditors. In such circumstance, the creditor does not have any priority over the assets of the applicant.

[93] Whatever the motives of the creditor, if he has an undisputed debt which remains unpaid, he is entitled to present a winding-up petition against the applicant.[60]

60 *Pacific & Orient Insurance*, supra n 6.

Is There Any Property in a Witness: Can the Truth Be Owned By Any Party?

by

*Justice Su Tiang Joo**

Introduction

[1] When a witness takes the witness stand, he is administered an oath.[1] In taking this oath, the witness affirms that he will tell the truth, the whole truth and nothing but the truth. The oath in this format is affirmed by the witness (including an expert whose primary duty is to the court) irrespective of whichever party calls him.

[2] This article addresses the issue of whether there is any property in a witness, in particular, whether a party can call the opposing party as a witness and if so, what are the consequences.

Need for witnesses and how to test their veracity

[3] Unless one falls within the exceptions set out in section 118 of the Evidence Act 1950 ("EA 1950"), all persons shall be competent to testify in court.[2] On a *prima facie* basis, a mentally-disordered person does not render him incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.[3] The ability of a person to comprehend questions asked and provide rational answers forms the foundation of

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* Judicial Commissioner High Court in Malaya, Barrister Gray's Inn. The author gratefully acknowledges the assistance rendered by Samantha Su Xiu Ming, Esther Teh and Thomas Cowie in putting up this article but any errors or omissions are solely that of the author. Highly recommended reading: Hodge M Malek KC (gen ed), *Phipson on Evidence*, 20th edn, Ch 45 on "Fact Finding And The Assessment Of Evidence".

1 Oaths and Affirmations Act 1949, s 6(1): all persons who may be lawfully examined, or give or be required to give evidence, by or before any court.

2 The exceptions to the general rule of s 118 of the EA 1950: where the court considers one to be prevented from understanding the questions put to them or prevented from providing rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other case of the same kind.

3 Explanation to s 118 of the EA 1950.

competency. One who is competent in the eyes of the law is therefore compellable to furnish evidence in court.[4]

[4] Witnesses play a crucial role in the pursuit of unveiling the truth. They will be subject to examination-in-chief, cross-examination and re-examination.[5] Cross-examination is an avenue accorded to the opposing counsel to weaken and destroy the party's case. Since time immemorial, cross-examination is known as "the greatest legal engine ever invented for the discovery of the truth".[6] It is premised on the idea that "face-to-face confrontation in open court[7] between these witnesses and the [parties] provides the strongest assurance of accurate testimony."[8] Evidence elicited in this context is said to be the most organic evidence[9] and serves as the most effectual way to test the veracity of witnesses because the trial judge has the opportunity to observe the witnesses' demeanour.

[5] The right to cross-examination is an entitlement, and Abdoolcader FJ said it is "clearly wrong" to deny a counsel the right to cross-examine a particular witness.[10] The fruits of the cross-examination "can never be a matter for speculation" and or that it is "a waste of time".[11] It is unpredictable as to what cross-examination would elicit or what different light could have been thrown on the situation and therefore, it is pertinent to allow for cross-examination to go on.[12]

Calling upon an opposing party as a witness and its consequences

[6] The proposition that parties to a civil suit are competent witnesses is codified in section 120 of the EA 1950. It is trite that litigants enjoy

4 EA 1950, s 132: Witness not excused from answering on ground that answer will criminate.
5 Ibid, ss 137 and 138.
6 John Henry Wigmore, *Evidence in Trials at Common Law* (Little, Brown: 1974), p 1367.
7 Courts of Judicature Act 1964, s 15A(2): open court would include cyberspace, virtual place or virtual space in which the High Court is held to conduct the proceedings of any cause of matter, civil or criminal conducted through remote communication technology.
8 Jonathan Clow, "Throwing a Toy Wrench in the Greatest Legal Engine: Child Witnesses and the Confrontation Clause" (2014–2015) 92 Wash U L Rev 793 at 793.
9 *Aiyar & Aiyar's The Principles and Precedents of the Art of Cross-Examination*, 10th edn (2004), p 19.
10 *Dato' Mokhtar Hashim & Anor v PP* [1983] CLJ (Rep) 101.
11 Ibid.
12 Ibid.

wide flexibility in determining who to call to establish their case; and no particular number of witnesses shall in any case be required for the proof of any fact.[13] No one party is precluded from calling their opposing party as his witness, be he a plaintiff or a defendant.[14]

[7] The Court of Appeal in *Tokio Marine Insurance (M) Sdn Bhd v Rathakrisnan a/l Ramatasu & Anor (and Another Appeal)*[15] held that there is nothing under the law that forbids a plaintiff from calling a defendant as a witness although he runs the risk of the defendant turning out to be a hostile witness. The Court of Appeal in deciding so, placed reliance upon section 120 of the EA 1950 which clearly provides that parties in civil proceedings are competent witnesses.

[8] The opposing party can be compelled to testify by way of the service of a subpoena.[16] It is also a settled principle that a party is entitled to use his opposing party's evidence whether to support or to state his case or defence.[17]

[9] The crux of section 120 of the EA 1950 was similarly illustrated in the landmark case of *Harmony Shipping Co SA v Davis & Ors* where the following passage from Lord Denning's judgment has been cited in numerous cases:

> So far as witnesses of fact are concerned, the law is as plain as can be. There is no property in a witness. The reason is because the court has a right to every man's evidence. Its primary duty is to ascertain the truth. Neither one side nor the other can debar the court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him. In no way can one side prohibit the other side from seeing a witness of fact, from getting the facts from him and from calling him to give evidence or from issuing him with a subpoena.[18]

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13 EA 1950, s 134.

14 *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 at 379–380; *Tokio Marine Insurance (M) Sdn Bhd v Rathakrisnan a/l Ramatasu & Anor (and Another Appeal)* [2017] 1 MLJ 779; *Cheng Siak Hor t/a United Penang Trading & Transport Agency & Anor v Rozali bin Ahmad* [2002] 7 MLJ 275 at 281.

15 [2017] 1 MLJ 779 at [21].

16 *Tan Kah Khiam v Liew Chin Chuan & Anor* [2007] 2 MLJ 445; *U-Re Auto Sdn Bhd v York Pacific Holdings Ltd* [2004] 3 CLJ 172.

17 *Tan Kim Ho & Anor v PP* [2009] 3 MLJ 151, FC.

18 *Harmony Shipping Co SA v Davis & Ors* [1979] 3 All ER 177 at 180.

[10] The underlying objective of this principle is that the primary duty of the court in any trial is to ascertain the truth and the court is entitled to the best evidence available.[19] Candour is crucial and whether a piece of evidence advances the case or not is a matter which can only be judged by testing all evidence in the case.[20] It is only through this that the judge is best able to assess the quality of the evidence by any particular witness to ascribe to it the appropriate weight.[21]

[11] Tactically, a plaintiff who seeks to call the defendant as his witness has the advantage of putting the defendant on the stand first so as to lead a much more cautious and honest testimony, rather than attempting to harmonise potential conflicting testimonies of other witnesses.[22] On the other hand, the plaintiff opens himself up to the potential risks of being bound by an unfavourable testimony from the defendant himself,[23] resulting in him having to seek to have the witness declared as hostile or even impeached.[24]

[12] The principle behind the provision in the EA 1950[25] allowing the court a wide and unfettered discretion to permit the person who calls a witness to put any question to him which might be put in cross-examination is premised upon the assumption that a witness must be taken to have a bias in favour of the party by whom he is called.[26] Permission will be granted whenever circumstances show there is a surprise, the witness unexpectedly turning hostile to the party calling him or he is unwilling to give evidence. Although the court has an unfettered discretion to allow a witness to be treated as hostile, sufficient reason ought to be given for exercising the discretion and the reason should be recorded.[27]

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19 *Dea Ai Eng v Dr Wong Seak Shoon & Anor* [2007] 2 MLJ 357 at 365.

20 *Clough v Tameside and Glossop Health Authority* [1998] 2 All ER 971 at 977.

21 *Wyman & Ors (on behalf of the Bidjara People) v Queensland (Qud 857 of 2013)* (2015) 324 ALR 454 at 489.

22 Gregory Forman, "Making the Defendant Testify in the Plaintiff's Case-in-Chief", available at https://www.gregoryforman.com/blog/2011/02/making-the-defendant-testify-in-the-plaintiff%E2%80%99s-case-in-chief/ (accessed January 22, 2018).

23 *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371, SC at 379–380.

24 *Lim Teng Leng @ Mohd iskandar Abdullah v PP* [1998] MLJU 152, HC; *Sarkar on Evidence*, 14th edn, Vol 2, p 2082.

25 EA 1950, s 154.

26 *Sir John Woodroffe & Syed Amir Ali's Law of Evidence*, 15th edn, p 812.

27 Ibid, at p 824.

Issuance of a subpoena

[13] A subpoena can be issued to compel the production of any person and documents before the judge, and can be issued against anybody, "be he a Minister of the Government or a nonentity".[28] There are three types of subpoenas which may be issued against witnesses, one of it being a subpoena to testify,[29] which seeks to compel the attendance of a witness in court to testify. The second type is a subpoena to produce documents,[30] which summons a particular witness to produce documents in court. The third type is a combination of both which is called a subpoena to testify and produce documents.[31]

[14] A party, who is of the view that any testimony extracted from an opposing party's witness will be advantageous to his case, is at liberty to apply for the issuance of a subpoena by the court to compel the attendance of the witness.[32] And if the party does not avail himself of the right to issue a subpoena, when the burden of proof is upon him, he cannot then turn around to invoke the presumption of adverse inference under section 114(g) of the EA 1950 against the other party.[33]

A party should not prevent any witness from testifying because to do so may amount to tampering or subverting the due administration of justice

[15] A witness who is well aware of the facts of a case is liable to be subpoenaed. Once a subpoena is issued against a particular individual, he is to abide by it.[34] This is premised on the basis that witnesses have

28 *Ismail v Hasnul; Ghafar v Hasnul* [1968] 1 MLJ 108, FC at 110–111, *per* Raja Azlan Shah J (as he then was).
29 Rules of Court 2012, O 38 r 14, and Form 63.
30 Ibid, O 38 r 14, and Form 64.
31 Ibid, O 38 r 14, and Form 65.
32 *Krishnan Nambiar s/o Perabakaran & Ors v Dr P Mahendran & Anor* [2009] 4 MLJ 267 at 274; *Ho Hup Construction Co Bhd v Woo Thin Choy* [2015] 9 CLJ 706; *Zulhasnimar binti Hassan Basri & Anor v Dr Kuppu Velumani P & Ors* [2014] 7 MLJ 899; *Guinness Anchor Bhd/Guinness Anchor Marketing Sdn Bhd v Chin Kiat Fah* [2005] 1 MELR 835, IC.
33 *Joint Management Body of Gurney Park Condominium v Majlis Perbandaran Pulau Pinang* [2013] 10 MLJ 600; *Ho Hup Construction Co Bhd v Woo Thin Choy* [2015] 9 CLJ 706; *Ng See Hem v Lim Ah Hooi* [1950] 1 MLJ 280.
34 *Ong Jane Rebecca v Lim Lie Hoa & Ors (Lim Lie Hoa, third party)* [2003] 1 SLR 457; *Harmony Shipping Co SA v Davis & Ors* [1979] 3 All ER 177.

a sacred duty to be present in court and must be prepared to furnish evidence, as and when he is required to. Witnesses are obliged pursuant to law to assist trial judges to comprehend better the facts of a case.[35] Any positive act to restrain a witness from testifying in court gives rise to an act of contempt of court. Similarly, any wilful attempt to prohibit the opposing party from having full and unimpeded access to a prospective witness is regarded as improper conduct.[36] If the action is inherently likely to interfere with the administration of justice, it is justice that is flouted by contempt of court.[37]

When a party calls a witness, is the witness deemed to be that of the party calling him and any testimony adverse to this party will be deemed to be an admission as against the party calling him?

[16] It has been held that a party can compel the attendance of any witnesses (including the opposing party) to testify in court, but this party bears the risk every time the evidence given by the witness called by him is adverse to him as it is to be treated as that of his own.[38] This includes evidence elicited during cross-examination.[39]

[17] Seeing that one party's evidence is that of another,[40] it has also been held that when a litigant agrees to call upon a witness to testify in court to establish his case, he is deemed to have agreed to be bound by the evidence of the witness, whether or not the evidence is or is not in his favour. There is a string of local authorities that hold that

35 *Versloot Dredging BV v HDI Gerling Industrie Verischerung AG & Ors* [2013] EWHC 581; *Cheah Cheng Hoc v PP* [1986] 1 MLJ 299; *R v Daye* [1908] 2 KB 333.

36 *Connolly v Dale* [1996] QB 120; *Crane World Asia Pte Ltd v Hontrade Engineering Ltd* [2016] 5 HKC 573; *Attorney General v Leveller Magazine Ltd & Ors* [1979] 1 All ER 745 at 947, *per* Lord Diplock.

37 *Lokman Noor Adam v PP (and Another Appeal)* [2022] 10 CLJ 850, CA at [36]; *Attorney General v Leveller Magazine Ltd & Ors*, ibid.

38 *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 at 379–380.

39 *Lim Guan Eng v PP* [1998] 3 MLJ 14 at 46–47; *Kheam Huat Holdings Sdn Bhd v The Indian Association, Penang* [2000] 7 MLJ 74 at 93.

40 *GS Gill Sdn Bhd v Descente Ltd (and Another Appeal)* [2008] 6 MLJ 181; *CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd* [2006] 3 MLJ 1 at 28; *Tan Kah Khiam v Liew Chin Chuan & Anor* [2007] 2 MLJ 445; *U-Re Auto Sdn Bhd v York Pacific Holdings Ltd* [2004] 3 CLJ 172; *Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd* [2017] MLJU 782; *Sethuratnam v Venkathchella* AIR 1920 PC 67; *Robins v National Trust Co* [1927] AC 515; *Sharikat Lee Heng Sdn Bhd v Port Swettenham Authority* [1971] 2 MLJ 27.

a party who calls the opposing party as his witness bears the risk of being bound by his evidence.[41]

[18] However, there is also the principle that there is no rule of law saying that a party is precluded from saying that a witness produced by him is not speaking the truth upon some particular point unless he has been declared hostile[42] and that it is not right to proceed on the basis that whatever is stated by a witness which is not in favour of the party calling him should necessarily be believed as if it were an admission made and binding upon the party calling him.[43]

Principles that are at odds with each other

[19] The trial judge is thus confounded by the following principles which are seemingly at odds with one another, namely:

(i) in general, it is for a party to choose which witness he wishes to call and there is no property in a witness;[44]

(ii) the law allows a party to compel his opposing party, by subpoena, if necessary to testify on his behalf;[45]

(iii) if the opposing party were to testify adversely against the party calling him, the party calling him is bound by the evidence led;[46]

(iv) the party calling the witness is not at liberty to put leading questions to the witness called by him;[47]

(v) the party calling the witness may, however, treat the opposing party as a hostile witness and apply to the court for leave to

41 *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 at 379–380; *Lim Guan Eng v PP* [1998] 3 MLJ 14 at 46–47; *Kheam Huat Holdings Sdn Bhd v The Indian Association, Penang* [2000] 7 MLJ 74 at 93.

42 *PP v Ramli bin Shafie* [2002] 6 MLJ 153, HC at 164F and G, citing *Baburan v Emperor* AIR 1939 All 754.

43 *PP v Ramli bin Shafie*, ibid at 164G–H, citing *State of Mysore v Raju Shetty & Ors* AIR 1961 Mys 74.

44 *Phipson on Evidence*, 20th edn, paras 45–35.

45 EA 1950, s 120.

46 *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 at 379–380; *Lim Guan Eng v PP* [1998] 3 MLJ 14 at 46–47; *Kheam Huat Holdings Sdn Bhd v The Indian Association, Penang* [2000] 7 MLJ 74 at 93.

47 EA 1950, s 142.

permit him to put any questions to the hostile witness which might be put in cross-examination;[48] and

(vi) if the burden of proof is upon the party who does not avail himself of the right to issue a subpoena, he is not permitted to invoke the presumption of adverse inference under section 114(g) of the EA 1950 against the other party,[49] and in fact, it should be the reverse.[50]

[20] In practice, the trial advocate for the litigant wishing to call an opposing party as his witness, therefore, has to wrestle very hard to see whether it is worth calling a potentially hostile witness to support his case. On the one hand, it may be that only the opposing party can provide the link to make out his case while on the other hand, there is the very real risk of the opposing party giving adverse testimony which would be treated as admissions against him.

[21] The author is of the respectful view that as all parties have the duty to place all available evidence before the court for the best assessment of the case, it is illogical that a party must be taken to have agreed to be bound by the evidence of his opposing party just because he elects to call him as a witness.

[22] In this regard, it is crucial to highlight that the duty of a witness is owed not only to the court but to the society as a whole.[51] "Whether called by the prosecution/Plaintiff or the Defence, the principal duty of a witness is to the court, and this overrides any duty he owes to the party who called him."[52] The provision of section 120 of the EA 1950 is clear in that all parties to the suit are competent witnesses. Therefore, it is my respectful opinion that the practice of labelling witnesses based on the party calling them should not be followed. Instead, it should be left to the trial judge to determine the credibility and weight of the evidence adduced.

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48 Ibid, s 154; *BN Choe v Sami Ahmad* (1969) 1 Andh LT 32.

49 *Joint Management Body of Gurney Park Condominium v Majlis Perbandaran Pulau Pinang* [2013] 10 MLJ 600; *Ho Hup Construction Co Bhd v Woo Thin Choy* [2015] 9 CLJ 706; *Ng See Hem v Lim Ah Hooi* [1950] 1 MLJ 280.

50 *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1, CA; *Munusamy Vengadasalam v PP* [1987] CLJ (Rep) 221, FC; *Ramuthi a/l Subramaniam v PP* [1994] 4 CLJ 1060, HC.

51 *R v Abdullah* [2010] MJ No 270, CA at [34]; *R v BT* [2013] NSJ No 6.

52 *Wilson v HM Advocate* [2009] HCJAC 58 at [61].

[23] Put it another way, when a witness is called to take the oath, he does not swear that he will tell the truth, the whole truth and nothing but the truth for the prosecution/plaintiff or defendant, as the case may be.

[24] Siti Norma Yaakob J (who retired as the Chief Judge of the High Court in Malaya) had occasion to hold that "the purpose of a trial is not only to get down to the bottom of the dispute, but also to find out if the witness desires to tell the truth."[53] Thus, surely a decision to call the opposing party with the view to cross-examining him in order to destroy the opposing party's case would be highly relevant.[54]

Striking out a subpoena

[25] Whilst the right of a party to the attendance of witnesses is a crucial part of the administration of justice, the court will exercise control over the privilege to prevent it being oppressively used, and where no useful result would be obtained by the attendance of a witness, the subpoena should be refused and struck out, if issued.[55] The party who has obtained the subpoena has the onus to prove that the subpoena is not frivolous, is not vexatious, and does not constitute an abuse of process of court by showing that the subpoenaed witness is able to give some evidence of any fact in issue or any fact declared by the EA 1950 as relevant.[56] If a subpoena is too wide and unlimited in its scope, it would be considered as amounting to a fishing expedition and liable to be struck out.[57]

53 *S Lourdenadin v M Ratnavale Nee Annalakshmi Vattivelu & Anor* [1986] CLJ (Rep) 481; *Motordata Research Consortium Sdn Bhd v Ahmad Shahril bin Abdullah & Ors* [2017] MLJU 1187; *Ahmad Radzi Sharbaini v Hj Ahmat Mohaayen Hj Saad & Satu Lagi* [2014] 9 CLJ 625.

54 Darrell W Roberts, "The Opposite Party Rule: An Instrument of Justice or of Abuse?" (2005) 63(6) *The Advocate* 861 at 878.

55 *Wong Sing Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 697, SC.

56 *Ismail v Hasnul* [1968] 1 MLJ 108, FC; *Pit Stop Auto Accessories v Tan Kock Siang; The Minister of Communications (applicant)* [1974] 2 MLJ 79, CA; *Celcom (M) Bhd & Anor v Tan Sri Dato' Tajudin bin Ramli & Ors (and Another Case)* [2018] 10 MLJ 397.

57 *Maju Holdings Sdn Bhd v Kamala Devi a/p Ramadass & Anor (and Another Appeal)* [2003] 2 MLJ 36, CA.

Conclusion

[26] The author ends by proposing amendments to the forms for the issuance of a subpoena. The wordings "to give evidence on behalf of the Plaintiff or the Defendant in the said proceedings" stated in Form 63, Form 64 and Form 65 provided for in the Rules of Court 2012 should be replaced with "to give evidence to the Court."

[27] The author is of the view that the proposed amendments seek to re-establish the sacred duty of a witness is to the court and not specifically to any party in a proceeding. The phrase "on behalf of the Plaintiff or the Defendant" creates a misconception and implies to the subpoenaed witnesses that their duty of testifying is for the party who subpoenaed them. Therefore, the proposed amendments are necessary to enhance the due administration of justice. These amendments break down the concept of "owning a witness" or "categorising a particular witness."

[28] It may be timely to do away with the assumption that a witness must be taken to have a bias in favour of the party by whom he is called. After all, the witness's duty to the court is to speak the truth, the whole truth and nothing but the truth and the truth cannot be held to belong to whoever is calling him or her.

Climate Justice in the Philippines: Proposed Judicial Reforms and Learnings

by

*Justice Teresita Asuncion M Lacandula-Rodriguez**

Introduction

[1] There have been many warnings about the existential threat posed by climate change and for the last 30 years, efforts have been made to tackle the climate crisis. Presently many Filipinos feel that it is no longer a threat after suffering back-to-back typhoons which have been related to human-caused climate change. Victims are looking for remedies to make those responsible for climate change compensate them for harms experienced, such as deaths, injuries and property damage.

