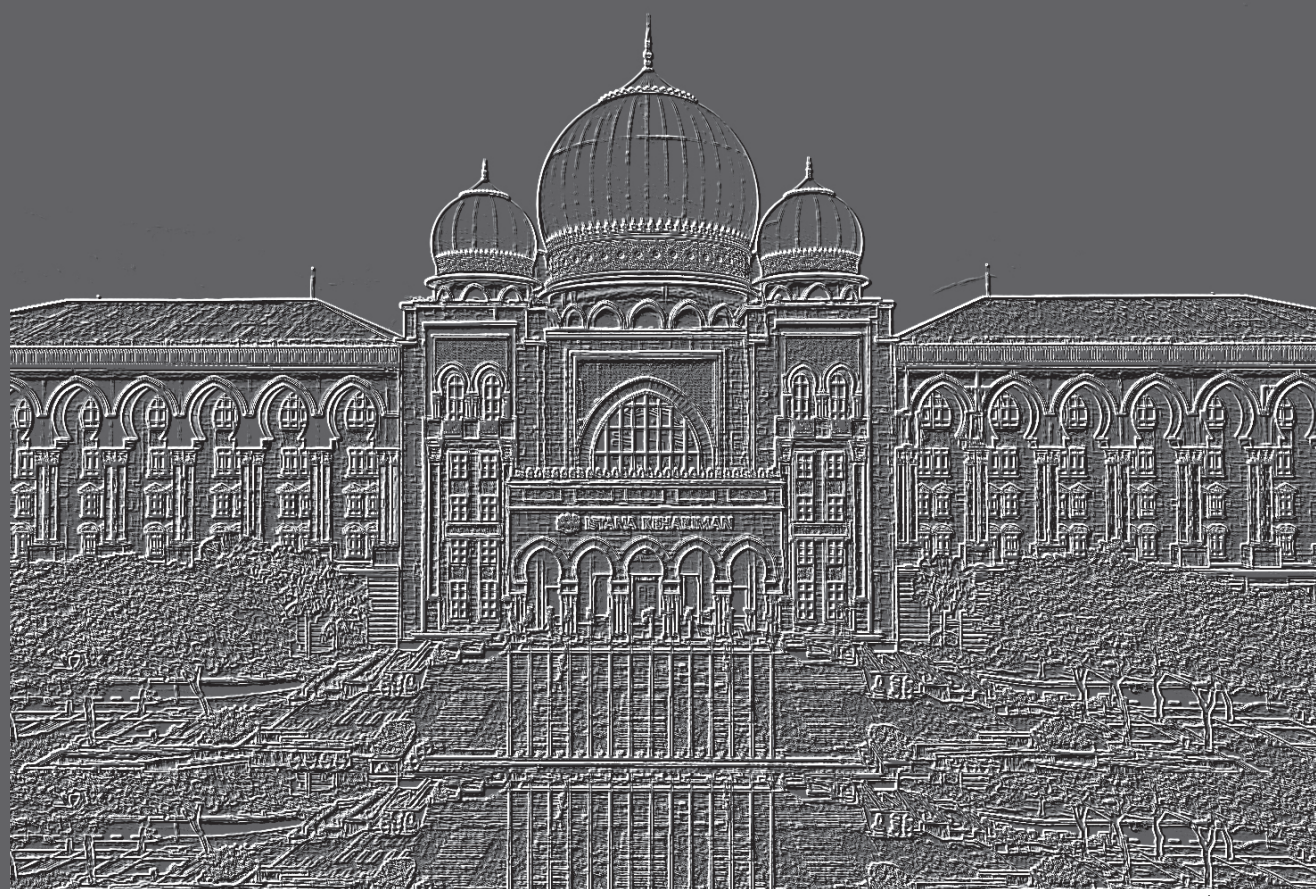
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July 2026



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PREFACE

You are holding in your hand or perhaps looking at pixels on a screen and reading from a hard or soft copy, that familiar journal that is published twice a year in January and July of each year – this being the July 2026 edition of the *Journal of the Malaysian Judiciary*. Writing is never easy and what more finding the time to write on top of one's judicial duties, the chief of which would be the writing of one's judgments.

The various judges and judicial officials have shared in this volume their reflections on various issues confronting the judiciary be they the established subjects of oral advocacy, access to justice, commercial dispute resolution, judicial review, expert evidence or the more esoteric ones like cross-border insolvency and digital justice. In a world where the only unchanging certainty is that nothing is certain or unchanging, the law must continue to adapt and not be anachronistic if it be to serve the enduring demands of the rule of law.

Whist it is almost cliche to be greeted with the first article titled "The Art of Advocacy", I was blown away when I first read it after The Right Honourable Chief Justice Tun Wan Ahmad Farid bin Wan Salleh shared with me soon after he delivered the keynote address on the subject. The speech is so characteristic of our Chief Justice who never fails to add a personal touch to all his keynote addresses and speeches. It is his snippets of stories that have made all his speeches personal and memorable. His own experience at the Bar and on the Bench help illustrate the important points in his message. He could not have said it better when giving advice to counsel on answering a question from the Bench:

> **[16]** If there's one thing you take away today, it's this: when a judge interrupts your perfectly rehearsed speech with a question, don't treat them like a heckler. Treat them like a GPS. If the GPS tells you to turn left, you don't say, "I'll get to that left turn at the next junction." You simply turn!

I commend the article for all to read, especially the young lawyers that our Chief Justice always has a heart for to see that they are properly mentored where advocacy and other lawyering skills are concerned. The older ones would find the stories and illustrations on the art of advocacy both riveting and refreshing. The Chief Justice concluded powerfully with these words that would reverberate through the corridors of courts:

[43] Be prepared. Be honest. Be courageous.

[44] And never – not once – underestimate the power of a well-made argument, in the hands of an advocate who truly believes in what they are doing.

[45] That, to my mind, is the art of advocacy. It belongs to all of you.

In "Access to Justice: Reflections from a Mobile Court", the Chief Justice recounts a visit to Kampung Tibabar, Ranau, Sabah, where a mobile court brought essential judicial and related government services to a remote community. After all the Rule of Law is about access to justice and where the people cannot come to the courts, the courts would go to the people! Justice is not just about resolving high-end complex commercial clauses by the courts but it is also the law reaching out to the villagers facing difficulties in birth registration and obtaining identification documents. His Lordship highlighted the human consequences of barriers created by distance, cost and limited infrastructure. It is a proactive and purposeful approach of bringing the law to the people so that they enjoy their full constitutional rights under the Malaysian sun.

Having sat in the Construction Court in Kuala Lumpur for three years plus and later chairing the Construction Panel in the Court of Appeal, I thought I should share some thoughts on "Governance in Construction Contracts and Dispute Resolution". The higher the stakes the greater the need for transparency, accountability and integrity and the construction industry is no exception. I surveyed the key phases throughout the life cycle of construction projects from tender to contract, from progress claims and performance to completion and when payment problems particularly do arise, to explore adjudication and arbitration. Our system of statutory adjudication yielding a solution of interim finality has helped alleviate the cash flow problem of many contractors who suffer delayed payments for work done. Prompt payment is an integral part of good governance and delayed payment should never become the culture of the construction industry. Corrupt practices can so easily creep in at every stage of the construction life cycle and there is an explorative study on the use of integrity pacts, anti-bribery and anti-corruption provisions, statutory safeguards, effective oversight and declarations under the relevant provisions of the Malaysian Anti-Corruption Commission Act 2009 by parties to the construction contract. I also addressed the need for adjudicators and arbitrators to maintain independence and impartiality throughout the adjudication and arbitration process, particularly in the face of possible conflicts of interest and non-disclosure. Sound rules and contractual safeguards must be matched by principled conduct and credible enforcement so as to engender and enhance confidence in the construction dispute resolution mechanism.

Justice Dato' Faizah Jamaludin, in "When Reconsideration Resets the Judicial Review Clock", examines when subsequent administrative action affects the three-month period under Order 53 rule 3(6) of the Rules of Court 2012. Distinguishing a fresh, legally operative decision from later

communication or mere correspondence, the article explains why a request for reconsideration does not itself restart time. Its structured approach assists courts and practitioners in balancing certainty and finality with the right to challenge unlawful exercises of public power. In an era of accountability and transparency there should be less reliance on the time period of three months running from the date when the grounds of application first arose and more from when the decision was first communicated to the applicant.

"Battle of the Experts: Truth, Advocacy, and Judicial Discretion in the Adversarial Arena", by Justice Atan Mustaffa Yussof Ahmad and Justice Avinder Singh Gill a/l Ranjit Singh, considers the judicial task of evaluating competing expert opinions. Examining the Evidence Act 1950, Order 40A of the Rules of Court 2012 and relevant authorities, the authors focus on methodology, factual foundations, qualifications, independence and impartiality, while also considering concurrent expert evidence. The article reinforces that expert testimony assists the court but never displaces its responsibility to reach an independent, reasoned conclusion. It also considers the approach to hot-tubbing or the concurrent giving of evidence by the experts. Somehow when the court sits the experts together, the psychology of it is such that they become less combative and more cooperative and collaborative and when disagreeing one with the other, it would be more a case of agreeing to disagree for some hopefully cogent reasons that are given. The article provides a practical guide to all judges when they have to evaluate expert evidence, remembering that if both experts are equally convincing then the plaintiff has not discharged its burden of proof on the balance of probabilities. It is interesting to note that courts in some jurisdictions now require prior leave of court to be obtained before an expert witness is called by each side to the dispute for invariably there would be two sides to an issue by the experts called by each side compared to one where the court appoints a single expert with the terms of reference.

In "*Universiti Malaya v ESA Jurutera Perunding Sdn Bhd*: Reframing Section 10(1) of the Arbitration Act 2005 and Restating Malaysian Precedent Doctrine", Justice Rajes Raghavji analyses the Federal Court's clarification of what constitutes a "step in the proceedings" capable of defeating an application for a stay in favour of arbitration. One can appreciate the tricky problem of having asked for an extension of time to file defence but before filing it, realising that there is an arbitration agreement and so proceeded to file for a stay application under section 10 of the Arbitration Act 2005. The article also examines the distinction between *ratio decidendi* and *obiter dicta*, urging careful engagement with the reasoning and limits of precedent rather than mechanical reliance on judicial observations. It offers practical insight into arbitration procedure and the disciplined application of authority.

Justice Dr Noradura binti Hamzah, in "The Undefined Exception: Public Policy under Section 7 of the Cross-Border Insolvency Act 2026", explores the interpretation of Malaysia's public policy exception in light of the UNCITRAL

Model Law and comparative jurisprudence. The Act came into force on August 28, 2026 and our courts would very soon have to expound on the public policy exception. In particular, the article considers the significance of omitting the word "manifestly" and argues for a restrained construction consistent with international cooperation and the Act's specific domestic safeguards. It offers a timely examination of how fundamental national principles may be preserved without unnecessarily frustrating cross-border insolvency proceedings.

The edition concludes with "Malaysia: Judicial Duty in the Digital Justice System" by Teoh Shu Yee, which considers the opportunities and risks of electronic courts, remote hearings, online dispute resolution and artificial intelligence. While acknowledging their potential to improve efficiency and accessibility, the author highlights concerns about bias, transparency, cybersecurity and judicial independence. The article rightly places human judgement and judicial discretion at the centre of responsible technological innovation in the administration of justice. Certainly, one cannot run away from the fact that the human person using artificial intelligence in his judicial work has to take final responsibility for it. Artificial intelligence may assist and augment judicial work but accountability for judicial decisions remains exclusively with the judge. Already we have counsel submitting bogus cases in the submissions filed and as judges we have the added responsibility to ensure that those bogus cases are not inadvertently cited in our judgments. Misleading the court is contemptuous and the necessary punishment will follow especially when the bundle of authorities are requested for and counsel could not produce it without apologising to opposing counsel and the court that the authorities are the result of the AI tool hallucinating!

On behalf of the Publication Committee, I extend my sincere appreciation to the authors and everyone involved in bringing this edition to publication, especially to our Secretary Tuan Shazali bin Dato' Hidayat Shariff, the Deputy Registrar, Policy and Legislation Division of the Chief Registrar's office of the Federal Court for all the follow-up, coordination and leg-work that have seen to the birth of this July 2026 issue. My heartfelt appreciation to Rachel Jaques of Thomson Reuters for her ever-reliable editing work.

It is my ardent hope that these contributions will be of practical and intellectual value to judges, practitioners, law students, the academia and all who share our commitment to justice. May the Journal continue to provide a forum where respect for enduring legal principles is accompanied by the curiosity and courage to examine how the law may better serve society. May others too be encouraged to write for future issues for finally it is the printed page in hard or soft copy that will long endure after the spoken word has long faded from memory.

On behalf of the Publication Committee
Lee Swee Seng

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The Art of Advocacy*

by

The Right Honourable The Chief Justice of Malaysia,
Tun Wan Ahmad Farid bin Wan Salleh

[1] Please allow me to thank the organisers, in particular the International Advocacy Training Council, for the invitation. Standing before such a distinguished gathering of legal minds, I'm reminded of the old saying that if you're the smartest person in the room, you're in the wrong room. Looking at this crowd, I am convinced that I am indeed in the right place.

[2] I want to begin this morning, not with a grand proposition, but an honest one. I recently revisited Iain Morley's *The Devil's Advocate*. This is, of course, not be confused with *The Devil Wears Prada 2* – which I heard is currently in cinemas, or the musical, which is playing in London's West End. I should probably clarify: Morley's "devil" is far more concerned with cross-examination than couture.

[3] What Morley offers is not fashion. It is something far more durable: a deceptively simple observation that has stayed with me long after I first encountered it.

[4] He writes that advocacy is "the skill of persuasion" – not knowledge of the law, nor mastery of procedure. Then, with characteristic honesty, he sets the bar: "Advocacy without errors is no small achievement."

[5] That line, modest as it sounds, contains a truth that every practitioner who has ever stood on their feet in a courtroom will recognise immediately – and perhaps, with a wince of personal recollection. We do not begin by being great. Not all of us are born great, achieve greatness at an early stage, or have greatness thrust upon us.

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* Keynote speech delivered by The Right Honourable The Chief Justice of Malaysia on the occasion of 5th IACTC Conference: The Art of Advocacy, held on May 2, 2026 at The Eastern & Oriental Hotel, Penang.

[6] We begin by being less wrong than we were yesterday. And we build, case by case, from there.

[7] It is from that starting point – humble, honest, and practical – that I want to speak to you today, about the art of advocacy, as seen from where I sit: the Bench.

[8] By the time an advocate rises to their feet, the judge has almost always already formed a preliminary view. We have read the pleadings and submissions. We have noted the obvious weaknesses on both sides. We come to the hearing with questions, not blank minds.

[9] This does not mean that the outcome is fixed. Far from it. The oral hearing remains genuinely decisive – not because it is where we first encounter the case, but because it is where we test our provisional views against the living argument. A good advocate can, and does shift, a judge. A poor one merely confirms our doubts.

[10] What we are looking for, from the very first moment the counsel speaks, is this: does this person understand their case? Not just know it – understand it. Do they grasp where the real contest lies? Can they take me, efficiently and clearly, to the point that matters? Because, the advocate who wastes the court's time on peripheral matters before arriving at the central issue, is not merely inefficient. They are signalling something troubling: that they themselves have not identified what the case is truly about.

We can tell when you do not know your own case

[11] Preparation is not optional. It is the precondition of everything. The advocate who has genuinely mastered the record – every document, every concession, every weakness as well as every strength – presents differently from the one who has read the submissions the night before. We can feel the difference within minutes. The former is anchored and agile. The latter is performing.

[12] I have always believed that the best test of preparation is this:

> can you answer the question you most dread being asked? Not the question you rehearsed – the question that exposes the soft underbelly of your case. If you can answer that question honestly, and still advance your argument, you are ready. If you cannot, no amount of perceived eloquence will substitute.

Our questions are not interruptions. They are invitations

[13] This is perhaps the most important thing I can say to you this morning. When a judge asks a question mid-submission, that is not an obstacle. It is a map. It tells you exactly where the court's concern lies – which means it tells you exactly where the case will be won or lost.

[14] We've all seen it: an advocate is mid-flow, feeling like Cicero, and then the judge asks a question. Some lawyers react like they've just hit a deer in the headlights – they "pivot" by pretending they didn't hear it.

[15] Don't be that person.

[16] If there's one thing you take away today, it's this: when a judge interrupts your perfectly rehearsed speech with a question, don't treat them like a heckler. Treat them like a GPS. If the GPS tells you to turn left, you don't say, "I'll get to that left turn at the next junction." You simply turn!

[17] The advocates who scare me are the ones who say "I will come to that" and immediately drive off into the sunset or the Black Forest, never to be seen again.

[18] Treating a judge's inquiry as an intrusion is like ignoring a GPS warning of danger ahead. Remember: a questioning judge is an awake judge. Don't put us back to sleep with "I'll get to that". An awake judge is one who can be persuaded – who can change his mind, and who can, against all odds, be brought to see your point.

Clarity is not simplification. It is sophistication

[19] On a usual day, we sit for at least five cases. By the time you rise to address us, we have read other submissions that morning, we will read more after you leave, and we carry live reserved judgments, alongside the matter you are arguing. This is not a complaint – it is the reality in which we are operating. Knowing it should shape how you communicate.

[20] So, please, give us a map. Don't make us go on a scavenger hunt for your point. We need: three issues. Two points. One central argument. If you start with a clear floor plan, we can follow you. But if you just wander from case to case like a tourist who has lost

their group, you aren't just confusing us – you're making us cranky. And trust me, a cranky Bench is rarely a sympathetic one. In a court room, structure isn't just good teaching; it is not a pedagogical device. Structure is an act of mercy.

Concede what cannot be held. You will win more by doing so

[21] Nothing erodes credibility faster than refusing to acknowledge the obvious. When authority runs against you, cite it yourself – before your opponent does – and explain why it is distinguishable or does not govern. When a fact is unfavourable, name it before we do, and place it in context.

[22] There is mistaken belief that when you start conceding, you start losing. That is far from the truth.

[23] Judges have seen every kind of advocate. We know the ones who contest every point, unwilling to concede anything. We discount them. But the advocate who gives ground cleanly, who narrows the contest to where it genuinely lies, who treats us as partners rather than adversaries – that advocate is believed. Even on the hard propositions. And I must emphasise, especially on the hard propositions.

Delivery is not decoration

[24] I want to say something about how you present yourselves, physically and verbally, because it is more consequential than advocates sometimes appreciate.

[25] The advocate who speaks with genuine conviction, who varies their pace, who pauses before a critical proposition to signal that something important is coming, who slows when precision matters and moves more quickly through uncontested background – that advocate is easier to follow and easier to trust.

[26] Look at the Bench. Don't look at the imposing chandelier in the courtroom. It's not going to fall. Most of us cannot afford it any way. So, look at us. Not at your notes, not at the middle distance. At us. Eye contact is not aggression – it is engagement. It tells us that you are thinking, not reciting. The advocate who reads their submissions verbatim signals that they are not confident enough to think on their feet. That signal is duly received.

[27] Let me give you a glimpse of what happens in the ante room before we go on the Bench. During our discussion, everyone would be eager to put across their views. Sometimes, it could be a heated discussion, but more often than not, we would come to a conclusion and form an initial decision on whether to allow or dismiss the appeal.

[28] On one occasion, we decided that a particular case lacked merit, and were of the view that the hearing would take no more than 10 minutes – we thought we might not even call the other party to submit. However, what unfolded in open court took a very different turn from what we had envisioned.

[29] The appellant's counsel's advocacy skills convinced us otherwise. His submissions kept our minds fully engaged, so much so that we later had to stand down to redeliberate. The counsel managed to offer us an entirely different perspective on the case, particularly on the question of how the trial judge had erred.

[30] My point is this – a counsel armed with good advocacy skills can convince even a panel of judges to change their minds. And mind you, he changed the minds of all three of us that day.

[31] I therefore encourage you to always be precise and concise, in your oral submissions. Give us only your strongest points, even if your written submission is 30 pages long, or more. A judge's attention is your most precious and finite resource in that courtroom – do not dilute it. Sharpen your arguments, lead with your best, and trust that a well-constructed submission, delivered with conviction, carries far more weight than an exhaustive recitation of every ground you have pleaded.

[32] Remember, we have read your written submissions. What we need from you is not repetition, it is illumination.

The Bench in the modern age: And what we need from you

[33] The courts are changing rapidly. Artificial intelligence, electronic filing, remote hearings, vast quantities of digital evidence – the landscape of litigation is being transformed, in ways that none of us fully anticipated even a decade ago.

[34] Technology will change how cases are prepared and presented. But it will *not* change what the Bench requires from those who appear before it. We still need advocates who can read the room – who sense

when an argument is landing and when it is not, when to press and when to yield, or when the case has turned and an entirely different approach is needed.

[35] For those who may not know, I was a lawyer before I became a judge – and in fact, my journey through law took me into all three branches of government. The Judiciary, you know me from. As for my time in the Executive and Legislative branches, well, that is a story best told some other time, certainly not in Penang.

[36] Early in my legal career, I was waiting in a Kuala Lumpur courtroom when I witnessed something I have never forgotten. There was one distinguished senior counsel who has now sadly passed on. He gave me one simple advice: a good lawyer knows the law, but a great lawyer knows the judge.

[37] And that is exactly my point about the limits of artificial intelligence: no matter how advanced the technology or how well you craft your prompt, AI cannot read a room the way an experienced lawyer reads a judge.

[38] To be fair, reading a single judge is a manageable task. At the High Court, there is only one presiding judge – which at least gives you a fighting chance. But move up to the appellate courts, and the calculus changes entirely. You will need to know more than 30 judges: their preferences, their temperaments, their tolerances, and the weight of their silences. No prompt will navigate you through that. Such intelligence is not artificial. It is earned – one courtroom, one panel, at a time.

Conclusion

[39] Let me leave you with this.

[40] An advocate, who walks in prepared, speaks honestly, and holds his dignity under pressure, is saying something beyond the case itself – that reason matters, *that* process matters, *that* the person before the court matters. Not because it is convenient. Because it is right.

[41] The law is slow. Justice is imperfect. Outcomes will sometimes disappoint you, and occasionally they will wound you. But do not let that diminish the work. Every well-crafted submission, every honest concession, every question answered directly and every argument

made with courage – these are not small things. They are the bricks from which the rule of law is built, one case at a time, in courtrooms large and small, in every jurisdiction you and I call home.

[42] So, go back. To your courts, your chambers, your clients, and your calling. Carry with you the understanding that the practice of law – at its finest – is not merely a profession. It is a promise: that when people come to us, at their most vulnerable, in their moments of greatest conflict and uncertainty, they will be met with skill, honesty, and an advocate who takes seriously the privilege of standing in their corner.

[43] Be prepared. Be honest. Be courageous.

[44] And never – not once – underestimate the power of a well-made argument, in the hands of an advocate who truly believes in what they are doing.

[45] That, to my mind, is the art of advocacy. It belongs to all of you.

Thank you.

Access to Justice: Reflections from a Mobile Court*

by

The Right Honourable The Chief Justice of Malaysia,
Tun Wan Ahmad Farid bin Wan Salleh

[1] The journey to the Tibabar village was an endurance test in itself. The road was a gruelling stretch of bumpy, loose gravel and jagged stones that shook the vehicle, and our modern sensibilities, long before we reached the destination. I looked at the speedometer of my vehicle. The gravel road alone clocked 8 km. With every kilometer deeper into the interior, our mobile phone signals flickered, weakened, and finally died. We were slipping off the grid, crossing an invisible line where urban convenience ends and isolation begins.

[2] We had arrived to set up a mobile court, a temporary lifeline at Kg Tibabar, located in the district of Ranau, Sabah. Inside the community hall, tables for various government agencies coordinated under the Judiciary's initiative were hastily arranged, including amongst others, *Jabatan Pendaftaran Negara* ("JPN"), *Jabatan Peguam Negara*, *Jabatan Bantuan Guaman* and *Jabatan Kebajikan Masyarakat*, bringing vital assistance directly to the doorstep of people who rarely see it. But amidst the bustle of folding tables, forms, and officials, what struck me most wasn't the logistics. It was the people.

[3] Villagers arrived clutching worn books and thick files of documents, holding onto these tattered papers like lifelines. Sitting on rows of plastic chairs and waiting patiently in the heat were families, large households of children and elders bearing the quiet, weathered faces of those hardened by the obstacles of daily survival. As the day unfolded, the gravity of their reality set in. Here were people navigating life without stable internet, reliable infrastructure, or the basic amenities we take for granted.