[2] It is in this context that this article will discuss climate justice, climate litigation and some of the judicial reforms which may be useful in order to give relief to those suffering the negative impacts of climate change. For this purpose, the article will first briefly look at the phenomenon of climate change and how humanity's reliance on fossil fuels has contributed to the climate crisis. Thereafter, it will examine climate justice as a goal of climate litigation and focus on two available remedies that can be used by victims of extreme weather events against fossil fuel companies when seeking damages in Philippine courts. Finally, some recommendations will be proposed on possible judicial tools which the Judiciary can create and implement on the subject of climate damages with the objective of balancing the rights of both parties and the directives of climate justice.

The climate situation and international action

[3] In the United Nations Framework Convention on Climate Change ("UNFCCC"), climate change is defined as "a change of

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climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."[1] Scientists, like those of the Intergovernmental Panel on Climate Change ("IPCC"), the leading global authority on climate change science, have shown that the temperature of the atmosphere is continuously increasing. This is the greenhouse effect which is a natural phenomenon wherein certain gases in the Earth's atmosphere block the heat from the sun and impedes its flow out of the planet. These gases are referred to as greenhouse gases ("GHGs"), the most famous of which is carbon. The IPCC has categorically concluded that humans are unequivocally the reason for the increasing GHG emissions in the atmosphere leading to the climate crisis.[2] Negative effects of climate change include the depletion of fish populations due to warmer and more acidic oceans, melting of polar ice affecting ocean currents, loss of biodiversity, droughts and changing weather patterns leading to food insecurity, water supply disruption, diseases, sea water level rise and the corresponding sinking of coastal areas, coral bleaching, wildfires, extreme weather events, as well as stronger typhoons and flooding, among others.

[4] To address the crisis, states, though international agreements, have agreed to a global cooperation in mitigating GHG emissions and adapting to the impacts of climate change. In the Paris Agreement, the goal of states is to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels".[3]

Philippine extreme weather

[5] In this era of changing climate, the Philippines is always in the list of countries most affected by its negative impacts. Even just

1 United Nations Framework Convention on Climate Change, Art 1(2), opened for signature on June 20, 1992, 1771 UNTS 107 (entered into force on March 21, 1994).

2 Intergovernmental Panel on Climate Change, 2021 Summary for Policymakers in Climate Change 2021: The Physical Science Basis (Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change), at 4, available at https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf (last accessed February 3, 2023) (https://perma.cc/NB56-UZ4V).

3 Paris Agreement, article 2(1)(a), opened for signature on April 22, 2016, 3156 UNTS 1 (hereinafter, "Paris Agreement").

from a single super typhoon such as Yolanda, internationally known as Haiyan, the country experienced tremendous losses as "[a] total of 6,245 individuals were reported dead, 28,626 injured, and 1,039 [missing]."[4] Millions of people became homeless with 550,000 houses damaged.[5] More recently in "the last quarter of [2020], it was assessed that about 305,000 houses were destroyed by typhoons Rolly and Ulysses."[6] There is an emerging climate science that seeks to prove that the increased frequency and severity of extreme weather events such as super typhoons are caused by climate change.

Climate change litigation

[6] Climate change is a ubiquitous problem that has to be tackled at all fronts. In any dispute, litigation should usually be considered as a last resort. This is especially true for climate-related problems where litigation should not be favoured. This is because climate change litigation is particularly filled with difficulties and challenges in view of its scope, complexities and reliance on science which is still in its nascent stage and continuously evolving. However, despite the burdensome nature of litigation, it is still viewed as another avenue for climate action considering the slow pace of international negotiations, wherein even what are perceived as weak targets are not being met.

[7] Because climate change litigation is a fast-developing field where there has been an increasing number of cases brought to court in the past 20 years, it is worth studying the topic despite the many practical difficulties of bringing a case forward in a country like the Philippines where the courts are burdened in many ways. Some of these systemic constraints include the time, costs, resources and legal services that are necessary in order to proceed with litigation. Proceeding with a case

4 Hiroshi Takagi and Miguel Esteban, "Statistics of Tropical Cyclone Landfalls in the Philippines: Unusual Characteristics of 2013 Typhoon Haiyan" (2016) 80 *Natural Hazards* 1 at 1, citing "National Disaster Risk Reduction and Management Council, Effects of Typhoon 'YOLANDA' (HAIYAN)", Situation Report No. 107, NDRRMC SitRep No. 107 (March 6, 2014).

5 Ivette Arroyo and Johnny Astrand, "Housing Recovery Outcomes After Typhoon Haiyan in the Philippines: a critical realist perspective" (2019) 18(2) *Journal of Critical Realism* 142.

6 Michael T Tiu, *The Climate Change and Human Rights Conundrum: Exploring Intersections, Tensions, and Strategies through the case of Vulnerable Filipinos in the Road Transportation Sector* (Quezon City Institute of Human Rights, U.P. Law Center, 2021), 139.

involves logistical difficulties of locating evidence and witnesses, as well as of enforcing the judgment after undergoing several layers of judicial hierarchy. The victims, who are already at a disadvantaged starting point of having been harmed, still have to endure protracted processes.

[8] Climate change litigation relates to legal cases brought to a tribunal which "directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts."[7] Possible climate change cases can include *mandamus* to compel the government to comply with obligations under domestic law and international agreements; cases arguing the government's duty to limit carbon emissions on various bases such as the constitutional right to a balanced and healthful ecology,[8] human rights (such as the right to life), and the country's commitment under the Paris Agreement[9] to stay the increase in global warming to 1.5° to 2°C above pre-industrial levels; cases linking a policy of the government, or project with the private sector to climate change impacts; cases for damages against private entities establishing that their emissions are the proximate cause of climate change impacts; cases against negligent government officials for typhoon-related deaths;[10] or a writ of *kalikasan* petition alleging massive environmental damage caused by climate change, to enumerate some.

[9] From these examples of possible climate change litigation, it can be seen that cases can be brought against the government and the public sector, as indeed worldwide, around 70% of cases are against national and sub-national governments.[11]

[10] For example, in the 2019 celebrated case of *Netherlands v Urgenda Foundation*,[12] the Dutch Supreme Court agreed with the lower courts and ruled that the Netherlands has an obligation under the European

7 Gregorio Rafael P Bueta, "The Heat is On: Prospects for Climate Change Litigation in the Philippines" (2018) 62 Ateneo LJ 760 at 772.

8 David Estrin, "Limiting Dangerous Climate Change: The Critical Role of Citizen Suits and Domestic Courts — Despite the Paris Agreement" (2017), at 11, available at https://www.jstor.org/stable/resrep15534.8 (last accessed May 26, 2020).

9 UN Doc FCCC/CP/2015/L.9/Rev/1 (December 12, 2015).

10 Gregorio Rafael P Bueta, supra n 7, at 791–792.

11 Joana Setzer and Catherine Higham, "Global Trends in Climate Change Litigation: 2022 Snapshot", available at https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf (last accessed May 25, 2023).

12 ECLI:NL:HR:2019:2007 (Sup Ct Neth, December 20, 2019) (Netherlands).

Convention on Human Rights ("ECHR") to protect the human rights of its citizens by taking suitable measures to do its part to prevent the threats caused by climate change. Specifically, it determined that the Netherlands is obliged to achieve at least a 25% reduction of its emissions compared to 1990 levels by the end of 2020.

Contribution of fossil fuels

[11] Cases have also been filed against private entities. It is undeniable that among the human activities that affect climate change, fossil fuel burning is the major contributor, accounting for more than 70% of global GHGs.[13] Fossil fuel companies are large emitters and they have profited tremendously and continue to profit from their carbon-emitting activities, which could be argued to be at the expense of those harmed by climate change. It is said that the fossil fuel business model, which maximises profit, does not take into account the costs of the climate change that they heavily contribute to, thereby externalising such cost[14] which consequently is absorbed by the public. They are targeted because as opposed to the government, especially for a third world country like the Philippines, they have the resources to fund the costs of climate change. Fossil fuel companies are argued to have caused harmful climate change impacts through their historical emissions which have been shown can be higher than many states.

[12] It is possible to quantify the historical contributions of fossil fuel companies to GHG emissions. For example, in a study by Richard Heede, it was found that 63% of cumulative worldwide carbon dioxide and methane emissions between 1854 and 2010 can be attributed to just 90 entities (referred to as "Carbon Majors"), from the production, sale and other associated activities of their products. This means that a small number of the world's companies contributed to a huge quantity and proportion of the emissions. The study analysed historic production records of these Carbon Majors, calculating the carbon

13 UN Human Rights Council, "Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment", ¶ 76, UN Doc A/74/161 (July 15, 2019).

14 Julie-Anne Richards and Keely Boom, "Carbon Majors Funding Loss and Damage", at 13, available at https://ke.boell.org/sites/default/files/carbon_majors_funding_loss_and_damage_kommentierbar.pdf (last accessed January 4, 2023) (https://perma.cc/8FKQS3XB).

content of their marketed fuels.[15] Heede's study had often been used as basis in climate litigation.

Climate justice

[13] One goal of climate litigation is to achieve climate justice which is a "concept that recognizes that climate change will disproportionately affect people who have less ability to prevent, adapt or otherwise respond"[16] to its impacts, specifically the vulnerable groups who are the least responsible for the same and also the least capable to respond. The Philippines is one of the states least responsible for climate change. In fact, the country's share of global cumulative CO2 emissions is only around 0.2% to 0.3%.[17] But it is always one of the countries most affected by climate impacts. In the Southwest Pacific region, 75% of all deaths caused by weather, climate and water hazards in the 50-year period of 1970–2019,[18] numbering 48,950 deaths recorded, occurred in the Philippines mainly due to storms. Typhoons and heavy rainfall cause floods and landslides, which in turn result in death and damage to property.

Philippine climate-related case

[14] Last year (on May 6, 2022), the Philippine Commission on Human Rights ("CHR") released its Final Report on what is known as the

15 Peter C Frumhoff, *et al*, "The Climate Responsibilities of Industrial Carbon Producers" (2015) 132 Clim Change 157 at 161.

16 International Bar Association Climate Change Justice and Human Rights Task Force, Achieving Justice and Human Rights in an Era of Climate Disruption, at 2, available at https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04 (last accessed July 31, 2022) https://perma.cc/3Y75-6EYD].

17 Hannah Ritchie and Max Roser, "Philippines: CO2 Country Profile", available at https://ourworldindata.org/co2/country/philippines#cumulative-how-much-co2-has-it-produced-to-date (last accessed February 19, 2022). See, e.g. Senate of the Philippines, "GHG Emissions at a Glance", available at https://legacy.senate.gov.ph/publications/AAG%202013-03%20GHG%20emission.pdf (last accessed February 16, 2022); Worldometer, "Philippines CO2 Emissions", available at https://www.worldometers.info/co2-emissions/philippines-co2-emissions/ (last accessed February 16, 2022).

18 World Meteorological Organization, "Atlas of Mortality and Economic Losses from Weather, Climate and Water Extremes (1970–2019)", at 48, available at https://library.wmo.int/doc_num.php?explnum_id=10769 (last accessed February 3, 2023) (https://perma.cc/JZ3G-VWQR).

Carbon Majors case. This started from a petition filed by Greenpeace, a non-government organisation, together with 13 other non-government organisations and 18 individuals (including farmers, fisherfolks, workers, typhoon survivors and other concerned Filipino citizens who bear the brunt of the impacts of climate change) in September 2015.[19] Named as respondents were 47 investor-owned coal, oil, gas, and cement companies, including Chevron, ExxonMobil, BP, Shell, and Total. Employing the study of Heede, these respondents were alleged to have produced fossil fuel products and cement that have been responsible for the biggest portion of carbon emissions. Petitioners sought to hold the Carbon Majors accountable for impairment of human rights due to climate-related disasters and shifts in ecosystems linked to climate change, to which the business of the Carbon Majors allegedly contributed to.

[15] In the CHR resolution, it found, among others, that the Carbon Majors may be held morally and legally liable for their contribution to climate change.[20] The Final Report recognised the responsibilities of corporations and stated that the legal liability for the purpose of claiming awards for damages from specific parties is a matter for courts to determine. It ruled that the Carbon Majors can be held civilly liable for willful obfuscation and obstruction to undermine climate science under the Civil Code. It also made recommendations on the role of courts in climate litigation.[21]

[16] Scholars have said that this report could potentially be used in future litigation seeking to hold corporate actors accountable to affected people.[22] But the question that is relevant now is that, if cases are indeed filed, do they have the chance of succeeding in Philippine courts?

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19 Lea B Guerrero, "When Communities Uphold Climate Justice", *Philippine Daily Inquirer* (December 15, 2019), available at https://opinion.inquirer.net/125889/whencommunities-uphold-climate-justice (last accessed February 3, 2023) (https://perma.cc/GC9J-6CK8).

20 Commission on Human Rights Philippines, "National Inquiry on Climate Change Report (2022)", available at https://chr.gov.ph/wp-content/uploads/2022/05/CHRP-NICC-Report-2022.pdf (last accessed May 22, 2022) (https://perma.cc/M5N7-LV42).

21 It also discussed recommendations for the Judiciary to craft rules of evidence on attributing climate change impacts and assessing damages and to take judicial notice of anthropogenic climate change. Ibid, at 109–110, 140, 159–160.

22 Joana Setzer and Catherine Higham, *supra* n 11, at 13.

Climate-related cases against Carbon Majors

[17] Before looking at Philippine remedies, it is worth discussing the case of *Milieudefensie v Royal Dutch Shell Plc*[23] which is another successful case from the Netherlands, this time against a Carbon Major. It was filed by non-government environmental groups Milieudefensie (also known as Friends of the Earth Netherlands), Greenpeace Nederland and others. They alleged that Shell's contributions to climate change arising from emissions from its different activities involving fossil fuels violated its duty of care under the Dutch Civil Code and international human rights obligations. In its 2021 ruling, the Hague District Court relied on a soft law which was the United Nations Guiding Principles on Business and Human Rights ("UNGPs")[24] which set out the human rights responsibilities of businesses. The court considered this as a global standard enjoining Shell as a private company to respect human rights. Given that climate change adversely affects the human rights of Dutch residents, Shell has an unwritten duty of care under Dutch tort law in its Civil Code, to reduce its emissions in line with the objectives of the Paris Agreement, even if it was not a state or its agent. The court factored in human rights in interpreting this duty of care. As a private non-state actor, Shell's individual responsibility to achieve its own emissions reduction target should align with the objectives of the state since it contributes significant emissions over which it has control and influence. In making it responsible for its emissions, the court ruled that the volume of emissions should be reduced by at least 45% by 2030, relative to 2019 levels. The judgment was appealed by Shell in 2022 and is still pending.

[18] Other climate change cases that have been brought against fossil fuel companies involve remedies under commercial laws, such as shareholder actions for failure to disclose climate risks using

23 Case No C/09/571932 / HA ZA 19-379 (The Hague District Court, 2021) (Netherlands).

24 UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises; John Ruggie, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, and Remedy' Framework", Annex, UN Doc A/HRC/17/31 (March 21, 2011). It provides a three-pillar "Protect, Respect and Remedy" Framework wherein the state shall protect human rights; corporations shall respect the same; and these pillars shall become meaningful only if there is effective access to remedy.

corporation and securities laws and greenwashing claims wherein corporations are accused of presenting misleading information so as to put forward an ecologically responsible image to the public.

Compensatory justice

[19] As stated in the introduction, many Filipino victims are looking for remedies to make those most responsible for climate change compensate them for loss and damage experienced. Having as a goal of climate justice, victims are relying on the principle of compensatory justice in framing legal responsibility in private claims wherein the one who caused the harm is being made liable for damages to the one who suffered the same.

[20] Thus, in discussing issues in relation to such potential court cases, this paper will concentrate on such claims for climate damages against fossil fuel companies. In this context, climate damages are those defined under the Civil Code that can be claimed as relief by victims of climate change-related events that cause losses and injuries. The Philippines has no substantive law that provides for a right of action of a private party against an emitter for its contribution to climate change. Thus presently, plaintiffs in possible court cases can only draw from general existing laws and legal principles in arguing for the legal duty owed to them.

Remedies for climate damages

[21] Worldwide, the most cited sources of possible remedies for climate damages are human rights law and tort law. First, in the rights-based approach, suits will invoke constitutional provisions specifically on the right to a balanced and healthful ecology and associated climate-related human rights found in the Bill of Rights and international human rights law. An action for damages on the basis of human rights is through a tort complaint wherein human rights abuses are translated into tort harms. Second is tort law under the Civil Code, specifically the provisions on nuisance, quasi-delict, abuse of rights and unjust enrichment. Climate torts focus on the liability of emitters for their wrongful emissions which contribute to climate change that causes injury or damage to another.

Rights-based approach

[22] To elaborate further, one avenue is the rights-based approach. The Philippine Constitution recognises the environmental right to a balanced and healthful ecology. But when a climate harm is

experienced, many other rights are affected. The Bill of Rights enumerates these internationally recognised human rights. It is already accepted internationally that climate change and its impacts have clear implications on the enjoyment of human rights, such as the right to life and health as when intense typhoons cause loss of life, sickness, and injury.[25]

[23] In the CHR Carbon Majors case, the issue was whether they had breached their responsibilities to respect the rights of the Filipino people and should be accountable for specific climate change-related events resulting to harm to the latter. There is a focus on Carbon Majors because significant amount of GHGs ascribable to their products lead to climate change, which in turn interferes with the enjoyment of human rights, particularly the right to life, right to the highest attainable standard of physical and mental health, right to food, right to water, right to sanitation, right to adequate housing and right to self-determination.

[24] Defendants can be held liable for climate change impacts only when it can be determined that they have, in fact, breached a human rights obligation owed to plaintiffs. In a suit for damages, the idea is to frame the personal injury and property damage suffered by plaintiffs as a human rights violation which can be translated into tort harms.

Tort law

[25] Second approach is through tort law under the Civil Code found under the provisions on nuisance,[26] quasi-delict, abuse of rights[27] and

25 See generally, Office of the United Nations High Commissioner for Human Rights, "Understanding Human Rights and Climate Change", at 2, available at https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf (last accessed February 3, 2023) (https://perma.cc/37UG-24WT).

26 Article 694 states: "A nuisance is any act, omission, establishment, business, condition of property, or anything else which:
(1) Injures or endangers the health or safety of others; or
(2) Annoys or offends the senses; or
(3) Shocks, defies or disregards decency or morality; or
(4) Obstructs or interferes with the free passage of any public highway or street, or any body of water; or
(5) Hinders or impairs the use of property."

27 Article 19 states: "Every person must in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith."

unjust enrichment.[28] The argument is that although climate change is an environmental issue, the basis for liability in climate change-related injury can be found in the existing private civil legal system.

[26] To illustrate, for quasi-delict under Article 2176 of the Civil Code,[29] there has to be fault or negligence on the part of defendant, which is a breach of duty owing to plaintiffs. For a climate tort, the tortious conduct is based on acts of producing and manufacturing the fossil fuels despite foreseeing and knowing the hazard they pose, resulting in wrongful emissions. It is argued that the starting point of the negligence can be pinned from the time that the fossil fuel industry had notice of climate science on anthropogenic or human-caused climate change, because from this time, the risk of causing damage was already foreseeable, and yet they did nothing to prevent or minimise the risk. To be liable, the negligent act or omission of defendant must be the proximate cause of the plaintiff's loss, damage or injury.

[27] Globally, no emitter has been held liable for damages yet, though there are many attempts to do so. An action that still has a chance of success is *Lliuya v RWE AG*.[30] It is a nuisance filed in Germany by a Peruvian farmer against RWE AG, which is Germany's largest electricity producer, alleging that the latter's historical emissions are contributing to climate change which manifests in the melting of mountain glaciers, a flood hazard that creates an interference with his property as it threatens to inundate the same. The melting of glaciers is feared to cause a glacial ice avalanche that would cause a sudden massive flood called as "outburst flood", killing many and destroying properties, as what had happened in a previous outburst flood. He prays that RWE be held *pro rata* responsible for the cost of flood protection measures as it is a major emitter. Here, Heede's study was again cited as the basis for arguing that RWE's contribution amounted to 0.47% of the global total emissions, and is the largest emitter in Europe.

28 Article 22 states: "Every person who, through an act of performance by another, or any other means, acquires or comes into possession of something at the expense of the latter without just or legal ground, shall return the same to him."

29 Article 2176 states: "Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this chapter."

30 Case No. 2 O 285/15, ECLI:DE:LGE:2016:1215.2O285.15.00 (District Court of Essen 2016) (Germany).

This translated to the company contributing 0.47% of the climate risk. The most recent update to this case is that court-appointed experts along with the court judges visited[31] the site to examine whether the plaintiff's house is actually seriously threatened by a flood wave from the glacial lake.[32] If the answer is yes, evidence will be presented with regards to the defendant's responsibility for such interference due to its GHG emissions. It is the only known case of its kind that has entered the evidentiary stage. The expert risk assessment report is expected to come out this year which is supposed to be discussed in the court hearing.[33]

Judicial tools for climate damages litigation

[28] In the Philippines, this kind of case had not been attempted yet. There are many difficulties in proceeding with a climate damages case in Philippine courts, and this article shall discuss a few possible reforms with the aim of overcoming these challenges. Philippine judges can also learn from the legal reasoning used by courts in other jurisdictions which have grappled with similar issues. It is argued that there are so many victims who need effective remedies, given the slow pace of cooperative global action. For the Judiciary, this entails removing procedural barriers to remedies under the rule-making constitutional power of the Supreme Court. Under section 5(5), Article VIII of the 1987 Constitution, it is vested with the power to promulgate rules concerning the "pleading, practice, and procedure in all courts", which shall "provide a simplified and inexpensive procedure for the speedy disposition of cases" and cannot "diminish, increase, or modify substantive rights".

[29] Even before the court can determine if there is a violation of legal duty, there are preliminary and procedural obstacles that must be hurdled first before the case may be heard on the merits.

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31 Dan Collyns, "German Judges Visit Peru Glacial Lake in Unprecedented Climate Crisis Lawsuit", *The Guardian* (May 27, 2022), available at https://www.theguardian.com/environment/2022/may/27/peru-lake-palcacocha-climate-crisis-lawsuit (last accessed June 4, 2022).

32 Germanwatch, "The Climate Case: Saúl versus RWE", available at https://www.germanwatch.org/en/huaraz (last accessed June 4, 2022).

33 Germanwatch, "Saul Luciano Lliuya against RWE: Expert Opinion Expected In Summer", available at https://www.germanwatch.org/en/node/88114 (last accessed June 16, 2023).

Proper court

[30] The first[34] and second[35] level courts would initially have jurisdiction over actions for damages. In 2021, the threshold amount for the jurisdiction of the first-level courts was increased to PHP 2 million. Beyond this amount, second-level courts have jurisdiction under the Republic Act No. 11576.[36]

[31] The Supreme Court had issued Rules of Procedure for Environmental Cases ("RPEC"),[37] which have been described as containing best practices in environmental litigation[38] such as a very liberal and broad policy on standing and creation of the writ of *kalikasan* (nature), which is a legal remedy to address a violation of the constitutional right to a balanced and healthful ecology. Nevertheless, the Supreme Court already had an occasion to clarify that damages is not a proper relief for private victims to claim and be awarded in a petition for issuance of writ of *kalikasan*. This was in *West Tower Condominium Corp v First Philippine Industrial Corp*[39] wherein the court stated that the rule 7, section 15(e) of the RPEC[40] expressly prohibits

34 Consisting of Metropolitan Trial Courts, Municipal Trial Courts in Cities, Municipal Trial Courts, Municipal Circuit Trial Courts and Shari'a Circuit Courts.

35 Regional Trial Courts and Shari'a District Courts.

36 An Act Further Expanding the Jurisdiction of the Metropolitan Trial Courts, Municipal Trial Courts in Cities, Municipal Trial Courts, and Municipal Circuit Trial Courts, Amending for the Purpose Batas Pambansa Blg 129, Otherwise Known As "The Judiciary Reorganization Act of 1980", as Amended, RA 11576 (2021). The law was signed on July 30, 2021. It was published in two newspapers of general circulation on August 6, 2021 hence it took effect on August 21, 2021.

37 Rules of Procedure for Environmental Cases, AM No 09-6-8-SC (April 13, 2010).

38 George Pring and Catherine Pring, "Environmental Courts & Tribunals: A Guide for Policy Makers (A Guide Published by the United Nations Environment Programme, 2016)", at 29–30, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf?sequence=1&isAllowed=y (last accessed September 1, 2021).

39 760 Phil 304 (2015).

40 Section 15 states: "Judgment. Within sixty (60) days from the time the petition is submitted for decision, the court shall render judgment granting or denying the privilege of the writ of *kalikasan*. The reliefs that may be granted under the writ are the following: …

(e) Such other reliefs which relate to the right of the people to a balanced and healthful ecology or to the protection, preservation, rehabilitation or restoration of the environment, *except the award of damages to individual petitioners*." (Emphasis added).

granting damages as relief in a petition for the issuance of a writ of *kalikasan*, indicating that separate actions for civil liability or damages should be resorted to.

[32] However, it is obvious that a climate damages case is not the same as other tort cases. It makes more sense to consider it as an environmental case that should be raffled to environmental or green courts already designated by the Supreme Court,[41] even if they are ordinary actions for damages, in order to benefit from the expertise, knowledge and training of its judge. Presently, not all first and second level courts have green courts. It may not be feasible to create environmental courts right now because only a few environmental cases are being filed. However, in order to improve access to remedies of victims, it is suggested that the Supreme Court designate more green courts from existing courts towards the objective that all trial courts have one.

Regular procedure

[33] Under the recently issued Rules on Expedited Procedures in the first level courts,[42] if the claim in an action for damages does not exceed PHP 2 million, the Rule on Summary Procedure shall govern where there is no trial and can be decided based on pleadings.[43] It is suggested that actions for climate-related damages of whatever amount should undergo trial because of the evidentiary needs of the dispute. This is because in the context of climate change wherein the human

41 Supreme Court, Designation of Special Courts to Hear, Try and Decide Environmental Cases, Administrative Order No. 23-2008 (SC AO No. 23-2008) (January 28, 2008).

42 Rules on Expedited Procedures in the First Level Courts, *AM No 08-8-7-SC, r 1*, § 1(A)(1)(b)(c).

43 Ibid, r III, A, § 14 states:

> Rendition of Judgment. Within thirty (30) calendar days from receipt by the court of the Mediator's Report or the JDR Report on the parties' failure to reach an amicable settlement, the court shall render judgment.
>
> However, should the court find it necessary to clarify certain material facts, it may, during the said period, issue an order specifying the matters to be clarified, and require the parties to submit additional judicial affidavits or other evidence on the said matters, within ten (10) calendar days from receipt of said order. Judgment shall be rendered within fifteen (15) calendar days after the receipt of the last clarificatory judicial affidavits, or the expiration of the period for filing the same.
>
> The court shall not resort to the clarificatory procedure to gain time for the rendition of the judgment.

contribution of GHG emissions to the climate and the relation of climate change to causing the climate hazard are studied scientifically, proof of the applicable climate science is necessary. Climate victims must show that the harms they were subjected to are traceable to the defendants' action or inaction. This causation requirement shall be explained more below.

Convenient forum

[34] The majority of the Carbon Majors included in Heede's study are headquartered abroad[44] but they are multinational corporations that have local subsidiaries in the Philippines.[45] The initial question that arises is whether Philippine courts have jurisdiction over the action since the GHGs will be argued to have been emitted where the defendants are located.

[35] Judges can look at existing jurisprudence like *Navida v Dizon*,[46] where the court upheld the jurisdiction of the trial court over a complaint for damages under quasi-delict against foreign defendant companies. Here, the plaintiff workers and residents sued to collect damages under Article 2176 for injuries and ailments in relation to their reproductive system that they allegedly experienced due to their exposure to a chemical found in products "manufactured, produced, sold, distributed, used, and/or made available in commerce"[47] by defendant foreign companies which were used to kill roundworms, while they were residing in the Philippines or employed in farms located in the country. It was alleged that this was done "without informing the users of [the products'] hazardous effects on health and/or without instructions on [their] proper use and application."[48]

44 Julie-Anne Richards and Keely Boom, supra n 14, at 16.

45 For example, some of the corporations that responded to the Carbon Majors case are ExxonMobil Petroleum & Chemical Holdings Inc Philippine Branch and Shell Company of the Philippines Ltd. Greenpeace Philippines, Petitioners' Consolidated Reply to the Respondent Carbon Majors in the National Public Inquiry Being Conducted by the Commission on Human Rights of the Philippines (February 14, 2017), available at https://www.greenpeace.org/philippines/press/1183/petitioners-consolidated-reply-to-the-respondent-carbon-majors-in-the-national-public-inquiry-being-conducted-by-commission-on-human-rights-of-the-philippines/ (last accessed January 27, 2022).

46 GR No 125078, 664 Phil 283 (2011), available at https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/51293 (last accessed March 19, 2022).

47 Ibid.

48 Ibid.

According to the trial court, it lacked jurisdiction over the subject-matter since the alleged negligent acts of the defendants happened abroad or outside Philippine territory, resulting to the dismissal of the complaint. When elevated to the Supreme Court, it reversed the order of dismissal and ruled that Philippine courts had jurisdiction over the quasi-delict based on the conduct charged against the defendants as manufacturers and the place where the cause of action took place.

[36] It seems that this ruling can be used as a basis to argue that Philippine courts have authority to resolve cases of cases brought by victims of harms, i.e. extreme weather events that caused injuries and damage, that occurred or were experienced within the country. This may give support to filing of the climate case in the Philippines against large emitters domiciled outside the country. Plaintiff-victims of extreme weather events can endeavour to show that they should litigate in the court of their residence which is also where they suffered the damage and where their witnesses, records and other evidence can be found. They can assert that the court has authority to resolve disputes in relation to the harm which happened within its territorial jurisdiction.

Permissive joinder

[37] As for the legal vehicle to bring action, though it seems that given the extent and pervasiveness of climate change wherein numerous plaintiffs are going to sue the same major emitters, the case may be brought as a class suit.[49] However, in the Philippine context, damages by different claimants cannot be collected in a single suit even if they suffered harms from the same event. For example, in the cases in relation to the *Doña Paz* maritime disaster,[50] the Supreme Court said

49 2019 Amendments to the 1997 Rules of Civil Procedure, r 3, § 12 provides that "[w]hen the subject matter of the controversy is one of common or general interest to many persons so numerous that it is impracticable to join all as parties, a number of them[,] which the court finds to be sufficiently numerous and representative as to fully protect the interests of all concerned[,] may sue or defend for the benefit of all."

50 The *Doña Paz* sinking that happened in 1987 resulted from the collision of *MV Doña Paz* and an oil tanker *MT Vector*. It was considered as the deadliest maritime accident in history wherein 4,386 people died. See Miriam Desacada, "Dona Paz Heirs Survivors, Heirs Get Compensation", *The Philippine Star* (March 5, 2017), available at https://www.philstar.com/nation/2017/03/05/1676695/doa-paz-survivorsheirs-get-compensation (last accessed February 3, 2023) (https://perma.cc/8PJZCJ8A).

that there was no common interest wherein there was only one right or cause of action pertaining or belonging in common to many persons as an integral entity. Instead, claimants for damages had distinct, separate, independent and determinable rights against the same party or parties. They can never be considered a class because of the individual assessment necessary to prove the injury, loss or damage.

[38] Thus, under current jurisprudence, damages have to be proved separately for each case even if the damages arose from the same extreme weather event. Nevertheless, a creative use of permissive joinder of parties[51] in one complaint wherein experts on climate science can testify on common matters across cases of several claimants against the same defendants can be developed. When the climate harm happens to whole communities, consolidation of actions may also be resorted to. This was suggested by the Supreme Court itself in the case of *Bulig-Bulig Kita Kamag-Anak Association v Sulpicio Lines Inc*.[52] In other words, the court may have joint hearings on matters that are common to the claims, before proceeding separately for matters pertaining to distinct, separate, independent and determinable rights such as those involving the determination of damages.

Foreign defendants

[39] Another preliminary matter is acquiring jurisdiction over the defendants. This can become the first tricky step that has to be properly done. Though there is a process of suing a foreign juridical entity,[53] many

51 2019 Amendments to the 1997 Rules of Civil Procedure, r 3, § 6 states:
"Permissive joinder of parties. — All persons in whom or against whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, may, except as otherwise provided in these Rules, join as plaintiffs or be joined as defendants in one complaint, where any question of law or fact common to all such plaintiffs or to all such defendants may arise in the action; but the court may make such orders as may be just to prevent any plaintiff or defendant from being embarrassed or put to expense in connection with any proceedings in which he may have no interest."

52 GR No 84750, 173 SCRA 514, 517 (1989).

53 2019 Amendments to the 1997 Rules of Civil Procedure, rule 14 (on Summons), § 14 states: "*Service upon foreign private juridical entities*. — When the defendant is a foreign private juridical entity which has transacted or is doing business in the Philippines, as defined by law, service may be made on its resident agent designated in accordance with law for that purpose, or, if there be no such agent, on the government official designated by law to that effect, or on any of its officers, agents, directors or trustees within the Philippines.

difficulties may be encountered in suing foreign corporations which are domiciled abroad. There is the option of impleading local subsidiaries as defendants. But to avoid liability, subsidiaries may argue that the act or negligence charged against them, which are alleged to be violative of human rights or tortious, were business decisions by the parent company that they just follow. The parent companies, on the other hand, may raise the defences of lack of jurisdiction and their separate corporate personality from their subsidiaries. The United Kingdom ("UK") Supreme Court had already come across this argument, though not specifically in the context of climate litigation. In the 2021 case of *Okpabi & Ors v Royal Dutch Shell Plc & Anor*,[54] it ruled that the corporate veil can be pierced if it can be proved that the parent company had control and considerable influence over the processes of their subsidiaries. This ruling may be useful in climate litigation by asserting that corporate policies that violated rights or gave rise to the tortious conduct are the same for the whole business group such that the parent companies may be held liable for the GHG emissions of their subsidiaries.

Political question

[40] The court may dismiss the case on the basis that the plaintiffs' claims involve a non-justiciable political question necessitating policy determinations and therefore beyond the competence of the Judiciary to decide under the separation of powers set up in the Constitution. Political questions refer to those "questions, which under the constitution, are to be decided by the people in their sovereign capacity, … delegated to the legislative or executive branch of the government."[55]

If the foreign private juridical entity is not registered in the Philippines, or has no resident agent but has transacted or is doing business in it, as defined by law, such service may, with leave of court, be effected outside of the Philippines through any of the following means:

(a) By personal service coursed through the appropriate court in the foreign country with the assistance of the department of foreign affairs;

(b) By publication once in a newspaper of general circulation in the country where the defendant may be found and by serving a copy of the summons and the court order by registered mail at the last known address of the defendant;

(c) By facsimile;

(d) By electronic means with the prescribed proof of service; or

(e) By such other means as the court, in its discretion, may direct."

54 Case ID: UKCS 2018/0068 UKSC 3 (Supreme Court 2021) (UK).

55 *Tanada v Cuenco* GR No L-10520, 103 Phil 1051 at 1067 (1957).

[41] American courts[56] have ruled that determination of whether defendants could be held responsible for climate-related damages due to their substantial contribution to climate change is a political question that should be decided by the political branches of government. In the internationally celebrated Philippine case *Oposa v Factoran*,[57] the respondents argued that the issue of whether or not logging should be allowed to continue is a political question that is not within the competence of the Judiciary to determine. The court disagreed and held that government policy was not put squarely in issue as "[what is principally involved [was] the enforcement of a right *vis-à-vis* policies already formulated and expressed in legislation."[58] Hence, for the case to be justiciable, it is important that the action be framed as a question of whether defendants violated the rights of the plaintiffs under the Constitution or the law. Even if the issue involves a political matter but it has a legal component, it cannot be considered a purely political question.

Jurisprudence

[42] These are just some of the preliminary or procedural issues. In resolving both procedural and substantive legal issues, it helps to have judges awakened and trained to have the correct mindset. When they learn about the urgency of the climate crisis, they become open to innovative approaches and an expansive scope of legal reasoning and solutions, with the ultimate objective of accomplishing the courts' part in dealing with such crisis. Judges will have to be cognizant of the basics of climate science and ready to perform their role in navigating and evaluating scientific evidence. Judges can be flexible and creative in applying existing doctrines to resolve climate suits, without distorting the same. In this way, remedies for injuries related to climate change need not be left solely to the Legislature.

[43] For example, tort law, which is the existing substantive legal tool to claim damages, is growing and reconceptualised to become capable of accommodating more complex allegations of causation. While learning from these evolving doctrines of other jurisdictions, the Philippine Judiciary can develop its own jurisprudence that is uniquely Filipino, given that the country's experience of climate change is unique.

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56 See, e.g. *Native Village of Kivalina v Exxon Mobil* 663 F Supp 2d 863 (ND Cal 2009); 696 F3d 849 (9th Cir 2012) (US).

57 GR No 101803, 224 SCRA 792 (1993).

58 Ibid, at 809.

Causation

[44] The Philippine Supreme Court has recognised that there can be damage without injury. This is when the loss or harm was not the result of a violation of a legal duty. Thus, although damage has been indubitably suffered by the plaintiff, it does not follow that the defendant fossil company can be held legally responsible for the same. This often happens when the existence of the legal duty and proximate causation had not been successfully established.

[45] In climate cases, defendants can focus on the difficulty in proving that its conduct caused the concrete climate change-induced harms. Three causal links have to be established by plaintiffs: first is linking the defendant's conduct (that is, the release of GHG emissions) to anthropogenic climate change; then linking the extreme weather event to anthropogenic climate change; and thereafter linking a specific loss or damage to the extreme weather event.

[46] The human contribution to GHG emissions may be measured, but connecting these emissions to the resulting harm is so complex that it has been posited to be impossible to do. The traditional approach in establishing causation is the "but for test", such that the harm would not have occurred without the negligent conduct of the defendant.[59] Under Philippine torts, "the 'but for test' determines whether a negligent act is the proximate cause."[60] With the present state of the science, it cannot be concluded that a single event would not have occurred if not for the human-induced emissions.

[47] Nevertheless, it is argued that when the court concludes based on the test for proximate cause, it is by reason of policy or exercise of discretion,[61] guided by principles of fairness and justice. It is not a mechanistic determination of factual causation, but a judgment on the blameworthiness of particular behaviour and seeks to avoid unjust outcomes. Some learnings can be drawn from how courts have handled the problem of causation in tobacco, asbestos, lead and

59 Rommel J Casis, "Blame Game: Determining Contributory Negligence" (2019) 63 Ateneo LJ 955 at 963.

60 Ibid.

61 Ibid, at 975.

pharmaceutical tort cases where modified general causation tests were successfully used.

Alternative tests

[48] First, in asbestos litigation, courts in the UK have ruled that it is enough that the defendant caused "a material increase in the risk" to which the plaintiff was exposed[62] or materially contributed to the damage. This test was used in *Fairchild v Glenhaven Funeral Services Ltd*[63] wherein the UK court found the employer liable upon proof that exposure to asbestos increased the risk that a person would develop the disease that the plaintiff suffered from. In another case, the UK court clarified that this was made precisely because, as a matter of policy, it was deemed to be unfair to impose on a claimant a requirement of proof which in most cases, because of the limitations of scientific knowledge, was quite incapable of fulfilment.[64] In climate litigation, it can be contended is that it is sufficient that the defendant materially increased the risk of the happening of the event that caused harm to plaintiff.

[49] Another alternative test is the Market Share Theory. In this approach, each defendant is liable for damages in proportion to its market share. This was used by the California Supreme Court in *Sindell v Abbott Laboratories*[65] wherein the particular defendant drug company responsible for the particular injuries suffered by the plaintiff cancer patients could not be singled out. Thus, the liability was apportioned based on the defendants' market share for the drug. Applying this theory to climate litigation, defendants shall be made liable for its share in the GHG emissions.

Expert testimony

[50] Climate science that will prove causation is brought to the attention of the court through expert opinion. Expert testimony may be received in evidence on matters requiring the expert's special

62 *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10 (UK).
63 [2003] UKHL 22, HL (UK).
64 *Sienkiewicz v Greif (UK) Ltd*, supra n 62, at [200].
65 449 US 912 (1980).

knowledge, skill, experience or training.[66] In determining the weight of scientific evidence as presented through expert testimonies, the judge can exercise discretion and some factors to guide this discretion are provided under the Rules of Court.[67]

[51] Even in the climate cases in other jurisdictions that had been unsuccessful, "there is [already] a vast judicial agreement on the causes, extent, urgency, and consequences of climate change."[68] In spite of the dismissal on procedural grounds, the courts have made pronouncements regarding the undeniability of climate change-related harms caused to people. Climate science as a factual matter is already massively accepted and considered as not anymore in doubt.

[52] Although some aspects of the basic climate science is already well-accepted in the scientific community and policy makers, it is still difficult to navigate the knowledge. In *California v BP plc*,[69] the judge allowed in court a climate tutorial of experts and counsels, which was an unprecedented move. In this case, the cities of Oakland and San Francisco filed an action against five energy companies in a California state court on the basis of nuisance, seeking damages for potential costs of abating climate impacts. The tutorial consisted of two parts where "[the] first part was to trace the history of scientific study of climate change. The second was to set forth the best science available today on 'global warming, glacier melt, sea rise, and coastal flooding.'"[70] In such a tutorial, those sharing their knowledge were not out under oath and not subjected to cross-examination. This process can be helpful in Philippine courts.

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66 2019 Amendments to the 1989 Revised Rules on Evidence, r 130, § 52.

67 Ibid, r 133, § 5 states: "Weight to be given opinion of expert witness, how determined. — In any case where the opinion of an expert witness is received in evidence, the court has a wide latitude of discretion in determining the weight to be given to such opinion, and for that purpose may consider the following:
(a) Whether the opinion is based upon sufficient facts or data;
(b) Whether it is the product of reliable principles and methods;
(c) Whether the witness has applied the principles and methods reliably to the facts of the case; and
(d) Such other factors as the court may deem helpful to make such determination."

68 Maria L Banda, "Climate Science in the Courts: A Review of U.S. and International Judicial Pronouncements", at 2, available at https://www.eli.org/sites/default/files/eli-pubs/banda-final-4-21-2020.pdf (last accessed August 8, 2023).

69 No C 17-06011 WHA, 2018 WL 1064293 (ND Cal Feb 27, 2018) (US).

70 Maria L Banda, supra n 68 at 21.

Conclusion

[53] The experience around the world shows that there are several problems every step of the way in climate damages litigation. Still, there is an escalating interest in suing fossil fuel companies and some even call 2023 a watershed year for climate change suits, with many cases to be decided in various countries that will influence the trajectory of climate litigation as a form of climate action.[71] To further propel this movement forward are the requests for advisory opinion from the International Court of Justice[72] as well as the International Tribunal on the Law of the Sea regarding the obligation of states under international law to ensure the protection of the climate system and the marine environment from anthropogenic GHG emissions.[73]

[54] Apart from achieving compensatory justice, it is hoped that climate damages litigation will be a deterrent against excessive emissions of big emitters. It can be a path towards mitigating GHG emissions by discouraging fossil fuel companies from continuing with their current contributions. It has been said that burning all known reserves of fossil fuels will result in GHG emissions three times more than the 2°C carbon budget,[74] going way above the cap stated in the Paris Agreement.

[55] There is a need for effective remedies especially because there is a looming scenario of "climate apartheid",[75] a term coined by the

71 Isabella Kaminski, "Why 2023 will be a watershed year for climate litigation", Wave (January 4, 2023), available at https://www.the-wave.net/climate-litigation-watershed-year/ (last accessed June 19, 2023).

72 United Nations Seventy-Seventh Session GA/12497, "General Assembly Adopts Resolution Requesting International Court of Justice Provide Advisory Opinion on States' Obligations Concerning Climate Change" (March 29, 2023), available at https://press.un.org/en/2023/ga12497.doc.htm (last accessed June 21, 2023).

73 International Tribunal for the Law of the Sea Case No. 31, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal), available at https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/ (last accessed June 21, 2023).