[4] At the front row sits a young mother trying to soothe a restless, crying toddler in her arms. She looked exhausted, her posture slumped under the weight of hardship, yet she maintained a gentle, patient focus

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* *New Straits Times*, August 12, 2026.

on her child. Beside her, an elderly lady stood balanced on a single wooden crutch, having lost one leg, yet she had made her way to the hall regardless, unwilling to let it stand between her and the help she came for. It was a poignant juxtaposition: the official machinery of the state trying to regulate lives through paperwork, sitting just feet away from a mother simply trying to comfort her child with the only warmth she had left, and an elderly woman whose quiet determination spoke louder than words.

[5] The bureaucratic hurdles were heartbreakingly stark. Among the most pressing issues was something as fundamental as the registration of births. Families grappled with the absence of official paperwork, documents that anchor a person to society, granting them access to education, health care, and legal identity. Without a birth certificate, a child is practically invisible to the system, locked out before their life has even truly begun.

[6] Present in the event were the court magistrates, dedicating their weekend for the community, to carry out duties that would otherwise require a trip to the courthouse. These included endorsing late registration of birth, handling matters relating to *surat akuan* (statutory declarations), and signing as Commissioner for Oaths. For many rural or underserved communities, these are services that had remained out of reach, not due to unwillingness, but due to the practical barriers of distance, cost, and unfamiliarity with formal processes. The nearest court or government office may be hours away, and the cost of travel, time off work, or navigating bureaucratic processes can be enough to permanently deter people from resolving even simple legal matters.

[7] The endorsement of late birth registration carried particular significance. Once settled on the spot, individuals could proceed immediately to JPN to apply for their MyKad, a document essential for accessing health care, education, employment, and virtually every other form of civic participation. For those who had gone years, sometimes decades, without formal identification, this single day's proceedings could resolve a barrier that had followed them their entire lives.

[8] A magistrate, after carefully reviewing and considering the testimony and documentations before him/her, may reject the application if it is found to be unsatisfactory be it due to insufficient documentation, unreliable witnesses brought to attest to the applicant's identity, parentage, or date of birth and blatant inconsistencies

which are not satisfactorily explained by the applicant. In such cases, applicants are allowed to gather further evidence or produce more credible witnesses before the matter could be reconsidered.

[9] By stepping outside the courtroom and into the community, the Judiciary demonstrated that access to justice is not merely about the existence of laws and institutions, but about ensuring people can actually reach them.

[10] Standing there, watching the contrast between the sharp, efficient tools of the mobile court and the deep-seated vulnerability of the villagers, a heavy question crept into my mind: *What does the future hold for them?*

[11] Later, as we visited the village school – SK Tibabar, part of the MyC2C (*From Court to Classroom*) program's outreach, the heavy cloud of sorrow lifted just enough to let the light through. In true *"rasa tamu"* fashion, the students' dance performance turned strangers into honoured guests, wrapping us in a welcome as vivid as it was heartfelt. Their bright eyes and eagerness to learn offered a powerful counterweight to the day's hardships. As our visit came to a close, the school choir gathered to send us off, singing *Lambai*. Their voices carried the vibrant, rhythmic warmth of Sabah, lingering in the air and filling the room with a profound sense of grace.

[12] What unfolded that day was a reversal of how justice is typically delivered. Far removed from the grandeur of the Palace of Justice in Putrajaya, it went looking for the people, instead of waiting for them to come find it. Access to justice is not an abstract ideal reserved for courtrooms and legal texts; it is measured in birth certificates issued, MyKads made possible, and lives no longer left unrecognised by the state. Justice that waits is justice denied. It must go to them. We will go to them.

Governance in Construction Contracts and Dispute Resolution*

by

*Justice Dato' Lee Swee Seng***

Abstract

Good governance in construction requires transparency, accountability and proper oversight from procurement and payment to contract administration and dispute resolution. The discussion considers prompt payment, bid-rigging, integrity pacts, anti-corruption clauses, corporate liability and the need for adjudicators and arbitrators to remain independent and impartial. It also highlights the risks of corruption, non-disclosure and fraud in arbitration of construction disputes. Legal and contractual safeguards must be supported by effective monitoring and enforcement with integrity.

[1] The poet John Keats once penned these enduring words: A thing of beauty is a joy forever! We can all enjoy the beauty and majesty of a finished product in construction, whether it be in an iconic building standing towering tall and changing the skyline of the city, or a curved bridge joining an island to the mainland reminding us how boring life would be if everything were a straight line though that may be the shortest distance between two points; or the crisscrossing of multiple loops of highways and bypasses in its dizzying patterns seen from a drone photo taken.

[2] Often the final product is the culmination of much sweat, toil and tears and hopefully no blood as in there were no fatalities throughout the construction. Life has taught us that the journey is as important if

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** Judge of the Federal Court of Malaysia. Research assistance was provided by Umar Imran bin Badrul Hisham and Yasmin Zahirah binti Shahrin of the Research Division of the Federal Court, and by Muhammad Iskandar Zainol, Deputy Registrar attached to the author's Chambers.

not more important than the destination and indeed if we start off right and continue in the right direction, then the destination is more or less assured. This morning I want to highlight some governance issues in the construction industry with respect to construction contracts and dispute resolution. It is the "G" in the ESG in construction that I shall focus on this morning.

[3] Whilst "government" has to do with power and control, "governance" focuses on transparency and accountability. The bigger the project, the higher the stakes and the greater the risks and correspondingly the need to have in place a framework of oversight and accountability throughout the life cycle of a project.

[4] Effective governance in construction goes beyond the signing of integrity pledges and the inclusion of anti-corruption clauses. It requires transparency, accountability and proper oversight at every stage of a project, from procurement and payment to contract administration and dispute resolution. These safeguards are necessary to ensure that misconduct is detected and addressed, and that confidence in the construction process is maintained.

Culture of delayed payments

[5] The lack of governance may be a culture of delayed payments for every progress claim or an under certification. The story was told of a contractor that had such a notoriety and at the end of the day, no suppliers wanted to supply him any building materials other than by way of cash on delivery!

[6] Some jurisdictions like Singapore, Queensland, Western Australia and Hong Kong would allow an invoice containing particulars of work done, setting out the calculation and the amount outstanding to qualify as a payment claim to which the paying party must respond within the statutory time frame for adjudication, failing which it is deemed to have disputed the debt but cannot raise positive defences of a set-off.

[7] To avoid the dire consequence of not being able to raise a set-off, the paying party must respond within the period stated by either disputing the claim in whole or in part and giving the reasons therefor. Section 21 of the Hong Kong ("HK") Construction Industry Security of Payment Ordinance ("SOPO") reads:

If a paying party fails to serve a payment response in reply to a payment claim by the payment response deadline, the paying party –

(a) is to be regarded as disputing the claimed amount that has not been paid by the paying party by the payment response deadline; and

(b) is not permitted to raise any set off in the adjudication proceedings in relation to the payment claim.

[8] Such a requirement does promote a system of responsible reply to a payment claim in that one cannot just simply ignore a claim without giving reasons at the earliest opportunity.

The use of integrity pacts

[9] To begin with, it is now more common for integrity pacts to be signed by all parties and their key staff at the tender stage of a project. For government projects, this is now mandated under PK 1.6 *Integriti Dalam Perolehan Kerajaan*, updated with effect from January 1, 2025.[1]

[10] The parties involved are required to give substantive undertakings which would include:

(a) *No offer, solicitation or acceptance of bribes* in connection with the tender or performance of the contract;

(b) No collusion or bid-rigging;

(c) Disclosure and avoidance of conflicts of interest;

(d) An obligation to *report attempted bribery*, including demands by government officers, to the Malaysian Anti-Corruption Commission ("MACC") or the police; and

(e) Disclosing *beneficial ownership*.[2]

[11] You may have read in the press about the Malaysia Competition Commission ("MyCC") issuing notices against some companies

1 *Perbendaharaan Malaysia*, PK 1.6 *Integriti Dalam Perolehan Kerajaan* (*Pekeliling Perbendaharaan Malaysia*, updated with effect from January 1, 2025), available at https://ppp.treasury.gov.my/ (accessed August 19, 2026).

2 Ibid, paras 5.2 and 2.7 (bribery); paras 5.2, 2.8 and *Lampiran* 8 (bid-rigging); para 2.6 (conflicts of interest); para 5.2 and *Lampiran* A (reporting of bribery); paras 3.1, 5.2 and 5.4 (beneficial ownership).

for allegedly colluding to bid-rig. In the *Malay Mail* of October 30, 2025, it was reported that the MyCC had imposed penalties totalling RM97.3 million on 26 companies for operating a bid-rigging cartel related to tenders worth RM540.72 million.[3] The Minister of Domestic Trade and Cost of Living ("KPDN"), Datuk Armizan Mohd Ali, revealed that MyCC was then investigating 14 other bid-rigging cases involving 563 companies, linked to tenders worth RM2.7 billion.[4]

[12] An earlier enforcement action illustrates how bid-rigging may operate in practice. In July 2025, MyCC imposed financial penalties totalling RM2.98 million on three contractors – Abadi Malaysia Sdn Bhd, Kota Landskap Sdn Bhd and Usia Maintenance Sdn Bhd – for their involvement in bid-rigging concerning six Perbadanan Putrajaya tenders issued between 2018 and 2021, collectively worth more than RM44 million. MyCC found that the companies had coordinated their tender submissions through information-sharing by WhatsApp, email and meetings, while the tender documents were prepared centrally under the coordination of one of the companies. The case demonstrates how apparently competing tenderers may, in substance, coordinate their bids and undermine the integrity of the procurement process.[5]

[13] Whilst these penalties are civil in nature it is important to note that the MACC may also take action under section 20 of the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act 2009") that reads:

> 20. *Corruptly procuring withdrawal of tender*
>
> A person –
>
> (a) who, with intent to obtain from any public body a contract for performing any work, providing any service, doing anything, or supplying any article, material or substance, *offers any gratification to any person who has made a tender for*

3 "Armizan: MyCC Cracks Down on Bid-Rigging Cartel, Fines 26 Companies RM97.3m", *Malay Mail* (October 30, 2025), available at https://www.malaymail.com/news/malaysia/2025/10/30/armizan-mycc-cracks-down-on-bid-rigging-cartel-fines-26-companies-rm973m/196609 (accessed August 19, 2026).

4 Ibid.

5 "Three Contractor Firms Fined Nearly RM3m for Bid-Rigging Cartel in Putrajaya Tenders, Says MyCC", *Malay Mail* (July 8, 2025), available at https://www.malaymail.com/news/malaysia/2025/07/08/three-contractor-firms-fined-nearly-rm3m-for-bid-rigging-cartel-in-putrajaya-tenders-says-mycc/183246 (accessed August 19, 2026).

the contract, as an inducement or a reward for his withdrawing the tender; or

(b) who *solicits* or *accepts any gratification as an inducement or a reward for his withdrawing a tender* made by him for such contract,

commits an offence.

(Emphasis added)

[14] It is interesting and more than that, important to note that the integrity pact exacts an obligation to report attempted bribery, including demands by government officers, to the MACC or the police.[6] This obligation is reinforced by section 25 of the MACC Act 2009. A person who is offered, promised or given gratification contrary to the Act must report the matter to the MACC or the police. Failure to do so is an offence punishable by a fine of up to RM100,000, imprisonment for up to 10 years, or both. Similarly, a person from whom gratification is solicited or obtained, or from whom an attempt is made to obtain it, must report the matter at the earliest opportunity. Failure to do so without reasonable excuse is punishable by a fine of up to RM10,000, imprisonment for up to two years, or both.

[15] The integrity pact also requires key personnel, including directors of the contracting parties, to acknowledge that they are aware of the corporate liability regime under section 17A of the MACC Act 2009. A commercial organisation commits an offence where a person associated with it corruptly gives, promises or offers gratification to obtain or retain business or a business advantage for the organisation. Upon conviction, the applicable penalty is a fine of not less than 10 times the value of the gratification or RM1 million, whichever is higher, imprisonment for up to 20 years, or both.[7]

[16] Section 17A(3) provides for liability of directors, controllers, officers, partners and persons concerned in the management of the affairs of the commercial organisation where the statutory requirements are satisfied.[8] The definition of a person "associated" with a commercial organisation is also deliberately broad. It includes directors, partners

6 See *Lampiran* 6 of PK 1.6.
7 MACC Act 2009, s 17A.
8 Ibid, s 17A(3).

and employees, as well as persons who perform services for or on behalf of the organisation. This has particular relevance to the construction industry, where a major project may involve employers, contractors, consultants, subcontractors, suppliers and many other persons performing services on behalf of the principal organisation.

[17] Section 17A also places considerable importance on preventive measures. A commercial organisation may rely on the statutory defence where it can establish that it had adequate procedures designed to prevent persons associated with it from undertaking the corrupt conduct. The Guidelines on Adequate Procedures issued by the Prime Minister's Office pursuant to s 17A(5) explains what a commercial organisation should do to establish the statutory defence of having "adequate procedure" to prevent corruption.[9]

[18] The Guidelines organise the required approach around the acronym TRUST: Top-level commitment; Risk assessment; Undertake control measures; Systematic review, monitoring and enforcement; Training and communication.

[19] Another set of integrity pact is to be signed after being awarded the contract. In other words, the commitment to zero tolerance against corruption is not just at the tender and procurement stage but also throughout the life cycle of the project including the performance and implementation stage up to completion and final-accounts stage.

[20] Some of the contractual consequences for breach would include rejection or revocation of the tender or award, termination, disciplinary measures, blacklisting or debarment. At the criminal side a prosecution under the MACC Act 2009 may follow. In reality there's the fear as to what would happen if there is no conviction at the end of the day. Would it be sufficient if there is proof, on the balance of probabilities, by the party terminating the contract that a corrupt payment had been made and that the ground for termination was valid? Depending on the evidence, a party with the option to terminate may choose the safer course of continuing with the contract and leave it to the MACC to prosecute the offenders.

9 Ibid, s 17A(5).

[21] After the signing of the integrity pacts often amidst the cameras clicking away and parties posing with a copy of integrity pledges, happily assured that everyone would walk the talk, it is then that the rubber hits the road. There is an area of weakness in the implementation of the integrity pact in practice, stemming from the fact that words alone are cheap and that what is required is an independent monitoring mechanism as highlighted by Transparency International. I am reminded of the reaction from a group of professionals who when it was proposed that their clients' account should be audited immediately retorted "You mean to say we are dishonest?", only to be responded with the explanation: "You need to be seen to be honest!" Until there are independent monitoring agents appointed, the many undertakings in the slew of documents signed will be just an additional set of documents signed to get the job and to get paid for the work done.

[22] Where the stakes are high and where there is much discretion that can be exercised one way or the other, there is a real temptation to choose the path of least resistance. If favours can be bought, then to some it is just the additional costs of doing business. At the bid stage there is the danger of tender-rigging, of submitting multiple tenders through related companies, of buying out other tenderers so that they may withdraw their bid or the promise of appointing them as subcontractors.

[23] There was a time when there was no Clients' Charter as to when an application for approval be it of building plans from a local authority or an approval of an environmental impact assessment report from the relevant authorities can be expected. There is the temptation to speed up progress by payment under counter rather than above counter. The story was told of someone who had to constantly check with a local authority as to why his building plans were taking so long for approval until a friend suggested to him that he should just use the services of the architects within the department concerned and everything would be expedited. What was wrong remained wrong and he did not succumb to the suggestion but waited stoically.

[24] Besides integrity pacts or even when there is none signed, there is found in most standard form construction contracts an anti-bribery and anti-corruption ("ABAC") clause that would allow the employer to terminate the contract in the event that the contractor had been

involved in corrupt practice in relation to the contract. Clause 53.1 of the PWD 203A (Rev 2007) reads as follows:

Termination

(a) If the Contractor, its personnel, servants, agents, employees or any of its sub-contractors gives or offers to give any person bribe, gift, gratuity or commission as an inducement or reward –

(i) for doing or fore-bearing to do any action in relation to the Contract or in any other Contract with the Government; or

(ii) for showing or fore-bearing to show favour or disfavour to any person in relation to the Contract or any other Contract with the Government then (officer named in Appendix) shall be entitled to forthwith terminate this Contract at any time by giving written notice to that effect to the Contractor.

[25] Clause 53.1(b)(i) provides for the following consequences upon termination on corruption:

Upon such termination under sub-clause (a) –

(i) the Government shall be entitled to all losses, costs, damages and expenses including any incidental costs and expenses incurred by the Government arising from such termination;

Lack of governance in the performance of the contract

[26] As the works progress there is the pressure to apply for an extension of time ("EOT") when a contractor is behind schedule for time is money with a liquidated and ascertained damages ("LAD") amount being imposed for every day of delay. There is sometimes the unilateral deduction for costs of rectifying defective works. There is the pressure asserted to certify completion when the project is not completed. Who can an aggrieved party complain to when there is no independent monitoring agency that has the power to audit claims, examine variations, monitor certification and payments, investigate red flags and generally to receive complaints and publish findings?

[27] There have been cases too where an architect has certified completion when there has not been completion and when the bank has released the last progress payment only for the purchaser to

discover that the building is far from being completed.[10] There have been cases where the developer or builder has gone into liquidation, so the purchasers' only viable recourse may be against the architect for negligent certification.

[28] In the Singapore Court of Appeal's case of *MC Strata Title Plan No 1075 v RSP Architects & Planners & Engineers* ("*Eastern Lagoon*"),[11] it was held that architects can owe a duty of care to a management corporation ("MC") in negligence for pure economic loss resulting from building defects, because sufficient proximity exists between architects and the MC for negligent design or supervision even in the absence of a contract.[12] Liability is not only confined to developers but extended to include professionals like architects in Singapore's strata development.

[29] Where professionals like engineers have compromised on design or failed to supervise the works properly resulting in negligent construction not according to specification where materials are concerned, a whole building may collapse. In the recent case in Hong Kong, where fire gutted the premises of the Wang Fuk Court on November 26, 2025 causing 168 deaths due probably to negligent or fraudulent use of combustible bamboo scaffolding and safety netting, the Independent Commission Against Corruption ("ICAC") jointly charged the directors of the companies responsible for 25 offences including for manslaughter who were accused of creating and overseeing a renovation scheme that turned the estate into a death trap.[13]

Independence and impartiality of adjudicators and arbitrators

[30] Section 24 of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") sets out clearly the mandatory requirement of

10 See the case of *Chin Sin Motor Works Sdn Bhd v Arosa Development Sdn Bhd & Anor* [1992] 1 MLJ 23.

11 [1999] 2 SLR 449.

12 Ibid, at [39] and [42].

13 Press release by the Government of the Hong Kong Special Administrative Region, "Seven Individuals and Two Companies Charged by Police and ICAC with 25 Offences of Manslaughter, Conspiracy to Defraud, etc Over Wang Fuk Court Fire" (June 10, 2026), available at https://www.info.gov.hk/gia/general/202606/10/P2026061000683.htm (accessed August 19, 2026).

an adjudicator, when appointed, to make a declaration in writing as to the following:

> 24. *Duties and Obligations of the Adjudicator*
>
> The adjudicator shall at the time of the acceptance of appointment as an adjudicator make a declaration in writing that —
>
> (a) There is no conflict of interest in respect of his appointment;
>
> (b) He shall act independently, impartially and in a timely manner and avoid incurring unnecessary expense;
>
> (c) He shall comply with the principles of natural justice; and
>
> (d) There are no circumstances likely to give rise to justifiable doubts as to the adjudicator's impartiality and independence.

[31] Adjudication and arbitration are different processes. Adjudication under the CIPAA is a speedy process that produces a decision of temporary finality until it is set aside or if there is a settlement by the parties or the dispute is later finally decided by arbitration or the court. Arbitration, on the other hand, generally results in a final decision that may be challenged only on limited grounds. Despite these differences, both processes require a neutral and impartial decision maker and independence and impartiality are exacted from both adjudicators and arbitrators.

[32] The International Bar Association has issued the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") which provide some guidance on circumstances affecting an arbitrator's independence and impartiality. It sets out a non-exhaustive list of various permutations of personal and professional relationships that must be disclosed, which parties cannot waive, and those which parties may waive only by express consent in writing known as the Non-Waivable Red List and Waivable Red List respectively.[14] The Non-Waivable Red List consists of situations so serious that no disclosure or subsequent agreement by the parties can cure the conflict – the arbitrator simply cannot serve, even with party consent, because it violates the fundamental principle that no one should

14 International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (approved by the IBA Council on May 25, 2024), pp 15–16.

be a judge in their own cause. Examples include where there is an identity between the arbitrator and a party, or where the arbitrator has a significant financial or personal interest in a party or in the outcome of the dispute.

[33] As for the Waivable Red List, whilst the degree of relationship is serious and gives rise to justifiable doubts, but the conflict *can* be cured if, after full disclosure, both parties expressly state their willingness to have the arbitrator serve. Examples include where the arbitrator has previously advised a party on the dispute itself or where a close family member of the arbitrator has a significant economic interest in its outcome.

[34] Then there is the Orange List consisting of a non-exhaustive list of situations that *might*, in the eyes of the parties, give rise to justifiable doubts — they are not automatically disqualifying, but must be disclosed.[15] If no timely objection is raised after disclosure, the party is deemed to have waived the conflict. Examples include where the arbitrator has served as counsel for one of the parties within the previous three years, or has been appointed as arbitrator by the same party on two or more occasions during that period. Disclosure does not by itself establish that the arbitrator is disqualified. Subject to the applicable law and rules, a party that does not raise a timely objection after learning of the relevant circumstances may be treated as having waived its objection.

[35] The Green List consists of those situations where there is no appearance and no actual conflict. There is thus no duty to disclose at all, since there is no realistic basis for a reasonable third party to doubt independence. Examples include where the arbitrator has previously expressed a general legal opinion on an issue that also arises in the arbitration, provided that the opinion was not directed at the particular case, or where the arbitrator and counsel are merely members of the same professional association.

[36] The Hong Kong Development Bureau, which implemented its Hong Kong Security of Payment Ordinance ("HK SOPO") which came into force on August 28, 2025, has adopted the above IBA Guidelines to be followed by the adjudicator nominating bodies and adjudicators in performing the requirements of sections 28 and 29 of their Ordinance

15 Ibid, pp 17–18.

with minor modifications to suit their local construction[16] industry practices. Under section 29(3) of the HK SOPO it is made explicitly clear that:

> From the time of accepting the appointment as an adjudicator until the adjudication proceedings are completed, an adjudicator must, as soon as the adjudicator is aware, disclose in writing any circumstances likely to give rise to justifiable doubts as to the adjudicator's independence or impartiality.

[37] Section 14 of the Arbitration Act 2005 provides for the same requirement of independence and impartiality of an arbitrator appointed and the need to maintain that independence and impartiality throughout the arbitral proceedings as follows:

> 14. *Grounds for challenge*
>
> (1) A person who is approached in connection with that person's possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence.
>
> (2) An arbitrator shall, without delay, *from the time of appointment and throughout the arbitral proceedings*, disclose any circumstances referred to in subsection (1) to the parties unless the parties have already been informed of such circumstances by the arbitrator.
>
> (Emphasis added)

[38] A failure to properly disclose circumstances that may give rise to a lack of independence or impartiality may attract criminal liability under section 199 of the Penal Code:

> Whoever, in any declaration made or subscribed by him, which declaration any Court, or any public servant or other person, is bound

16 Development Bureau, Government of the Hong Kong Special Administrative Region, Guideline on Conflicts of Interest in Adjudication (Construction Industry Security of Payment Ordinance (Cap 652)), available at https://www.devb.gov.hk/filemanager/en/content_2436/Guideline_on_Conflicts_of_Interest_in_Adjudication.docx (accessed August 19, 2026); Development Bureau, "Bills Committee on Construction Industry Security of Payment Bill: Follow-up Actions Required of the Administration Arising from the Discussion at the Meeting on 14 October 2024", LC Paper No CB(1)1353/2024(01), (October 20, 2024), p 4.

> or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.

[39] In *Yusof Holmes Abdullah v PP and Another Appeal*,[17] the appellant had acted as an adviser to JMR, a party to the contract for land reclamation in Penang.[18] There was evidence of communications between him and JMR's representatives concerning the very dispute which eventually went to arbitration. He had even assisted in drafting correspondence to the KLRCA concerning the commencement of the arbitration. Yet, when accepting his appointment, he signed a statement of independence.

[40] In *Sundra Rajoo v Mohamed Abdul Majed & Anor*,[19] the High Court regarded the history of more than 20 appointments of the first defendant as arbitrator by the same claimant or corporate group as sufficient material that it should have been disclosed.[20] The court took a serious view of the first defendant's non-disclosure and ordered disclosure of past and present appointments, failing which the co-arbitrator would be disqualified as arbitrator.