74 UN Human Rights Council, "Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment" UN Doc A/74/161 (July 15, 2019), at para 24.

75 Ibid, at para 26, citing the Report of the Special Rapporteur on extreme poverty and human rights, UN Doc A/HRC/41/39, at para 51.

UN Special Rapporteur on extreme poverty and human rights, Philip Alston. He referred to a situation where the rich can buy themselves out of the climate harms, while the poor have no choice but to accept their hardships. Those who are bearing the costs of climate change destruction should have a chance to prove their case in court. This entails removing substantive, procedural and practical barriers to remedies, as well as providing effective liability regimes.

[56] It is posited that it seems absurd that GHG emissions are known and accepted to be harmful, yet courts are believed as powerless to protect those who are harmed. It is not just through the policy-making departments of the government that activities are judged to be wrong by society. As long as they are framed as a controversy involving rights and duties, these wrongs are exactly within the domain of the Judiciary to adjudicate.

[57] To conclude, the issues and challenges discussed demonstrate the difficulties faced by climate damages litigation from beginning to end – the legal duty has to be pinpointed from existing general laws, alternative tests to proximate causation are apparently necessary, and the science that will produce the required evidence is still developing. But all these have not stopped nor slowed down the waves of litigation aspiring to hold emitters liable. And the trial courts are the frontliners in this particular path of solving the climate crisis.

The Silent Threat: Human Trafficking and Migrant Smuggling "Procedures Through the Eyes of the Courts"*

by

*Datuk Vernon Ong Lam Kiat***

[1] May I begin by expressing my gratitude to the Multimedia University Law Society for giving me the honour and privilege of delivering the keynote speech on the occasion of the Law Seminar 2022 with the theme "The Silent Threat: Human Trafficking and Migrant Smuggling".

[2] Human trafficking is a worldwide problem and it is especially pernicious. According to the United Nations Office on Drugs and Crime ("UNODC") human trafficking and migrant smuggling are global and widespread crimes that use men, women, and children for profit. The organised networks behind these lucrative crimes take advantage of people who are vulnerable, desperate, or simply seeking a better life. There are many parts to human trafficking – they include forced labour, commercial sex, and organ harvesting. It is a multi-billion dollar business and is one of the largest organised crimes in the world today.

[3] Over the years, we have become accustomed to reading news about human trafficking in far-away places in Europe, Africa and the USA/Mexico border. Consequently, we usually associate human trafficking with cases we read in the news involving foreigners – Myanmarese, Bangladeshi, Vietnamese, Afghans, Iranians, Syrians, Sri Lankans, Africans and Latin Americans. Lately, however, we have had news of cyber slavery involving Malaysians in Cambodia and Thailand. Victims are lured by fake offers of lucrative work, kidnapped by the syndicates, held captive and forced, under threats of violence, to perpetrate web scams. We have had news of Malaysians being rescued

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** Retired Judge of the Federal Court.

from Cambodian human traffickers. Reality came crashing with the heart-breaking news of 23-year-old trainee teacher Goi Zhen Feng; he was a victim of the scammers' feeding ground – social media. Goi met a girlfriend online and they would chat over video calls. He had gone to Bangkok to meet his girlfriend but did not return. Goi died alone in a hospital in the Western Thai border town of Mae Sot; his body bore signs of abuse and internal bleeding. We cannot imagine what Goi must have gone through and the deep pain and suffering his parents must have endured. We now know that that there are many more Malaysians who have become victims of human trafficking. As such, the theme for this seminar is most appropriate and timely.

[4] I must therefore congratulate the Multimedia University Law Society for selecting human trafficking and migrant smuggling issues as the theme of discussion in this seminar.

[5] I will address "Procedures Through the Eyes of The Courts" in four parts:

(i) Part I: The legal framework of human trafficking and migrant smuggling;

(ii) Part II: The role of the court in respect of procedural law;

(iii) Part III: Criminal proceedings under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ("ATIPSOM"); and

(iv) Part IV: Protection orders issued by courts for victims of human trafficking and migrant smuggling.

Part I: The legal framework of human trafficking and migrant smuggling

International laws and standards on human rights

[6] Human rights are inherent to all individuals by virtue of his or her humanity. As such, all human beings, regardless of race, gender, nationality, ethnicity, language, religion, or other status, are born free and equal in dignity and endowed with basic rights, and fundamental freedoms like fairness, equality, respect, and independence. The Universal Declaration of Human Rights ("UDHR") which was adopted by the United Nations General Assembly in 1948 has been generally

accepted as the foundation of international human rights law. The UDHR underscores the principle that human rights are universal and inalienable, indivisible, interdependent, and interrelated. It advocates that human rights must be universally upheld and protected.

[7] Allied with the theme of this article, the human rights that come to mind are the right to life, liberty, and the security of person (article 3 of the UDHR), freedom from slavery (article 4 of the UDHR), freedom from torture (article 5 of the UDHR), freedom from arbitrary detention (article 9 of the UDHR), and freedom of movement (article 13 of the UDHR). It goes without saying that human rights should be protected by the rule of law. As such, everyone has the right to the protection of the law against any infringement, violation, interference, or attack of their human rights.

[8] In the light of the above, human trafficking and migrant smuggling are undoubtedly serious human rights violations. Even though these two types of human rights violations are sometimes conflated, they are, in law and in fact, distinct crimes.

[9] Whilst there is no definitive estimate of the number of victims of these two crimes globally, it is estimated that millions of men, women, and children worldwide are victims of human trafficking and migrant smuggling. To lure vulnerable targets into situations of exploitation, traffickers and smugglers are known to use violent, manipulative, and deceptive methods and tactics. These are serious offences that have had both significant and deleterious impact on the lives and safety of millions of families around the world.

[10] As such, the UNODC has taken the lead role internationally to combat human trafficking and migrant smuggling pursuant to two United Nations General Assembly Protocols adopted in November 2000. The first is the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Particularly Women and Children ("UN TIP Protocol").[1] The second is the Protocol against the Smuggling of

1 Adopted in November 2000 by United Nations General Assembly. It is the first legally binding instrument with an internationally recognised definition of human trafficking. This definition provides a vital tool for the identification of victims, whether men, women or children, and for the detection of all forms of exploitation which constitute human trafficking. Countries that ratify this treaty must criminalise human trafficking and develop anti-trafficking laws in line with the Protocol's legal provisions.

Migrants by Land, Sea, and Air ("UN SOM Protocol")[2] which addresses the growing problem of organised criminal groups who smuggle migrants primarily for profit. This Protocol aims at reducing the smuggling of migrants, protecting the rights of smuggled migrants, and preventing the abuse associated with this crime. Malaysia is a party to the UN TIP Protocol but not a party to the UN SOM Protocol.

[11] The words "human trafficking" and "smuggling of migrants" have been given a wide definition under the UN TIP and UN SOM Protocols.

[12] Article 3(a) of the UN TIP Protocol defines the crime of "human trafficking" by broadly defining "trafficking in persons" as follows:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

[13] "Smuggling of migrants" is defined in article 3(a) of the UN SOM Protocol:

> "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

[14] At the international level, the UNODC plays an important role to support countries in protecting victims and eradicating the

2 It is the first global international instrument to contain an agreed definition of smuggling of migrants. It addresses the growing problem of organised criminal groups who smuggle migrants primarily for money. The Protocol aims at reducing the smuggling of migrants, protecting the rights of smuggled migrants, and preventing the abuse associated with this crime. Countries that ratify this treaty must ensure that migrant smuggling is criminalised in accordance with the Protocol's legal requirements.

crimes of human trafficking and migrant smuggling. The UNODC is a source of global expertise, knowledge, and innovation in the fields of human trafficking and migrant smuggling. The UNODC provides an extensive collection of multilingual, evidence-based publications, tools and manuals for training, education, research, policy, and legal reform purposes. Ultimately, their work is to safeguard people from the abuse, neglect, exploitation or even death that is associated with these two crimes.[3]

Malaysia's domestic legislation

[15] In Malaysia, protection against human trafficking and migrant smuggling is a constitutional fundamental. Firstly, the concept of equality is embodied in Article 8 of the Federal Constitution, which declares that all persons are equal before the law and are entitled to the equal protection of the law. Secondly, slavery and forced labour are prohibited under Article 6 of the Federal Constitution.

ATIPSOM and other related legislations

[16] The ATIPSOM provides a comprehensive legal framework dealing with a wide range of offences involving conduct associated with human trafficking and migrant smuggling.

[17] Initially promulgated as the Anti-Trafficking in Persons Act 2007, the Act was amended in 2010 and renamed as the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. As its name suggests, the amendment incorporates provisions relating to the smuggling of migrants in Part IIIA of the Act. According to a statement by the then Minister of Home Affairs of Malaysia, the 2010 amendments were based on an understanding that trafficking in persons and smuggling of migrants were "closely linked and interlinked, particularly in the context of exploitation of foreign labour and migrants."[4]

[18] This declared objective is reflected in the preamble of the ATIPSOM, which provides that it is "An Act to prevent and combat

3 Official portal of UNODC accessible at https://www.unodc.org/unodc/en/human-trafficking/index.html.

4 L Lyons and M Ford, "Trafficking Versus Smuggling: Malaysia's Anti-Trafficking in Persons Act" in Sallie Yea (ed), *Human Trafficking in Asia: Forcing Issues* (London and New York: Routledge, 2014), pp 35–48.

trafficking in persons and smuggling of migrants and to provide for matters connected therewith."

[19] Section 2 of the ATIPSOM defines "trafficking in persons" as follows:

> "trafficking in persons" means all actions of recruiting, conveying, transferring, acquiring, maintaining, harbouring, providing or receiving, a person, for the purpose of exploitation, by the following means:
>
> (a) threat or use of force or other forms of coercion;
>
> (b) abduction;
>
> (c) fraud;
>
> (d) deception;
>
> (e) abuse of power;
>
> (f) abuse of the position of vulnerability of a person to an act of trafficking in persons; or
>
> (g) the giving or receiving of payments or benefits to obtain the consent of a person having control over the trafficked person;

[20] Meanwhile "smuggling of migrants" is defined under section 2 of the ATIPSOM in the following manner:

> "smuggling of migrants" means –
>
> (a) arranging, facilitating or organizing, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful; and
>
> (b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in paragraph (a);

[21] As will become apparent, the provisions of the ATIPSOM are quite comprehensive. There are eleven offences relating to the smuggling of migrants[5] as well as numerous other offences relating

5 ATIPSOM, ss 26A–26K.

to trafficking in persons.[6] Corporations, their agents, and employees are not exempt from criminal liability.[7] The prosecution of offences under the ATIPSOM requires the prior written consent of the Public Prosecutor.[8] Part IV of the ATIPSOM provides powers of investigation, arrest, search and seizure and examination to "enforcement officers",[9] who are defined as police, immigration, customs, Malaysian Maritime Enforcement Agency or labour officers.[10] Enforcement officers are indemnified against prosecution under the ATIPSOM for any act, statement or omission made in good faith.[11]

[22] More significantly, the ATIPSOM's jurisdiction is extra-territorial.[12] Therefore, the ATIPSOM applies to offences committed within or outside Malaysia, regardless of the offender's nationality or citizenship – if Malaysia is the receiving or transit country, or if the exploitation occurs in Malaysia, and if the receiving or transit country is a foreign country but the human trafficking begins or ends in Malaysia. This is consistent with article 4 of the UN TIP Protocol, which states that the Protocol applies to the prevention, investigation, and prosecution of transnational crimes involving an organised criminal group.

[23] On top of that, the enforcement of the ATIPSOM is also supplemented by the Immigration Act 1959/63 [Act 155], the Employment Act 1955 [Act 265], the Malaysian Maritime Enforcement Agency Act 2004 [Act 633], the Customs Act 1967 [Act 235], the Child Act 2001 [Act 611], the Penal Code [Act 574], and the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 [Act 297]. The Extradition Act 1992 [Act 479] and the Mutual Assistance in Criminal Matters Act 2002 [Act 621] offer some legislative assistance pertaining to international human trafficking and migrant smuggling matters.

Part II: The role of the court in respect of procedural law

The court's role in general

[24] The function of the courts is to interpret the law. The most recent authority on the duty of the court to interpret the law is the judgment

6 Ibid, ss 12–15A.
7 Ibid, ss 63–65.
8 Ibid, s 41.
9 Ibid, ss 28–34.
10 Ibid, s 27.
11 Ibid, s 62.
12 Ibid, s 3.

of the Federal Court in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan (and Other Cases)*[13] where the Federal Court most critically observed as follows:

> [167] Be that as it may, one of the functions of the courts is to interpret the law. An inherent part of this function is to see that the Executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject (see *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors v Datuk James Wong Kim* Min [1976] 2 MLJ 245 at p 251; [1976] MLRA 132 at pp 145–146 (FC)). Whatever safeguards that are provided by law against the improper exercise of such power must be vigorously enforced by the courts. As such, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising preventive detention must be strictly construed and safeguards which the law provides for the protection of any citizen must be liberally interpreted.

[25] In *Ketheeswaran a/l Kanagaratnam & Anor v Public Prosecutor*,[14] the applicants were facing three charges under section 12 of the ATIPSOM. For the purpose of the trial, the prosecution delivered to the applicants the depositions made by the three victims in the three charges pursuant to section 51A of the Criminal Procedure Code ("CPC"). Later, the applicants filed an application to challenge the constitutionality of section 61A of the ATIPSOM which provides that the deposition of trafficked persons or smuggled migrants who could not be found would be accepted as *prima facie* evidence without the need for it to be tested under cross-examination. The applicants argued that section 61A of the ATIPSOM was unconstitutional and in contravention of Articles 121(1), 8(1), and 5(1) of the Federal Constitution.

[26] The High Court dismissed this application and held that section 61A of the ATIPSOM does not contravene Articles 121(1), 8(1), and 5(1) of the Federal Constitution because section 61A of the ATIPSOM does not usurp the power of the court as the final arbiter to rule, make findings and arrive at a decision. The High Court further ruled that section 61A of the ATIPSOM is concerned only with *prima facie* evidence and the deposition in itself does not establish a *prima facie* case. In order to prove a *prima facie* case, the court must

13 [2021] 3 MLJ 759.
14 [2022] 8 MLJ 23.

consider the evidence in totality before arriving at its decision. The depositions made would still be subject to an evaluation as to its contents, irrespective of the fact that the statement is not subject to cross-examination.

Procedural law as part of access to justice

[27] That said, procedural law in respect of human trafficking and migrant smuggling crimes has a significant impact on the overall accessibility of a legal system. One shall be mindful that the procedural law forms part of the access to justice and seeks to "provide the machinery, the manner or means, by recourse to which legal rights and duties may be enforced or recognized by courts".[15]

[28] The principle that the purpose of procedural law is to facilitate access to justice was articulated by the Indian Supreme Court in *The State of Punjab v Shamlal Murari & Anor* in the following words:[16]

> … [P]rocedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the hand-maid and not the mistress, a lubricant, not a resistant in the administration of justice.

[29] It also goes without saying that access to justice is a constitutional fundamental and that access to justice and the fundamental legal principle of the rule of law are interrelated concepts. As Lord Phillips observed in the United Kingdom Supreme Court case of *Ahmed v HM Treasury*:[17]

> Access to a court to protect one's rights is the foundation of the rule of law.

[30] This interrelation between access to justice and the rule of law was also emphasised by Lord Steyn in the case of *R v Secretary of State for the Home Department, Ex p Pierson*:[18]

> The rule of law in its wider sense has procedural and substantive effect. … Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of

15 *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at 222, *per* Edgar Joseph Jr FCJ.
16 [1976] 1 SCC 719 at [8].
17 *Ahmed v HM Treasury; al-Ghabra v HM Treasury; R (on the application of Youssef) v HM Treasury* [2010] UKSC 2 at [146].
18 [1998] AC 539 at 591.

law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.

Part III: Criminal proceedings under the ATIPSOM

General

[31] It is therefore abundantly clear that human trafficking and migrant smuggling are comprehensively criminalised under Malaysian law. The statutory basis to prosecute the perpetrator of these two crimes is provided under the ATIPSOM.

[32] In this connection, it is important to note that human trafficking and smuggling of migrants are governed by different procedures in criminal proceedings. Criminal proceedings for human trafficking are conducted under the CPC.[19] However, migrant smuggling cases are conducted under the Security Offences (Special Measures) Act 2012 ("SOSMA"). This is because the smuggling of migrants is a "security offence" pursuant to Part IIIA (Smuggling of Migrants), section 3 of the SOSMA and the First Schedule to the SOSMA.

[33] In Malaysia, the criminal procedure law is codified in the CPC, which governs the entire process of criminal proceedings.[20] The CPC prescribes the rules and procedures to be followed to ensure an accused receives a fair trial. In a criminal trial, the observance of certain basic rules has been shown to be the most effective safeguard against unfairness, errors, and abuse.

[34] In *Foo Yong Fong & Anor v R*,[21] Rose CJ observed as follows:

> I may perhaps be forgiven for observing that forms and procedures, whether civil or criminal, are not intended or devised in order to put obstacles in the way of the plaintiff or the prosecution, as the case may be. They are designed to ensure that the issues to be determined are fairly and clearly stated, so that the defendant in a civil and the accused in a criminal case knows the case that he has to meet and is not placed in a position of embarrassment. Thus, a fair trial is assured.

19 Section 3 of the CPC lays down the general rule that all offences under the Penal Code, as well as all offences in statutes other than the Penal Code, must be inquired into and tried according to the same provisions of the CPC.

20 *Lim Hung Wang & Ors v PP* [2011] 9 MLJ 752.

21 [1962] 1 MLJ 156.

[35] Our courts have decided in many cases that a departure from the provisions of the CPC is a ground upon which an appellate court may intervene. However, there is an important proviso, and it is this: the appellate court would not exercise that intervention power if there was no miscarriage of justice or "failure of justice", as the phrase employed by section 422 of the CPC. In *Goh Keat Peng v PP*,[22] Zulkefli Ahmad Makinudin J (as he then was) said as follows:

> It is to be noted that the relevant provisions of the CPC and the Act (i.e., the Courts of Judicature Act) have been enacted with the primary purpose of ensuring proper conduct of the prosecution of an offence and to prevent injustice meted out on any party.

[36] Every accused has a right to a fair trial. A fair trial includes fair and proper opportunities allowed by law to prove one's innocence. Adducing evidence in support of the defence is a valuable right and the denial of that right means the denial of a fair trial. It is therefore essential that rules of procedure designed to ensure justice should be scrupulously followed and the courts should be vigilant in seeing that there is no breach of them.[23]

[37] It is also a cardinal principle that in criminal cases the provisions of the law must be strictly followed.[24] No court may override the express provisions of the CPC or indeed, any other statute[25]. As said by Zulkefli Ahmad Makinudin J in *Goh Keat Peng v PP*,[26] the CPC has been enacted to ensure a fair trial, proper prosecutorial conduct, and to prevent injustice to any party. We must always bear in mind that, however serious a crime a person is accused of, and however despicable the accused may appear to be, the accused person may only be convicted on the evidence produced in accordance with the stringent requirements of the law.[27]

[38] In criminal cases, compliance with the provisions of the CPC is mandatory. The accused person is not competent to waive non-compliance with any of the provisions of the CPC by the Public

22 [2001] 2 CLJ 498.
23 *Kalyani Baskar v MS Sampoornam* [2007] 2 SCC 258.
24 *Karpal Singh v PP* [1986] 2 MLJ 319.
25 *Sukma Darmawan Sasmitaat Madja v Pendakwa Raya* [2007] 4 AMR 578.
26 [2001] 2 CLJ 498.
27 *Krishnan s/o Ramar v PP* [1987] CLJ (Rep) 145.

Prosecutor. No default by the defence or waiver or agreement by the parties can supersede the written law, especially in criminal matters.[28]

[39] In *PP v H Chamras Tasaso*,[29] Hashim Yeop A Sani J, commenting on the criminal justice system, said:

> Our system of justice has its own traditions. These traditions are based on well established principles. One of these principles is that an accused person is presumed innocent until proven guilty. The right of the accused in any criminal trial will be ineffective and meaningless unless such right is supported by the spirit and the traditions on which our system is built. The importance of the presumption of innocence lies not on its abstract principle but in the extent to which in actual practice an accused person, irrespective whether he be a citizen or not, is in a position to assert that principle against an over-eager prosecutor or official who may find it easier to build up a case based on the assumption of guilt than by the laborious collection of independent evidence.

[40] The presumption of innocence is a fundamental concept in criminal proceedings. This basic principle is recognised in article 11 of the UDHR, which provides that "Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which they have had all the guarantees necessary for their defence." A similar declaration is contained in the European Convention on Human Rights. In Malaysia, this right is embodied in Article 5(3) of the Federal Constitution. In *Pendakwa Raya v Gan Boon Aun*,[30] the Federal Court affirmed the presumption of innocence as an inherent part of our criminal jurisprudence. In that case, the Federal Court opined:

> … In *PP v Yuvaraj* [1969] 2 MLJ 89, the Privy Council held that the principle that the prosecution must prove its case against an accused beyond reasonable doubt was fundamental to the administration of justice under the common law. This means that the presumption of innocence is a fundamental right at common law just as access to justice is a common law fundamental right. It is a right that falls

28 *Fan Yew Teng v PP* [1971] 2 MLJ 271; *Chah Siew Kok v PP* [1987] CLJ (Rep) 518; *Ooi Lean Chai v PP* [1991] 2 MLJ 552; *Alcontara a/l Ambross Anthony v PP* [1996] 1 CLJ 705; *Mahdi Keramatviyarsagh Khodavirdi v PP* [2015] 3 CLJ 336.

29 [1975] 2 MLJ 44 at 44.

30 [2017] 3 AMR 164.

> within Article 5(1) of the Constitution, as the definition of "law" in Article 160(2) and section 66 of the Interpretation Acts 1948 and 1967 includes written law and the common law of England. In *Ranjit Singh v State of Maharashtra* (2005) 5 SCC 294 and in *Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632, the Indian Supreme Court held that the presumption of innocence is a human right protected by Article 21.

[41] I would also like to draw your attention to the discretionary powers of judges, especially when it comes to certain aspects of procedural law. In this context, they are the CPC, the ATIPSOM and the SOSMA. For example, under the CPC, the courts and judges have been vested with discretionary powers on a variety of matters such as authorising detention pending investigation, issuing warrants of arrest, search, etc. It is part of the judicial function that is not controlled by fixed rules of law. However, like all discretionary powers, the judges will (and must) exercise this power judiciously. Lord Halsbury in *Sharpe v Wakefield*[31] held that "discretion" means "according to the rules of reason and justice, not according to private opinions; according to law and not humour. It is not to be arbitrary, vague and fanciful, but legal and regular. The word 'discretion' in itself implies vigilant circumspection and care, therefore, where the legislature concedes wide discretion, it also imposes a heavy responsibility."[32]

[42] Similarly, in *Veerasingam v PP*,[33] Thomson CJ opined:

> Clearly, to exercise his discretion properly the judge must apply his mind to all the relevant material. He must consider the circumstances of the original trial. He must consider the original Petition of Appeal. And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to that original Petition of Appeal. He must consider his own powers as to such matters as the granting of adjournment and the requiring of Notice to be given. And then he must exercise his discretion as he sees fit in order that substantial justice may be done in the matter. It may be that he may find it helpful to look at what has been done in some other case by some other judge but if he does he must be careful to look at what that other judge has

31 [1981] AC 197.
32 *Ibrahim & Ors v Emperor* AIR 1933 Sind 49.
33 [1958] MLJ 76 at 79.

> done merely as an illustration and not as laying down any judicial precedent (see the observations of Bowen LJ, in *Jones v Curling* 13 QBD 262, 271, supra).

[43] I will now touch on the burden of proof in respect of criminal proceedings relating to human trafficking and migrant smuggling. It is settled law that the burden of proving a criminal charge rests on the Public Prosecutor. The Public Prosecutor must prove its case beyond reasonable doubt. There are two aspects to this burden of proof. One is the *legal burden* on the prosecution to prove its case beyond reasonable doubt and the other is the *evidential burden* on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case.[34]

[44] For example, in the case of human trafficking, exploitation is one of the essential elements to prove the offence. Numerous judicial decisions have ruled that the element of coercion is essential in the definition of "trafficking in persons" under section 12 of the ATIPSOM.[35] Hence, the burden is on the prosecution to prove the element of coercion.[36] The accused would be entitled to a full acquittal if the element of coercion had not been proven by the prosecution.

[45] In the case of smuggling of migrants, section 2 of the ATIPSOM defines the act of "smuggling of migrants" as, *inter alia*, "arranging, facilitating or organising, directly or indirectly, a person's unlawful entry into … or unlawful exit from any country of which the person is not a citizen or permanent resident …". As such, the fact of facilitating or arranging for unlawful entry or unlawful exit is a key ingredient or *actus reus* of the offence "smuggling of migrants". The accused would be entitled to an acquittal if the prosecution has failed to make out its case on this key ingredient. In this respect, the Court of Appeal in *Public Prosecutor v Sumon Khan & Anor*[37] held as follows:

> [63] As far as the second accused's role is concerned, it was merely confined to looking after the said 13 Bangladeshis in Sibu including purchasing the flight tickets to KLIA from Sibu, Sarawak and it

34 *Balachandran v PP* [2005] 2 MLJ 301.
35 *PP v Ooi Wei Yhee & Satu Lagi* [2016] 2 CLJ 861, HC; *PP v Mong Soon Tat* [2019] 1 LNS 726, HC; and *Siow Hee Liong & Satu Lagi v PP* [2017] 1 LNS 348, HC.
36 *Siow Hee Liong & Satu Lagi v PP*, ibid.
37 [2019] 2 MLJ 215.

does not involve facilitating or arranging for unlawful entry or unlawful exit of the said 13 Bangladeshis, into or out of Malaysia. At Sibu, Sarawak, the 13 Bangladeshis were already in Malaysia and when they flew to KLIA they were not exiting Malaysia. Hence the essential element of the offence of smuggling of migrants, that is to arrange the said Bangladeshis to enter and exit Malaysia, is not made out against the second accused because his role, as instructed by Sivasankar, was to assist while the said 13 Bangladeshis were in Sibu only. He was never involved in cross-border or international smuggling.

[46] A discussion on criminal procedure would be incomplete if I omit to mention the role and function of practice directions which are issued by the courts. In essence, practice directions are rules of practice and not rules of law. Whilst practice directions do not have the force of law, they provide guidelines for the more effective implementation of the rules of court. As such, practice directions are intended to be no more than a direction for administrative purposes only. Be that as it may, practice directions should be strictly adhered to by the parties to the proceedings.[38] For migrant smuggling cases, the Chief Justice has issued a Chief Justice's Practice Direction No. 1 of 2017 in relation to the day-to-day registration, case code to categorise the type of cases, and hearing of cases in the High Courts.

[47] On this matter, it is noteworthy that the Judiciary has also taken its own initiatives to expedite cases concerning human trafficking and migrant smuggling. One of the initiatives is the establishment of a specialised court known as the Anti-Trafficking in Persons Sessions Court ("ATIP Court") in the Klang Sessions Court to deal with human trafficking cases[39] on March 28, 2018. Klang has been the pioneer location[40] and presently, the Klang Sessions Court is the only ATIP Court operating in Malaysia.[41] The ATIP Court in its first month successfully expedited the hearing of the 12 trafficking cases in an existing court by setting aside a few hours a week for senior,

38 *Yeo YooTeik v Jemaah Pengadilan Sewa, P Pinang & Anor* [1996] 2 CLJ 628; *Raja Guppal a/l Ramasamy v Sagaran a/l Pakiam* [1999] 2 CLJ 972.

39 Chief Justice Tun Raus Sharif's speech during the official opening of the ATIP Court in Klang dated March 28, 2018.

40 Ibid.

41 Information from Office of the Registrar of the Subordinate Courts of Malaya, Istana Kehakiman, Putrajaya.

experienced judges to focus on trafficking cases.[42] It gave an opportunity for the prosecutors to engage with victims at least two weeks prior to trial to better understand and address the victims properly.[43]

[48] For the speedy disposal of human trafficking cases, the Judiciary also has a fixed timeline of nine months from the date of registration for the disposal of these types of offences.[44]

[49] Statistics wise, between the years 2019 and June 2022,[45] it shows that yearly, the number of migrant smuggling cases appear not to have deviated significantly, although there is a discernible decline in the number of registrations. In 2019, there were 329 migrant smuggling cases registered, in 2020 there were 221 cases, in 2021, 218 cases, and as of June 2022, 96 cases. Over these four years, the High Court has disposed of 741 cases, leaving 238 cases pending disposal. This translates to a disposal rate of 86%.

[50] As for human trafficking cases, the disposal rate is 90% between the period 2019 and June 2022. This disposal rate is translated from the number of registrations of human trafficking cases over these four years, which was 1,381 cases, and from this figure, the courts managed to dispose of 1,247 cases. It can be concluded that the performance of the courts in respect of these two crimes is at near maximum efficiency.

Procedures for human trafficking offences under the ATIPSOM and the CPC

[51] Human trafficking offences under the ATIPSOM are tried in the Sessions Court. The Sessions Court has jurisdiction to try all offences other than offences punishable by death. It can pass any sentence according to law other than the sentence of death.[46]

[52] The Sessions Court is within the class of subordinate courts, where the applicable trial procedures are *summary trial procedures* as laid down in Chapter XIX of the CPC. In Malaysia's context, summary

42 Rohaida Nordin and Renuka a/p Jeyabalan, "Protection of the Rights of the Victims of Human Trafficking: Has Malaysia Done Enough" (2019) 3 JSEAHR 300.
43 Ibid.
44 Ibid.
45 Statistics from Statistics Unit, Strategic Planning and Training Division, Istana Kehakiman, Putrajaya.
46 Subordinate Courts Act 1948, ss 63 and 64.

trial means trial before the subordinate court pursuant to Chapter XIX of the CPC.[47] Although Chapter XIX of the CPC is entitled "Summary Trials by Magistrates", the procedure is also applicable to trials before the Sessions Court.[48]

[53] A summary trial is a speedy trial which dispenses with unnecessary formalities or delay.[49] It is, however, to be conducted with the same care as in regular trials, or perhaps with more scrutiny, so as to dispel any apprehension on the part of the accused of a failure of justice on account of the summary procedure.

[54] In a summary trial, the court trying the case must be fully cognisant of the following principles:

(i) that the trial is summary in nature;

(ii) that the evidence must be confined to what is legally relevant;

(iii) that where the rule of evidence is explicit, it must be enforced strictly on both sides; and

(iv) that where the rule is discretionary, for example, as to points which are remote or only affect credit, the discretion must be exercised with regard to the real gravamen of the charge.[50]

[55] The main provisions on summary trial are contained in section 173(a) to (o) of the CPC. The procedure at the commencement of a trial includes the reading of the charge and the taking of the plea.[51] If the accused pleads guilty to a charge, the plea shall be recorded and he may be convicted thereon and the court shall pass sentence according to law.[52] However, if the accused refuses to plead or does not plead, or claims to be tried, the court shall proceed to take all such evidence as may be produced in support of the prosecution.[53]

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47 Hamid Sultan bin Abu Backer, *Janab's Key to Criminal Procedure*, 3rd edn (2015), p 149.

48 *Tengku Abdul Aziz v PP* [1951] 1 MLJ 185; *Loh Kam Foo v PP* [1997] 4 MLJ 113; *Karpal Singh & Anor v PP* [1991] 2 MLJ 544.

49 *Sarkar on Criminal Procedure*, 7th edn (1996), p 837.

50 *Muthusamy v PP* [1948] MLJ 57; *Goh Tong v PP* [1953] MLJ 251.

51 CPC, s 173(a).

52 Ibid, s 173(b).

53 Ibid, s 173(c).

In turn, the accused is allowed to cross-examine all the witnesses for the prosecution.[54]

[56] A criminal trial is essentially a two-stage process; the first stage consisting of the prosecution's case, and if defence is called, the second stage consisting of the case for the defence. The duty of the court at the end of the prosecution's case during a summary trial is set out in section 173(f) of the CPC which stipulates that when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused.

[57] A *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each and every ingredient of the offence which if unrebutted or unexplained, would warrant a conviction.[55]

[58] A line of cases including *Mohamad Radhi bin Yaakop v Public Prosecutor*,[56] *Looi Kow Chai & Anor v Public Prosecutor*,[57] *Balachandran v Public Prosecutor*,[58] and *Pendakwa Raya v Mohd Radzi bin Abu Bakar*[59] have ruled that at the end of the case for the prosecution, the evidence must be subject to maximum evaluation in order to determine whether a *prima facie* case has been made out. This principle has also been reiterated and affirmed by the seven-member panel of the Federal Court in the case of *Abdullah bin Atan v Public Prosecutor (and Other Appeals)*.[60]

[59] In *Public Prosecutor v Mohd Radzi bin Abu Bakar*,[61] the Federal Court gave the following guidance to the lower courts in determining a *prima facie* case:

> For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:
>
> (i) subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each

54 Ibid, s 173(e).
55 Ibid, s 180(4).
56 [1991] 3 MLJ 169.
57 [2003] 2 MLJ 65.
58 [2005] 2 MLJ 301.
59 [2006] 1 CLJ 45.
60 [2020] 6 MLJ 727.
61 [2006] 1 CLJ 45.

of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is "Yes", then a prima facie case has been made out and the defence should be called. If the answer is "No" then, a prima facie case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] MLJ 263.

[60] If the prosecution invoked a statutory presumption against the accused, it is incumbent upon the accused to rebut such presumption on a balance of probabilities.[62]

[61] Should a *prima facie* case be established, the court will order the accused to enter his defence.[63] The accused will then be given three alternatives thereafter, namely, to give sworn evidence, to give unsworn evidence (statement from the dock), or to remain silent.[64]

[62] At the conclusion of the summary trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond a reasonable doubt.[65] If the court finds that the prosecution has proved its case beyond a reasonable doubt, the court shall find the accused guilty and he may be convicted on it[66] but if the court finds that the prosecution has not proved its case beyond a reasonable doubt, the court shall record an order of acquittal.[67]

62 *Abdullah bin Atan v PP (and Other Appeals)* [2020] 6 MLJ 727.
63 CPC, s 173(h).
64 Ibid, s 173(ha).
65 Ibid, s 173(m)(i).
66 Ibid, s 173(m)(ii).
67 Ibid, s 173(m)(iii).

[63] Upon a conviction being recorded against an accused, he has the right to appeal to a higher court in the judicial hierarchy against both the conviction and sentence. Section 26 of the Courts of Judicature Act 1964 ("CJA") provides for the jurisdiction of the High Court to hear criminal appeals from the subordinate courts. The procedure for such appeals are stipulated in Chapter XXX of the CPC.

[64] It is important to note that there are special procedures under the ATIPSOM for human trafficking offences and that these provisions shall prevail in the event of any conflict with the provisions of other written laws.[68]

[65] For example, section 59 of the ATIPSOM provides that no agent provocateur shall be presumed to be unworthy of credit by simply having attempted to commit or to abet, or having abetted or having been engaged in a criminal conspiracy to commit any human trafficking offence if the main purpose of such attempt, abetment or engagement was to secure evidence against such person. It also provides that notwithstanding any law or rule of law to the contrary, a conviction for any offence under the ATIPSOM solely on the uncorroborated evidence of any agent provocateur shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgment to the need to warn itself against the danger of convicting on such evidence.

[66] In respect of admissibility of documentary evidence, where any enforcement officer has obtained any document or other evidence in the exercise of his powers under the ATIPSOM, such document or copy of the document or other evidence, as the case may be, shall be admissible in evidence in any proceedings under the ATIPSOM, notwithstanding anything to the contrary in any written law.[69]

[67] Further, the depositions of trafficked persons or smuggled migrants who cannot be found but whose depositions have been recorded under the Immigration Act 1959/63 would be accepted as *prima facie* evidence without the evidence being tested under cross-examination at the trial.[70]

68 ATIPSOM, s 5.
69 Ibid, s 60.
70 Ibid, s 61A.

[68] In *Ketheeswaran a/l Kanagaratnam & Anor v Public Prosecutor*,[71] the High Court held that notwithstanding section 61A of the ATIPSOM, the court retains the ultimate power to assess and evaluate the evidence before making findings of fact.

[69] The dispensation for cross-examination of deponents of such depositions is, however, subject to the requirement that there is an order of removal from the Director General of the Immigration Department. In *Pendakwa Raya v Sumon Khan & Mohammed Yazir Openg*,[72] the Court of Appeal held that before depositions of migrants can be admitted as evidence, there must be an order for removal of them issued by the Director General of the Immigration Department.

Procedures for migrant smuggling offences under the CPC and the SOSMA

[70] Since the smuggling of migrants has been classified as a security offence, a person involved in the smuggling of migrants will be dealt with according to the special procedures under the SOSMA.

[71] Be that as it may, the general provisions of the CPC are still applicable in respect of matters which are not expressly provided for under the SOSMA. In respect of matters which are provided for under both the SOSMA and the CPC, the provisions in the SOSMA shall prevail. This is in accordance with the maxim *generalia specialibus non derogant* – the principle of interpretation of statutes that general provisions do not derogate from the specific ones, or put simply, the need to accord precedence to a specific provision over the general provision.

[72] For example, the SOSMA makes no specific provision on the procedure of the stages of a criminal trial. Accordingly, the general provisions in the CPC on High Court trials (Chapter XX) will apply where the court decides on whether a *prima facie* case has been made out at the end of the prosecution's case and on whether the defence raised by the accused has raised a reasonable doubt. These procedures are laid down under sections 178 to 183 of the CPC.

71 [2022] 8 MLJ 23.
72 [2018] 1 LNS 1506, CA.

[73] Some of the special SOSMA procedures may appear to infringe on a person's fundamental rights under Article 5 (Liberty of the person), and Article 8 (Equality) of the Federal Constitution. In this regard, it is important to note that the SOSMA is an Act enacted to provide for special measures relating to security offences for the purpose of maintaining public order and scrutiny. Further, the SOSMA was enacted pursuant to Article 149 of the Federal Constitution which empowers Parliament to enact legislation against subversion, action prejudicial to public order, etc. This means that any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Articles 5, 9, 10, or 13 of the Federal Constitution, all of which relate to the guarantee of certain fundamental rights of citizens.

[74] The rationale for enacting the SOSMA is explained further in the second part of the preamble – to prevent any action or threatened action from persons both inside and outside Malaysia with regard to the following: "(1) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; (2) to excite disaffection against the Yang di-Pertuan Agong; (3) which is prejudicial to public order in, or the security of, the Federation or any part thereof; or (4) to procure the alteration, otherwise than by lawful means, of anything by law established …".

[75] The special nature of the SOSMA was highlighted by the Federal Court in *Dato' Seri Anwar Ibrahim v Kerajaan Malaysia & Anor*[73] in the following words:

> SOSMA is an Act to provide for special measures relating to security offences for the purpose of maintaining public order and national security. SOSMA was enacted pursuant to paras (a), (b), (d) and (f) in cl (1) of art 149. Part II on "SPECIAL POWERS FOR SECURITY OFFENCES" provides for the power of arrest without warrant and detention for an initial period of twenty-four hours and thereafter for a period of up to twenty-eight days for the purpose of investigation (ss. 4–5). There are also other special procedures relating to: (i) electronic monitoring device (s. 7); (ii) sensitive information (ss. 8–11); (iii) protected witnesses (ss. 14–16), (iv) evidence (ss. 17–26); and (v) trial of security offences by the High Court and on bail (ss. 12–13).

73 [2021] 8 CLJ 511.

[76] Therefore, the inclusion of offences under Part IIIA (Smuggling of Migrants) enactment of the SOSMA has far-reaching consequences with regard to the court procedures as well as the rights of accused persons, as it represents a significant departure from normal and usual procedures.

[77] For example, a police officer of or above the rank of Superintendent of Police may extend the period of detention of a person arrested for alleged involvement in a security offence for up to 28 days for the purpose of investigations.[74]

[78] The right of a person arrested to consult a legal practitioner of his choice pursuant to Article 5(3) of the Federal Constitution is also circumscribed under subsections 5(2) and (3) of the SOSMA which stipulate as follows:

> 5. *Notification to next-of-kin and consultation with legal practitioner*
>
> (1) …
>
> (2) A police officer not below the rank of Superintendent of Police may authorize a delay of not more than forty-eight hours for the consultation under paragraph (1)(b) if he is of the view that –
>
> (a) there are reasonable grounds for believing that the exercise of that right will interfere with evidence connected to security offence;
>
> (b) it will lead to harm to another;
>
> (c) it will lead to the alerting of other person suspected of having committed such an offence but who are not yet arrested; or
>
> (d) it will hinder the recovery of property obtained as a result of such an offence.
>
> (3) This section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution.

[79] The right to privacy is another basic right which has been circumscribed. The SOSMA provides the Public Prosecutor with the power to authorise any police officer or any other person to intercept,

74 SOSMA, s 4(5).

detain and open any postal article in the course of transmission by post, to intercept any message transmitted or received by any communication or to intercept or listen to any conversation by any communication if he considers that it is likely to contain any information relating to the commission of a security offence.[75] The exercise of the powers of the Public Prosecutor has been considered by the Court of Appeal in *PP v Kadir Uyung & Anor (and Other Appeals)*[76] where the Court of Appeal made the following observations:

> [206] As rightly pointed out by learned counsel for the appellants, there are two types of communication interception, one under section 6(1) and the other under section 6(3) of SOSMA. Information that is required to be given in an application for communication interception is regulated by section 31 of SOSMA. For communication interception under 6(1), the requirements of the First Schedule of the Regulations have to be followed and for communication interception under section 6(3) of SOSMA, the requirements of the Second Schedule of the Regulations have to be followed.
>
> …
>
> [215] We have gone through the grounds of judgment carefully and we were not persuaded that the learned trial judge had mishandled the issue of interception of communications as alleged. In fact the learned judge had dealt with the issue admirably and we can do no better than to reproduce verbatim what he said in full below, parts of which we have reproduced earlier in this judgment:
>
> > "12.19. Reading s. 6 of the Act which states that notwithstanding any other written law, this includes Regulations 2012, the discretion is on the PP to decide whether the communication interception is likely to contain any information relating to the commission of a security offence. When such an application is made to PP, the application or basis for the application is not provided to the court and it is not in a position to assess and determine whether the communication interception is likely to contain any such information relating to the commission of a security offence."

[80] It follows that any information that is obtained through intercepted communication under section 6 of the SOSMA is admissible by virtue

75 Ibid, s 6.
76 [2017] 1 LNS 1403.

of section 24 of the SOSMA, which provides that, *inter alia*, "No person or police officer shall be under any duty, obligation or liability or be in any manner compelled to disclose in any proceedings the procedure, method, manner or the means or devices used with regard to – (a) anything done under section 6; and (b) any matter relating to the monitoring, tracking or surveillance of any person."

[81] It is also important to note that the criminal procedures on pre-trial discovery and disclosure of documents under the general provisions of the CPC do not apply in migrant smuggling cases. Section 8(1) of the SOSMA stipulates that, notwithstanding section 51A of the CPC relating to the disclosure of certain documents and facts, if the trial of a security offence involves matters relating to sensitive information, the Public Prosecutor may, before the commencement of the trial, apply by way of an *ex parte* application to the court to be exempted from the obligations under section 51A of the CPC.