Bribery, corruption and fraud in arbitration

[41] One cannot speak about bribery and corruption in international arbitration without referring to the case of *The Federal Republic of Nigeria v Process & Industrial Developments Limited* .[21] The parties did not raise the issue of corruption at the arbitration proceedings and neither did the arbitral tribunal inquire into it. It was raised by Nigeria in the setting aside of the awards stage in London.

[42] On January 11, 2010, Nigeria entered into a 20-year Gas Supply and Processing Agreement ("GSPA") with Process & Industrial Developments Ltd ("P&ID"). Nigeria was to supply "wet" gas to Gas-Processing Facilities constructed by P&ID, for it to be stripped

17 [2020] 4 CLJ 688.
18 Ibid.
19 [2011] 6 CLJ 923.
20 Ibid.
21 [2023] EWHC 2638 (Comm).

into "lean" gas to be delivered to Nigeria for power generation. The remaining natural gas liquids would remain with P&ID to be sold.

[43] Both parties barely performed their GSPA obligations. P&ID commenced arbitration against Nigeria in the third year, relying on an arbitration clause in the GSPA. The Tribunal issued a final award dated July 17, 2015 ("Award on Liability") that Nigeria had committed a repudiatory breach and was liable for damages. It also published a further award dated January 31, 2017 ("Award on Quantum") dealing with quantum, which required Nigeria to pay USD6.6 billion with a 7% interest rate.

[44] In February 2016, before issuing the Award on Quantum, P&ID was investigated by the Nigerian Economic and Financial Crimes Commission ("EFCC").[22] In June 2018, the EFCC commenced a further investigation into the GSPA, the arbitration and the subsequent awards that had been issued.[23] In September 2019, the EFCC interviewed several Nigerian officials and found that P&ID had paid them throughout a period of years.[24] On September 19, the High Court convicted P&ID for offences of tax evasion, money laundering and trading without necessary licences.

[45] Nigeria filed a challenge in the High Court of England and Wales disputing the awards. They alleged that P&ID was corrupt before entering and during the GSPA as well as during the trial's early stages, managing to corrupt two of their leading counsel.[25]

[46] Knowles J acknowledged the fact that the corrupt payments were not referred to the arbitral tribunal to decide, saying that the arbitration was a "shell that got nowhere near the truth".[26] From the evidence adduced at the setting aside of the award stage, Knowles J concluded that whilst P&ID did not contract into the GSPA as a sham to obtain an arbitral award or corrupt settlement, he however set aside the awards on findings of "serious irregularity" that caused substantial injustice under section 68(2)(g) of the Arbitration Act 1996 ("AA 1996"). This was due to instances of "corruption without hesitation".

22 Ibid, at [338].
23 Ibid, at [409].
24 Ibid, at [54]–[55].
25 Ibid, at [12].
26 Ibid, at [580].

The court found that P&ID had practised the "most severe abuses of the arbitral process".[27] It first produced false evidence, then bribed a Mrs Taiga, a senior Nigerian government lawyer, to suppress the information about bribes paid during the GSPA's formation, and it improperly retained Nigeria's internal legal documents, which were used to monitor Nigeria's position and awareness as the arbitration continued.[28]

[47] Thus, it was uncovered at the setting aside of the awards hearing before Knowles J that the corrupt practices started at the procurement of the contract stage and continued through the performance of the contract and even persisted into the preparation of the witness statements for the hearing before the High Court which were found to be false.

[48] Regarding the issue of the arbitrator's powers, Chief Justice of Singapore Sundaresh Menon CJ expounded during the Kaplan Lecture 2025[29] that an abuse of process had taken place as corruption in arbitration proceedings is a public policy issue which can be reviewed by courts at the post-award stage regardless of whether the parties had raised them previously.[30]

[49] It is not for the parties to say that the arbitral tribunal lacks jurisdiction merely because the parties had not referred the issue of corrupt payments in their pleadings and thus is not an issue for the arbitral tribunal to decide on. The so-called agreement does not prevent the scrutiny of possible corruption as seen in *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter*.[31]

[50] In *Metal-Tech Ltd v The Republic of Uzbekistan*,[32] the arbitral tribunal took the view that it lacked jurisdiction as the "investment" made was not an "investment" within the meaning of the Bilateral Investment Treaty ("BIT"). Metal-Tech entered into a joint-venture agreement with two Uzbekistan state-owned enterprises to establish

27 Ibid, at [516].
28 Ibid, at [494]–[496].
29 Sundaresh Menon CJ, "Corruption in International Arbitration: The Past, Present and Future", Kaplan Lecture 2025, Hong Kong International Arbitration Centre (December 1, 2025), paras 19–20.
30 Ibid, para 36.
31 [2021] 5 SLR 228 at [153].
32 ICSID Case No ARB/10/3, Award (October 4, 2013).

Uzmetal, to build and operate a production plant in Uzbekistan.[33] Three consulting agreements were drafted that required Uzmetal to distribute dividends. Failing to distribute the dividends following a court order, a shareholder sought bankruptcy proceedings against Uzmetal.[34] Metal-Tech then initiated arbitration proceedings against Uzbekistan, alleging the BIT was breached when the bankruptcy proceedings were initiated.[35] Uzbekistan alleged that Metal-Tech's investment was acquired using corruption hence the tribunal lacked jurisdiction.[36]

[51] The tribunal concluded that there were significant elements of corruption as seen from the multiple arbitration corruption "red flags" such as the advisor having a lack of experience in the sector, the unusually high commissions paid in cash, and the bribing of government officials, among others.[37] As Uzbekistan's consent to the ICSID arbitration was only for disputes "concerning an investment", Metal-Tech's tainted investment arising from corrupt money paid to officials took the "investment" outside the class of investment covered by Uzbekistan's consent.[38]

[52] Just as there have been cases of fraud in procuring a court order, in *Contax Partners Incorporated BVI v Kuwait Finance House & Ors*[39] there was a fabricated Kuwaiti arbitral award for about £70 million that was sought to be enforced in England. The court was informed by the defendants that: (i) the entire arbitral claim was actually commenced without authority; and (ii) the underlying arbitration agreement did not exist, as no arbitration had actually taken place.[40] They then sought to set aside the enforcement order.

[53] Justice Butcher J then investigated and examined the documents presented before him in accordance with the defendants' submissions and found that parts of the judgment had been lifted from another judgment of a separate case.[41] In addition to that, the award did not

33 Ibid, at [7].
34 Ibid, at [47]–[52].
35 Ibid, at [107(iv)].
36 Ibid, at [110(i)].
37 Ibid, at [289], [293] and [373].
38 Ibid, at [289] and [373].
39 [2024] EWHC 436 (Comm).
40 Ibid, at [24].
41 Ibid, at [16(1)], [36], [40]–[44].

contain the basic elements of a Kuwaiti arbitration award, such as compliance with the Kuwaiti Civil Procedure Law.[42] These findings supported that there were no records that the said Kuwaiti arbitration proceedings ever happened. The enforcement order was therefore set aside.

[54] The case highlights the important role of enforcement courts in preventing fraudulent awards from being enforced. Where an award raises doubts, the court may need to verify the arbitration agreement, the composition of the tribunal and whether the arbitration actually took place. The case also shows the need for reliable systems to verify the authenticity of arbitral awards and the proceedings from which they arise. Technology can support this verification process. It can however equally be used to produce convincing forgeries.

Conclusion

[55] Good governance must operate throughout the life cycle of a construction project, from procurement and payment to contract administration and dispute resolution. Integrity pacts, contractual provisions and statutory duties must be supported by transparency, accountability, proper monitoring and effective enforcement. These measures provide the necessary framework for good governance, but their effectiveness ultimately depends on the people entrusted to apply them.

[56] It goes without saying that no system can be better than the people that man it. Be that as it may, with a system of surveillance and monitoring, aided by computerisation, digitalisation and now AI, breaches and bottlenecks can be more easily identified and addressed. The basic values of life have always been the same from time immemorial – be as good as one can possibly be for anything less than that comes with a heavy price to pay. Integrity is what you do when no one is watching but there is always someone watching over you.

[57] The time is always right to do that which is right. Wrong is wrong even if everyone is doing it. Right is right even if no one is doing it. We remember the lines from Robert Fulghum's *All I Really Need to*

42 Ibid, at [46]–[47], [50].

Know I Learned in Kindergarten: "Play fair. Don't hit people. Put things back where you found them. Clean up your own mess."[43]

[58] Translated into the language of the construction industry it would read: "play fair" means transparency and integrity; "don't hit people" means resolving disagreement without destroying relationships; "put things back" means accountability for what has been entrusted to us; and "clean up your own mess" means taking responsibility when things go wrong.

43 Robert Fulghum, *All I Really Need to Know I Learned in Kindergarten: Uncommon Thoughts on Common Things* (Villard Books, 1988), p 4.

When Reconsideration Resets the Judicial Review Clock

by

*Justice Dato' Faizah Jamaludin**

Abstract

This article examines when reconsideration, later communication, or another subsequent administrative act affects the three-month period for judicial review under the two alternative triggers in Order 53 r 3(6) of the Rules of Court 2012. It analyses Malaysian authorities on reviewability, reconsideration, communication, promptness and extension of time, and argues that a request for reconsideration does not itself restart time. A later date arises only where the competent authority reopens the matter and makes a further decision with present legal effect. Preliminary steps, refusals to reopen, fuller reasons and administrative silence will not ordinarily have that effect. Belated communication of the original decision raises a separate question under the communication limb. The article proposes a practical method for identifying the act challenged, the lawful decision maker, the legal effect of any later act, and the grievance pleaded.

Introduction

[1] Administrative decision making does not always end with the first formal decision. A disappointed person may ask the authority to reconsider. The authority may seek further material, meet the affected person, give fuller reasons, correct an error, decline to reopen, or make a further determination on the merits. Months may pass in correspondence. When judicial review follows, the first question is not simply when the last letter was sent. It is which act is being challenged, and under which limb of Order 53 r 3(6) of the Rules of Court 2012 ("ROC 2012") time is to be measured.

[2] The rule contains two alternative reference points: the date when the grounds of application first arose and, where a decision is

* Judge of the Court of Appeal of Malaysia. The views expressed in this article are the author's personal views and do not represent the views of the Malaysian Judiciary.

challenged, the date when the decision was first communicated to the applicant. The distinction is not technical. It determines whether time runs from the legal grievance itself, from the first legally relevant communication of the decision, or from a later act that is truly capable of being challenged. A request for reconsideration does not, without more, restart the three-month period. Time may run from a later date only where the competent authority reopens the matter and makes a further decision with present legal effect.

[3] That distinction is often obscured by the language of correspondence. A later document may be the first legally relevant communication of an earlier decision rather than a fresh exercise of power. Conversely, a later letter may add nothing to the original decision even if expressed firmly or in fuller terms. Preliminary steps, refusals to reopen, administrative silence and fuller reasons do not ordinarily alter the legal position. The court must therefore distinguish a fresh decision, later communication of an old decision, and correspondence that has no independent legal effect.

[4] The time rule serves both access to judicial review and the public interest in finality. It preserves supervisory control where public power is exercised unlawfully, while protecting good administration, affected persons and third parties from indefinite uncertainty. This article examines Malaysian authorities on reviewability, reconsideration, communication, promptness and extension of time. It suggests a practical method: identify the act challenged, the lawful decision maker and source of power, the legal effect of any later act, and the grievance pleaded.

The statutory framework and the two triggers

[5] Order 53 r 3(6) of the ROC 2012 provides two reference dates: when the grounds of application first arose and, where a decision is challenged, when the decision was first communicated to the applicant. In *P Maradeveran Periasamy v Suruhanjaya Pilihan Raya*, the Court of Appeal explained that the first date depends on the grounds relied on, while the second depends on communication of the decision. The dates operate in the alternative because the rule uses "or". Neither invariably supersedes the other; the court must determine which date fits the facts, the pleaded grievance and the nature of the challenge.[1]

1 *P Maradeveran Periasamy & Ors v Suruhanjaya Pilihan Raya & Anor* [2019] 2 MLJ 70; [2019] 6 CLJ 173, CA at [19], [21], [24], [25] and [31].

[6] That distinction makes identification essential. The court cannot fix when the grounds arose without identifying the legal wrong alleged; nor can it fix communication without identifying the decision said to have been communicated. A chronology of letters and meetings is not enough. Each event must be related to the public power exercised, its legal effect, and the relief sought.

[7] Rule 3(7) allows the court, on application, to extend time for good reason. That question is separate from the identification of the correct trigger. A genuine later decision may be challenged without an extension if the application is filed in time. A request that produces no later decision may still help explain delay, but the applicant must apply for an extension and account for the period of delay.

[8] The consequences of error are serious. In *Wong Kin Hoong v Ketua Pengarah Jabatan Alam Sekitar* ("*Wong Kin Hoong*"), the Federal Court described compliance with the time frame as fundamental and going to jurisdiction. Once the explanation for delay had been rejected, the court no longer had jurisdiction to hear the application for leave, and the merits were irrelevant.[2]

The prior question of reviewability

[9] Before deciding whether reconsideration has generated a fresh limitation period, the court must identify a reviewable act. A document that forms only part of an unfinished administrative process does not itself amount to a reviewable decision. Conversely, a document need not bear the label "final decision" before it has sufficient legal effect to attract supervisory review.

[10] The contrast between *Mudah.my* and *MyTeksi* is instructive. In *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* ("*Mudah.my*"), an audit-findings letter set out initial findings, invited the taxpayer to attend a meeting, contemplated further documents and discussion, and anticipated finalisation only after that process. The Court of Appeal held that no reviewable decision had yet been made. The application was premature.[3] The case shows that apparent firmness of language

2 *Wong Kin Hoong & Anor v Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 MLJ 161, FC at [17], [18] and [30].

3 *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* [2017] 2 MLJ 197, CA at [8]–[18].

and practical pressure do not displace the need to read the document within the whole statutory and administrative process.

[11] In *MyTeksi Sdn Bhd v Competition Commission* ("*MyTeksi*"), in contrast, the Court of Appeal held at the leave stage that a proposed competition decision was arguably amenable to review. Although further steps remained before a final decision under the Competition Act 2010, the proposed decision contained a decision in principle, imposed directions and exposed the companies to a daily penalty for non-compliance. It was capable of affecting rights, interests or liabilities and could therefore be challenged.[4] The substantive appeal in *Suruhanjaya Persaingan v MyTeksi Sdn Bhd* confirmed that the proposed decision was amenable to judicial review.[5]

[12] These cases turn on legal effect and statutory context. Finality remains relevant because a genuinely preliminary view will often have no operative consequence. The question is whether the act has altered, constrained or authoritatively determined the applicant's present legal position, or is a legally significant step towards doing so.

[13] The same discipline applies to reconsideration. A later response is not fresh merely because it is chronologically later. One must ask whether it amounts to a reviewable act in its own right. A courteous acknowledgement, a refusal to reopen, silence, or a fuller explanation may leave the earlier legal position untouched. A true redetermination may replace, vary or maintain that position through a further exercise of power.

Reconsideration as a fact-sensitive inquiry

[14] The persuasive starting point is the Singapore case of *Per Ah Seng Robin v Housing and Development Board* ("*Per Ah Seng Robin*"). The Singapore Court of Appeal stated that time generally runs from the impugned decision or, in a multi-stage process, from the final step. That is not inflexible. Time may start later where the authority's

4 *MyTeksi Sdn Bhd & Ors v Competition Commission* [2022] 6 MLJ 767, CA at [39]–[46] and [55]–[61].

5 *Suruhanjaya Persaingan v MyTeksi Sdn Bhd & Ors* [2025] 3 MLJ 197, CA at [24]–[29].

conduct indicates a willingness to reconsider. Whether delay has been satisfactorily explained remains a separate and fact-sensitive inquiry.[6]

[15] The reference to conduct is important because neither party's description is conclusive. The court examines the course of dealing as a whole: whether the authority sought information, met the affected person, reopened the relevant criteria, referred the matter to the lawful decision maker, and ultimately communicated a determination reached after that process.

[16] That reasoning was expressly endorsed by the Malaysian Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Yayasan Buah Pinggang Kebangsaan Malaysia* ("*Yayasan Buah Pinggang*"). The Lembaga Hasil Dalam Negeri ("LHDN") revoked the National Kidney Foundation's ("NKF") tax-exempt status by a letter dated August 29, 2019. NKF made representations. LHDN then requested further information, a meeting took place, and the Ministry of Finance referred the matter back to LHDN for attention and action. By a letter dated June 17, 2020, LHDN maintained its earlier conclusion. The court held that LHDN had unequivocally demonstrated a willingness to reconsider and had in fact reconsidered the matter. The earlier decision could not be treated as decisive. Time ran from the later decision even though it reiterated the same substantive result.[7]

[17] *Yayasan Buah Pinggang* shows that an unchanged outcome may still be a fresh decision. LHDN did more than receive a request: it sought input, engaged with NKF and made a further determination. Its later letter was therefore the decision under review.[8]

[18] The decision should not be read as establishing an automatic suspension principle. It does not say that time stops whenever discussions begin, or that every response to representations creates a new limitation period. Such a reading would undermine the finality that Order 53 r 3(6) protects. The authority's objective conduct must demonstrate a real reopening, and the later act must be capable of standing as the decision challenged.

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6 *Per Ah Seng Robin v Housing and Development Board* [2016] 1 SLR 1020 at [51]–[58].

7 *Ketua Pengarah Hasil Dalam Negeri v Yayasan Buah Pinggang Kebangsaan Malaysia* [2024] 4 MLJ 288, CA at [30]–[37].

8 Ibid, at [33]–[37]. The Court of Appeal also addressed the computation of time under O 3 r 2 of the ROC 2012 and s 145 of the Income Tax Act 1967 at [39]–[45].

The limiting cases

A. A fact-specific later rejection

[19] In *Menaka Deivarayan v Pentadbir Tanah Daerah Bagan Datuk* ("*Menaka Deivarayan*"), the High Court treated a later letter rejecting the applicant's request for reconsideration as the relevant communicated decision. The earlier letters created uncertainty because they were addressed to another person. The applicant promptly sought clarity and received an unequivocal rejection of her own application. Leave was filed within three months of receipt. In the alternative, the court considered that the effort to obtain reconsideration and clarity supplied good reason for any delay.[9]

[20] The result turned on the uncertainty in the earlier letters and the applicant's prompt attempt to resolve it. It should therefore be treated as a fact-specific High Court decision. A later rejection is not invariably a fresh decision. The answer depends on whether the original act was decisive against the applicant, whether the matter was truly reconsidered, and whether the challenge is directed to the later determination.

B. A unilateral request and administrative silence

[21] *Sime Darby Plantation Bhd v Pengarah Tanah dan Galian Pulau Pinang & Ors* ("*Sime Darby*")[10] provides the clearest counterpoint to *Yayasan Buah Pinggang*. The applicant sought to challenge a statutory land acquisition. Some 18 months after Form E had been served, it wrote to the Chief Minister asking that the acquisition be withdrawn. The Chief Minister did not respond. The applicant argued that the omission to respond created a later trigger under the grounds limb.

[22] The High Court rejected the argument. The Order 53 statement showed that the real challenge was to the State Authority's acquisition decision, not to the Chief Minister's silence. The Chief Minister did not exercise the State Authority's statutory power under the Land Acquisition Act 1960 and had no relevant function within that legislative scheme. A letter to an office without power to decide could not create a fresh exercise of public power. To allow it to reset

9 *Menaka Deivarayan v Pentadbir Tanah Daerah Bagan Datuk, Perak & Ors* [2021] 7 MLJ 232, HC at [27]–[37].

10 [2025] MLJU 3935.

time would produce disorder and uncertainty in the land acquisition process.

[23] *Sime Darby* marks three limits: the request must reach the legally relevant authority; that authority must objectively reopen the matter rather than remain silent; and the later act must correspond with the decision, grounds and relief pleaded. Without those features, time remains tied to the original decision.

C. The clock follows the real grievance

[24] The need to match the decision to the grievance also appears in *Mohd Kamilzuhairi bin Abd Aziz v Pendakwa Syarie Selangor*. A *fatwa* had been gazetted in 2013, but the applicants were charged only in March 2023. The High Court held that the decision challenged was the later decision to charge them. The *fatwa* formed the legal background, but the applicants' grievance arose from the operative step taken against them. Their application filed within three months of the charges was therefore not late on that ground.[11]

[25] The principle is broader than the facts of that case. An older instrument may supply the legal basis for a later act without necessarily being the decision challenged. Conversely, a new letter cannot obscure that the applicant still seeks to quash or invalidate an old operative decision. The court should read the statement, relief, grounds and chronology together to identify the legal wrong for which a remedy is sought.

Fresh decision or later communication

[26] A later document may be a fresh decision or the first legally relevant communication of an earlier decision. Those events are not the same. The Federal Court's divided decision in *Damien Thaman Divean v Majlis Eksekutif Negeri Selangor* ("*Damien Thaman*") illustrates the distinction.[12]

11 *Mohd Kamilzuhairi bin Abd Aziz & Ors v Pendakwa Syarie Selangor & Ors* [2024] 9 MLJ 763, HC at [21]–[29]. The application ultimately failed on other jurisdictional and justiciability grounds.

12 *Damien Thaman Divean & Anor v Majlis Eksekutif Negeri Selangor Darul Ehsan (EXCO) & Ors* [2026] 5 CLJ 1; [2026] 4 MLRA 227, majority judgment at [25]–[38] and answers at [42].

[27] The Selangor State Executive Council decided in November 2000 to excise part of the Bukit Cherakah Forest Reserve. A *Gazette* notification dated April 14, 2022 was published on May 5, 2022 and stated that the excision took effect from the date of the 2000 decision. The judicial review application was filed on August 3, 2022. The *Gazette* was therefore central to the timing dispute, but the case was not a conventional reconsideration case. The question was whether the *Gazette* was a later operative decision, a retrospective validation of the earlier decision, or the statutorily prescribed communication of that decision.

[28] For the majority, the operative decision remained the decision of November 20, 2000. Section 13 of the National Forestry Act 1984 permitted the notification to specify that date as the effective date, and section 20 of the Interpretation Acts 1948 and 1967 permitted subsidiary legislation to operate retrospectively, subject to the statutory limitation concerning penalties. The *Gazette* was treated as compliance with the notification requirement, not as a fresh decision to excise the land. The majority also endorsed the view that the grounds had arisen through alienation and extensive physical development over the intervening years. The application was out of time, no extension had been sought, and the appeal was dismissed.

[29] The dissenting judgment approached the statutory scheme differently. Section 13 of the National Forestry Act 1984 made the *Gazette* notification mandatory and supplied the lawful means of communicating the excision to the public. The private 2000 decision could not fairly start time against persons who had no access to it. On that analysis, the second limb of Order 53 r 3(6) applied and time ran from publication on May 5, 2022. The application filed on August 3, 2022 was within three months. The dissenting judge, Lee Swee Seng FCJ, would have allowed the appeal and remitted the matter for substantive hearing.[13]

[30] For present purposes, the majority decision represents the binding authority. Its reasoning cautions against assuming that a later *Gazette*, notice or formal instrument is necessarily a new decision. The legal character of that instrument depends on the enabling statute, the original decision and the effect that the later instrument is permitted

13 Ibid, dissenting judgment at [61]–[70], [90]–[105] and [169]–[170].

to have. At the same time, the dissent identifies the distinct question of communication: where legislation prescribes a public mode of notice, the legal significance of that requirement must be addressed rather than displaced by an assumption that visible development necessarily communicates the precise decision.

[31] A fresh decision and first communication are different routes to a later date. The first requires a further exercise of decision-making power. The second may concern an old decision if that is when it was first brought to the applicant's actual knowledge or, where the statute so provides, notified to the public. The court should identify the route asserted and test it against the governing legislation.

Communication, knowledge and promptness

[32] The Court of Appeal's judgment in *Zakaria bin Ismail v Pengarah Jabatan Perancangan Bandar dan Desa Pulau Pinang* ("*Zakaria Ismail*"), concerning planning permission for the Penang South Reclamation project, provides a useful restatement of the two limbs. The court reaffirmed that they are separate. The grounds limb may operate despite the applicant's lack of actual knowledge of the decision, whereas the communication limb turns on when the decision was brought to the applicant's actual knowledge or notice.[14]

[33] Communication is a question of fact and statutory context. Formal service may be required under the relevant legislation, as the land acquisition cases demonstrate. In other settings, actual knowledge may arise from a press statement or may be inferred from the evidence. Mere public activity does not always disclose that a particular approval exists, but extensive participation in related proceedings may support an inference that the applicant knew of it. Constructive knowledge should not displace an express statutory mode of service. At the same time, an applicant cannot disregard clear evidence of actual knowledge while waiting for a preferred document.[15]

14 *Zakaria bin Ismail & Ors v Pengarah Jabatan Perancangan Bandar dan Desa Pulau Pinang & Ors* [2026] 8 CLJ 561, CA at [37]–[42].