[82] The SOSMA provides that the court shall view the sensitive information and other documents relating to the sensitive information and the court shall, in lieu of the delivery of the documents by the Public Prosecutor to the accused, order the Public Prosecutor to produce a statement setting out the relevant facts that the sensitive information would tend to prove or a summary of the sensitive information to be admitted as evidence.[77]

[83] A statement or summary of the sensitive information is served on the accused pursuant to section 51A of the CPC. If the accused objects to the admission of the statement or summary of the sensitive information as evidence, then the accused's counsel shall be permitted to view the sensitive information, submit against the admissibility of the statement or summary of the sensitive information in the trial and submit on whether the sensitive information ought to be disclosed to the accused.[78]

[84] Hearings on the disclosure and/or admissibility of the sensitive information are held in camera. The court's decision on whether the statement or summary of the sensitive information is admissible as evidence or whether the sensitive information be disclosed to the accused is final and non-appealable.[79]

77 SOSMA, s 8(3).
78 Ibid, s 8(4).
79 Ibid, s 8(8).

[85] It is also pertinent to note that all security offences shall be tried by the High Court[80] (section 12 of the SOSMA; see also *PP v Puganeswaran Paramasiwan*[81] where the High Court held that "SOSMA which clearly provides for special procedures for the trial of the security offence by the High Court and equally special procedures for the granting of bail must mean that these special procedures are only exercisable by the High Court. Those powers cannot be used by the Sessions Court.").

[86] Migrant smuggling is also a non-bailable offence.[82] However, bail may be only granted to a person below the age of 18 years, a woman, or a sick or infirm person. In *Jimmy Seah Thian Heng & 4 Ors v Public Prosecutor (and 4 Other Applications)*,[83] the High Court held that bail was available under section 13(1) of the SOSMA notwithstanding that the Public Prosecutor does not first apply for an electronic monitoring device.

[87] Another special provision relates to "protected witnesses", who is defined as a witness whose exposure will jeopardise either the gathering of evidence or intelligence, or his life and well-being.[84] Section 14 of the SOSMA expressly stipulates that the evidence of such a witness is to be given in a special manner notwithstanding Article 5 of the Federal Constitution and section 264 of the CPC.

[88] The statements by an accused person, whether made orally or in writing to any person at any time, shall be admissible in evidence notwithstanding sections 24 and 26 of the Evidence Act 1950 which provide, *inter alia*, that a confession caused by inducement, threat or promise is irrelevant in a criminal proceeding.[85] This is not only a significant departure from the provisions of the Evidence Act 1950 but also from the CPC, especially section 113 of the CPC which provides that a statement made by an accused under section 112 of the CPC is inadmissible against an accused person. Any confession thus obtained under the SOSMA against the accused person can be admitted and used against the accused even if it was given involuntarily.

80 Ibid, s 12.
81 [2022] 1 LNS 688.
82 SOSMA, s 13.
83 [2018] 6 AMR 345.
84 SOSMA, s 3.
85 Ibid, s 18A.

[89] Another special procedure of note under the SOSMA provides that a conviction obtained based on the uncorroborated testimony of a child of tender years is not illegal, though not given on oath if the court opines that the child has sufficient intelligence and understands the duty of speaking the truth.[86] In a similar vein, section 26(1)(b) of the SOSMA provides that no agent provocateur shall be presumed to be unworthy of credit by simply having attempted to abet or abetted the commission of a security offence.

[90] As can be seen from the foregoing, the special procedures under the SOSMA are significant and wide-ranging; they deal with the powers of arrest and detention, rights of the accused, power to intercept the communication, sensitive communication, trial and bail, protected witnesses, and evidence.

Part IV: Protection orders issued by the courts

[91] Under the ATIPSOM, a trafficked person will be placed under government facilities for 21 days under interim protection orders for suspected victims[87] and 90 days under protection orders for certified victims.[88] This important function is carried out by the Magistrates' Court.

[92] In *Public Prosecutor v Zhao Jingeng & Ors*,[89] the High Court highlighted the importance of the protection order granted by the court, among others, to assist the work of the investigation officers in recording the evidence of a victim of human trafficking under section 52 of the ATIPSOM. The High Court allowed the prosecution's revision application and made an extension of the protection order under section 51(3)(a)(ii) of the ATIPSOM. The High Court ordered that the victims be placed at a place of refuge for a period not exceeding three months to enable the enforcement officer to make the necessary deposition. The High Court also ordered the Immigration Department and the prosecution to take immediate steps under section 52(1) of the ATIPSOM to record the evidence of the victims. This is to ensure that there is no unnecessary prolonging of the stay of the victims so that they can go back to their home country as soon as possible.

86 Ibid, s 19.
87 ATIPSOM, s 44.
88 Ibid, s 51.
89 [2010] 7 MLJ 306.

[93] In *Public Prosecutor v Vira Prihatin & Ors*,[90] the High Court held that the initial 21-day period was important in order to enable the necessary investigations and enquiry to be carried out pursuant to section 51 of the ATIPSOM. In this case, the High Court held that any interpretation of the provisions in the ATIPSOM "must be construed with reference to the intended objective of the Legislature in enacting such provisions" that is "to prevent and combat trafficking in persons and smuggling of migrants and to that end it has also clearly defined in rather wide terms these categories of persons".

[94] Apart from that, the welfare of the trafficked person is further protected when section 66A(1) of the ATIPSOM stipulates the power of the court to order payment of compensation to be paid by the convicted person. Further, the payment of such compensation shall not prevent any civil proceeding instituted by the victim.[91] Even in the case of acquittal of the accused, the court has the power to make an order for the payment of wages in arrears to the alleged trafficked person.[92]

Conclusion

[95] We all recognise that human trafficking and smuggling of migrants is a heinous transnational crime – a matter which has galvanised the international community to adopt the Protocols and the UNODC in assisting member states to combat these transnational organised crimes. Whilst there are adequate laws, both substantive and procedural, in place to deal with those who perpetrate such crimes, to bring them to account for their misdeeds, and to protect the victims of such crimes, such crimes continue to flourish because of the high profits. Yes, human trafficking and the smuggling of migrants is a silent threat, that is why it is especially insidious and menacing to our society.

[96] I hope I have been able to give you an insight into the procedures through the eyes of the court and that you have found it beneficial. With that, I thank you for your patience and hope that all of you will have a fruitful Seminar.

90 [2018] 8 MLJ 421.
91 ATIPSOM, s 66A(4).
92 Ibid, s 66B.

The Past, the Present and the Future of Cross-Border Insolvency: But What's Next for Malaysia?

by

*Kho Feng Ming**

Abstract

The insolvency aspect of a corporation was never meant to be scrutinised hermetically confined within its jurisdictional silos. Modern commerce means businesses tend to have multiple economic footprints around the world. While businesses prosper and flourish beyond their territorial border, they are never insured from financial hiccups and setbacks. On occasion, their fiscal failure leads to untimely demise and this is the moment where the law on cross-border insolvency becomes significant. As states vary in their legal frameworks to deal with the failure of a global corporation, the UNCITRAL devised a Model Law which was meant to be the ideal legislative guide. Using content analysis as the methodology of research, this article seeks to address why the law on cross-border insolvency has become imperious and what are the areas we can improve in light of the pace of growth of modern commerce. As this area is complex and highly technical, it is therefore necessary for it to be examined through the lenses of its history. Thereafter, this article will craft out the recent developments of this subject and will paint a picture on the inherent nature of the Model Law. An assessment of our legal position in this area will be done to understand whether our contemporary approaches should be consigned to the relics of legal history. This article will highlight the roles which the courts can play to modernise the law of cross-border insolvency and will conclude by modestly pointing out some key areas of interest.

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Introduction

[1] Cross-border insolvency is not a novel concept in the 21st century. Although it is not a term of art, we have been consistently comforted by the assurance that it is not an "unruly horse".[1] To put it concisely, cross-border insolvency is concerned with insolvency that encompasses a "cross border" or "foreign" element.[2] As simple as it may sound, its legal history is unfortunately convoluted. Its complicated past tells us that there are different schools of thought on the philosophies that govern this area of law. For many in the international insolvency community, the two broad dichotomies, i.e. "universalism" and "territorialism", are the theoretical difficulties which have attracted intense debates among the scholars. Such incongruous state of affairs is foreseeable given that this particular area of law engages with the oft-sensitive word "sovereignty". As we live in a world of distinct sovereign states each having their respective laws and legal systems, problems ensue when, for instance, court *X* has within its jurisdiction the asset of a debtor but this debtor at the same time has commenced bankruptcy proceedings in court *Y* which is situated in another country. The immediate question is, what would be the next proper course of action for court *X*? Should court *X* exercise control over the asset within its jurisdiction? Or, should court *X* transfer the property to court *Y* especially since the latter is the *main* proceeding which is in the midst of addressing the debtor's bankruptcy matter?[3] It is the foregoing perplexing dilemma that gave rise to the doctrinal divergence.

[2] For universalists, they contend that court *X* should transfer the asset to court *Y* since court *Y* is the main proceeding that is dealing with the debtor's bankruptcy.[4] Its aim is to ensure that creditors

1 Burrough J in the leading English decision of *Richardson v Mellish* (1824) 2 Bing 229 at 252; 130 ER 294 at 303 – public policy in the realm of the law of contract is: "[A] very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law."

2 See Hamish Anderson, *The Framework of Corporate Insolvency Law* (Oxford University Press: New York, 2017), pp 272–294.

3 Phoebe Hathorn, "Cross-Border Insolvency in the Maritime Context: The United States' Universalism vs Singapore's Territorialism" (2013) 38(1) *Tulane Maritime Law Journal* 239 at 241.

4 John J Chung, "The Retrogressive Flaw of Chapter 15 of the Bankruptcy Code: A Lesson from Maritime Law" (2007) 17 *Duke Journal of Comparative & International Law* 253 at 262.

are subjected to the similar legal regime. Hence, the genesis of the universalist's argument is marketing the idea of "judicial economy" where cross-border insolvency should be dealt with by a single forum. A single court such as court *Y* will command a worldwide stay of all proceedings[5] and thereafter make a worldwide distribution of the debtor's assets to the creditors. There should only be one set of laws that govern all the assets of the debtor regardless of their respective locations.[6] This will ensure equality for stakeholders "with similar legal rights everywhere in the world".[7] For those who advocate for territorialism, they view that court *X* should exercise control over the asset which is within its jurisdiction without deference to another country such as court *Y*. This is commonly associated with the "grab rule" where court *X* "grabs" whatever assets which are within its jurisdiction and uses them to satisfy the debts owed to the domestic creditors.[8] Therefore, for territorialism advocates, the work of corporate insolvency operates hermetically confined to its jurisdictional boundaries[9] and the consequence of this is the existence of multiple forums culminating with various governing laws. Their main contention is that importance should be placed on the country's social and national goals and this is a feature significantly lacking in universalism. Frederick Tung explained:[10]

> More generally, states take differing approaches to resolving corporate financial distress and addressing the various interests implicated. States may have quite divergent views of the appropriate methods and goals for an insolvency regime. Some protect secured creditors above all else. Others focus primarily on rescuing the going concern and maximizing employment, with creditor recoveries being less important. Some eschew formal legal proceedings in favor of more informal mechanisms for resolution of financial distress. Some visit

5 See Jay L Westbrook, "A Global Solution to Multinational Default" (2000) 98 *Michigan Law Review* 2276 at 2293.

6 Leif M Clark and Karen Goldstein, "Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies" (2011) 46(3) *Texas International Law Journal* 513 at 516.

7 See Jay L Westbrook, supra n 5.

8 Phoebe Hathorn, supra n 3.

9 Kannan Ramesh, "Cross-Border Insolvencies: A New Paradigm", speech delivered at the International Association of Insolvency Regulators' 2016 Annual Conference and General Meeting in Singapore (September 6, 2016).

10 Frederick Tung, "Fear of Commitment in International Bankruptcy" (2001) 33 *George Washington International Law Review* 555 at 574–576.

> personal liability on corporate directors for insolvent trading. With respect to asset disposition, substantive rules address (a) what items count as debtor assets subject to bankruptcy jurisdiction, (b) the terms, if any, on which a rescue attempt will be permitted, (c) how and by whom the choice between liquidation and rescue should be made, (d) who should manage the firm in the interim, and (e) what if any restrictions are to be placed on the firm's interim management.
>
> To the extent that universalist interjection of home country law reorders a state's distributions to creditors such that recoveries for intended local beneficiaries are frustrated, fundamental public policy considerations are implicated. To the extent universalism demands a rescue attempt when liquidation is the local preference, or vice versa, domestic policies are thwarted … Universalism effectively requires a state's pre-commitment to wholesale deferral to other states' various prescriptions for financial distress. This is no small request.

[3] Following from the aforesaid, it seems obvious that both schools of thought respectively possess a great deal of truth and are correct in their own sense. However, both theories suffer from significant congenital defects. Although universalists endeavour to promote judicial economy, the exercise to marshal the assets of the debtor from every corner of the world and to transfer it to a single court is costly.[11] Even if the consolidation exercise is successful, they may be faced with the subsequent problem of recognition and enforcement of the judgment of the main proceeding as not all states subscribe to universalist theories.[12] Putting it in another way, non-recognition essentially renders the entire main proceeding futile. Nevertheless, embracing the concept of territorialism does not solve the problem. While universalists have conceded that the *modus operandi* of territorialism affords a more efficient approach in dealing with the assets of the debtor, some foreign creditors may lose their opportunity to recover the debt as they did not file a claim against the assets in that jurisdiction. Since territorialism upholds the view of independent and separate proceedings, this can only encourage a frantic scramble to trace the debtor's assets as creditors logically would not want to forego its debts. This gives rise to inequitable results as territorialism

11 Leif M Clark and Karen Goldstein, supra n 6, at 517.

12 Stacy Allen Morales and Barbara Ann Deutcsh, "Bankuptcy Code Section 304 and US Recognition of Foreign Bankruptcies: The Tyranny of Comity" (1984) 39 *Business Law* 1573 at 1586.

seems to not only favour the local creditors, but it is also inimical to the foreign creditors. Even if the foreign creditor manages to file a claim in a national court, questions arise as to whether territorialism recognises their claims and what form of assistance will be given to the foreign creditors/foreign insolvency representative.[13] If one may add, fragmentation of proceedings is another area that is difficult to reconcile with because inconsistent decisions are the natural by-product of this theory.[14] This is so since "individual outcomes [for a particular proceeding in the respective national courts] would depend on where the assets, debtors, and creditors happened to be".[15] Thus, it is apparent that none of the above two philosophies are harmonious to the law on cross-border insolvency and this is similarly echoed in the speech by Justice Steven Chong of the Supreme Court of Singapore delivered at the World Enforcement Conference 2019:[16]

> 15. This should hardly come as a surprise because bridging towards that distant dream would require a significant amount of ideological and practical compromise and substantive legal convergence. After all, the design of each country's insolvency laws is a product of a "multitude of social and economic considerations and compromises"; each is a response to a unique set of political exigencies and a reflection of the particular policy preferences of its citizens. The inevitable result is a high degree of variance in insolvency laws across national systems. These differences can range from specific legal rules, such as those concerning the treatment of foreign creditors, to the overarching goals of the insolvency process altogether, such as whether it aims to prioritise creditor returns or job preservation.
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> 16. Given this "patchwork" of national insolvency laws, it will not be easy to forge a common consensus at a supranational level for the

13 S Chandra Mohan, "Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer" (2012) 21(3) *International Insolvency Review* 199 at p 2.

14 Rosalind Mason and John Martin, "Conflict and Consistency in Cross border Insolvency Judgments", paper presented at the 32nd Annual Conference of the Banking & Financial Services Law Association in Brisbane (September 4, 2015).

15 See Chief Justice Sundaresh Menon, "The Future of Cross-Border Insolvency: Some Thoughts on a Framework Fit for a Flattening World", keynote address delivered at the 18th Annual Conference of the International Insolvency Institute 2018, at para 20(c).

16 Justice Steven Chong, "The Judicial Insolvency Network: A Ready Response in an Imperfect World", keynote address delivered at the World Enforcement Conference 2019, at paras 15–16.

governance of international insolvencies that can obtain in a binding legislative instrument …

[4] Fortunately, after some intellectual soul searching, the international insolvency community navigated past the competing ideologies and was able to identify the middle ground. The international community was able to curate a pragmatic compromise and this gave rise to the concept of "modified universalism".[17] There is no doubt that human ingenuity as well as innovations played a part in forging a practical solution, but the desire to exchange ideas demonstrates a genuine enthusiasm in devising a meaningful and effective framework for cross-border insolvency.

[5] Modified universalism, as its name suggests, is the middle ground between both universalism and territorialism. Although it has been tagged as an "ancient vintage",[18] some argue that this phrase was actually coined more than two and a half centuries ago by Justice Bathurst in *Solomons v Ross*.[19] Lord Hoffmann in *McGrath & Ors v Riddell & Ors*[20] explained that modified universalism "has been the golden thread running through English cross-border insolvency law since the eighteenth century". Be that as it may, the common view in the present day is that this doctrine is the central tenet for the jurisprudence of cross-border insolvency.[21] What "modified universalism" envisages is that the "[local] courts should, so far as is consistent with justice and [local] public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution".[22] This

17 See Sir Geoffrey Vos, "Modified Universalism: Do We Know What it Means?", lecture delivered in the Supreme Court of Singapore on October 26, 2017.

18 Jay L Westbrook, "Choice of Avoidance Law in Global Insolvencies" (1991) 17 *Brooklyn Journal of International Law* 499 at 517.

19 (1764) 126 ER 79.

20 [2008] All ER(D) 116 at [30].

21 See, for example, in the United Kingdom, the case of *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508. See also LoPucki LM, "Cooperation in International Bankruptcy: A Post-Universalist Approach" (1999) 84 *Cornell Law Review* 696; Adrian Walters, "Modified Universalisms & The Role of Local Legal Culture in the Making of Cross-Border Insolvency Law" (2019) 93 *American Bankruptcy Law Journal* 47; G McCormack, "Universalism in Insolvency Proceedings and the Common Law" (2012) 32 *Oxford Journal of Legal Studies* 325.

22 *In re HIH Casualty and General Insurance* [2008] 1 WLR 852 at [30], *per* Lord Hoffmann.

means whilst the main insolvency proceeding is tasked with distributing the debtor's assets to the creditors, those concurrent proceedings which are ancillary in nature should *cooperate* with the former so long as it is consistent with the notion of justice and public policy. This is because the underlying basis of an insolvency process is to achieve economic efficiency and to obtain optimal returns for the creditors.[23] This aim is not difficult to achieve if all claims (as well as issues) are being centralised in one forum. The international insolvency community has the general consensus that this concept is non-parochial in nature and it affords an efficient and effective way of handling the global assets of the debtor. To put it succinctly, modified universalism actually calls for "sensible judicial cooperation" and this theory eventually becomes the foundation of the philosophy envisaged in the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law").[24]

The present: What is the Model Law and its status?

[6] In its purest form, the Model Law is actually a tool of harmonisation. It was conceived in 1997 with the objective to create connections on the aspect of cross-border insolvency among the states and to canvas a landscape for legal convergence between jurisdictions. The Model Law understands that there will be more than one set of insolvency proceedings. However, maximum cooperation and coordination among these various proceedings should be the common guiding principles.[25] The basic governing principles envisaged in the Model Law can best be summarised into the following four main elements:

(a) Access:[26] thereby allowing foreign insolvency representatives a right of access to the local courts;

(b) Recognition:[27] thereby allowing the local courts to recognise a foreign insolvency proceeding either as the "main proceeding" or "non-main proceeding";

23 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [1].

24 UN (1997). For a brief history leading to the birth of the Model Law, see S Chandra Mohan, supra n 13, at pp 3–4.

25 Gerard McCormack and Wan Wai Yee, "The UNCITRAL Model Law on Cross-Border Insolvency Comes of Age: New Times or New Paradigms" (2019) 54(2) *Texas International Law Journal* 273 at 276.

26 Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, UN Sales No E.14.V.2 (2014), at para 23.

27 Ibid, at para 9.

(c) Relief:[28] thereby allowing the local courts to grant reliefs in aid of the foreign insolvency proceeding; and

(d) Cooperation:[29] thereby allowing cooperation and direct communication between the local court and the foreign courts so as to "foster decisions that would best achieve the objectives of both proceedings".[30] Coordination is also paramount for the more effective management of concurrent proceedings.[31]

[7] Hence, the Model Law strives to promote orderly winding up across borders, with particular emphasis being placed on comity, harmonisation and legal convergence.[32] The UNCITRAL also expressly said that the Model Law is, after all, designed to "assist States to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border insolvency".[33] It serves as a legislative guide for states to encourage their respective laws being drafted in accordance with the aforesaid four guiding principles. The provisions in the Model Law are worded generally in nature, consisting of only 32 articles supplemented with an explanatory Guide to Enactment, with the hope that states will support it by adoption or by incorporation into their domestic legislation.[34] Unfortunately, in spite of its high hopes and as the Model Law celebrates its 27th birthday this year, only 57 states have adopted it across the globe. The likes of the United States of America ("US"), United Kingdom ("UK"), Australia, Japan and recently, Singapore, have chosen to subscribe to the Model Law, but many other states remain hesitant in doing so. In fact, the emerging global economy superpowers such as China and India, as well as those in the European Union ("EU")

28 Ibid, at para 29.
29 Ibid, at paras 29–30.
30 Ibid, at para 31.
31 Ibid, at paras 30–31.
32 Justice Aedit Abdullah, "Celebrating and Reflecting on 25 Years of the Model Law on Cross Border Insolvency: The Newbie's Take – Singapore and the Model Law", speech delivered at the International Insolvency Institute.
33 See the official website of United Nations Commission on International Trade Law (UNCITRAL), available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.
34 Bob Wessels, Bruce A Markell and Jason J Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* (Oxford University Press, 2009), p 202.

such as Germany and France appear to be resistant towards the Model Law.[35] Apparently, some states are taking the stance of "wait and see" approach, while others are happy to "wait and wait"[36] and then only make its decision. As of today, there remains a significant number of states who have yet to adopt the Model Law into their legal systems. The level of reception of the Model Law somehow reminds us of the famous English adage that adroitly describe the cynical attitude of most states towards international law:[37]

> English law is law, foreign law is fact, and international law is fiction.