15 Ibid, at [38(3)], discussing *Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors* [2016] 1 MLJ 200; [2015] 3 CLJ 1017, FC; *Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor* [2016] 1 MLJ 544; [2015] 3 CLJ 861, FC; *Ratna Sari Arif & Ors v The Mayor of the City of Kota Kinabalu & Ors* [2016] 3 MLJ 769; [2016] 10 CLJ 138, CA; and *Tan Bun Teet v Jawatankuasa Perancang Negeri Pahang & Ors* [2026] 5 CLJ 657, CA.

[34] A related question concerns the word "promptly". In *Tan Bun Teet v Jawatankuasa Perancang Negeri Pahang*, the Court of Appeal treated promptness as an independent requirement and held that delay may be fatal even where filing occurs within the three-month period, particularly in planning cases involving investment and third-party reliance. *Zakaria Ismail* took the opposite view. It held that promptness is not a separate mandatory requirement once either statutory limb is satisfied, relying on the Federal Court decisions in *Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors* and *Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor*.[16] The dissent in *Damien Thaman* was consistent with that approach in relation to a mandatory *Gazette* notification: an application filed within three months of the prescribed communication should not nevertheless be treated as late.[17]

[35] There is therefore conflicting Court of Appeal authority on whether promptness operates as an independent requirement within the three-month period. *Zakaria Ismail* treated the earlier Federal Court decisions as binding and inconsistent with a separate promptness bar. The majority in *Damien Thaman* decided the limitation issue by identifying the 2000 decision as the operative decision, finding the application out of time and noting that no extension had been sought; it did not determine the promptness issue under the communication limb. Pending authoritative resolution, the three-month period should be treated as the outer limit, and an applicant should file as soon as reasonably possible after the earliest credible trigger.

A structured inquiry for fresh decision cases

[36] The authorities point to a structured inquiry. No single factor is conclusive, and the weight of each factor depends on the statutory scheme. The following questions may assist courts, counsel and public authorities.

(a) *Identify the act challenged:* What decision, omission, notice or determination is said to be reviewable? It should be identified

16 *Zakaria Ismail*, ibid, at [38(4)], declining to follow on this point *Tan Bun Teet v Jawatankuasa Perancang Negeri Pahang & Ors* [2026] 5 CLJ 657 at [49]–[54].

17 *Damien Thaman*, see n 12 above, dissenting judgment at [93]–[105]. The dissent reasoned that, where the objective trigger is formal communication by a mandatory *Gazette* notification, promptness merges into the three-month period measured from that communication.

in the Order 53 statement, and the relief and grounds must correspond to it. The court should begin with the act for which a public law remedy is sought, not with the abstract question whether there was "reconsideration".

(b) *Identify the lawful decision maker and source of power:* Did the body or officer dealing with the request have a statutory power, duty or properly implied authority to reconsider? A response from the wrong office cannot ordinarily replace the decision of the body entrusted with the function. Under some statutes, an internal review or appeal is itself the operative determination.

(c) *Examine the authority's conduct:* Did it invite representations, seek further evidence, hold a new hearing or meeting, reconsider the criteria, or refer the matter back for determination? These matters may show reopening. Acknowledgement, delay, silence or courtesy will ordinarily not suffice unless the merits were taken up again.

(d) *Determine the later act's legal effect and scope:* Did it replace, vary, supersede or independently determine the applicant's legal position? A new explanation for an old decision will not normally suffice, although an unchanged result may be fresh if reached through a genuine new exercise of power. The court must also determine the scope of any reopening. Review of one new issue does not necessarily reopen the whole decision.

(e) *Match the grounds to the decision:* A failure to consider evidence submitted on reconsideration attacks the later exercise. Bias or denial of a hearing in the original process may still be directed to the original decision unless the later process cured or repeated the defect. Time must be analysed by reference to the ground, not only the date on the later letter.

(f) *Apply both limbs and consider promptness:* After identifying the decision and grounds, the court should ask when the grounds first arose and when the decision was first communicated. It must then decide which limb applies, taking account of any prescribed form of service or publication. Given the present divergence, the prudent course is to file without avoidable delay.

[37] A later period may therefore run only when the proper authority actually revisits the matter and issues a reviewable determination

with present legal effect. It extends only to grounds directed to that determination.

Common factual patterns

[38] The structured inquiry produces different answers in recurring situations.

(a) *Same decision, same material and no reopening:* The authority merely states that there will be no change and does not reassess the merits. The original clock ordinarily remains controlling.

(b) *Same outcome after genuine merits review:* The competent authority receives new material, reopens the merits and makes a further operative determination. A fresh period may run from the later decision, as *Yayasan Buah Pinggang* demonstrates.

(c) *Fuller reasons only:* Reasons supplied later may clarify why the original decision was made without changing the operative act. Ordinarily, improved explanation alone does not restart time. If the reasons disclose a new and previously unknowable ground, the grounds limb may require separate analysis, but the applicant should not assume that awaiting reasons preserves time.

(d) *Statutory internal review or appeal:* Where the legislation makes the review determination the operative decision, time will ordinarily be assessed from its communication. The statutory text remains decisive. A non-statutory request cannot simply be equated with a review process established by law.

(e) *Silence:* A unilateral request followed by silence does not, without more, create a later decision or restart time. The identity and statutory power of the person addressed remain material.

Procedural discipline where the date is uncertain

[39] The safest practical response to uncertainty is not to wait for a court to characterise the correspondence. An applicant should work from the earliest plausible date, preserve the complete chronology, and file protectively where necessary. The Order 53 statement may identify alternative decisions if the facts genuinely support them, but the alternatives must remain coherent with the relief and grounds.

[40] Waiting for reasons is especially risky. In *Heflin ak Dino v Human Rights Commission of Malaysia*, the applicant argued that the respondents' failure to provide grounds explained the delay. The High Court held that reasons were not a prerequisite to filing. The applicant could have commenced the judicial review while continuing to request them. The application was filed five months after the three-month period had expired, without a satisfactory explanation for the delay.[18]

[41] If any credible trigger places the application outside time, an extension should be sought expressly. *Zakaria Ismail* explains that the extension prayer may be included with the leave prayer in Form 109, but it must be served on the respondents and heard *inter partes*. The extension question should be determined first. If no extension is granted, the court cannot proceed to the leave or substantive merits merely because the Attorney General or another party did not object.[19]

[42] The applicant must provide evidence addressing the whole period of delay. Genuine attempts to obtain clarity or resolve the matter without litigation may amount to good reason in an appropriate case. *Menaka Deivarayan* treated the applicant's prompt and detailed effort to resolve an ambiguous administrative position as good reason in the alternative. *Per Ah Seng Robin* likewise recognised that serious and genuine attempts to resolve a dispute may justify some latitude, while emphasising that the inquiry is fact-sensitive, and the delay must be fully explained. Neither authority converts negotiation into an automatic extension.

[43] Applicants should place the full chronology before the court, with the material communications, the authority and power of each person involved, the scope and outcome of any reconsideration, the date and mode of communication, the explanation for delay, and any resulting prejudice. It is rarely enough to say that discussions were ongoing.

[44] Public authorities can reduce uncertainty through careful correspondence. A response should state whether the authority has agreed to reopen the matter, identify the power and scope of any review, explain whether implementation is suspended, and say whether the

18 *Heflin ak Dino v The Human Rights Commission of Malaysia & Ors* [2025] MLJU 5049 at [53]–[70].

19 *Zakaria Ismail*, see n 14 above, at [39]–[40] and [43]–[48].

later decision replaces the earlier one. Such clarity does not determine the court's legal characterisation, but it is relevant evidence of what the authority actually did and promotes good administration.

Jurisdiction waiver and the stage of objection

[45] The jurisdictional treatment of the time rule also limits what the parties can achieve by agreement or omission. In *Zakaria Ismail*, the Court of Appeal held that non-objection by the Attorney General at the leave stage could not confer jurisdiction over an application that did not comply with rule 3(6). Agreement, consent, election, waiver, acquiescence and estoppel could not overcome the express rule. A jurisdictional objection could be raised later even though leave had been granted, and no appeal had been brought against the leave order.[20]

[46] This reinforces the need for the court to determine the limitation issue on a proper evidential basis. The absence of opposition does not relieve the applicant of establishing compliance or obtaining an extension. Equally, because the merits cannot restore a jurisdiction lost through unexcused delay, an apparently strong substantive challenge does not answer the procedural question.[21]

[47] The result may appear severe, particularly where the alleged illegality is serious or affects the public. That makes accurate identification of the challenged decision and the correct trigger all the more important. Where delay is justified, rule 3(7) supplies the mechanism for addressing it. The concept of reconsideration should not be enlarged merely to avoid an extension application.

Conclusion

[48] Order 53 r 3(6) is not answered by chronology alone. The grounds limb and the communication limb perform different functions: one asks when the legal grievance first arose; the other asks when the impugned decision was first communicated. A later document may matter under either route, but only if its legal character, statutory setting and practical effect are properly identified.

20 ROC 2012, O 53 r 3(2), (6), (7) and (8); *Zakaria Ismail*, see n 14 above, at [39]–[48].

21 *Wong Kin Hoong*, see n 2 above, at [30]; *Zakaria Ismail*, see n 14 above, at [40], [44] and [47]–[50].

[49] Reconsideration does not, by itself, reset the judicial review clock. The decisive question is whether the competent authority has reopened the matter and made a further reviewable determination affecting the applicant's present legal position. If so, the later period is confined to grounds directed to that later exercise. If not, time remains tied to the original decision or to its first legally relevant communication.

[50] The structured approach proposed in this article keeps that inquiry disciplined. It directs attention to the act challenged, the lawful decision maker, the source of power, the legal effect of any later act, and the grievance pleaded. Where doubt remains, prompt filing and, where necessary, an express application for extension of time remain the prudent course. Properly applied, this approach preserves access to judicial review while preventing reconsideration from becoming a device for indefinite uncertainty. It protects legality, good administration and the public interest in finality.

Battle of the Experts: Truth, Advocacy, and Judicial Discretion in the Adversarial Arena

by

Justice Atan Mustaffa Yussof Ahmad and
*Justice Avinder Singh Gill a/l Ranjit Singh**

Abstract

[1] In litigation conducted within an adversarial system, expert evidence occupies an uneasy and often contentious space. Where each party retains and presents its own expert, the proceedings can descend into what may be described as a "battle of the experts", a contest of competing opinions in which technical rigour risks being subordinated to the imperatives of partisan advocacy. The expert who is instructed, remunerated, and in some cases extensively coached by the retaining party does not always arrive in court as a dispassionate seeker of truth. The resulting spectacle, two qualified professionals offering diametrically opposed conclusions on the same body of evidence, can leave the trier of fact more bewildered than enlightened.

[2] At the centre of this dilemma sits the judge. This article examines, on principled grounds, how that dilemma is resolved. It identifies the governing factors that Malaysian courts apply when preferring one expert over another: the quality of reasoning and methodology; the factual foundation on which the opinion rests; the specificity and statutory adequacy of qualifications; independence and impartiality; consistency with objective evidence; performance under cross-examination; and clarity of communication.

[3] The article also considers the procedural architecture of Order 40A of the Rules of Court 2012 and the concurrent evidence procedure known as hot-tubbing. Drawing on authorities from

* Respectively, Judge of the High Court of Malaya and Judicial Commissioner of the High Court of Malaya.

Sim Ah Song & Anor v R[1] to the Federal Court's watershed ruling in *Teoh Kiang Hong v Theow Say Kow*,[2] it offers a principled framework for the Bench and practical guidance for the Bar.

I. Introduction: The epistemic paradox

[4] The adversarial trial regularly produces a paradox that no amount of procedural ingenuity has entirely resolved. Two qualified and ostensibly sincere experts, examining the same facts and relying on the same discipline, arrive at diametrically opposed conclusions. The court must choose between them. Yet the very reason expert evidence was needed in the first place is that the court lacks the technical knowledge to evaluate the question independently.

[5] The paradox is not new. In *Sim Ah Song & Anor v R*,[3] the Singapore High Court articulated the foundational principle with admirable economy:

> The responsibility for the determination of this question, as in the case of every question upon which expert evidence is called, rested upon the Court and not upon the expert.

[6] This principle, predating Merdeka, remains no less exacting today. In such cases, the court does not abdicate its fact-finding function; rather, it arrives at its decision through a principled evaluation of the expert testimony and reports before it, scrutinising not merely the expert's conclusions, but the soundness of the reasoning that underpins them.

[7] The stakes are seldom trivial. In criminal proceedings, expert preference may determine whether an accused person lives or dies. In commercial and construction disputes, it may determine the fate of hundreds of millions of Ringgit. In medical negligence litigation, it shapes the standard of care and the accountability of practitioners. Getting this exercise right, at first instance, cannot be overstated.

[8] Unlike lay witnesses who testify to facts within their personal knowledge, expert witnesses are engaged precisely because the

1 [1951] 1 MLJ 150 (decided by the Singapore High Court under its appellate criminal jurisdiction).
2 [2025] 1 MLJ 813.
3 [1951] 1 MLJ 150.

court lacks the specialised knowledge necessary to resolve issues of a technical, scientific, or professional nature. Yet the adversarial system, by its very design, places that guide in the employ of one of the contending parties. This is a structural tension that has long troubled courts and commentators alike. The expert who is instructed and remunerated by a party does not always arrive in court as a dispassionate seeker of truth. The resulting challenge, for the judge, is to distinguish genuine expertise from advocacy dressed in scientific or specialist expertise clothing.

[9] This article addresses that challenge directly by exploring the statutory and procedural framework governing expert evidence in Malaysia; establishing the court's constitutional role as the ultimate finder of fact; and examining, through the lens of recent authorities from Malaysia and other jurisdictions, the seven governing factors that recurrently determine the outcome of contested expert disputes. The article concludes with practical guidance for judges exercising this evaluative function and for counsel preparing or challenging expert evidence.

II. The legal framework

A. Section 45 of the Evidence Act 1950: Admissibility and the threshold of expertise

[10] The gateway to expert evidence in Malaysian law is section 45 of the Evidence Act 1950, which renders admissible the opinions of "persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions". The key word is "specially". General proficiency in a discipline does not automatically confer authority over every sub-question within it.

[11] The authoritative test is the two-limb inquiry articulated by the Supreme Court in *Junaidi Abdullah v PP*:[4] First, does the nature of the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under enquiry? The court added a calibration that has proven particularly significant in practice:

4 [1993] 1 MLRA 452.

> The more scientific and complex the subject matter, the more extensive and deeper will the Court be required to enquire in the ascertainment of (the expert's) qualification or experience in the particular field of art, trade or profession.

[12] The *Junaidi* test is the beginning of that inquiry.

[13] An expert who clears the admissibility threshold has merely earned the right to be heard, and the weight of the opinion remains a separate and more consequential question. The flexibility afforded to experiential as well as formal qualifications is not without risk, and courts must be vigilant about assessing not merely whether a witness has experience in a general field, but whether that experience is specifically relevant to the particular question on which opinion is sought.

B. Section 51 of the Evidence Act 1950: Reasoning is indispensable

[14] While section 45 opens the door to expert evidence, section 51 of the Evidence Act 1950 imposes the accompanying discipline: it renders relevant not merely the expert's opinion, but the grounds on which that opinion rests. The corollary, though nowhere stated in the text of the provision but now firmly settled by authority, is that a bare expression of opinion, unsupported by the reasoning that underlies it, carries no evidential value whatsoever. In *Sim Ah Song & Anor v R*,[5] Brown, Acting CJ, articulated the rationale with enduring clarity: the function of the expert witness is to draw on his knowledge and experience so as to furnish the court with an understanding it does not itself possess. It is not enough for him to pronounce a conclusion; he must supply the reasoning that makes the conclusion intelligible to the court. Absent that explanation, the court is no better placed to decide the question than before the evidence was led, and if it nonetheless acts on the expert's bare assertion, the determination becomes, in substance, the expert's and not the court's. The reasoning must illuminate the court's own analysis, never substitute for it.

[15] Recently, in *Perbadanan Pengurusan One Tanjong v Province Valley Sdn Bhd*,[6] the Court of Appeal confirmed that an "expert's evidence must be substantiated with reasoning, as a bare expression of his

5 [1951] 1 MLJ 150.
6 [2025] MLRAU 129.

opinion holds no evidential value whatsoever". The Court of Appeal essentially applied *Sim Ah Song & Anor v R*.[7]

[16] Section 51 of the Evidence Act 1950 is where preference is born. An expert who reasons aloud, who takes the court from premise through inference to conclusion, gives the court the tools to assess the opinion. An expert who merely asserts a conclusion, however authoritatively, leaves the court without any rational basis for preference.

C. Order 40A of the Rules of Court 2012: From procedural safeguard to substantive gatekeeper

[17] The Evidence Act 1950 provides the substantive legal basis for the admissibility of expert opinion evidence, whereas Order 40A of the Rules of Court 2012 provides the procedural framework governing how such evidence is prepared, disclosed, and brought before the court.

[18] Order 40A r 2 of the Rules of Court 2012 imposes an overriding duty: the expert's primary obligation is to the court, not to the party that retained him.

[19] Order 40A r 3 of the Rules of Court 2012 prescribes the mandatory contents of an expert report including qualifications, materials relied upon, range of opinion with reasons, summary of conclusions, and a signed declaration accepting full responsibility for the report.

[20] Order 40A r 5 of the Rules of Court 2012 empowers the court to direct concurrent expert evidence.

[21] Two recent decisions demonstrate that Order 40A's requirements are not merely procedural formalities, but conditions the courts are prepared to enforce. In *Boustead Cruise Centre Sdn Bhd v Nikmat Mujur Sdn Bhd & Anor* ("*Boustead Cruise Centre*"),[8] the defendant's expert had neither sworn nor affirmed any affidavit exhibiting the report, nor accepted full responsibility for it. The High Court held that his testimony was "wholly inadmissible" and ruled that the non-compliance with Order 40A r 3 was fatal even though the plaintiff had not objected. This case demonstrates that the court is the final arbiter on when expert testimony can be accepted and consent or

7 [1951] 1 MLJ 150 at [49] and [51].
8 [2025] 5 MLRH 75.

non-objection from the opposing party cannot override the mandatory language in Order 40A.

[22] The Court of Appeal in *Langkawi Yacht Club Bhd v Suzannah Helen Harvey & Anor* ("*Langkawi Yacht Club*")[9] reaffirmed the principle. In that case, the plaintiffs alleged that their yacht had been damaged by contaminated fuel. They did not tender an expert report, but instead relied on the scientific opinions of the yacht's sailor, an aircraft engineer who was called solely as an ordinary witness of fact. The trial judge erroneously admitted and preferred that witness's scientific theories on sodium contamination over the expert testimony adduced by the opposing party. The Court of Appeal reversed the decision, holding that an ordinary witness cannot be transformed into an expert by "backdoor appointment or even mutual agreement". The procedure prescribed by Order 40A of the Rules of Court 2012 must be followed, and where it is not, the court errs in preferring such evidence over independent contemporaneous documents and properly admitted expert testimony.

[23] The above cases carry a stark lesson for counsel: compliance with Order 40A is not a formality to be observed loosely. The rules of admissibility determine whether expert evidence may be received at all; the rules of procedure under Order 40A determine whether it will be. Neither can be treated as secondary to the other.

III. The court as arbiter, not umpire

[24] The adversarial tradition is sometimes described as positioning the judge as a passive umpire. This model has never been appropriate in relation to expert evidence. A judge who simply records competing expert opinions and announces a preference without engaging with their substance has not discharged the judicial function; they have abdicated it.

[25] This position has been consistently affirmed. In *Wong Swee Chin v PP*,[10] the Federal Court held that the trial judge "cannot transfer this task to the expert witness, the court must come to its own opinion".

9 [2026] 3 MLRA 539.
10 [1980] 1 MLRA 125.

[26] Expert evidence "is not conclusive". Such evidence is given as a guide to the judge. The judge is free to accept or reject the opinion or to accept an opinion as against another.[11]

[27] This is not a licence for arbitrariness. It is a statement of where epistemic responsibility ultimately lies.

[28] A court that adopts an expert's opinion without independent analysis commits a misdirection. So does a court that rejects expert evidence without adequate reasoning. The appellate standard is well established: a finding preferring one expert over another is entitled to considerable weight though less sacrosanct than findings of pure fact, and will not be lightly disturbed on appeal unless it is "clearly unsound".[12]

[29] In *Collector of Land Revenue v Alagappa Chettiar*,[13] which involved a dispute over the valuation of compulsorily acquired land, the Privy Council restored the trial judge's preference for the government valuer over the landowners' expert, ruling that an appellate court should not disturb a judge's preference between conflicting expert valuers unless the judge's reasons are demonstrably unsound.

[30] Similarly, in *Teoh Kiang Hong v Theow Say Kow @ Teoh Kiang Seng, Henry* ("*Teoh Kiang Hong*"),[14] a dispute involving an allegedly forged signature on a share sale agreement, the Federal Court restored the trial judge's preference for a private handwriting expert, who produced undisputed specimen signatures in court for comparison, over a government chemist who failed to produce her specimens. The Federal Court held that the trial judge's substantiated preference was entitled to deference and was not plainly wrong.

[31] The work of articulating the basis for preference is therefore as important as the preference itself. A well-reasoned preference is insulated on appeal whilst an impressionistic one is not.

[32] The judge's role in evaluating expert evidence is not passive but active. This means that judges must approach expert evidence with

11 Rafiah Salim and Cheong May Fong, *Evidence in Malaysia and Singapore, Cases, Materials and Commentary*, 3rd edn (Malaysia: Butterworths Asia, 2013).

12 *Collector of Land Revenue v Alagappa Chettiar* [1971] 1 MLJ 43, PC, reaffirmed in *Teoh Kiang Hong v Theow Say Kow @ Teoh Kiang Seng, Henry* [2025] 1 MLJ 813, FC.

13 [1971] 1 MLJ 43, PC.

14 [2025] 1 MLJ 813, FC.

the same rigour, care, and intellectual honesty that they would bring to any other contested issue of fact.

IV. The governing factors

[33] Where experts disagree, the court does not resolve the conflict by mechanical application of a single test. It weighs a range of considerations, developed and refined through the case law, that together inform its assessment of reliability and persuasiveness. The seven factors examined below are complementary lenses through which the court evaluates competing expert evidence. The weight given to each will depend on the nature of the dispute and the quality of the evidence before the court.

Factor 1: The quality of reasoning and methodology

[34] The most important determinant of preference is not what the expert concluded, but how the expert got there. The seminal formulation was articulated in *Singapore Finance Ltd v Lim Kah Ngam (S'pore) Pte Ltd*,[15] where the court held that it must examine "the scientific grounds and bases" of each expert opinion, testing whether the factual premises existed and whether the inferences drawn from them were sound. In that case, the plaintiffs' expert theorised that the extensive cracks to the plaintiffs' building were caused by a "bottom heave" resulting from the defendants' excavation works. The court actively applied this test and rejected the expert's opinion because his factual premise did not exist (the soil was actually permeable fill material, not an impermeable natural clay deposit) and his scientific inferences were unsound (he misapplied engineering formulae and wrongly inferred that a slight, normal misalignment of sheet piles indicated a structural failure). The Federal Court in *Teoh Kiang Hong*[16] put it plainly: what matters is "the reasoning and the explanation given as to how the experts had arrived at the respective conclusions as they did".

[35] The applicable benchmark deserves emphasis.

[36] An expert who applies a bespoke or idiosyncratic standard rather than the accepted professional or regulatory benchmark builds on an

15 [1984] 2 MLJ 202, HC (Singapore).
16 [2025] 1 MLJ 813, FC.

unstable foundation. In *Lim Gim Eng & Ors v Ernst & Young & Ors ("Lim Gim Eng")*,[17] the plaintiffs' expert "disregarded" the Malaysian Approved Standards on Auditing ("MASA") and "instead applied a self-invented standard". The defendants' expert, by contrast, "reviewed EY's actual audit working papers in detail before forming his opinions and applied the relevant MASA throughout". The court found this "methodological foundation gives his evidence an objectivity and rigour that was entirely absent" from the plaintiffs' expert. The correct, externally established benchmark was decisive.

[37] Where quantitative models are employed, methodological discipline extends to the inputs. In *Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors*,[18] the High Court scrutinised not merely whether the option-pricing model was appropriate, but whether the underlying assumptions were sound. Erroneous or unjustified assumptions are as fatal to an expert's opinion as flawed reasoning from correct assumptions.

[38] In *Bolitho v City and Hackney Health Authority*,[19] the House of Lords held that a court may reject expert opinion even where it is not directly contradicted, if the opinion cannot withstand logical analysis. In that case, a two-year-old child suffered severe brain damage from a cardiac arrest following episodes of respiratory difficulties. The doctor had negligently failed to attend to the child, but the defence led expert evidence that even if she had attended, a competent doctor would not have intubated the child because the invasive risks of intubation outweighed the small risk of a total respiratory collapse based on the child's symptoms. Although the House of Lords ultimately accepted this defence expert's opinion as logically defensible, it established the broader principle that a judge is entitled to reject a body of professional opinion if it is incapable of withstanding logical analysis, particularly if the experts fail to direct their minds to weighing the comparative risks and benefits.

[39] Malaysian courts have adopted this approach in *Foo Fio Na v Dr Soo Fook Mun & Anor*[20] and *Zulhasnimar bt Hasan Basri & Anor v Dr*

17 [2026] MLJU 1230, HC.
18 [2026] 4 MLRH 227.
19 [1998] AC 232.
20 [2007] 1 MLJ 593, FC.

Kuppu Velumani P & Ors.[21] An opinion that is logically indefensible may be rejected, even if uncontradicted. This approach also echoes the earlier non-medical negligence authorities, which hold that a bare, unreasoned expert opinion, whatever its admissibility, carries no evidential value.

Factor 2: The factual foundation – Engagement with the evidence

[40] An expert opinion is only as strong as the facts upon which it rests. Malaysian courts have consistently preferred experts who engage personally and directly with primary material over those who work from secondary sources, photographs, summaries, or the reports of others.

[41] In *PP v Dato' Seri Anwar Ibrahim*,[22] the Court of Appeal preferred the prosecution's experts, who had personally conducted the DNA analysis, over the defence experts, who had merely reviewed manuals and journals without performing the relevant tests. In *Syarafi Abu v PP*,[23] the pathologist who had performed the autopsy, and whose findings were consistent with the eyewitness evidence, was preferred over the defence expert, who had merely reviewed the post-mortem report and photographs. In *Tan Sri Dato' Kam Woon Wah v Dato' Sri Andrew Kam Tai Yeow (No 2)*,[24] the handwriting expert who had examined 30 original signatures was preferred over an expert who had worked from only 10 photocopied specimens.

[42] The principle proved fatal to the plaintiff's expert in *Lim Gim Eng*.[25] A telling admission under cross-examination that the expert had "never reviewed EY's audit working papers before forming his opinions", the very documents on which the audit opinion was based, was held to be a fundamental deficiency. In that case, where investors sued a statutory auditor for failing to detect a massive fraud orchestrated by a fund management company, the court held that the plaintiff's expert could not properly assess the adequacy of the auditor's work without first examining the working papers documenting the audit procedures that had actually been performed.

21 [2017] 5 MLJ 438, FC.
22 [2014] 3 MLRA 124.
23 [2019] MLRAU 69, CA.
24 [2021] MLRHU 2104, HC.
25 [2026] MLJU 1230, HC.

[43] Contemporaneous documentary evidence is particularly compelling. In *Oil Partners LLC v Sime Darby Oils Pasir Gudang Refinery Sdn Bhd and Another Case* ("*Oil Partners*"),[26] the contemporaneous Certificates of Analysis ("CoAs"), showing that the goods met the contractual specifications at the point of packing, were held to constitute objective documentary evidence that the plaintiff's expert interpretation could not displace. The plaintiff alleged that shipments of refined coconut oil contained inherent manufacturing defects because testing conducted in Russia, between nine and 15 months after shipment, revealed extraordinarily high free fatty-acid levels. The court rejected that theory, holding instead that the CoAs, issued on the basis of accredited laboratory testing conducted on the very day the oil was packed in Malaysia, conclusively established that the oil complied with the contractual specifications at the point of shipment.

Factor 3: Qualifications and specific expertise

[44] The *Junaidi* test asks whether the witness is "specially skilled".

[45] General expertise in a discipline does not automatically confer authority over every sub-question within it. Courts are alert to this distinction. In *Zaini Pilus v PP*,[27] the High Court found that the trial judge had erred by preferring the evidence of a general government medical officer over that of a private specialist on a question squarely within the specialist's domain. In *Ong Eng Hock & Anor v Ong Cheng Guan & Anor*,[28] the Federal Court affirmed the preference for the expert whose credentials and specialised training demonstrably surpassed those of the opposing witness.

[46] A more consequential dimension has emerged in regulated industries: the requirement of a statutory credential. In *Lim Gim Eng*,[29] the plaintiff's expert lacked registration with the Audit Oversight Board (AOB) – a statutory prerequisite for auditing asset management companies. SJ Asset Management Sdn Bhd ("SJAM"), whose audits were in issue, was a licensed fund manager regulated by the Securities Commission. The court found that the expert's "lack of registration means that he does not possess the minimum legal qualification to

26 [2026] 3 MLRH 768, HC.
27 [2023] MLRHU 1018.
28 [2018] 5 MLRA 89.
29 [2026] MLJU 1230, HC.

audit companies in the category of SJAM and, by extension, to opine authoritatively on the standards applicable to such audits".

[47] The absence of a mandatory statutory credential goes to the capacity of the expert to give admissible opinion on the specific regulatory standard in question.

Factor 4: Independence and impartiality – The hired-gun problem

[48] An expert who advocates for the retaining party, rather than assisting the court, forfeits the epistemic authority that justifies expert evidence in the first place. The most widely cited articulation of the expert's duties remains that of Cresswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)*.[30] Expert evidence must be the independent product of the expert uninfluenced as to form or to content by the exigencies of litigation; the expert must provide independent assistance to the court rather than act as an advocate; the expert must not omit to consider material facts which could detract from his concluded opinion; and where the expert's view has changed on a material matter, such change of view must be communicated to the other side without delay and where appropriate to the court. These duties are now reflected in Order 40A r 2 and are applied with increasing rigour.[31]

[49] The Federal Court in *Teoh Kiang Hong*[32] definitively repudiated the historical assumption that government experts are presumptively more reliable than private-sector experts; or that the payment of a fee to a private expert is *per se* a reason to discount the opinion. In that case, which centered on an allegedly forged signature on a share sale agreement, the trial judge preferred the comprehensive analysis of a private handwriting expert over a government chemist. The Court of Appeal reversed this decision, influenced by the argument that the government chemist was an unpaid, independent witness whereas the private expert was paid for his services. The Federal Court rejected this approach and restored the trial judge's finding, ruling that preferring a government expert over a private one merely because the latter is paid does not provide a valid or reasonable ground for

30 [1993] 2 Lloyd's Rep 68. This decision was reversed on the facts on appeal, though the Court of Appeal expressly endorsed Cresswell J's summary on expert duties.

31 See *Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia Tenaga Nasional Bhd* [2015] 5 MLJ 52, CA and *Naora Global DMCC v Owners and All Other Persons & Ors* [2025] MLRHU 2445, HC.

32 [2025] 1 MLJ 813, FC.

a conclusion. The decisive question is whether independence was actually compromised and not whether a fee was received, and not whether the expert bears a government title.

[50] The converse is equally instructive.

[51] In *Dato' Stanley Isaacs v The Government of Malaysia & Ors*,[33] a medical negligence suit where the government defendants relied on reports from two serving government medical specialists to absolve their Hospital Kuala Lumpur doctors of negligence, these government medical experts gave opinions in contravention of the Malaysian Medical Council's guidelines that prohibited them from expressing expert opinions in proceedings involving their own employer. The court observed that their reports were heavily skewed toward absolving the defendants of liability and notably silent on late and inaccurate entries in the deceased patient's medical records, concluding that they were "merely in-house experts who were beholden to the first defendant as their employer and owed allegiance to the other defendants". The court found them to be non-independent and institutionally biased, not because they were hired, but because they were structurally compromised. A government expert defending their own employer's conduct is subject to exactly the same independence challenge as a private expert hired for the occasion.

[52] The independence inquiry also asks whether the expert's report engages seriously with the opposing case or presents a one-sided narrative. Non-disclosure of material adverse to the expert's credentials, as arose in *Securities Commission Malaysia v Toh Kai Fatt*,[34] where the expert had failed to disclose that cases cited as supportive of his competence had in fact been settled without any findings made on his evidence, caused serious damage to credibility. Candour in disclosure is an aspect of independence.

Factor 5: Consistency with the objective evidence

[53] An expert opinion that conflicts with established objective facts stands on weak ground. One corroborated by independent contemporaneous evidence stands on strong ground. In *Jitweer Singh Ojagar Singh v PP*,[35] the preferred expert's opinion was supported by

33 [2019] 8 MLJ 331, HC.
34 [2023] MLRHU 907, HC.
35 [2016] 4 MLJ 525, CA.

and consistent with the other direct evidence in the case. In *Syarafi Abu v PP*,[36] the prosecution pathologist's findings were consistent with eyewitness testimony, whereas the defence expert's alternative theory conflicted with it.

[54] Contemporaneous documentary records and retained physical samples are particularly compelling, as demonstrated in *Oil Partners*: where the facts speak that clearly, expert opinion becomes confirmatory rather than determinative, and an expert whose opinion conflicts with such objective data bears a heavy burden of explanation. An expert who constructs a hypothesis requiring the court to reject well-established physical or documentary facts invites the inference that the opinion has been reverse engineered from a desired outcome rather than derived from principled analysis.

Factor 6: Performance under cross-examination

[55] Cross-examination has long been celebrated as the "greatest legal engine ever invented for the discovery of truth".[37] In the context of expert evidence, that claim requires qualification, but the procedure remains indispensable.

[56] At its best, cross-examination can expose methodological inadequacy, logical inconsistency, selective use of data, undisclosed assumptions, and departure from the professional mainstream. At its worst, it becomes an exercise in point scoring that amplifies peripheral inconsistencies while leaving the substance of the opinion intact.

[57] The most basic marker of reliability is consistency between the written report and oral testimony. An expert who presents a carefully reasoned report but retreats significantly in the witness box raises an obvious concern, as shown in the cases of *Genevieve Christeta Bois v PP* ("*Genevieve*")[38] and *Securities Commission Malaysia v Toh Kai Fatt* ("*Toh Kai Fatt*").[39] In *Genevieve*, the court rejected the defence document examiner's opinion after he was left "embarrassed and lost for words" during cross-examination when confronted with the fact that his equipment was inferior to the prosecution expert's and

36 [2019] MLRAU 69, CA.
37 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, Vol 5 (Boston: Little, Brown), § 1367.
38 [2014] 1 MLRH 658, HC.
39 [2023] MLRHU 907, HC.

his methodology was flawed. Similarly, in *Toh Kai Fatt*, an expert's credibility was severely damaged when cross-examination forced him to backtrack on claims made in his report regarding his supposedly flawless testimonial track record and the factual basis of his market analysis. However, the Federal Court's qualification in *Muniandy & Ors v PP* ("*Muniandy*")[40] remains important: being unshaken under cross-examination is not an all-sufficient test of credibility, and "the inherent probability or improbability of a fact in issue must be the prime consideration". In *Muniandy*, the trial judge accepted eyewitness testimony claiming an attack with an iron rod and an axe simply because the witnesses were unshaken during cross-examination. The Federal Court overturned this, relying on medical experts who testified that the physical injuries were completely inconsistent with those weapons, making the unshaken testimony inherently improbable.

[58] The critical distinction is between a reconsideration that is genuine and principled, and a capitulation that is the product of advocacy pressure.

[59] An expert who, when shown additional primary material, revises a conclusion on stated grounds, gains credibility by doing so. The most damaging concessions are those that go to methodology and benchmark. In *Lim Gim Eng*, the plaintiffs' expert's concession under cross-examination that he had assessed the auditors' work against a self-invented standard rather than MASA proved fatal not just to the expert's credibility, but to the plaintiffs' case. A central methodological concession is often more significant than any damage caused by vigorous general cross-examination.

[60] Courts must also be alert to the risk of allowing the destruction of a peripheral position to carry disproportionate weight in their assessment of the expert's overall credibility. The advocate's duty is to advance their client's case through legitimate means, and not to confuse or humiliate, but rather to illuminate.

Factor 7: Communication and presentation – Substance over style

[61] Clarity of communication assists the court's understanding of expert evidence. But eloquence alone is not a substitute for sound reasoning, and courts have become increasingly vigilant about the risk of preferring the better presenter over the better analyst. In *Ang Chwee*

40 [1966] 1 MLJ 257, FC.

Keong v R,[41] where a lottery expert merely asserted that documents found on the appellant were betting slips without explaining how he arrived at that conclusion, the court reaffirmed that a bare expression of opinion, however persuasively delivered, cannot supply the want of reasoning required under section 51 of the Evidence Act 1950.

[62] The High Court in *Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha NGU (previously known as Dai-Ichi Shokai) & Ors*[42] (when evaluating an unchallenged, comprehensive expert valuation report to assess damages for land) (quoting *Sakthivel Punithavathi v PP*)[43] identified the proper hierarchy:

> … content credibility, evidence of partiality, coherence and a need to analyse the evidence in the context of established facts remain vital considerations; demeanour however more often than not recedes into the background as a yardstick.

[63] The lesson is that demeanour-based assessment of expert evidence, unlike lay-witness assessment, is a secondary tool at best. In *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor*,[44] where the Court of Appeal overturned a trial judge who had invalidated a will by relying on witnesses' demeanour while ignoring their motives and the objective probabilities of the case, the court emphasised that the judge must assess and weigh evidence against relevant criteria and not merely form an impression of the witness.

[64] Where an expert employs superior technology in conducting an examination, the choice of methodology is itself a substantive consideration, not merely a stylistic one. In *Genevieve*,[45] the court preferred evidence derived from a Video Spectra Comparator over that obtained using a Stereoscopic Zoom Microscope. The case illustrates that the quality of the methodology employed is a substantive factor in evaluating expert evidence. However, the methodological advantage was only one strand in a broader assessment of credibility, which also took into account the witness's demeanour and financial interest.

41 [1955] 1 MLRH 578, HC.
42 [2019] 11 MLJ 71.
43 [2007] 2 SLR 983.
44 [2003] 2 MLJ 97.
45 [2014] 1 MLRH 658, HC.

The court's ultimate rejection of the evidence of the defendant's forensic document examiner rested on the cumulative effect of those considerations, rather than on the disparity in equipment alone. The decision therefore demonstrates that while the use of superior technology is an important consideration, it is not by itself determinative; the expert's overall credibility remains an integral part of the trial judge's assessment.

[65] Demeanour and fluency are not proxies for reliability. An expert who testifies hesitantly, but whose methodology withstands scrutiny, ought not to be discounted on that account; equally, an expert who testifies with confidence and polish, but whose methodology is flawed, ought not to be preferred merely because his evidence was more accessible to the court. The court's inquiry must ultimately turn on the soundness of the reasoning, not the manner of its delivery.

V. Special topics

A. The Teoh Kiang Hong watershed

[66] *Teoh Kiang Hong* is the most significant recent articulation of expert preference principles in Malaysian law, for reasons already touched on above: it repudiated fee and status-based hierarchies[46] and confirmed that report length is no substitute for reasoning.[47] What has not yet been addressed is the Federal Court's third holding, on the standard of appellate review – arguably the ruling's most consequential legacy for how trial judges should approach the task of preference in the first place.

[67] The trial judge's preference for one expert over another is a finding of fact entitled to appellate deference, disturbed only if plainly wrong. Quoting Lord Diplock, the Federal Court affirmed that a trial judge's preference of one expert over another "was also one which was not lightly to be disturbed by an appellate court unless it could be demonstrated that the judge who heard and saw them give their evidence had misunderstood it or that his reasons for preferring one to the other were clearly unsound". Because the trial judge had solidly based his preference on the private expert's production of verifiable

46 [2025] 1 MLJ 813, FC at [49].
47 Ibid, at [34].

hard evidence, the Federal Court found his decision was not "plainly wrong" and restored his ruling. In rejecting the Court of Appeal's approach, the Federal Court said:

> … although the court has the discretion to choose one expert's opinion over the other, preferring the evidence of a government expert as opposed to that of an expert witness from the private sector, merely because the latter expert witness was paid for his services by one of the parties, whereas the government expert was not, would not provide, in our respectful view, a valid or reasonable ground to premise a conclusion.

[68] This reinforces both the importance of the preference being well reasoned at first instance and the premium placed on getting the analysis right before the decision is made. *Teoh Kiang Hong* thus stands for the proposition that the law draws no formal hierarchy between experts based on who pays them, who employs them, or how much they write. What the Federal Court restored to primacy was substance over appearance: an expert's opinion is to be weighed by the transparency and verifiability of the reasoning underlying it, precisely as section 51 of the Evidence Act 1950 has always required, and not by markers of institutional pedigree or apparent neutrality that Malaysian courts had, at times, allowed to substitute for that inquiry. Once a trial judge has engaged with that substance and arrived at a reasoned preference, the role of an appellate court is correspondingly narrow: it may intervene only where that reasoning is shown to be plainly unsound, and not merely because a different conclusion is also open on the evidence.

B. Concurrent expert evidence: Hot-tubbing

Origins

[69] Concurrent expert evidence originated in the Australian Competition Tribunal in the 1970s, and has since been adopted, in various forms, in Malaysia, Singapore, Hong Kong, Canada, England, Japan and the United States.[48]

48 National Judicial Institute, "*Science Manual for Canadian Judges*" (2013, updated July 1, 2018), p 160, available at https://www.nji-inm.ca/index.cfm/publications/science-manual-for-canadian-judges/?langSwitch=en.

Statutory framework

[70] Order 40A r 5 of the Rules of Court 2012 provides the procedural foundation for concurrent expert evidence. The court may direct a discussion between experts for the purpose of identifying the issues in the proceedings and where possible, reaching agreement on an issue. Following such a discussion, the experts prepare a joint statement identifying areas of agreement and disagreement with reasons. The contents of any expert discussions are not referable at trial unless the parties agree. This is a protection that encourages candour.

Malaysian judicial practice

[71] Malaysian courts have embraced this procedure with increasing enthusiasm. In *Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors*,[49] the court directed that the testimony of the experts be received simultaneously rather than sequentially, identifying the "principal benefit" as being so that the experts "would address their points of disagreement on a point-by-point basis, which greatly assisted the court in understanding the various points raised in respect of the same issue".

[72] In *Lim E Tern & Ors v Pengarah Hospital Tuanku Ja'afar Seremban & Ors*,[50] the court signalled at case management that expert testimony would be received simultaneously thereby demonstrating that hot-tubbing should be planned early, not treated as an afterthought.

[73] The most instructive recent example is *Orin Energy Investments Ltd v Futura Asia Ltd* ("*Orin Energy*"),[51] a judgment by Ong Chee Kwan J (as he then was). Both parties had engaged experts on United States sanctions law. A hot-tubbing protocol was agreed upon, and the court annexed that protocol to its judgment expressly as "a guide to future cases". Under the *Orin Energy* protocol, each expert takes an oath or affirmation before testimony begins and confirms the written report as their own. Each gives an oral presentation of their position. The judge then questions the experts on areas of disagreement and

49 [2019] MLRHU 1296, HC.
50 [2022] MLRHU 1201, HC.
51 [2025] 1 MLRH 210, HC.

invites each to respond to the other's answers. Only after the judge has completed questioning may counsel question the opposing expert. The judge may at any time permit or invite direct discussion between the experts on any area of disagreement.

Rationale and advantages

[74] This protocol is notable for placing the judge, not counsel, in the primary interrogative role. This is the essence of hot tubbing's appeal. The court can probe the genuine technical disagreement directly, without the filter of advocacy, and in real time can hear each expert's response to the other's position.

Appropriate uses

[75] The procedure works best in specialist or technical disputes such as construction, valuation, engineering and financial analysis. Where the issues are discrete, the experts can be confined to a defined matrix of disagreement and the court is equipped to chair a structured technical exchange. Its limitations have been identified where significant issues of credit arise between the experts, or where one expert is substantially more dominant in personality.

[76] Whilst hot tubbing may be an attractive methodology to employ to assist a judge to determine which, if at all, expert's testimony to accept, it is not feasible in every type of case.

[77] It is advantageous, and this is not an exhaustive list, when:

(a) the dispute is genuinely methodological or technical, and the key question is which of two competing frameworks or valuations is more defensible (construction delay/quantum disputes, valuation disputes, some areas of scientific or engineering evidence). Here, structured dialogue between experts narrows the issues efficiently and lets the tribunal see disagreement in real time rather than reconstructing it from two sequential, siloed testimonies.

(b) the experts are roughly evenly matched in competence and are both acting in good faith as neutral assistants to the court, so the conclave surfaces genuine intellectual disagreement rather than performance.

Limitations

[78] Conversely, hot-tubbing may be unsuitable in the following circumstances:

(a) Credibility and demeanour-driven disputes. *Genevieve* is itself an illustration of why hot-tubbing would not obviously improve, and might actively undermine, certain fact findings. The trial judge's rejection of the forensic document examiner's evidence rested heavily on demeanour under sustained cross-examination.

(b) Power and articulacy imbalances. If hot-tubbing systematically rewards the more socially dominant or rhetorically skilled expert regardless of the soundness of the underlying methodology, it risks reintroducing, in a different guise, the very "substance over appearance" problem *Teoh Kiang Hong* corrected.

(c) Criminal proceedings and matters of guilt. Where liberty is at stake and the burden of proof is beyond reasonable doubt, the reduction of adversarial testing that hot-tubbing is explicitly designed to achieve is much harder to justify. Cross-examination in that setting is not merely a mechanism for efficiency but a constitutional safeguard.

(d) Single, unopposed, or asymmetric expert evidence. Hot-tubbing has nothing to offer where there is only one expert, or where, as in many forensic document or handwriting disputes, the two sides' experts are not remotely equivalent in resources, methodology, or institutional backing.

VI. Practical synthesis

A. For the judge: An evaluative framework

[79] The seven factors may usefully be applied in the following sequence.

[80] Firstly, the court should consider procedural compliance. Has the expert complied with Order 40A r 3 of the Rules of Court 2012? Non-compliance may affect the admissibility of the expert evidence, rather than merely its weight, as recognised in *Boustead Cruise Centre*.[52]

52 [2025] 5 MLRH 75.

[81] Secondly, the court should examine the expert's reasoning. Is the reasoning transparent and logically coherent? Can the court follow each step from the underlying premises to the ultimate conclusion? Has the expert identified the applicable professional or regulatory benchmark and applied it to the specific facts of the case? If not, the opinion has no evidential value under section 51 of the Evidence Act 1950.

[82] Thirdly, the court should assess the factual foundation of the opinion. Did the expert personally engage with the primary material, such as the actual records, samples, documents, or phenomena in dispute, or was the opinion derived largely from secondary sources?

[83] Fourthly, the court should consider the expert's specific expertise. Is the expert's experience directly matched to the precise issue before the court? In the context of regulated industries, does the expert possess the relevant statutory qualification or credential?

[84] Fifthly, the court should evaluate the expert's independence. Does the report deal fairly with contrary evidence, or does it ignore or minimise competing material? Is there any institutional or other relationship with the retaining party that may structurally compromise the expert's independence?

[85] Sixthly, the court should consider consistency with the objective evidence. Is the expert's opinion consistent with the established objective facts, including the physical evidence, contemporaneous documents, and independently obtained test results?

[86] Seventhly, the court should evaluate the expert's performance under cross-examination. Did the expert maintain the opinion on principled grounds, or did the expert capitulate under advocacy pressure? If concessions were made, did they undermine the core methodology and applicable benchmark, or did they relate only to peripheral matters?

[87] Where the evaluation is closely balanced, the first three factors generally provide the most reliable basis for preference. These are the elements most directly within the court's ability to evaluate without itself becoming a technical expert. Consider directing concurrent evidence at case management in technical disputes; the *Orin Energy* protocol provides a ready-made framework.

B. For counsel: A practical checklist

[88] A number of practical considerations may assist counsel in presenting and challenging expert evidence effectively. The following principles, distilled from the authorities and common forensic experience, provide a useful checklist at each stage of the litigation, from the selection of an expert to the conduct of cross-examination.

[89] Firstly, when selecting an expert, counsel should ensure that the expert's particular experience and statutory qualifications correspond precisely to the issue in dispute, rather than relying on expertise in the broader discipline alone. Counsel should also anticipate challenges to the expert's independence. An expert who has materially changed an opinion without promptly communicating both the change and the reasons for it risks undermining his or her own credibility before the court.

[90] Secondly, when preparing the expert report, counsel should ensure full compliance with Order 40A r 3 of the Rules of Court 2012. The report should clearly explain the methodology employed and the professional or regulatory benchmark applied. It should engage candidly with contrary evidence and explain why that evidence does not undermine the opinion reached. As observed in *Teoh Kiang Hong*, a concise, rigourous report is generally more persuasive than one that is lengthy but unfocused.