[8] Therefore, this naturally puts the Model Law in the limelight as to whether it is actually a story of success or rather a flop. This assessment is of particular importance given how the business world has progressed. The modern commerce, to put it aptly, entails an insatiable pursuit of economic opportunities. The manner in which it operates has become truly borderless and it reflects just how the trade of goods and services flow seamlessly. Businesses have developed to become transnational in nature and this change precisely resonates the concept of "free market economies".[38] Also, the emergence of technology literally transforms the entire commercial landscape to a whole new level. It even allows "the smallest enterprises [to] be born global"[39] as digital globalisation affords small and medium enterprises to participate in the regional and global economy. What can be discerned from this new paradigm is that it is inexorable and irreversible. Modern businesses endeavour to establish "economic footprints across multiple economies and economic zones".[40] As a result, businesses tend to spur across multiple jurisdictions. The

35 Status: UNCITRAL Model Law on Cross-Border Insolvency (1997), available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last accessed on April 5, 2023).

36 See Patrick Ang, "Cross-Border Insolvency Issues in Asia" [2015] 1 LNS(A) xci.

37 A Contributor, "Is International Law Justiciable in English Courts?" (1995) 54 *Cambridge Law Journal* 230.

38 See, generally, Andrew G Terborgh, "The Post-War Rise of World Trade: Does the Bretton Woods System Deserve Credit?" (September 2003), Economic History Working Paper No 78/03, London School of Economics and Political Science.

39 McKinsey Global Institute report, "Digital Globalization: The New Era of Global Flows" (March 2016), p 7, available at https://www.mckinsey.com/.

40 Kannan Ramesh, supra n 9, para 11.

testament of this can be gleaned from the sheer amount of multilateral as well as bilateral trade investment treaties being conceived in the recent decades.[41] Trade partnerships are no longer a distant dream and the continuous birth of trading blocs vow to stitch us into a cohesive economic community. The economic growth around the globe is simply too progressive and coupled with the recent Belt and Road Initiative ("BRI"), the future global economy will be a bloom rather than gloom. Certainly, we are now living in a different commercial age.

[9] However, regardless of how promising modern commerce can be, it is ignorant for us to snub the natural corollary of every global business: what happen if they fail? What happens if they catch a "nasty cold"[42] that effectively spells the end of the life of the corporation(s)? Thus, the "big question" we must ask ourselves right now, and as rightly described by the leading international insolvency judge Kannan Ramesh, "whether our insolvency laws have adjusted satisfactorily to meet the transformed commercial landscape?"[43] Do our laws have the capability to accommodate and address this new paradigm? To answer this, we must first remind ourselves of the principle of law governing the aspect of corporation. We are well apprised of the trite principle that the respective members of, for instance, a multinational business group, are separate legal entities. This means that if a specific member is insolvent, it affects only that particular entity and not on the group as a whole. Unfortunately, the practical reality points exactly to the opposite as the fiscal failure of one yields a grave impact on the other members of the group. This effectively demands us to engage with the various legal systems of different jurisdictions. Irit Mevorach explained:[44]

> Many cross-border insolvency cases of groups involve economically integrated enterprises because such enterprises are prone to the "domino effect," with the insolvency of one or few entities of the group cascading throughout the entire integrated enterprise. Integration may be in terms of the group business, where the entire group or

41 See M Sornarajah, *The International Law on Foreign Investment*, 3rd edn (Cambridge University Press, 2010).

42 Kannan Ramesh, supra n 9, para 7.

43 Ibid, at para 10.

44 Irit Mevorach, "Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge" (2014) 9 *Brooklyn Journal of Corporate, Financial and Commercial Law* 226 at 234–235.

> some parts thereof have run a single or an interdependent business. In the more rare cases, the integration is in terms of the assets and debts, whereby the affairs and liabilities of the different entities have been intermingled and inseparable.

[10] Such statement is not entirely untrue as the collapse of Lehman Brothers in 2008 warned us why the law must keep pace with the evolution of commerce.[45] The Lehman Brothers Group consisted of 7,000 legal entities in 40 different countries across Europe and Asia. When it filed Chapter 11 bankruptcy proceedings in the US, it essentially brought the creditors around the world to haywire. Eighty bankruptcy proceedings were filed against Lehman Brothers' subsidiaries as well as their affiliates, and the minutes transpired from the records of the proceedings said the following:[46]

> [T]he chaos that ensued was unprecedented and presented the potential for highly fractious proceedings permeated by years of extended, complex and expensive litigation among competing interests and entities.

[11] The collapse of Canadian telecommunications company, the Nortel Network Group of Companies, in 2009 is another instance telling us that the spectacular fall of a global business is capable of triggering repercussions that are multi-jurisdictional in nature.[47] The fall of the Nortel Group gave rise to concurrent insolvency proceedings being commenced in North America, Canada and

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45 See Michael Guihot, "Cross-border Insolvency: A Case for a Transaction Cost Economics Analysis", submission for the III Prize in International Insolvency Studies (2016), pp 39–40.

46 Debtors' Amended Response to Objections to Approval of Proposed Disclosure Statement, *In re Lehman Bros* Holdings, No. 08-13555 (Southern District of New York Bankruptcy Court, August 23, 2011), para [1].

47 See *Re Nortel Networks Corp* 2015 ONSC 2987; Jim Christie, "Slim Odds For Clawbacks of Attorney's Fees in Nortel Bankruptcy" (Reuters, May 28, 2015), available at http://www.reuters.com/article/bankruptcy-nortel-idUSL1N0YJ0J120150528; Edward J Janger and Stephan Madaus, "Value Tracing and Priority in Cross-Border Group Bankruptcies: Solving the Nortel Problem from the Bottom Up" (2020) 27(2) *University of Miami International & Comparative Law Review* 331; LexisNexis, "Implementing a global settlement of disputes (*Re Nortel Networks UK Ltd and other companies*)" (December 19, 2016), available at https://blogs.lexisnexis.co.uk/content/restructuring-and-insolvency/implementing-a-global-settlement-of-disputes-re-nortel-networks-uk-ltd-and-other-companies.

Europe, and again, it demonstrates that the fiscal failure of one affects the entire business group. In fact, the insolvency process becomes even trickier if it is intertwined with admiralty law. The fall of Hanjin Shipping[48] in 2016 is a typical example where the creditors were puzzled on what would be the next course of action *vis-à-vis* the vessels.[49] The tug of war between admiralty and insolvency law steps in and this renders the whole insolvency exercise "murky and treacherous".[50] If one may add, the recent collapse of cryptocurrency exchange group, FTX, posed further questions as to how asset tracing and valuation of crypto assets should be done.[51] The assets are not conventional real estate or those readily identifiable but are of a different nature. They reside in cyberspace and this renders asset valuation extremely tedious.

[12] Armed with the aforesaid eventful past, we now look at our laws and legal systems governing cross-border insolvency. Do they satisfactorily provide an efficient and effective way of dealing with the fallen global business entity? Do the commercial and legal aspects "turn harmoniously upon the same axis"?[52] In this regard, the UNCITRAL Legislative Guide on Insolvency Law skilfully sketch out the current legal landscape of the respective states on cross-border insolvency:[53]

> [N]ational insolvency laws have by and large not kept pace with the trend [of increasing cross-border insolvencies] … This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies,

48 For further reading, see Minjee Kim, "Cross-Border Insolvency and Debt Reconstructing Law Reform in Singapore: Reflections on the Hanjin Shipping Case" (2019) 19(2) *Australian Journal of Asian Law* 233.

49 BBC News, "Bankrupt Hanjin Seeks Court Protection for Its Ships" (2016); Joyce Lee and Lee Se Young, "Hanjin Shipping files for Receivership, as Ports Turn Away Its Vessels" (2016), Reuters.

50 Sarah C Derrington, "The Interaction between Admiralty and Insolvency Law" (2009) 23(1) *Australian and New Zealand Maritime Law Journal* 30.

51 Kannan Ramesh, "The Case for Cooperation and Communication in Cross-Border Insolvency Proceedings", speech delivered at the 2nd International Research Conference on Insolvency and Bankruptcy 2023. On the collapse of FTX, see William Ery, Christopher Tse, David Scheuermann and Patrick Heusser, "The Collapse of FTX: A Post Morterm Report", Crypto Finance Deutsche Borse Group (November 2022).

52 Justice Steven Chong, supra n 16, at para 3.

53 See UNCITRAL Legislative Guide on Insolvency Law (2005), p 310.

> impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets.

[13] In light of the UNCITRAL commentary, one will be curious as to why the abovementioned observation and even an honest assessment of our respective cross-border insolvency law is necessary. To answer this, we fall back to identifying the *raison d'etre* of cross-border insolvency law. Contrary to the popular belief that the insolvency exercise is solely catered for the benefit of the creditors, we must not overlook the fact that this process also encompasses the aspect of navigating the best solutions to the economic malaise suffered by the debtor.[54] Insolvency process also strives at maximising the value of all the assets of the failing company so as to ensure optimal returns for the creditors. This is commonly associated with the concept of economic efficiency[55] and is the bedrock of insolvency law even in light of the business disintegration. The World Bank said:[56]

> … the goal of [international insolvency proceedings is to] maximise the value of the debtor's worldwide assets, protecting the rights of the debtors and creditors, and furthering the just administration of the proceedings.

[14] However, as modern global businesses are becoming behemoths in nature, the exercise to unravel their assets and liabilities becomes extremely tricky.[57] It would therefore require the conscious collective and collaborative efforts of all stakeholders. To do this effectively, the central lodestar has to be the concept of "universalism" alluded to above. Nonetheless, the reality is that universalism only appears to be a jewel in the crown that remains "tantalising [and yet] out of reach".[58] Many states still tailor their laws in the fashion which is not ideal to cross-border insolvency, while others draft their legislation to only cater for domestic purposes. They are not conducive "for the fair

54 Wolf-Georg Ringe, "Insolvency Forum Shopping, Revisited" in Vesna Lazić and Steven Stuij (eds), *Recasting the Insolvency Regulation* (TMC Asser Press, 2020), para 16-03, Ch 1.

55 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21.

56 World Bank, Principles and Guidelines for Effective Insolvency and Creditor Rights Systems (April 2001).

57 Kannan Ramesh, supra n 9, para 8.

58 Justice Steven Chong, supra n 16, at para 25.

and efficient administration of cross-border insolvencies"[59] because they do not envision the orderly collection, distribution as well as the maximisation of the assets of the particular global business group. This resembles a significant divergence on the area of cross-border insolvency which is very unfavourable to the economic impetus. The viable alternative to address this conundrum would be the Model Law, in which the Chief Justice of Singapore Sundaresh Menon explained that although the Model Law may not be the silver bullet, it does sufficiently provide a uniform approach towards cross-border insolvency:[60]

> 24. Superficially, the Model Law might appear anodyne, given its apparent focus on matters of procedure. However, this is a case of the whole being much more than the sum of its parts … [T]he structure of the Model Law, is inescapably universalist in spirit. Yet, the Model Law leaves room for national interests in the form of three principal safeguards, namely: first, the public policy exception; second, the proviso that remittal can be ordered only where the interests of local creditors are adequately protected; and third, the pre-eminence of local proceedings where there are concurrent proceedings.
>
> 25. Now, whether one elects to describe this as "modified universalism with a territorialist foundation" or territorialism with a universalist foundation does not matter. What does matter is that it articulates a powerful normative vision that insolvencies should, in the first instance, be governed primarily by the court and laws of the debtor's [centre of main interest], subject to some safeguards being in place to cater for local interests. This is what subscription to the Model Law entails, and once States accept this, they will be more amenable to embracing other proposals that are similarly premised on a universalist foundation … One scholar has rather aptly likened this to wading into a lake rather than jumping in.

What does the future hold for Malaysia?

[15] Having carefully set out the tremendous development of the global economy as well as drawing the importance of the Model Law,

59 Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, supra n 26, at para 5.

60 Sundaresh Menon CJ, "The Future of Cross-Border Insolvency: Some Thoughts on a Framework Fit for a Flattening World", keynote address delivered at the 18th Annual Conference of the International Insolvency Institute 2018.

what then is the legal position in Malaysia concerning cross-border insolvency? A simple answer to this is that we do not have a specific law to address this particular area. In spite of amending our previous Companies Act 1965 and formulating a new piece of law, i.e. the Companies Act 2016, our laws (including the Companies (Corporate Rescue Mechanism) Rules 2018 and the Companies (Winding-Up) Rules 1972) continue to lack the foreign/cross-border dimension. Although our laws do possess several corporate rescue mechanisms such as corporate voluntary arrangements ("CVA"), judicial management ("JM"), as well as schemes of arrangement ("SoA"), neither of them addresses cross-border insolvency. Following from this, it is not unusual to find that cases of such nature have yet to arise in our local jurisprudence. As such, we are indeed unsure of whether Malaysia is a subscriber to the theory of "universalism", "territorialism" or even "modified universalism". One certain fact is that we have yet to adopt the Model Law into our legal system. Therefore, towards this end, what does the future hold for us for matters concerning cross-border insolvency? Should this current state of affairs subsist even in light of the sustained economic growth around the world? Or should we make some bold insolvency reforms and tell the whole world that we have now emerged as one of the prominent hubs for insolvency and debt restructuring?

[16] On October 5, 2021, we were blessed with a significant development in this area of law. Our Federal Court and the Supreme Court of Singapore agreed to two Protocols on court-to-court communication and cooperation in admiralty, shipping and cross-border corporate insolvency matters. This bilateral effort is a very important progress for our legal system as the Protocols function to "facilitate the efficient and timely coordination and administration of shipping and admiralty cases as well as cross-border corporate insolvency cases".[61] The emergence of the Protocols speaks volume of our commitment (especially the Judiciary) in cooperating, communicating and coordinating with other states such as Singapore in cross-border insolvency matters. This brings us to

61 Media Release: "Malaysia and Singapore implement protocols on court-to-court communication and cooperation in admiralty, shipping and cross-border corporate insolvency matters" (October 5, 2021), available at https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-release-malaysia-and-singapore-implement-protocols-on-court-to-court-communication-and-cooperation-in-admiralty-shipping-and-cross-border-corporate-insolvency-matters.

the next question: should we replicate what Singapore has done in dealing with cross-border insolvency? In recent years, Singapore has promoted themselves as the international centre for insolvency debt restructuring. They have made several changes to their legal framework where, among others, the Model Law was adopted into their Companies Act[62] via amendment[63] in 2017. Recently, they have also consolidated the personal and corporate insolvency laws into a single piece of legislation, i.e. the Insolvency, Restructuring and Dissolution Act 2018, which sends the message to the world on their strong restructuring and rehabilitating culture and persuading the world on their capability to become a major global legal and financial hub.[64] However, all these require a full-fledged commitment from the Parliament. It goes without saying that if we are to follow the same, we need to carefully study this crucial revamp of our laws and duly consider the multifaceted interests of various stakeholders. Certainly, this is neither an overnight task nor can it occur by happenstance. It will be a long and tedious process requiring numerous compromises and concessions. In spite of this, there are actually a few areas which we (the Judiciary) can emulate and imbibe from Singapore's experience while we anticipate the move by the legislative body.

[17] First, by participating in the Judicial Insolvency Network ("JIN"). In short, JIN is a network of insolvency judges established in 2016 and is a judicial model which is in sync with the global trade at the moment. Some may describe it as a form of "judicial diplomacy",[65] but the cardinal feature of JIN is that they share the common values where the *courts* can play an important role and contribution to address the challenges of cross border insolvency.[66] On its official webpage, it states:[67]

62 The Singapore Companies Act 1967 (2020 Revised Edition).

63 The Singapore Companies (Amendment) Act 2017. For a detailed discussion on the recent development of insolvency law in Singapore, see the article by Justice Kannan Ramesh and Justice Aedit Abdullah, "Developments in Singapore Insolvency Law" January [2020] JMJ 190.

64 See the keynote address delivered by Justice Kannan Ramesh at the Singapore Insolvency Conference 2018.

65 Emily Lee, "Judicial Diplomacy in the Asia-Pacific: Theory and Evidence from the Singapore-initiated Transnational Judicial Insolvency Network", University of Hong Kong Faculty of Law Research Paper No 2022-21 (April 28, 2022).

66 See JIN's official website, "About us", available at http://www.jin-global.org/about-us.html.

67 See https://www.supremecourt.gov.sg/news/media-releases/judges-of-the-worldwide-judicial-insolvency-network-to-meet-in-new-york-city-this-september.

> The overarching objective of these Guidelines is to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings … by enhancing coordination and cooperation amongst courts under whose supervision such proceedings are being conducted.

[18] One of the chief purposes of JIN is to further facilitate court-to-court *communications* and *cooperation*. In doing so, they have developed a common framework known as the JIN Guidelines, i.e. Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters.[68] As of the date of writing, 16 courts across the globe have adopted the JIN Guidelines. This is one of the major achievements of JIN given that they barely existed seven years ago. Specifically, the core features of the JIN Guidelines entail:

(a) sharing of the court's papers such as orders, judgments etc.;[69]

(b) notice of its proceedings to be given to parties in proceedings in another jurisdiction;[70]

(c) recognition of foreign court's orders without further proof;[71] and

(d) the conduct of joint hearings.[72]

[19] Such coordination and collaborative efforts are conducive to the entire cross-border insolvency process. The courts would be able to coordinate the proceedings more effectively and at the same time, the entire insolvency exercise becomes more efficient. This is not an entirely new legal process but a mere reflection of the concept of "modified universalism" as envisaged by the Model Law.[73] Its ultimate concern is rested on uniting the courts in cross-border insolvency cases. Hence, JIN is actually a form of judicial leadership offering a promising future where the courts take the lead "to develop soft law norms that can guide the international insolvency community towards a common understanding of how parallel insolvency proceedings

68 See JIN's official website, "Initiatives", available at http://www.jin-global.org/jin-guidelines.html.
69 JIN Guidelines, guideline 7.
70 Ibid, guideline 9.
71 Ibid, guideline 12.
72 Ibid, Annex A.
73 Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, supra n 26, at para 4 which says "to facilitate and promote a uniform approach towards cross-border insolvency".

might be conducted".[74] In fact, the manner in which Justice Steven Chong spoke so impressively on JIN warrants a substantial portion of his speech worthy to be reproduced here:[75]

> Indeed, it goes without saying the doors to the JIN are always open and your interest in it will be most welcomed. It is after all the JIN's objective to foster a convergence in judicial attitudes and philosophies on cross-border insolvency matters on a global scale. That entails a deeper understanding of all the different legal systems of the world and what better way to acquire it than through your intimate participation in the broader conversation. I therefore urge you to seriously consider being involved in the JIN – to bring your expertise to bear on its work, to collaborate with fellow judges just as we are doing today, and in time, to benefit from a deep "spirit of trust" between courts that will give to the international business community the same kind of certainty, stability, and confidence that they might expect only from hard laws. If this appeals to you but you would like to know more about the JIN before joining as a member, then do consider coming on board first as an observer. Take the opportunity for yourself to see up close how we operate. Then, if you are convinced about the work that we do and committed to the vision that we hope to achieve, pledge your formal support. I eagerly await your participation in the JIN in one capacity or the other.

[20] The next initiative which we can engage in is "to cooperate" and "to communicate" with the other foreign courts. There is no doubt that these two elements are the subset of what has been discussed in the preceding section. Nevertheless, it is somehow necessary to reiterate them as both cooperation and communication are the "critical and integral dimension"[76] of cross-border insolvency. This means that while we anticipate the legislation moved by the policymakers, our courts can actually take the lead in this area by forging cooperation and fostering communication with the foreign courts. In doing so, it tells the world of modern commerce that we are always ready to cooperate, collaborate and communicate with the other courts and we agree with the significance of coordinating the insolvency proceedings and will also find the best solutions for the parties. Such approach is not anathema to the current concept of "modified universalism"

74 Justice Steven Chong, supra n 16, at para 25.
75 Ibid, at para 24.
76 Kannan Ramesh, supra n 51.

and it can promise an effective yet efficient insolvency process. It also reduces the risk of fragmentation of proceedings as explained in the theory of "territorialism". In fact, such approach is also allied to the core principles entrenched in the Model Law. In particular, both articles 25 and 27 of the Model Law expressly emphasise the obligation to cooperate and communicate in the cross-border insolvency process and even state the permissible forms of cooperation:

> *Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives*
>
> 1. In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State].
>
> 2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.
>
> *Article 27. Forms of cooperation*
>
> Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:
>
> (a) Appointment of a person or body to act at the direction of the court;
>
> (b) Communication of information by any means considered appropriate by the court;
>
> (c) Coordination of the administration and supervision of the debtor's assets and affairs;
>
> (d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
>
> (e) Coordination of concurrent proceedings regarding the same debtor;
>
> (f) [The enacting State may wish to list additional forms or examples of cooperation].

[21] The most encouraging development which we can take pride in at the moment is that our courts are actually moving towards a

very positive direction. The recent Protocols/bilateral effort with our Singapore counterpart is a ground-breaking move and it showcases that our Judiciary recognises the importance of cooperating and communicating with foreign courts in cross-border insolvency matters. And as modified universalism being adherent of communication and cooperation between courts, the Model Law also said that communicating and cooperating with each other should be the virtue so long as they are in consonant with the notion of justice and local public policy. Surely, if we add this powerful tool to facilitate the cross-border insolvency process, the global business and the international insolvency community will tentatively look forward to more initiatives of such nature by our Judiciary in the near future.

[22] The next area which the Judiciary can do is of particular interest (and also important): what if cross-border insolvency cases do indeed arise in Malaysia? For instance, if the ship from Hanjin docked in Malaysia, or if the likes of the Nortel Network Group called for assistance from our court, what can we do under such circumstances? There is no doubt that they have filed their main proceeding in a foreign court, and with the foreign insolvency representative being appointed, do we actually:

(a) recognise their standing?

(b) grant them access to the local court? If so, what rights do they have?

(c) recognise the foreign main and non-main proceedings?

(d) grant relief (and interim relief) to the foreign insolvency representative and/or debtor? If so, what are the distinct reliefs available to the foreign main and non-main proceedings?

(d) allow the enforcement of the order of the foreign main proceeding?

[23] The answers to these questions are significant as they reflect our judicial approach in dealing with cross-border insolvency cases. How do our courts address these issues in light of the absence of express statutory provisions? While we are still suffering from the infirmity in terms of legislation, this is an area where judicial gap filling becomes the centre of attention. The courts can actually play the role of "agents

of harmonisation" as described by Gopalan and Guihot,[77] where we develop our jurisprudence based on the letter and spirit of the Model Law. But how can this gap-filling exercise be done?