[91] Thirdly, during examination-in-chief, counsel should lead the expert through the reasoning process rather than merely eliciting the ultimate conclusion. The expert should identify the applicable benchmark, explain the primary material personally reviewed, and demonstrate how each inferential step is grounded in that material. Counsel should also identify the opinion's most vulnerable aspect and address it proactively before it is exposed in cross-examination.

[92] Fourthly, when cross-examining the opposing expert, counsel should focus on the logical structure of the opinion, the primary material considered, and the benchmark applied. The most effective challenges are often that the expert failed to review the primary records, applied the wrong professional or regulatory standard, or relied on assumptions that were unjustifiable. Counsel should also explore whether any institutional affiliation may affect the expert's independence, bearing in mind that such challenges may succeed

as readily against government experts as against privately retained experts.

VII. Conclusion

[93] The question posed by this article is not unanswerable. It has a principled answer.

[94] Preference turns on the quality of reasoning, grounded in the primary evidence, applied against the correct benchmark, and offered by an independent expert who has fulfilled the duties imposed by Order 40A of the Rules of Court 2012 and established by long jurisprudential tradition. It does not turn on the rank, institutional affiliation, or presentation style of the witness.

[95] The trajectory of Malaysian law on this question is unmistakable. From *Sim Ah Song & Anor v R*, where the court asserted its own responsibility for fact-finding as a matter of foundational principle; through the Privy Council's formulation in *Collector of Land Revenue v Alagappa Chettiar* that a preference between experts is a finding of fact entitled to appellate deference; to the Federal Court's watershed ruling in *Teoh Kiang Hong* that payment and institutional status are irrelevant to the weight of expert evidence; the law has moved steadily away from institutional deference and toward substantive scrutiny of the expert's reasoning.

[96] The new procedural architecture of Order 40A of the Rules of Court 2012 reinforces this trajectory. Formal compliance is not a technicality; it is a prerequisite. A backdoor appointment will not produce admissible expert evidence, as *Langkawi Yacht Club* makes clear. It is not enough for an expert merely to speak to a report; he must accept responsibility for it on oath. Absent that, the court is given no expert evidence at all, as *Boustead Cruise Centre* illustrates.

[97] The court retains, and must actively exercise, its role as the final arbiter. Expert evidence is a tool, not a verdict. The obligation to choose between competing experts cannot be delegated; it must be exercised through the principled application of the factors examined in this article.

[98] There is a final observation worth making for the benefit of those who retain, prepare, and present expert witnesses. The expert who will

carry the day is not necessarily the most senior, the most voluminous in output, or the most assured in delivery.

[99] The expert who will carry the day is the one who is procedurally compliant; genuinely independent; grounded in the primary material; transparent in methodology; applied the correct benchmark; and who, when challenged, holds the opinion for the right reasons. Whatever the institutional letterhead, those qualities will be recognised and preferred.

Universiti Malaya v ESA Jurutera Perunding Sdn Bhd: Reframing Section 10(1) of the Arbitration Act 2005 and Restating Malaysian Precedent Doctrine

by

*Justice Rajes Raghavji**

Introduction

[1] Few questions in the law of arbitration are at once so procedurally narrow and so commercially consequential as whether a defendant, by some pre-stay act, has "taken a step in the proceedings" and thereby forfeited its right to a stay under section 10(1) of the Arbitration Act 2005.[1]

[2] The phrase is short, undefined, and of considerable antiquity; its application has divided the High Court for the better part of two decades. In *Universiti Malaya v ESA Jurutera Perunding Sdn Bhd* ("*Universiti Malaya*"),[2] the Federal Court has, at last, supplied a coherent answer – and, in doing so, has done rather more than dispose of an appeal about an engineering consultancy.

[3] The decision is significant on three distinct levels. First, it resolves the substantive issue by holding that an application for an extension of time to file a defence, together with the service of a notice to produce documents referred to in the pleadings, does not – at least in circumstances such as those before the court – constitute a step in the proceedings.

[4] Secondly, and perhaps more significantly, the judgment provides a thoughtful examination of the doctrine of precedent. It clarifies how lower courts had mistakenly treated a passage from the court's earlier

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* Judicial Commissioner, Construction Court 1, Kuala Lumpur High Court.

1 Arbitration Act 2005 (Act 646), s 10(1).

2 [2026] 4 MLJ 418, FC. The grounds of judgment were delivered by Ahmad Terrirudin Mohd Salleh FCJ; the panel comprised Hasnah Mohammed Hashim CJM, Zabariah Mohd Yusof and Ahmad Terrirudin Mohd Salleh FCJJ. For the Court of Appeal judgment below, see *ESA Jurutera Perunding Sdn Bhd v Universiti Malaya* [2025] 2 MLJ 618.

judgment, which was merely *obiter dicta*, as though it were binding authority, and explains the proper weight to be accorded to *obiter* observations of an apex court by the courts below.

[5] Thirdly, by remaining silent on a practical issue, the decision leaves untouched an important commercial reality that sits uneasily alongside its pro-arbitration approach. It does not address the position of a party who, confronted with arbitration costs running into six figures as compared with relatively modest court filing fees, may have every commercial incentive to litigate in court instead of pursuing arbitration, and whose conduct reflects that preference.

[6] This article examines each of these three dimensions in turn. It begins by setting out the statutory and historical framework within which the expression "steps in the proceedings" must now be understood. It then traces the development of the relevant jurisprudence before and after *Universiti Malaya*. The discussion next considers the court's treatment of the doctrine of *stare decisis*, particularly its emphasis on the duty of lower courts to engage with the underlying authorities rather than mechanically treating every statement of an apex court as binding precedent. Finally, the article identifies the question left unresolved by the decision and considers whether the court's robust "hold the parties to their bargain" philosophy can withstand the commercial realities and economics of modern dispute resolution.

I. The statutory and historical frame

[7] Section 10(1) of the Arbitration Act 2005 ("Act 646") requires a court, where proceedings are brought in respect of a matter that is the subject of an arbitration agreement, to stay those proceedings and refer the parties to arbitration "where a party makes an application before taking any other steps in the proceedings", unless the agreement is null and void, inoperative, or incapable of being performed. The operative phrase – "before taking any other steps in the proceedings" – is the gatekeeper. An applicant who crosses that threshold before applying is taken to have elected to litigate and to have abandoned the bargain to arbitrate.

[8] As the Federal Court was at pains to emphasise, that phrase is not an artefact of the modern Model Law regime. It long predates the UNCITRAL Model Law 1985 on which Act 646 is modelled, appearing

in the United Kingdom Arbitration Act 1950 and traceable to section 4 of the Arbitration Act 1889, from which Malaysia's repealed Arbitration Act 1952 ("Act 93") was in turn derived.[3] The lineage matters, because the English authorities construing the phrase a century ago remain the bedrock on which the Malaysian gloss is built.

[9] What has changed, decisively, is the consequence that attaches once the gateway is crossed. Under section 6 of the repealed Act 93, the court retained a discretion whether or not to grant a stay; compliance with the statutory conditions did not entitle an applicant to a stay as of right.[4] The reform sequence removed that discretion in two stages. When Act 646 replaced Act 93 in 2005, the permissive "may" became the peremptory "shall"; and the 2011 amendment further reduced the court's role by deleting the requirement to determine whether a dispute existed between the parties.

[10] The result, as Ramly Ali FCJ explained in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Berhad*,[5] is that a stay is now mandatory once the court is satisfied that a binding arbitration agreement exists and is not null and void, inoperative, or incapable of being performed. The court no longer delves into the merits and should lean towards granting a stay even where it is in some doubt about the validity or scope of the clause.[6]

[11] This legislative trajectory is not mere background. It is, as will appear, the analytical key to the entire decision. The central authority on "steps in the proceedings" – *Sanwell Corporation v Trans Resources Corporation Sdn Bhd & Anor* ("*Sanwell*")[7] – was decided in 2002, in the discretionary era, before the pro-arbitration stance had been hardened into statutory command. Much of what follows can be understood as the Federal Court asking whether reasoning forged under a regime of judicial discretion can be transposed, unmodified, onto a regime of mandatory referral. Its answer is a careful "not quite".

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3 *Universiti Malaya* [2026] 4 MLJ 418 at [38].

4 *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at 112, *per* Edgar Joseph Jr SCJ; *Perbadanan Kemajuan Negeri Perak v ASEAN Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309, SC.

5 [2016] 5 MLRA 529 at [32].

6 Ibid, at [88]; and see *Universiti Malaya* [2026] 4 MLJ 418 at [44]–[45].

7 [2002] 2 MLJ 625, FC.

II. The substantive doctrine: "steps in the proceedings" before and after *Universiti Malaya*

A. The Sanwell framework

[12] *Sanwell* remains the starting point for the analysis. The issue before the court was whether the entry of an unconditional appearance constituted a step in the proceedings within the meaning of section 6 of Act 93. The court held that it did not. Whether conditional or unconditional, the entry of an appearance is a mandatory procedural requirement under the Rules of Court and is therefore a "permitted, excluded or exempted" step that does not preclude an application for a stay.[8] In reaching that conclusion, Mohtar Abdullah FCJ articulated what has since become the canonical three-limb taxonomy:[9]

> (a) the entry of appearance … is a permitted, excluded or an exempted step in the proceedings that does not amount to a step …;
>
> (b) if the applicant has served any pleadings, then he has clearly taken a step in the proceedings …;
>
> (c) if he has taken any other action in the proceedings (other than steps (a) or (b) …), the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed of by arbitration.

[13] The architecture is straightforward. Limb (a) provides a safe harbour; limb (b) constitutes a hard stop; and limb (c) is a fact-sensitive residual category governed by the requirement of an "unequivocal intention" to proceed with the litigation.

[14] The difficulty confronting the Federal Court in *Universiti Malaya* was that two of the most common pre-stay acts – a request for an extension of time to file a defence and the service of a notice to produce documents – fall within limb (c), yet the High Court had reached sharply divergent conclusions on whether either act evinced

8 Ibid; discussed in *Universiti Malaya* [2026] 4 MLJ 418 at [53].

9 *Sanwell* [2002] 2 MLJ 625 at 638, reproduced in *Universiti Malaya* [2026] 4 MLJ 418 at [52].

the requisite unequivocal intention to abandon arbitration in favour of litigation.

B. The English roots: Consent against compulsion

[15] Because limb (c) derives from the English authorities, the Federal Court returned to source. Three 19th-century decisions frame the issue. In *Chappell v North* ("*Chappell*"),[10] the obtaining of a series of consensual extensions of time was held not to constitute a step in the proceedings. As Denman J observed, a consent "asked for the very purpose of avoiding the necessity of taking a step" cannot itself amount to a step. In *Brighton Marine Palace and Pier Ltd v Woodhouse* ("*Brighton Marine*"),[11] North J expressed the point memorably: "asking for time by letter is not taking a step in the action; it is taking a step outside the action altogether". The object of the relevant rule, he explained, was to enable parties to enlarge time by agreement without incurring the expense of an application to the court.

[16] Set against these authorities is *Ford's Hotel Co Ltd v Bartlett* ("*Ford's Hotel*"),[12] in which the House of Lords held that an extension of time *did* constitute a step in the proceedings. The Federal Court's careful reading of *Ford's Hotel* is the hinge of the entire judgment. There, the defendants had obtained the plaintiff's consent to three successive extensions of time. Only when a fourth request was refused did they issue a summons in chambers and obtain an order extending time by 14 days.

[17] It was *that* – the judicial invocation of the court's process, culminating in a formal order – that constituted the relevant step. As Lord Shand explained, the proceeding "took place judicially in chambers, which was the same as if in Court", and the presentation of the summons "implied a statement to the effect that the appellant were to defend the action".[13] Lord Halsbury LC located the mischief in the unnecessary costs incurred once the court's machinery has been engaged. The object of the statute, he explained, was to require a party to identify the *terminus a quo* "at once, and before any further

10 [1891] 2 QB 252 at 256, *per* Denman J.
11 [1893] 2 Ch 486 at 488–489, *per* North J.
12 [1896] AC 1, HL.
13 Ibid, at 6, *per* Lord Shand.

proceedings were taken", so that "costs should not be thrown away in beginning to litigate".[14]

[18] The Federal Court drew the distinction with precision. *Ford's Hotel* did not overrule *Chappell* and *Brighton Marine*; rather, it stands alongside them.[15] The decisive consideration is not the request for an extension of time *per se*, but whether the request was pursued through the court's judicial process – by a formal application culminating in a court order – or obtained extra-judicially by consent. An extension obtained by agreement under what is now Order 3 r 5(3) of the Rules of Court 2012 is a step taken "outside the action altogether"; by contrast, an extension obtained through a formal application under Order 3 r 5(1) is a step within the proceedings. The corollary, expressed in unequivocal terms at paragraph 67, is that "not all requests for an extension of time amount to a step in the proceedings."

C. Sanwell's misstep and the post-Sanwell domino

[19] The difficulty, however, was that *Sanwell* had itself blurred the distinction. In distinguishing *Usahabina v Anuar Yahya* ("*Usahabina*")[16] – a case in which an extension of time had been obtained by consent – the *Sanwell* court observed, citing *Ford's Hotel*, that the defendant's request for an extension "was clearly a step in the proceedings … clearly indicating an intention to deliver a statement of defence, thus abandoning the right to arbitration."[17]

[20] The Federal Court in *Universiti Malaya* identified three shortcomings in that reasoning.[18] First, the observation was made without any substantive examination of the facts in *Ford's Hotel*. Secondly, it failed to consider whether a *consensual* extension, as opposed to one obtained through a formal application to the court, could properly constitute a step in the proceedings. Thirdly, it did not explain how the reasoning in *Ford's Hotel* could be transposed to the materially different facts of *Usahabina*, where the extension had been obtained by consent rather than by judicial order. In short, *Sanwell*

14 Ibid, at 4–5, *per* Lord Halsbury LC.
15 *Universiti Malaya* [2026] 4 MLJ 418 at [63]–[64].
16 [1998] 7 MLJ 691, HC.
17 *Sanwell* [2002] 2 MLJ 625 at 631–632, quoted in *Universiti Malaya* [2026] 4 MLJ 418 at [69].
18 Ibid, at [70], [78]–[83].

had relied on *Ford's Hotel* in a factual context to which the House of Lords' decision did not apply.

[21] The consequences of that passage are among the most instructive aspects of the judgment, for they demonstrate how an imprecise observation by an apex court can ossify into received doctrine. The Federal Court traced a "domino effect" of lower-court decisions that treated *Sanwell* as authority for the broad proposition that any request for an extension of time is a step in the proceedings.[19] The Court of Appeal in *IFCI Ltd v Archipelago Insurance Ltd*[20] held that two requests for an extension of time amounted to a step "as was held by the Federal Court in *Sanwell Corp*". A succession of High Court decisions followed suit – *Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd*,[21] *Mun Seng Fook v AIG Malaysia Insurance Bhd*,[22] *Kem Krest LLC v R P Trust Inc & Ors*,[23] and *MISC Bhd v Cockett Marine Oil (Asia) Pte Ltd*.[24] Several reasoned, by reference to Order 18 r 2(1), that because a defence is filed only where a party "intends to defend", a request for an extension of time to file one necessarily evinces an intention to litigate.

[22] The Federal Court rejected that reasoning. It observed that the authorities had collapsed a mere intention to file a defence into the taking of an actual step in the proceedings. By reading the words "intends to defend" in Order 18 r 2(1) into limb (c)'s requirement of an "unequivocal intention to proceed with the suit", they had, in the court's words, "elevat[ed] a mere intention to file a defence into an actual step in the proceedings and render[ed] the avenue for extension of time by consent under O 3 r 5(3) illusory".[25] The flaw in the reasoning is readily apparent. In the ordinary case, no defence is ever filed because the stay application succeeds. To equate the contemplation of filing a defence with the taking of a step is therefore to attribute legal significance to an act that never in fact occurs.

[23] Running against this dominant line of authority was a quieter but principled current – *Airbus Helicopters Malaysia Sdn Bhd v Aerial*

19 Ibid, at [70], [78]–[83]; *Universiti Malaya* [2026] 4 MLJ 418 at [75].
20 [2022] 22 MLJ 971 at [25].
21 [2009] MLJU 286.
22 [2019] 7 MLJ 59.
23 [2021] MLJU 2310.
24 [2022] 8 MLJ 786.
25 *Universiti Malaya* [2026] 4 MLJ 418 at [75].

Power Lines Sdn Bhd ("*Airbus Helicopters Malaysia Sdn Bhd*"),[26] *Sumber Khazanah Sdn Bhd v Apex Communications Sdn Bhd*,[27] and *C&B Global Sdn Bhd v Getthiss (M) Sdn Bhd*[28] – in which extensions sought out of necessity, or pursuant to the court's own direction, were held not to constitute steps in the proceedings. In *Airbus Helicopters Malaysia Sdn Bhd*, Lee Swee Seng JCA captured the approach that *Universiti Malaya* would later endorse. It would be "too simplistic and indeed too strict an approach, steeped in technical traps", to conclude that a mere request for an extension of time *ipso facto* amounts to taking a step in the proceedings. Rather, the inquiry should focus on "upholding the bargain initially struck by the parties to elect arbitration … and not … being unduly fastidious with or fixated on technical non-compliance seeking to trip and trap the defendant into litigation".[29]

D. The notice to produce documents

[24] The second contested act concerns the service of a notice to produce documents referred to in the pleadings under Order 24 r 10. The High Court has reached conflicting conclusions on whether this constituted a step in the proceedings: *CLLS Power System Sdn Bhd v Sara-Timur Sdn Bhd* ("*CLLS Power System*")[30] held that it did, whereas *Life Plaza Sdn Bhd v Pasukhas Construction Sdn Bhd* ("*Life Plaza*")[31] held it did not. The Federal Court resolved the conflict in favour of *Life Plaza*, placing a notice to produce squarely within limb (c). It held that such a notice is "a necessary but peripheral action that did not touch on the merits of the substantive dispute".[32] It is an investigative measure to inspect documents referred to in the pleadings rather than a pleading itself. Accordingly, its service does not amount to an election to proceed with the litigation or a waiver of the right to arbitrate.

[25] Two aspects of the court's treatment of *CLLS Power System* merit attention. First, the court observed that the contrary view in *CLLS Power System* was arguably *obiter*, as the High Court ultimately found

26 [2024] 2 MLJ 471; [2024] 4 CLJ 243.
27 [2023] MLJU 2260.
28 [2019] MLJU 347.
29 [2024] 2 MLJ 471.
30 [2015] 11 MLJ 485.
31 [2012] MLJU 176; [2012]5 CLJ 120.
32 *Universiti Malaya* [2026] 4 MLJ 418 at [131].

that no arbitration clause existed.[33] Secondly, the court reinforced its conclusion by relying on the persuasive Commonwealth authority. In *E Londonderry Port and Harbour Commissioners v W S Atkins Consultants Ltd*,[34] the Northern Ireland court held that a request for discovery of documents referred to in the statement of claim was consistent with a party merely "investigating the nature and terms of the contractual arrangement". Likewise, in *Amoe Pte Ltd v Otto Marine Ltd*,[35] the Singapore High Court held that a notice to produce served to ascertain the nature of the claim "is not a step in the proceedings, even without an express reservation of the right to seek a stay". That final qualification is particularly significant, as the next section demonstrates.

E. What Universiti Malaya settles

[26] On the facts, the court held that the defendant's two consensual extensions, its indications that it would file a defence, and its service of a notice to produce did not, whether individually or collectively, amount to steps in the proceedings or constitute a waiver of the arbitration agreement.[36] The extensions were reasonable, necessary and sought in good faith, as the defendant required time to retrieve documents dating back to 2008 that were no longer in its possession – an explanation the plaintiff did not dispute.[37] The notice to produce was merely investigative and peripheral. Viewed in its proper chronology, the defendant had also acted with reasonable expedition, issuing its notice of arbitration and filing its stay application within days of receiving the documents.[38]

[27] Several principles emerge from the decision. First, a consensual extension of time under Order 3 r 5(3) is not a step in the proceedings; any contrary observations in *Sanwell* are *obiter* and therefore not binding. Secondly, a notice to produce documents referred to in the pleadings is a peripheral investigative measure and likewise does not constitute a step in the proceedings. Thirdly, although an express reservation of the right to arbitrate may be relevant, its presence or absence is never determinative.

33 Ibid, at [93], citing *CLLS Power System* [2015] 11 MLJ 485.
34 [2011] NIQB 74 at [25]–[26], *per* Weatherup J.
35 [2013] SCD 297; [2014] 1 SLR 724.
36 *Universiti Malaya* [2026] 4 MLJ 418 at [137].
37 Ibid, at [129].
38 Ibid, at [136].

[28] Ultimately, the inquiry is whether the applicant has objectively demonstrated a clear and unequivocal intention to submit to the court's jurisdiction and abandon the arbitration agreement. That is a fact-sensitive inquiry requiring the court to consider the parties' conduct as a whole, rather than applying procedural rules rigidly or mechanically.[39]

[29] This holistic approach is drawn from the Federal Court's earlier decision in *Yeo Eng Lam v Infinity Vantage Sdn Bhd* ("*Yeo Eng Lam*"),[40] which the court confirmed as binding. It is to that decision, and its significance within the doctrine of precedent, that this article now turns.

III. Restating Malaysian precedent doctrine

[30] One of the most significant aspects of *Universiti Malaya* extends well beyond arbitration. In substance, the judgment is also an important restatement of Malaysian precedent doctrine. Having concluded that *Sanwell*'s observations on extensions of time were *obiter*, the Federal Court did not simply dispose of the appeal.

[31] Instead, it examined why those observations had nevertheless come to be treated as binding and, in doing so, clarified several principles governing the operation of precedent. Four aspects of the judgment deserve particular attention.

A. Adherence to precedent does not require adherence to dicta

[32] The court first addressed what might be described as an excessive deference to appellate *dicta*. Referring to Lord Moulton's celebrated essay, it described the lower courts' reliance on *Sanwell* as "an instance of obedience to what is, strictly speaking, non-binding".[41] The phrase is an elegant inversion of Lord Moulton's expression "obedience to the unenforceable", but its significance is practical rather than rhetorical.

[33] A court that treats non-binding observations as though they were binding does not demonstrate greater fidelity to precedent; it misunderstands the limits of precedent itself. The consequence

39 Ibid, at [77], [117]–[119].

40 02(i)-20-03 of2019(W); broad grounds delivered February 24, 2021, discussed in *Universiti Malaya* [2026] 4 MLJ 418 at [105]–[111].

41 *Universiti Malaya*, ibid, at [85], citing JB Moulton, "Law and Manners", (1924) 134 *The Atlantic Monthly* 1–5.

was apparent in this area of law. Although Order 3 r 5(3), and its predecessor, had always permitted consensual extensions of time, that rule had effectively been displaced by repeated reliance on *Sanwell*'s[42] *obiter* observations.

B. Not all dicta are created equal

[34] The court then examined the different categories of judicial *dicta* and the authority each carries. It adopted the well-known analysis of Megarry J in *Richard West and Partners (Inverness) Ltd & Anor v Dick*,[43] distinguishing between *obiter dicta*, judicial *dicta*, and a third, "so far innominate", category comprising statements that summarise principles established by earlier authorities.

[35] Such statements, Megarry J observed, derive authority not merely from the judge making them but also from "an unseen cloud of his judicial brethren", and therefore represent "the highest authority that any dictum can bear". The court also referred to Cairns J's observation in *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd*[44] that where the House of Lords, after careful consideration of the authorities, declares that a cause of action exists, a first instance judge should ordinarily proceed on that basis without enquiring whether the statement was strictly necessary for the decision.

[36] Properly understood, however, the court was not retreating from English or Australian authority. On the contrary, it undertook a detailed examination of those authorities, beginning with *Ford's Hotel* and continuing through the modern Australian cases. What it ultimately rejected was not the authorities themselves but a particular doctrine developed from them: the proposition that "seriously considered *dicta*" of an apex court may bind lower courts.

C. Why Malaysia declined the Australian approach

[37] That doctrine originated in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* ("*Farah*"),[45] where the High Court of Australia described it as a "grave error" for an intermediate appellate court to depart from "seriously considered *dicta* of a majority of this court". The Federal

42 *Universiti Malaya*, ibid, at [85].
43 *Universiti Malaya*, ibid, at [86].
44 [1969] All ER 850.
45 (2007) 236 ALR 209.

Court noted, however, that subsequent Australian decisions have struggled to define the content of that expression.

[38] Cases such as *Pape v Federal Commissioner of Taxation*,[46] *CGU Workers Compensation (NSW) Ltd v Garcia*,[47] and *Zotti v Australian Associated Motor Insurers Ltd* ("*Zotti*")[48] reveal continuing uncertainty over what qualifies as "seriously considered" and whether such *dicta* are binding only when they have become "long-established". Campbell JA's acknowledgment in *Zotti* that he entertained "some doubt about the proper way" to understand *Farah* illustrates the difficulty.

[39] Faced with those uncertainties, the Federal Court deliberately declined to adopt the Australian approach. Expressing the point memorably, it remarked that "such roses are not in our garden".[49] Instead, it reaffirmed a simpler and more predictable principle: *obiter dicta*, however carefully considered or persuasively expressed, do not bind lower courts in the same manner as *ratio decidendi*.

[40] The court was therefore not rejecting comparative jurisprudence. Rather, it declined to import a doctrine that would blur the distinction between *ratio* and *obiter* and risk perpetuating the very uncertainty that had followed *Sanwell*.

[41] The broader methodological lesson is equally significant. Courts should engage directly with the reasoning found in the source authorities – in this case, *Ford's Hotel* – instead of treating an apex court's abbreviated summary of those authorities as a substitute for the authorities themselves.

D. Identifying ratio: The rehabilitation of Yeo Eng Lam

[42] The judgment contains a further development of broader significance. Having concluded that its observations in *Sanwell* were *obiter*, the court simultaneously confirmed that the broad grounds delivered in *Yeo Eng Lam* remained binding. The apparent tension disappears once recent Malaysian authority on the precedential value of judicial reasons is considered.

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46 [2009] 238 CLR 1.
47 [2007] 69 NSWLR 680.
48 (2009) 54 MVR 111.
49 *Universiti Malaya* [2026] 4 MLJ 418 at [91].

[43] In *Tetuan Wan Shahrizal, Hari & Co v PP*,[50] the Federal Court held that an appellate decision delivered without written grounds establishes no *ratio decidendi* and therefore creates no binding precedent.

[44] By contrast, in *Firdaus Khan Parit Khan & Anor v CIMB Bank Berhad*,[51] Azizul Azmi Adnan JCA explained that broad grounds may nevertheless be binding where the *ratio* can be clearly identified, even though the factual narrative is abbreviated. *Yeo Eng Lam*[52] fell into that latter category.

[45] The juxtaposition is revealing. In a single judgment, the Federal Court reduced the precedential force of one of its earlier pronouncements while reaffirming another as binding. There is no inconsistency in those two conclusions. The observations in *Sanwell* were *obiter* on an issue that did not arise for decision, whereas *Yeo Eng Lam* contained an identifiable *ratio* notwithstanding the brevity of its grounds. The judgment therefore illustrates a broader point about precedent.

[46] What binds is determined not by the prominence of an earlier statement, nor by the status of the court that made it, but by orthodox principles governing *ratio decidendi*. Identifying what is binding remains an exercise of legal analysis rather than mechanical citation.

[47] Once *Yeo Eng Lam* is recognised as the controlling authority,[53] the governing principles become clear. The expression "step in the proceedings" must be interpreted consistently with the mandatory-referral policy underlying section 10(1) of the Arbitration Act 2005. Whether a party has demonstrated a clear and unequivocal intention to abandon arbitration is a fact-sensitive inquiry requiring the court to consider the parties' conduct as a whole.

[48] A reservation of rights is relevant but not conclusive, while procedural applications that do not engage the merits of the dispute will ordinarily not constitute steps in the proceedings. Those principles formed the analytical framework through which the Federal Court resolved the present appeal.

50 [2023] 4 MLJ 1.
51 [2024] 4 MLJ 474, CA at [10]–[11].
52 02(i)-20-03 of 2019(W).
53 *Universiti Malaya* [2026] 4 MLJ 418 at [105].

IV. Recentring section 10(1): The primacy of the arbitration agreement

[49] One aspect of *Universiti Malaya* deserves closer attention than it has so far received. Throughout the litigation, and indeed in much of the earlier case law, the debate centred almost exclusively on whether the defendant had taken a "step in the proceedings". The Federal Court reminded us that this is only one part of the inquiry mandated by section 10(1).

[50] The provision imposes two cumulative conditions. The first is substantive: the dispute must fall within a valid arbitration agreement that is neither null and void, inoperative nor incapable of being performed.[54] The second is procedural: the application for a stay must be made before the applicant has taken any other step in the proceedings. While the procedural limb has understandably attracted most of the judicial and academic attention, the judgment makes clear that the substantive inquiry comes first.

[51] That analytical sequence follows the Federal Court's earlier decision in *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd*.[55] The threshold question is whether the parties have entered into a valid agreement to arbitrate the dispute. Only if that question is answered affirmatively does the court proceed to consider whether the applicant has taken a step in the proceedings within the meaning of section 10(1).

[52] Applying that framework, the court found a *prima facie* arbitration agreement in clause 4 of the Conditions of Engagement, no allegation having been made that the agreement was null and void, inoperative or incapable of being performed. The plaintiff's own pleading repeatedly referred to the contractual documents containing the arbitration clause, demonstrating that it commenced the action with knowledge of the parties' agreement to arbitrate.

[53] The significance of this aspect of the judgment extends beyond the facts of the case. By placing the existence of the arbitration agreement at the forefront of the analysis, the court restored the proper focus of section 10(1). The issue is not simply whether a defendant has committed a procedural misstep. Rather, it is whether a party

54 Ibid, at [49].
55 [2020] 3 MLJ 545.

who knowingly agreed to resolve its disputes by arbitration should nevertheless be permitted to pursue litigation in court.

[54] Viewed from that perspective, the doctrine of "steps in the proceedings" assumes its proper role. It is not a freestanding procedural trap capable of defeating arbitration on technical grounds, but a limited exception to the statutory policy favouring the enforcement of arbitration agreements. Like other exceptions to a substantive right, it should therefore be construed narrowly.

[55] Seen in this light, *Universiti Malaya* is not concerned solely with identifying what amounts to a step in the proceedings. It also restores the analytical sequence intended by section 10(1), requiring the court to begin with the parties' agreement to arbitrate before considering whether that right has subsequently been waived by litigation conduct. Any analysis of the decision that focuses only on the procedural limb captures only part of the court's contribution.

V. The limits of *Universiti Malaya*: When neither party seeks arbitration

[56] The analysis in *Universiti Malaya* proceeds from a common factual premise: a defendant who wishes to enforce an arbitration agreement is met with the argument that it has forfeited that right by taking a step in the proceedings. Every aspect of the court's reasoning is directed towards resolving that issue. Its interpretation of "steps in the proceedings", its adoption of a holistic inquiry, its treatment of reservations of rights, and its repeated emphasis on holding parties to their contractual bargain, all serve to protect the party seeking to arbitrate.

[57] The judgment does not, however, address the converse situation in which neither party wishes to invoke the arbitration agreement. That scenario is becoming increasingly familiar in commercial litigation. A defendant may have little incentive to seek a stay where litigation offers a substantially less expensive forum than arbitration. Court filing fees are comparatively modest, whereas arbitration commonly involves tribunal fees, institutional charges, hearing expenses and significantly higher legal costs. Where both parties prefer litigation for commercial reasons, neither may invoke section 10(1), notwithstanding the existence of a valid arbitration agreement.

[58] The reason why *Universiti Malaya* does not resolve that scenario lies not in the court's reasoning but in the structure of section 10(1) itself. The provision is party-activated. A stay may be granted only upon the application of a party. If neither party applies for one, the statutory mechanism is never engaged and the proceedings continue in court. In those circumstances, the familiar judicial statements that parties should be held to their agreement to arbitrate have no practical operation because there is no application through which that agreement may be enforced.

[59] This reveals an interesting tension within modern arbitration law. On the one hand, the courts consistently describe an arbitration agreement as an important expression of party autonomy that should ordinarily be enforced. On the other hand, that same principle of party autonomy permits both parties, by their conduct, to abandon arbitration altogether. The law therefore provides robust protection for a party wishing to enforce an arbitration agreement, but leaves untouched the situation in which both parties prefer to litigate despite their earlier contractual choice.

[60] The judgment therefore leaves several questions for future consideration. First, where a defendant deliberately files a defence or otherwise engages with the merits in order to remain in court, would such conduct fall within the category of litigation steps that irrevocably preclude a subsequent stay application?

[61] Secondly, where both parties have elected, by their conduct, to litigate notwithstanding an arbitration agreement, does any residual judicial power exist to require compliance with the contractual choice of forum, or is the court entirely dependent upon an application under section 10(1)?

[62] Thirdly, should the comparative cost of arbitration and litigation have any bearing on the analysis? If parties elect litigation principally because of the costs of arbitration, does that merely reflect the continuing operation of party autonomy, or does it undermine the legislative policy favouring the enforcement of arbitration agreements?

[63] *Universiti Malaya* does not answer those questions, nor was it required to do so. Its significance lies elsewhere. Nevertheless, the decision exposes an inherent limit within section 10(1). The statutory policy favouring arbitration operates only when a party invokes it.

[64] Where both parties choose, for commercial or strategic reasons, to continue litigating, the arbitration agreement remains unenforced notwithstanding the strong judicial policy favouring its observance. Whether that position represents a deliberate legislative choice or an area requiring further doctrinal development is likely to become an increasingly important question as commercial parties continue to weigh the relative costs of arbitration and litigation.

VI. Conclusion

[65] *Universiti Malaya v ESA Jurutera Perunding Sdn Bhd* is a decision of significance well beyond its immediate facts. At one level, it clarifies the meaning of "steps in the proceedings" under section 10(1) of Act 646 by confirming that the inquiry is directed towards whether the applicant has objectively demonstrated a clear and unequivocal intention to abandon arbitration.

[66] At another, it restates important principles of Malaysian precedent doctrine by reaffirming the distinction between *ratio decidendi* and *obiter dicta* and emphasising the need for courts to engage directly with source authority. Finally, it restores the proper analytical sequence under section 10(1) by confirming that the existence of a valid arbitration agreement is the threshold inquiry, with procedural questions arising only thereafter.

[67] At the same time, the judgment identifies the limits of the statutory framework. It answers the question whether a party seeking to enforce an arbitration agreement has lost that right through its litigation conduct. It does not, because it was not required to, determine the position where neither party seeks to invoke the arbitration agreement. That unanswered question highlights an important feature of section 10(1): the statutory policy favouring arbitration is ultimately dependent upon party invocation.

[68] The courts will robustly enforce the parties' contractual bargain when asked to do so. Where neither party asks, however, the bargain remains unenforced – not because the law rejects arbitration, but because party autonomy permits the parties, by common conduct, to depart from the forum they originally selected.

The Undefined Exception: Public Policy under Section 7 of the Cross-Border Insolvency Act 2026

by

*Justice Dr Noradura binti Hamzah**

Abstract

Malaysia's Cross-Border Insolvency Act 2026 (Act 877) adopts the UNCITRAL Model Law on Cross-Border Insolvency, but departs from article 6 in the public policy exception. Section 7 omits the word "manifestly" and states the reach of the exception more fully than the Model Law does, while section 2(2) retains the Model Law uniformity clause unaltered. It leaves the expression "public policy" undefined. This article examines the resulting question of construction. It argues that the fuller statement of scope in section 7 is declaratory rather than enlarging, and that the specificity of the restrictions which Act 877 enacts beneath section 7, the retention of section 2(2), and the settled restraint of Malaysian public policy doctrine in arbitration and in contract together require the section to be read at the international standard. It also identifies a question Act 877 leaves open, i.e. where a Shariah matter arises in Islamic financial business, a Malaysian court is bound by a ruling of the Shariah Advisory Council, and no other adopting state has a category of fundamental principle that is statutorily fixed in that way. The gaps left by the restrictions are better closed by the amendment power in section 34 than by an expansive construction of section 7.

Introduction

[1] The Cross-Border Insolvency Act 2026 (Act 877) ("Act 877") came into operation on August 28, 2026.[1] It is Malaysia's first dedicated

* Judicial Commissioner, High Court of Malaya at Johor Bahru.

1 Act 877 received Royal Assent on January 20, 2026 and was published in the *Gazette* on January 30, 2026. By section 1(2), Act 877 comes into operation on a date appointed by the Minister by notification in the *Gazette*. By the Cross-Border Insolvency Act 2026 (Appointment of Date of Coming into Operation), PU(B) 311/2026, dated August 18, 2026 and gazetted August 27, 2026, the Minister appointed August 28, 2026 as the date on which the Act came into operation.

cross-border insolvency statute, and it adopts the UNCITRAL Model Law on Cross-Border Insolvency of 1997 ("Model Law") as a standalone enactment rather than by amendment to the Companies Act 2016 (Act 777) ("Act 777"). By section 35(1) it applies only to cross-border insolvency proceedings commenced on or after that date.

[2] Act 877 is procedural in character, complementing the existing corporate insolvency framework without altering its structure or its fundamental principles.[2] Its application is confined to corporate debtors, individual insolvency having been deferred to a later phase.[3] Within that field it does what the Model Law does, namely:

(a) it gives foreign representatives direct access to the High Court;

(b) it provides for the recognition of foreign main and non-main proceedings;

(c) it attaches automatic consequences to recognition of a main proceeding;

(d) it confers a discretion to grant relief; and

(e) it provides for cooperation and for the coordination of concurrent proceedings.

[3] Against that architecture stands section 7, the public policy exception. It is the only provision in Act 877 that confers on the court an open-textured discretion to refuse to act. It is undefined, and it is expressed in terms distinct from those of its Model Law counterpart.

2 See *Penyata Rasmi Parlimen, Dewan Rakyat* (July 29, 2025), p 39, where Dato' Sri Azalina binti Othman Said, the Minister in the Prime Minister's Department (Law and Institutional Reform), described the Bill as procedural in nature, complementing existing corporate insolvency law without altering its structure or fundamental principles, and recorded that the authoritative text is the English text.

3 See s 2(1) of Act 877 for the definition of "debtor", which is confined to a corporation as defined in s 3 of Act 777 or in s 2 of the Labuan Companies Act 1990 (Act 441) ("Act 441"). Section 3(2) excludes individual insolvency and bankruptcy under the Insolvency Act 1967 (Act 360), registered and licensed businesses, limited liability partnerships and foreign limited liability partnerships under the Limited Liability Partnerships Act 2012 (Act 743), and the persons specified in Part I of the Schedule.

[4] This article is concerned with the content and the threshold of that exception. The question is not academic. Section 17(2) makes recognition mandatory once four objective conditions are met, subject only to section 5(2), which is rule-based and leaves the court no discretion, and to section 7. Everything discretionary at the recognition stage therefore passes through section 7.

[5] In brief, this article argues that in enacting Act 877, Malaysia has aligned itself with the international instrument in substance, adopting the Model Law's architecture, retaining its uniformity clause and declining to impose any reciprocity requirement, while at the same time protecting domestic business and domestic financial stability more thoroughly than either of the jurisdictions examined below. The protection has been delivered, however, by specific and published enactment rather than by conferring a general discretion on the court, and that choice of method is the key to section 7. A statute that protects domestic interests transparently has less need of a broad residual exception, not more. The two movements that appear to run in opposite directions, a textually lowered threshold on the one hand and an unusually dense body of specific restriction on the other, are therefore reconcilable, and Act 877 read as a whole does not require the wide construction that its most conspicuous departure from the Model Law appears at first sight to invite.

Section 7 and article 6

The two texts

[6] Article 6 of the Model Law provides:

> Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

[7] Section 7 of Act 877 provides:

> Nothing in this Act shall prevent the Court from refusing to take any action or grant any order or relief under this Act if the taking of such action or the granting of such order or relief would be contrary to the public policy of Malaysia.

[8] The two provisions differ in two respects.

A. The omission of "manifestly"

[9] The first is the omission of the qualifying adverb. In the Model Law the exception is engaged only where the action would be manifestly contrary to the public policy of the enacting state. The qualification is deliberate and is understood to signal that the exception operates at the margin rather than as a general reservation of curial discretion.

[10] Comparatively, the United Kingdom ("UK") legislation on cross-border insolvency retained it. Article 6 of Schedule 1 to the UK Cross-Border Insolvency Regulations 2006 ("CBIR") refers to action manifestly contrary to the public policy of Great Britain or any part of it. However, Singapore did not. Article 6 of the Third Schedule to the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA") refers simply to action contrary to the public policy of Singapore.

[11] Malaysia has followed Singapore. UNCITRAL has itself noted the departure, recording that a small number of enacting states, including Chile, Serbia and Singapore, omitted the word, and observing that the omission leads to a potentially different standard of exclusion from that applicable under the Model Law.[4] Japan and South Korea have made the same omission.[5] Malaysia may now be added to the list.

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4 UNCITRAL, *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency* (United Nations, Vienna, 2021), Ch I, art 6, Introduction, endnote 3, p 20, available at https://uncitral.un.org/en/texts/insolvency (accessed September 12, 2026). The endnote records that some jurisdictions, such as Chile, Serbia and Singapore, omitted the word when enacting art 6, and observes that this leads to a potentially different standard of exclusion from that applicable under the Model Law. It refers, in relation to Singapore, to *Re Zetta Jet Pte Ltd* [2018] SGHC 16 at [22]–[23], and notes the different formulation adopted in Poland via art 392(2) of Poland's Bankruptcy Law of January 1, 2016, under which recognition of a ruling opening foreign proceedings may not contravene the basic principles of the Polish legal order, while suggesting that its aim is the same as that of art 6.

5 Article 21(3) of the Japanese Law on Recognition of and Assistance in Foreign Insolvency Proceedings, Law No 129 of 2000, which permits a court to refuse recognition of a foreign proceeding considered to be contrary to public order or good public morals in Japan, and which makes no mention of action that is manifestly contrary; and art 632(2) of the Korean Debtor Rehabilitation and Bankruptcy Act, Act No 7428 of March 2005, as amended, by which the court may dismiss a petition for recognition if the foreign bankruptcy proceeding is contrary to the public policy of the Republic of Korea. Both provisions are discussed in G McCormack and WY Wan, "Model Law on Cross-Border Insolvency Comes of Age: New Times or New Paradigms" (2019) 54 *Texas International Law Journal* 273 at 288, nn 62 and 63, citing respectively Shin Abe, "Japan", and Chiyong Rim,

[12] Whether the omission produces a different standard has come before the Singapore courts three times, and they have not spoken with one voice. In *Re Zetta Jet Pte Ltd*,[6] the debtor had obtained recognition of a Chapter 11 proceeding commenced in deliberate breach of a Singapore injunction restraining it from doing so. The High Court observed that nothing in the parliamentary debates or the preparatory materials explained the omission, that the omission must have been deliberate and conscious given the emphasis the drafters had placed on the word, and held that the standard of exclusion on public policy grounds in Singapore is lower than in jurisdictions where the Model Law has been enacted unmodified, so that recognition may be denied although it may not be manifestly contrary to public policy. Recognition was refused, the foreign representative having flouted an express order of the court and thereby undermined the administration of justice in Singapore.[7]

[13] The sequel confined the reach of that refusal without disturbing the threshold. After the Singapore injunction had been discharged by consent, and the court which had granted it was content to let it go, the same court held that recognition no longer undermined the administration of justice in Singapore and granted full recognition. The earlier breach remained a contempt which might be pursued separately, but it had ceased to be a ground for refusing recognition.[8]

[14] The threshold was reopened in *Re PT Garuda Indonesia (Persero) Tbk*, where the Singapore International Commercial Court respectfully disagreed with *Re Zetta Jet Pte Ltd*. Drawing on the distinction in the 1997 and 2013 Guides between domestic public policy and the narrower conception engaged where the application of foreign law or the recognition of a foreign judgment is in question, the court held that the word "manifestly" was never meant to affect the standard contemplated by article 6 at all. Its inclusion makes explicit what was always implicitly understood, namely that a high threshold must be met before recognition is refused. It adds no further depth to the requirement and is included to erase doubt and give clarity. A high threshold was also required by the purpose of the Model Law in

"South Korea", in Look Chan Ho (ed), *Cross Border Insolvency: A Commentary on the UNCITRAL Model Law*, 4th edn (Globe Law and Business, 2017) at pp 324 and 585.

6 [2018] 4 SLR 801; [2018] SGHC 16.

7 Ibid, at [22], [23] and [29].

8 *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53 at [121] and [122].

advancing modified universalism and by the notion of comity, and was supported by article 8, the uniformity clause.[9]

[15] The question is therefore contested rather than settled, and a Malaysian court construing section 7 will have to choose between the two positions. The reasoning in *Re PT Garuda Indonesia (Persero) Tbk* travels, because it does not depend on anything peculiar to Singapore. It rests on the UNCITRAL materials, upon the purposes of the Model Law, and on the uniformity clause, each of which is equally available to a Malaysian court, the uniformity clause being enacted as section 2(2) of Act 877.

[16] That reasoning is not binding in Malaysia, but it is unusually apposite. It concerns the identical departure from the identical text, in the jurisdiction the responsible Minister identified as the model for the Malaysian approach. It also disposes of any suggestion that the argument from omission is self-evidently correct.

B. The widened object

[17] The second departure is disparate from the above. Article 6 of the Model Law, article 6 of Schedule 1 to the CBIR and article 6 of the Third Schedule to the IRDA are identical in their object. Each speaks of the court refusing to take "an action governed by this Law". Section 7 does not. It speaks of refusing to take any action or grant any order or relief under Act 877.

[18] The formulation is wider in terms. It engages not only the decision whether to take an action but expressly the grant of any order and the grant of any relief. On its face it reaches the recognition order under section 17, provisional relief under section 19, post-recognition relief under section 21, and, cooperation under Part IV being action under Act 877, the cooperation and communication functions in sections 25 to 27.

[19] It does not follow, however, that the departure widens the exception in substance, and it is submitted that it does not. The question is what the shorter formula already covers. Article 6 is a general provision. It appears in Chapter I of the Model Law, among the provisions of general application, and not in Chapter III, which governs recognition and relief. Meanwhile, section 7 occupies the

9 *Re PT Garuda Indonesia (Persero) Tbk* [2024] SGHC(I) 1 at [82]–[90], the court referring at [88] to *Re Agrokor DD* [2018] 2 BCLC 75 at [109], and at [85] to s 252(2) of the IRDA, under which regard may be had to the preparatory materials and the Guide to Enactment.

corresponding position in Part I of Act 877.[10] It is therefore not confined to any stage of the process. And the grant of relief under article 21, the making of a recognition order under article 17 and the extension of cooperation under articles 25 to 27 are each plainly an action governed by the Model Law. There is nothing which the fuller Malaysian words reach that the Model Law words do not.

[20] The better reading is that section 7 is declaratory of the scope article 6 already has, and that the enumeration was adopted out of caution rather than to enlarge. Two considerations support that reading. The Model Law itself found it necessary to make the recognition obligation in article 17(1) expressly subject to article 6, and section 17(2) does the same by reference to section 7, which would be unnecessary if the exception were understood to be confined to recognition and superfluous if it were understood not to reach recognition at all.[11] The draftsman of a general provision may reasonably spell out what it governs. And the contrast with article 33 of the recast European Insolvency Regulation, which is confined to the refusal of recognition, shows that where an instrument means to limit the exception to one stage, it says so.

[21] The consequence for the argument of this article is that only one of the two departures requires an answer. The threshold question is real and is addressed in the discussion of Malaysian domestic law and in the conclusion below. The object question resolves itself on analysis. Malaysia has stated the scope of its public policy exception more fully than the Model Law states it, but it has not extended that scope.

[22] Malaysia has therefore taken the lower textual threshold of one comparator while stating the reach of the exception more fully than any. It is the first of those choices, and not the second, that calls for an answer.

C. The uniformity clause

[23] Against those departures stands a provision adopted without alteration. Article 8 of the Model Law requires that, in interpretation, regard be had to the international origin of the Model Law and to the

10 Article 6 appears in Ch I of the Model Law, among the general provisions, and not in Ch III, which governs recognition and relief. It is accordingly not confined to any particular stage of the process. Section 7 occupies the corresponding position in Pt I of Act 877; *cf* art 33 of Regulation (EU) 2015/848, which is confined to the refusal of recognition.

11 Model Law, art 17(1); Act 877, s 17(2).

need to promote uniformity in its application and the observance of good faith. It appears as article 8 in both comparators and as section 2(2) of Act 877, in materially identical terms.[12]

[24] Malaysia has thus enacted in one statute a uniformity clause in the Model Law's own words and a public policy exception in words wider than the Model Law's. That is the interpretive problem this article addresses. It may be observed at the outset that section 2(2) is the stronger textual indication, being a provision that governs the construction of Act 877 as a whole, including section 7, whereas section 7 governs only itself.