[24] The answer to this lies in the common law and our courts will find the aid of common law extremely useful. If truth be told, the common law actually remains as an indispensable arsenal to bridge the gap between the Model Law and our domestic legislation. For instance, in assessing whether recognition should be given to the insolvency proceeding which took place in foreign jurisdiction, what is/are the appropriate test for recognition? Surely, it is not appropriate for our courts to "blindly" recognised the foreign proceeding as prayed for by the foreign insolvency representative. In this regard, the common law centre of main interest ("COMI") test would be useful. Whilst it is generally true that the foreign main proceeding should be commenced based on the place where the company is incorporated, there is nothing that prevents the company to file the proceeding in other places such as where it has its COMI.[78] This means that if the company can show to our courts that the foreign main proceeding is taking place in a state which is its COMI, our courts should give recognition to this foreign main proceeding.[79] Hence, hypothetically, if it happens that Hanjin Shipping came to seek our assistance in light of the rehabilitation order issued by the Korean court, the common law test of COMI would be useful. As a matter of common sense, since Hanjin is a shipping firm in Korea, it is reasonable to say that the COMI of Hanjin Shipping is also in Korea. Thus, there is no compelling practical or commercial reason for refusing to recognise the proceedings being filed in the Korean Bankruptcy Court. More importantly, such recognition means that our courts can render further assistance to Hanjin Shipping such as granting a stay of all proceedings that have been commenced against its subsidiaries in Malaysia and also prohibiting any form of

77 Sandeep Gopalan and Michael Guihot, "Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling" (2015) 48 *Vanderbilt Journal of Transnational Law* 1224 at 1275, 1279 and 1284.

78 The other relevant tests for COMI are the location where the company carries on its business, the law chosen to govern their contracts, and the location of their assets. These are sufficient indicators that their business has substantial connection to a particular jurisdiction and is also their centre of main interest.

79 For the Singapore experience, see *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] SGHC 108 and *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)* [2016] SGHC 195.

enforcement or execution against any of their assets. This is a typical example of how judicial gap filling can operate with the aid of the common law principles.

[25] However, whilst the author has postulated judicial gap filling in the preceding paragraphs, the important point to be driven home is that the judicial philosophy in dealing with cross-border insolvency cases should lean towards the direction of "modified universalism". Ideally and also adjunct to the spirit of the Model Law, our courts can build on the foundation of cooperation and communication by collaborating and coordinating with the foreign courts. So long as the request for assistance is in consonance with the notion of justice and domestic public policy, such judicial attitude should be consistently upheld whenever we deal with cross-border insolvency matters. The prime focus is judicial comity and collective insolvency proceeding especially in the absence of "hard law", and the jurisprudence of cross-border insolvency should be developed towards "modified universalism". In fact, judicial innovations in this area is also recommended if it adheres to the theory of "modified universalism". One particular example of this would be the use of alternative dispute resolution ("ADR") to deal with issues that arise in cross-border insolvency cases. In particular, mediation is an area of ADR which we can cling on since its genesis is rested on the element of "compromise" – a prominent feature which remains indelible to date. As illustrated by Justice Kannan Ramesh, courts can actually work together to direct the parties to mediate.[80] Although we are unsure of the extent in which mediation can assist, mediation will act as "a negotiation shock absorber to increase the odds [for] stakeholders [to] figure out … a resolution [that] is in their mutual interest".[81] For sure, we know that the debtor is facing various stakeholders who are vested with distinct interests of their own, and mediation could be the platform for them to identify the common ground as well as the best solution.

[26] Therefore, the matters set out in the foregoing section are the possible crucial areas in which our courts can take the lead for matters concerning cross-border insolvency. The ideas laid out above may not be comprehensive, but they are certainly the new paths as well as the practical solutions to remedy our temporary statutory defects.

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80 Kannan Ramesh, supra n 51.

81 The Hon James M Peck, "Plan Mediation as an Effective Restructuring Tool", speech delivered at the Singapore Academy of Law (April 1, 2019).

The important point is that we must continue to evolve to meet the ever-changing global economy. Our thinking, ideas and approaches must be able to keep up with the pace of modern commerce. However, as we are well aware that complex legal issues in myriad nature do continue to arise in cross-border insolvency cases, the following section of the article will briefly address certain issues which we may need to monitor closely.

A critique on some critical issues

[27] This section is divided into three parts. First, it seeks to address the issue of "forum shopping" where this notion, though being anathema to the general principle of law, nevertheless appears to be a normative concept in the cross-border insolvency process. The second issue to be highlighted is the problem of "reciprocity" where due to the non-confluence of philosophy and approach among states, a particular insolvency proceeding commenced in one state may not necessarily be recognised by the other. This is a disheartening outcome as it means the entire cross-border insolvency process is rendered obsolete. The last issue being addressed in this section is the apparent tug of war between the law of insolvency as well as admiralty claims. It highlights the key areas where both sets of laws are competing at the expense of the rights and interests of another.

Forum shopping

[28] In legal sense, whenever one mentions the phrase "forum shopping", the immediate impression that is canvassed to us is that this is an extremely "dirty word". Conventionally, "forum shopping" or "forum selection" is a taboo of the highest order and it is notorious for being one of the cardinal sins in the legal world. In fact, every litigant is often being sternly warned against using this tactical advantage at the prejudice of their opponent(s). Otherwise, the attempt to use this unlawful strategic gain will backfire perniciously. However, in the eyes of cross-border insolvency, "forum shopping" is not necessarily a bad thing and should not be given with indignation.[82] On some occasions, there can be good forum shopping:[83]

82 *The Atlantic Star* [1974] AC 436 at 471, *per* Lord Simon.

83 Friedrich K Jeunger, "Forum Shopping, Domestic and International" (1989) 63 *Tulane Law Review* 553 at 570–571. See also *Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch), *per* Newey J.

> Not all forum shopping merits condemnation … and we should not let a disparaging term becloud our thinking.

[29] In the context of cross-border insolvency, the underlying basis for holding such a positive view stems from the fact that the debtor company should generally have the autonomy to choose the forum which will offer the best outcome for the entire insolvency process, or a forum that can provide the best solution for all the stakeholders.[84] If, for instance, its place of incorporation does not possess a sound and robust system for the insolvency and debt restructuring exercise, does this make commercial sense for the debtor to insist on filing its main proceeding at this particular location? The debtor will know that if they persist to do so, the recovery of the economic value of their company may not be to the maximum scale. This is neither favourable nor beneficial for stakeholders such as the creditors. However, if its COMI is situated in another jurisdiction which happens to be possessing the right DNA for this insolvency exercise, there is no powerful objection which can be mounted against the debtor for choosing the other forum.[85] In other words, forum shopping can actually be deemed as an inevitable characteristic in cross-border insolvency cases. Since there are multiple jurisdictions and a myriad of legal frameworks across the globe, with each of them comprising a diverse insolvency culture, they actually yield a distinct considerable impact on the insolvency outcome. Hence, forum selection should not be strictly condemned on every occasion as it is a mere attempt to achieve the best possible result for all. It aims at obtaining the best, the most efficient and the most effective administration for the insolvency proceeding. Thus, in the event where the debtor company is successful in identifying the favourable forum, they will proceed with relocating their assets to this chosen forum and for it to command the supervisory jurisdiction over the entire insolvency proceeding. This is the point where both the local court and the foreign courts must become extra cautious. The burning question here is, how do the courts assess whether this particular case is good or bad forum shopping? How do the courts

84 Sundaresh Menon CJ, supra n 60, at paras 29, 32 and 33. See similarly *JSC Bank of Moscow v Kekhman & Ors* [2015] EWHC 396 (Ch) at [127].

85 See *Re Noble Group Ltd & Anor (No. 2)* [2019] 2 BCLC 548; Kannan Ramesh, "Party Autonomy and the Search for Nodal Jurisdictions in Cross-Border Insolvency", speech delivered at the Texas International Law Journal Symposium (February 6, 2021).

determine whether this "forum selection" discretion is being exercised *bona fide* or vice versa? Certainly, the courts would not want to render any form of recognition and/or assistance to the debtor company if this discretion is being exercised *male fide*. In this regard, several foreign cases seem to offer some valuable insight:

(a) Forum selection *per se* is not objectionable.[86]

(b) The forum selection should be done in consultation with the creditors.[87]

(c) If the forum selection is for the best interest of the creditors, and especially if there is clear and consistent support by the creditors, the courts generally should not deem it as bad forum shopping.[88]

(d) Bad forum shopping is if the debtor's intention is to escape its debts or to interfere with the claims of the creditors.[89]

(e) It cannot be regarded as good forum shopping if the selection leads to "unjustified inequality" between the disputing parties.[90]

(f) If forum selection is used to evade responsibilities towards the debtor's employees, to evade criminal laws or to cause prejudice to the creditors, it is bad forum shopping.[91]

[30] In some literature, it even stated that bad forum shopping can also entail situations where the debtor has fulfilled the formal requirements but used it against its purpose.[92] If the forum selection is "to obtain a more favourable legal position to the detriment of the general body of creditors",[93] it cannot be attributed as good forum shopping. Perhaps, all of the above point to the fact that the guiding principle for the courts is to assess whether the forum selection decision is commercially sound and whether it is done in the abhorrence of common sense judgment.

86 *Codere Finance (UK) Limited* , supra n 83, at [18].
87 *Kinsela v Russell Kinsela Pty Ltd (in liquidation)* (1986) 4 NSWLR 772 at 730.
88 *Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch), *per* Hildyard J.
89 *Codere Finance (UK) Limited*, supra n 83, at [18].
90 *Re Indah Kiat International Finance Co BV* [2016] EWHC 246 (Ch).
91 *Zetta Jet Pte Ltd & Ors (Asia Aviation Holdings Pte Ltd, intervener)* [2019] 4 SLR 1343 at [58].
92 Horst Eidenmüller, "Abuse of Law in the Context of European Insolvency Law" (2009) *European Company and Financial Law Review* 1 at para 9.
93 European Insolvency Regulations 2015/848, recital 5.

The aforesaid list is not exhaustive and this is an area where it can be subject to further development in the near future.

Reciprocity

[31] This is another area of interest. As foreshadowed above, there are several states which have adopted the Model Law into their legal frameworks while some states have yet to do so. Also, in our local context, although we are not one of the adopters of the Model Law, the aforesaid discussions duly suggest that our judicial approach can and should be shaped towards the modern theory of "modified universalism". It is also recommended that the jurisprudence for this particular area of law should be developed on the bedrock of cooperation, communication and collaboration. This means that we are highly encouraged to align ourselves with the spirit of both the Model Law as well as the philosophy of "modified universalism". This is largely due to the paradigm shift in the global economy.

[32] However, a question arises in the context of reciprocity, i.e. what if our courts recognise the other foreign insolvency proceeding but we do not receive the same favourable treatment in return? Referring back to the hypothetical example of court *X* and court *Y*, the reciprocity problem entails the situation where "country *X* will only recognise country *Y*'s foreign proceeding if country *Y* recognises country *X*'s proceedings".[94] This is a formidable stumbling block which limits the effectiveness of both the Model Law and the concept of "modified universalism". This is true especially where the insolvency cultures and policies differ among the states. The issue of non-adoption of the Model Law itself has been a grave concern. This problem is further compounded when some states are not avid supporters of "modified universalism" and some are the champion of "territorialism". This could mean that the order/judgment of court *X* will not be recognised by court *Y* as the latter does not share the same philosophy with the former. When the underpinning theory giving rise to the order/judgment diverges, there is simply no basis for recognising and enforcing the order/judgment at all. A typical example on this can be seen in the jurisdiction of China where reciprocity will only be given

94 Gerard McCormack and Wan Wai Yee, supra n 27, at 285–286.

by their courts on an *ad hoc* basis.[95] Such approach unfortunately poses a high risk of ossifying the entire insolvency process.

[33] In fact, if one may add, there are also distinct legal treatments on the issue of reciprocity even among those states which have adopted the Model Law. In particular, article 6 of the Model Law states that the local court may refuse assistance in relation to foreign insolvency proceedings if to do so would be "manifestly" contrary to the local public policy. This means that as a matter of general principle, recognition, reliefs and assistance will not be given only in very rare and exceptional instances. The adopters of the Model Law such as the US and the UK have incorporated article 6 *in verbatim* into their legal framework. However, this is not the case in Singapore where the word "manifestly" is omitted. This modification means that the threshold for invoking public policy is lower than the Model Law.[96] In South Africa, an entirely different scenario takes place. The Model Law in South Africa says that reciprocity will only be given to countries designated by the government agency and to date, there is no such designated country at all. Some scholars therefore have commented that such approach practically leaves the entire South Africa's Model Law a "dead letter".[97]

[34] Hence, it can be discerned from the above discussion that reciprocity will continue to remain as an issue of utmost concern. It is therefore necessary for us to keep a close watch on the latest developments around the world especially on the judicial model to tackle this particular area. There could be bold innovations which are not too distant from us. After all, it might just require us to exchange ideas and to share our past experiences to harness an effective solution. The new blueprint to tackle this reciprocity issue could be just around the corner.

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95 See China's Enterprise Bankruptcy Law, article 5; Emily Lee, "Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters Between Hong Kong and Mainland China" (2015) 63(2) *American Journal of Comparative Law* 439 at 458.

96 *Re Zetta Jet Pte Ltd* [2018] SGHC 16 at [21] and [23].

97 See Alastair Smith and Andre Boraine, "Crossing Borders into South African Insolvency Law: From the Roman-Dutch Jurists to the UNCITRAL Model Law" (2002) 10(1) *American Bankruptcy Institute Law Review* 136 at 190.

The antagonism between insolvency law and admiralty **in rem** *claims*

[35] The preceding section of this article highlighted that the law on cross-border insolvency becomes extremely difficult to navigate when it mingles with admiralty claims. This is a worrying sign because, hypothetically, if the aforesaid Hanjin Shipping case creeps to the shores of Malaysia, how would our legal frameworks deal with cases of such nature? Should the courts prioritise insolvency over the admiralty claims, or vice versa? If admiralty claims are to be treated differently and take precedence over insolvency law, what would be the justification(s)? In *Re Aro Co Ltd*,[98] the English Court of Appeal said that there are indeed sustainable justifications to treat admiralty claims preferentially, given that they are the "lifeblood of globalisation":[99]

> … ships are owned and trade internationally, and unless a claimant can gain immediate security for a claim [through an arrest] he may never have the opportunity effectively to pursue it.

[36] Perhaps an illustration would be helpful. Let's say a claimant filed *in rem* proceedings against the vessel, is this act of filing an admiralty *in rem* writ legitimate especially when the company *is engaged with* insolvency-related administration? There is a *general* proposition of law that says if the admiralty *in rem* writ is filed *prior* to the presentation of the winding-up petition, such claimant has essentially acquired the status of secured creditor.[100] There is, of course, different legal positions in some other jurisdictions.[101] Nonetheless, the pertinent point to note is that upon the issuance of the *in rem* writ, the claimant actually acquires a security interest in the property which entitles him to be classified as a secured creditor.[102] This is the time where it encroaches into the law of insolvency. Insolvency law neither creates nor extinguishes rights, but it determines the *manner* in which these rights are to be satisfied. In doing so, this is where the collective execution of the assets of the company becomes essential.[103] Admiralty law does not see the case in

98 [1980] 1 Ch 196 at 206A–B.

99 Barry Glassman, "Shipping: Globalization's Lifeblood", *Forbes* (January 2, 2013).

100 *The Zafiro* [1959] 3 WLR 123.

101 Nonetheless, not all jurisdictions agree to this general proposition of law. See the case of *Benson Bros Shipbuilding Co (1960) Ltd v The Ship Miss Donna* [1978] 1 FC 379 at 387.

102 *The Monica S* [1968] 2 WLR 431 at 439.

103 *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc*, supra n 21, at [14], per Lord Hoffmann.

this manner. Admiralty law only "concerns itself with the rights and obligations between persons involved in sea and water transport".[104]

[37] However, if the *in rem* writ is filed *post* the commencement of the insolvency-related administration, this poses another problem.[105] Although it is trite that the claimant is required to obtain court's leave prior to the filing of the *in rem* writ, it is the consequential result of the *in rem* proceeding that demands further deliberation.[106] The answer to this issue is important because although the *in rem* writ is issued against the *res*, the ultimate party liable to the claim *may* still be the company (which is *in personam*).[107] This is true especially where the proceeds of the sale of the *res* do not fully satisfy the claim and the recovery of the balance sum would be by way of *in personam* action against the company. In other words, the enforcement of the claim is now militated against the company who, at the same time, is also engaged with insolvency-related administration. How does the law of insolvency (which aims at preventing dissipation of the assets of the company) reconcile with the competing interest of the claimant in admiralty jurisdiction? Although both insolvency law and admiralty claims continue to share the common value of dealing with the rights of the creditors *vis-à-vis* the claims,[108] it remains one of the delicate areas where the exercise to ameliorate this tension is extremely mind-boggling. To date, the interaction between these two areas of law continue to vex all the courts around the world and the basis giving rise to such strained interaction could as well stem from their distinct underpinning philosophies:[109]

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104 William Tetley, "The General Maritime Law—The Lex Maritima" (1994) 20 *Syracuse Journal of International and Comparative Law* 105 at p 3.

105 For Singapore's position, see *The Ocean Winner* [2021] 4 SLR 526 as well as the case commentary by Tan Siew Chi and Koh Thiam Knee, "Reconciling the Tension between Insolvency Law and Admiralty *in rem* claims" [2021] *SAL Practitioner* 25. For the legal position in Australia, see Sarah C Derrington, "The Interaction between Admiralty and Insolvency Law" (2009) 23(1) *Australian and New Zealand Maritime Law Journal* 30.

106 See *Danny Morris & Anor v The Ship Kiama* [1998] FCA 256.

107 *The Bunga Melati 5* [2011] 4 SLR 1017.

108 Steven Rares, "Ship Arrests, Maritime Liens and Cross-Border Insolvency", address at the 6th Annual World Congress of Ocean 2017 (November 3, 2017), para 3.

109 See Justice Steven Chong, "When Worlds Collide: The Interaction Between Insolvency and Maritime Law", keynote address delivered at the 2nd meeting of the Judicial Insolvency Network (September 22, 2018), paras 2, 16.

> Insolvency law generally seeks to centralise all assets of the debtor in a single forum in order that it can be distributed in a simple, inexpensive, and expeditious manner for the benefit of all creditors. To that end, it postpones the rights of individual creditors, who are restrained from bringing individual actions during the pendency of the insolvency process to prevent the dissipation of the assets of the estate … Maritime law, on the other hand, contemplates a multiplicity of proceedings in a multiplicity of fora. Its *sine qua non* is the action *in rem*, which allows maritime creditors to obtain security for their claims by arresting the ship that is connected with their claims in any port where she may be found. The guiding philosophy of maritime law is pragmatic individualism and its laws operate centrifugally, away from the centre.
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> …
>
> Maritime law is a specialised body of rules that is marked by two specific features. First, it deals only with maritime claims; second, it is principally concerned with maritime property, mostly ships. In this sense, it stands in stark contrast with insolvency law, which strives to satisfy all creditors as a body, regardless of the nature of their claims, through a realisation of all of the assets of the debtor.

[38] Thus, it can be observed that these two areas of law will continue to be at loggerheads due to the way in which their respective jurisprudence developed in the past. A *res* will and always continue to be subject to both the admiralty claim as well as an asset capable to be liquidated under insolvency law.[110] This is the only matter we are certain of until today.

[39] To conclude, the three issues elucidated above are the difficult areas in the realm of cross-border insolvency. There is no universal answer thus far for all these three issues and will remain as niche areas for a considerable future. It is therefore important to keep our minds open and observe the latest development in various jurisdictions. This is the only positive outlook we can take away for the time being.

Conclusion

[40] This article will conclude by saying that the law relating to cross-border insolvency is no longer an outmoded subject. Its importance

110 DR Thomas, *Maritime Liens* (United Kingdom: Stevens & Sons, 1980), para 99.

is gaining momentum and this can be attributed to the sustained growth of the global economy in recent decades. Indeed, the manner in which modern commerce has transformed post second world war is a remarkable story of the human race. It reflects our tremendous capability to recoup and to identify effective solutions to remedy the wrongs done by our forefathers. However, as global business prospers, it always embodies the risk of default. Regardless of how rich the promise of modern commerce can offer, any business can suffer sudden setbacks and may lead to untimely demise. This is the point where the law on cross-border insolvency becomes pivotal. The law must be able to cater for situations of such nature and it must continue to develop in tandem with the pace of the global economy.

[41] Regrettably, this is not the case in reality. States generally have contrasting approaches in dealing with the failure of corporations who possess multiple businesses across the globe. This prompted the birth of the Model Law which was supposed to act as the common procedural baseline for states. Nonetheless, it is unfortunate that the Model Law was only rewarded with mild reception since its inception. The drafter of the Model Law was not prescient that many states are still quite resistant and fairly hesitant to adopt it into their legal systems. Such scenario is extremely unfavourable to the world of modern business. A global corporation struck by economic malaise ought to have the legal panacea to recover its value for the benefit of the creditors. This is a task which both the policymaker and the lawmaker must quickly address.

[42] While we patiently wait for the legislation improvement, our courts can take the lead by cooperating and communicating with foreign jurisdictions. By talking with each other and by working with each other, both the local and foreign courts will be able to coordinate all insolvency proceedings around the world. Such collaboration will ensure an effective and efficient insolvency process for all interested parties. This line of judicial approach is also friendly to the concept of "modified universalism": a theory that has obtained broad consensus among the international insolvency community. Hence, even if we have to live in the absence of statutory guidance, there is always room for us to thrive. Judicial innovations in this area is certainly a welcome feature. Nevertheless, while we attempt to navigate through the patchy road, there are a few inherent issues

that persistently linger in our mind. Forum shopping, reciprocity and the pejorative relation with admiralty claims are among those thorny areas that we must manoeuver tactfully. After all, our ultimate aim is to ensure that the entire process of cross-border insolvency is conducive to all parties.

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