[25] That tension has an answer in the practice of the jurisdiction whose drafting Malaysia followed. In *United Securities Sdn Bhd v United Overseas Bank Ltd*,[13] its first reported appellate decision on the Model Law, the Singapore Court of Appeal recorded that it was cognisant of article 8 in construing the provisions before it, and endorsed the observation at first instance that the courts should tack as closely as possible to the general interpretive trends taken in other jurisdictions applying the Model Law in its various enactments.[14] The uniformity clause is therefore not merely hortatory. It has been treated by a final appellate court as governing the construction of the enacted Model Law, including provisions that had been modified on enactment.[15] There is no reason why section 2(2) should be read more weakly.[16]

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12 Ibid, art 8; CBIR, Sch 1, art 8; IRDA, Third Sch, art 8; Act 877, s 2(2).

13 [2021] SGCA 78; [2021] 2 SLR 950 at [28].

14 Ibid, endorsing *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] 4 SLR 1343 at [38]. That decision is to be distinguished from *Re Zetta Jet Pte Ltd* [2018] 4 SLR 801; [2018] SGHC 16, which concerned the public policy exception itself.

15 UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* (United Nations, Vienna, updated 2022, Sales No 23.V.I) ("*The Judicial Perspective*"), Pt II, Section A, para 18, p 8, available at https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/mlcbi_judicial_perspective_2021_advance_copy.pdf (accessed September 15, 2026), where it was observed that although the Model Law emphasises a uniform approach to interpretation based on its international origin, the domestic law of most states is likely to require interpretation in accordance with national law unless the enacting state has endorsed the international approach in its own legislation.

16 Section 9A of the Interpretation Act 1965 (Singapore) provides for purposive interpretation in subsection (1) and, in subsections (2) and (3), for the use of extrinsic material, the categories of which include, by subsection (3)(f), any document declared by the written law to be a relevant document for the purposes of that section. Section 252(2) of the IRDA makes that declaration in respect of UNCITRAL's preparatory documents and the Guide to Enactment.

[26] One further feature should be noted before the argument proceeds. Neither section 7 nor the interpretation section defines what is meant by the public policy of Malaysia, and no definition was introduced in the course of enactment. The approach adopted was that the content of the expression is best determined by the courts upon the facts and context of each case, and developed through decided cases rather than fixed by statutory definition.[17] The question with which this article is concerned is how a court should approach that task.

D. The standard of section 2(2)

[27] If section 2(2) directs the court to the international origin of Act 877 and to uniformity in its application, it is necessary to identify what that international standard is. UNCITRAL's own materials record that no uniform definition of public policy is attempted in article 6, because the notion is grounded in national law and differs between states. They also record that the concept has been interpreted narrowly and applied only in exceptional circumstances on a consistent basis in courts around the world, and that the purpose of the word "manifestly" is to emphasise that the exception is to be interpreted restrictively and invoked only in exceptional circumstances concerning matters of fundamental importance for the enacting state.[18]

[28] The case law collected by UNCITRAL bears that out and yields four propositions of present use.

Section 17A of the Interpretation Acts 1948 and 1967 (Act 388) ("Act 388") contains the corresponding direction as to purposive construction, but Act 388 has no counterpart to section 9A(2) and (3) and makes no provision for the use of extrinsic material. Act 877 likewise contains no provision declaring the UNCITRAL materials relevant. Section 2(2) is therefore the only textual route by which a Malaysian court may have regard to them.

17 *Penyata Rasmi Parlimen, Dewan Rakyat* (July 29, 2025), p 57.

18 UNCITRAL, *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency* (United Nations, Vienna, 2021), Ch I, art 6, Introduction, para 1, p 20, available at https://uncitral.un.org/en/texts/insolvency (accessed September 12, 2026), referring to UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (United Nations, New York, 2014, Sales No E.14.V.2), paras 101–104, p 52, available at https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf (accessed September 15, 2026). The Guide to Enactment and Interpretation was adopted by UNCITRAL on July 18, 2013 as the revised Guide; *The Judicial Perspective*, see n 15 above, Pt III, Section B.5, "The 'public policy' exception", paras 49–58, pp 19–22, available at https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/mlcbi_judicial_perspective_2021_advance_copy.pdf (accessed September 15, 2026).

[29] First, a mere conflict between the foreign law and the law of the receiving state does not engage the exception. The procedural fairness of the foreign proceeding must be in doubt, or the action sought must frustrate the receiving court's ability to administer the recognition proceeding or impinge severely upon a local constitutional or statutory right.[19]

[30] Secondly, the relief available in the foreign proceeding and the relief available in the receiving state need not be identical. Otherwise, the public policy exception would be unnecessary. Differences of priority, of procedure, of access to court records and of entitlement to trial by jury have all been held insufficient.[20]

[31] Thirdly, the exception is argued frequently and succeeds rarely. The reported instances of success are narrow and concrete, such as relief that would have required conduct criminal under the law of the receiving state, or recognition of a proceeding pursued in breach of a stay already in force in the receiving state.[21]

[32] Fourthly, the burden of articulation lies on the objector, who must identify the fundamental policy said to be violated rather than assert inconsistency at large.[22]

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19 *Iida v Kitahara (Re Iida)* 377 BR 243 at 259 (BAP 9th Cir 2007), as summarised in UNCITRAL, *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency* (United Nations, Vienna, 2021), Ch I, art 6, case law on art 6, para 6, p 20, available at https://uncitral.un.org/en/texts/insolvency (accessed September 12, 2026).

20 *Re Metcalfe & Mansfield Alternative Investments* 421 BR 685 at 695 697 (Bankr SDNY 2010), as given in UNCITRAL, *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency* (United Nations, Vienna, 2021), Ch I, art 6, endnote 22, available at https://uncitral.un.org/en/texts/insolvency (accessed September 12, 2026), where the court held that the relief granted in the foreign proceeding and the relief available in a United States proceeding need not be identical, since if identity were required the public policy exception in art 6 would be unnecessary.

21 UNCITRAL, *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency* (United Nations, Vienna, 2021), Ch I, art 6, case law on art 6, paras 7 and 8, p 21, available at https://uncitral.un.org/en/texts/insolvency (accessed September 12, 2026). For two of the rare instances in which the exception has been applied, see *In re Toft* 453 BR 186 (Bankr SDNY 2011) and *In re Gold & Honey Ltd* 410 BR 357 (Bankr EDNY 2009).

22 UNCITRAL, *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency* (United Nations, Vienna, 2021), ibid, para 5, p 20, available at https://uncitral.un.org/en/texts/insolvency (accessed September 12, 2026), citing *In re Toft* at 195–196 (Bankr SDNY 2011).

[33] Paragraphs 102 and 103 of the 2013 Guide to Enactment and Interpretation ("the Guide") confine the exception to fundamental principles of law, in particular constitutional guarantees, and state that because the exception operates in matters of international cooperation and the recognition of the effects of foreign laws, public policy in that context is to be understood on a more restrictive basis than purely domestic public policy.[23] That distinction matters for the discussion below, which examines what Malaysian courts have made of the expression in wholly domestic settings.[24]

[34] None of this is binding in Malaysia. All of it is material to which section 2(2) directs the court's attention, and none of it is displaced by the omission of a single adverb from section 7.

The layered restrictions

[35] Beneath section 7, Act 877 enacts four distinct layers of specific restriction. Their cumulative detail is unusual among adopting states, and it is central to the argument of this article.

The first layer: Exclusion from application

[36] Section 3(2), read with Part I of the Schedule, excludes 17 categories of entities from the operation of Act 877 altogether. Each is a:

(a) financial services or Labuan entities:

(b) licensed persons and financial holding companies under the Financial Services Act 2013 (Act 758) ("Act 758") and the Islamic Financial Services Act 2013 (Act 759) ("Act 759");

23 UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (United Nations, New York, 2014, Sales No E.14.V.2), at paras 102 and 103, p 52, available at https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf (accessed September 15, 2026). To the same effect, and consulted directly, see para 30, p 28, where the Guide records that no definition of public policy is attempted because notions vary from state to state, that the intention is that the exception be interpreted restrictively and art 6 used only in exceptional and limited circumstances, and that differences in insolvency schemes do not themselves justify a finding that enforcing one state's laws would violate the public policy of another state; and para 21(e), p 26, where the Guide states that the public policy exception is expected to be rarely used.

24 *The Judicial Perspective*, see n 15 above, Pt III, Section B.5, paras 51 and 52, p 20, available at https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/mlcbi_judicial_perspective_2021_advance_copy.pdf (accessed September 15, 2026).

(c) prescribed institutions under the Development Financial Institutions Act 2002 (Act 618); prescribed financial and Islamic financial institutions;

(d) member and bridge institutions under the Malaysia Deposit Insurance Corporation Act 2011 (Act 720) ("Act 720");

(e) exchange holding companies and their subsidiaries under the Capital Markets and Services Act 2007 (Act 671) ("Act 671");

(f) central depositories under the Securities Industry (Central Depositories) Act 1991 (Act 453); and

(g) the range of Labuan banks, investment banks, insurers, reinsurers, *takaful* and *retakaful* operators, protected cell companies, trust companies, trusts, payment system operators, exchanges and foundations.

[37] This layer is jurisdictional, not discretionary. Where it applies there is nothing for the court to weigh.

The second layer: The mandatory prohibition

[38] Section 5(2), read with paragraph 1 of Part II of the Schedule, provides that the court shall not recognise any foreign proceedings, grant any relief, modify relief already granted, or provide any cooperation or coordination, if and to the extent that to do so would be prohibited by, interfere with, or be inconsistent with the named provisions of Act 758, Act 759, Act 720, Division 2 of Part II of Act 671, or the International Interests in Mobile Equipment (Aircraft) Act 2006 (Act 659).

[39] It also prohibits any interference with the finality of payment or netting arrangements or with the enforceability of a netting provision under the Netting of Financial Agreements Act 2015 (Act 766).[25]

[40] This layer too is mandatory. The court exercises no judgment as to whether the restriction should apply.

The third layer: The regulator gateway

[41] Paragraphs 2 to 4 of Part II of the Schedule operate differently again. Where:

(a) Bank Negara Malaysia has specified measures under section 31(1)(a) of the Central Bank of Malaysia Act 2009 (Act 701)

25 Act 877, s 5(2) read with Sch, Pt II, para 1.

("Act 701"), issued an order in writing under section 31(1)(b), or exercised its power under section 32;

(b) the Securities Commission Malaysia has issued a directive in writing under section 31ZG of the Securities Commission Malaysia Act 1993 (Act 498) ("Act 498"); or

(c) the Labuan Financial Services Authority has issued a direction under section 4B of the Labuan Financial Services Authority Act 1996 (Act 545),

then recognition, relief, the modification of relief, cooperation and coordination are all barred unless the foreign representative or other applicant has first obtained the prior written approval of the regulator concerned.[26]

[42] This is not a prohibition addressed to the court but a condition precedent addressed to the applicant, and satisfaction of it lies in the discretion of an administrative body rather than of the court and has no counterpart in either comparator.

The fourth layer: Targeted protections within the operative Parts

[43] A series of provisions inside the operative Parts protects specific domestic interests without engaging public policy at all.[27] Section 13(2) preserves the ranking of claims and the exclusion of foreign tax, social security and superannuation claims, while section 13(3) prevents a foreign creditor from being ranked below general unsecured creditors merely because it is foreign. Sections 20(4)(b) and 21(5) preserve criminal proceedings and the actions of bodies exercising regulatory, supervisory, investigative or enforcement functions of a public nature. Section 21(2) requires the leave of the court before property of the debtor is transferred to any person outside Malaysia, and leave may be granted only where the court is satisfied that the interests of creditors in Malaysia are adequately protected. Section 21(3) further requires certification or a guarantee that the claims of Malaysian creditors below a prescribed threshold have been met and satisfied from the

26 Ibid, Sch, Pt II, paras 2–4, referring respectively to ss 31(1)(a), (b) and 32 of the Central Bank of Malaysia Act 2009 (Act 701), s 31ZG of the Securities Commission Malaysia Act 1993 (Act 498), and s 4B of the Labuan Financial Services Authority Act 1996 (Act 545).

27 Act 877, ss 13(2) and (3), 20(4)(b), 21(2) and (3), 21(5), 22, 23(9) and 28–32.

property applied to be so transferred. Section 22 requires the court, in granting, refusing, modifying or terminating relief, to be satisfied that the interests of creditors, including Malaysian creditors, secured creditors, parties to hire-purchase agreements and other interested persons including the debtor, are adequately protected. Section 23(9) excludes retrospective avoidance. Sections 28 to 32 govern the coordination of concurrent proceedings and preserve the primacy of Malaysian proceedings in respect of property located in Malaysia.

[44] The fourth layer is the only one that has so far been the subject of subsidiary legislation, and the manner of its exercise is instructive. By the Cross-Border Insolvency (Prescription of Threshold) Order 2026, made on August 18, 2026 and brought into operation on the same day as Act 877 itself, the Minister prescribed the threshold for the purposes of section 21(3).[28] Its operative provision states that the Minister prescribes an amount not exceeding RM200,000 as the threshold for the claims of creditors in Malaysia.

[45] The first observation is substantive. The effect is that a foreign representative seeking to transfer property of the debtor out of Malaysia must first certify or guarantee that the claims of Malaysian creditors whose debts do not exceed the prescribed threshold have been met and satisfied from the property to be transferred. The ring-fence is therefore calibrated to smaller domestic creditors. Malaysian creditors with larger claims are not protected by the certification mechanism at all, and must rely instead on the general requirement in section 21(2) that leave be granted only where the court is satisfied that the interests of creditors in Malaysia are adequately protected, and on section 22.

[46] The second is a drafting observation. Section 21(3) is framed by reference to creditors whose debts do not exceed "the threshold as prescribed by the Minister". The subsection therefore contemplates a single figure against which a creditor's debt is to be measured. The Order does not in terms prescribe a figure. It prescribes "an amount not exceeding two hundred thousand ringgit" as the threshold, which is on its face indeterminate. The natural and sensible construction is

28 Cross-Border Insolvency (Prescription of Threshold) Order 2026, PU(A) 299, made on August 18, 2026 and in operation from August 28, 2026, made in exercise of the power conferred by s 21(3) of Act 877.

that the threshold is RM200,000, and a court would be very likely to adopt it, since any other reading would leave the certification obligation without a measurable content. The point is nonetheless worth recording, because section 21(6) provides a mechanism by which the Minister may amend the threshold after consultation with the Minister of Finance and the Minister charged with responsibility for companies,[29] and the opportunity might usefully be taken to state the figure directly.

[47] Two further provisions belong to this layer although they are not framed as protections. Section 20(2) provides that the stay and suspension arising on recognition of a foreign main proceeding are of the same scope and effect as if the debtor had been made the subject of a winding-up order under Act 777 or Act 441, and subject to the same powers, prohibitions, limitations, exceptions and conditions as would apply under the laws of Malaysia in such a case. Construing the identical article, the Singapore Court of Appeal held that its purpose is that recognition of a foreign proceeding should have its own effects rather than import the consequences of the foreign law into the insolvency system of the enacting state, consistent with the basic approach of the Model Law, which is not to attempt a substantive unification of insolvency law.[30] Differences between foreign and Malaysian insolvency regimes are therefore neutralised by section 20(2) itself, and need not be addressed under section 7 at all.

[48] Secondly, the definition of "foreign proceedings" in section 2(1) operates as a gateway before section 7 is reached. The same court held that a proceeding must possess four cumulative attributes, to be considered as a whole, before it can qualify.[31] A proceeding that lacks these attributes is not recognised, and no question of public policy arises.

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29 Act 877, s 21(6). The power to amend the threshold is exercisable by the Minister after consultation with the Minister of Finance and the Minister charged with responsibility for companies.

30 *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] SGCA 78; [2021] 2 SLR 950 at [35].

31 Ibid, at [53]. The four attributes are that the proceeding involve creditors collectively, have its basis in a law relating to insolvency, be subject to the control or supervision of the court, and have as its purpose the reorganisation or liquidation of the debtor. The definition of "foreign proceedings" in s 2(1) of Act 877 is in the same terms as art 2(a) of the Model Law, so the attributes are equally applicable.

What the layers imply

[49] Two inferences follow from the layers described above.

[50] The first supports a narrow reading of section 7. Parliament identified, with unusual particularity, the categories of Malaysian public interest it considered required protection against a foreign proceeding, and by section 34 conferred on the Minister a power to add to that list on the recommendation of Bank Negara, the Securities Commission, the Malaysia Deposit Insurance Corporation, the Labuan Financial Services Authority, the Companies Commission, the Civil Aviation Authority or any other relevant authority.[32] A statute that legislates its public interest carve outs to that level of detail, and that provides a standing mechanism for extending them, gives a court little reason to read the residual exception expansively. Sections 4 and 8 point the same way, preserving as they do the operation of other written laws and the power to provide additional assistance. So does the Preamble, which states as objectives greater legal certainty for trade and investment and the fair and efficient administration of cross-border insolvencies.[33] The making of the threshold Order on the eve of commencement shows, further, that the specific layers are not dormant. They are being operated, and the mechanism for adjusting them is in use.

[51] The international treatment of the exception does not contradict that reading, although it must be stated with care. UNCITRAL records that, since article 6 deals with all the provisions of the Model Law and not only with recognition, an application to take action under a specific provision may require the court to consider whether that action would be contrary to public policy, and suggests that the sparing application of article 6 indicates that the exception should be applied only where another specific provision does not govern the dispute. The decision cited for the latter proposition does not in terms support it. In *Re Pan Ocean Co Ltd*,[34] the court rejected an argument that article 6 would be rendered otiose unless the relief available under article 21 extended beyond domestic law, and held that article 6 is not confined to article 21 but operates across the specific provisions, as illustrated

32 Act 877, s 34.
33 Ibid, Preamble, objectives (b) and (c).
34 [2014] EWHC 2124 (Ch).

by *In re Toft*,[35] where relief sought under an express statutory power was refused on public policy grounds.[36] What can safely be said is the narrower proposition, i.e. where a specific provision has already resolved the competing interests, there is less occasion to resort to the residual exception. Act 877 supplies a far denser body of specific provision than the Model Law itself, and the room left for the residual exception is correspondingly smaller.

[52] The same position has been reached judicially. In *In re Creative Finance Ltd*, the United States Bankruptcy Court for the Southern District of New York, though offended by the conduct of the debtors, found no precedent for applying the public policy exception on the sole ground of misbehaviour, and dealt with the matter instead through the requirements for recognition. In *Re OGX Petroleo e Gas SA*, the recognition order was dismissed *ab initio* for failure to make full and frank disclosure of the consequences of recognition for third parties not before the court, the English court observing that since many applications are made *ex parte* such disclosure must be made in all respects.[37]

[53] The second inference concerns the reach of the layers rather than their character. They are exhaustive of the financial sector and silent elsewhere. No provision of Act 877 excludes from its operation, or restricts recognition in respect of, an entity carrying on essential infrastructure functions in energy, water, transport, telecommunications or defence, unless that entity happens also to fall within one of the financial categories already described. This article

35 453 BR 186 (Bankr SDNY 2011).

36 UNCITRAL, *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency* (United Nations, Vienna, 2021), Ch I, art 6, Introduction, para 4, p 20, available at https://uncitral.un.org/en/texts/insolvency (accessed September 12, 2026), citing at endnote 10 *Re Pan Ocean Co Ltd* at [104]. See also *In re Toft*, discussed at [104] of that judgment.

37 *The Judicial Perspective*, see n 15 above, Pt III, Section B.5, para 57, p 22, available at https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/mlcbi_judicial_perspective_2021_advance_copy.pdf (accessed September 15, 2026), discussing *In re Creative Finance Ltd* 543 BR 498 at 515–516 (Bankr SDNY 2016), the citation and pinpoint being those given in UNCITRAL, *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency* (United Nations, Vienna, 2021), Ch I, art 6, endnote 30, available at https://uncitral.un.org/en/texts/insolvency (accessed September 12, 2026). See also *The Judicial Perspective*, para 58, p 22, discussing *Ivan Cherkasov v Olegovich* [2017] EWHC 3153 (Ch) and *Re OGX Petroleo e Gas SA* [2016] EWHC 25 (Ch).

also explains why that is better understood as a method not yet fully applied than as an absence of protection, and why the remedy lies in section 34.

[54] Viewed objectively, the two features examined in this part disclose a coherent legislative design, and it is one that should be stated before the construction of section 7 is addressed further.

[55] Malaysia has aligned itself with the international instrument in substance and not merely in name. It adopted the whole architecture of the Model Law, being access, recognition, relief, cooperation and the coordination of concurrent proceedings, in the Model Law's own sequence. It retained article 8 unaltered as section 2(2), which is the provision by which an enacting state signals that its legislation is to be read with the international body of law rather than apart from it. And it imposed no reciprocity requirement. That last point is not a small one. Reciprocity conditions are the principal means by which states have qualified their acceptance of the Model Law, and the experience elsewhere shows what they cost. In South Africa the designation mechanism has never been operated, with the result that the Model Law is of no practical effect, and in China recognition remains conditional upon treaty or *ad hoc* reciprocity.[38] When Singapore considered the question, its Insolvency Law Review Committee declined to recommend a reciprocity requirement. That conclusion is defensible because the Model Law itself contains elements that protect local creditors and local public policy.[39] Malaysia has reached the same conclusion, and has taken those protective elements considerably further.

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38 *The Judicial Perspective*, see n 15 above, Pt III, Section B.4, para 48, p 19, available at https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/mlcbi_judicial_perspective_2021_advance_copy.pdf (accessed September 15, 2026), recording that there is no requirement of reciprocity in the Model Law and that a foreign proceeding is not to be denied recognition solely on the ground that the courts of the originating state would not provide equivalent relief. On reciprocity as an impediment, see G McCormack and WY Wan, "Model Law on Cross-Border Insolvency Comes of Age: New Times or New Paradigms" (2019) 54 *Texas International Law Journal* 273 at 287–288, noting that under s 2 of the South African Cross-Border Insolvency Act 2000 the designation mechanism has never been exercised, with the result that the Model Law is of no practical effect there, and that art 5 of China's Enterprise Bankruptcy Law 2006 conditions recognition upon treaty or reciprocity.

39 Report of the Insolvency Law Review Committee (Ministry of Law, Singapore, 2013), pp 236–238, as discussed in G McCormack and WY Wan, ibid, at 288.

[56] The protection has been delivered, however, by a particular method, and the method matters more than the quantum. Malaysia does not protect domestic interests by qualifying the recognition obligation with a general discretion. Section 17(2) remains mandatory. It protects them instead by specific, identifiable and published provisions, named categories of excluded entities in Part I of the Schedule, named statutes whose operation may not be interfered with in paragraph 1 of Part II, named regulators whose prior written approval must be obtained in paragraphs 2 to 4, and a prescribed monetary threshold below which the claims of Malaysian creditors must be satisfied before property leaves the jurisdiction. A foreign representative advising on the prospects of recognition in Malaysia can read every one of those provisions in advance and price the risk accordingly.

[57] That is the difference between calibration and unpredictability, and it is what allows Act 877 to be open and protective at the same time. The restrictions are numerous, but they are ascertainable. They do not require the court to form a view about the merits of the foreign system, and they do not expose an applicant to an assessment of national interest made for the first time at the hearing. In that respect Act 877 is more protective of specified domestic interests than either of the jurisdictions examined below, and no less predictable in the manner of that protection.

[58] Two consequences follow from that design. The first concerns the infrastructure gap identified above. On this analysis it is not an absence of protection but a sector to which the chosen method has not yet been extended, and section 34 supplies the means of extending it, on the recommendation of the relevant authority and by an order published in the *Gazette*. The second concerns section 7, and it is the principal submission of this article. A Legislature that has chosen to protect domestic interests through transparent and specific enactment has chosen predictability over discretion. To construe the residual exception broadly would return to section 7 the work that Parliament deliberately placed in provisions which a foreign representative can consult, and would forfeit the very predictability that the method was designed to secure. The balance Malaysia has struck is therefore itself a reason for reading section 7 narrowly.

The procedural rules

[59] That analysis is confirmed, and the design completed, by the procedural rules made shortly after Act 877 came into force. By the

Rules of Court (Amendment) 2026 a new Order 88A was inserted into the Rules of Court 2012, in operation from September 3, 2026. The rules were made by the Rules Committee under section 17 of the Courts of Judicature Act 1964 (Act 91).

[60] An application for recognition is to be made *ex parte* by originating summons, supported by an affidavit which must depose to the matters listed in rule 2(2) and exhibit the documents listed in rule 2(3). That is where the resemblance to an ordinary *ex parte* application ends. Within 14 days of filing, the foreign representative must serve notice of the application on a defined list of persons connected with the debtor, and must cause notice of the filing to be published on the website of the Insolvency Department of Malaysia.[40] At the hearing the foreign representative must satisfy the court that both requirements have been complied with, and any person served, together with any other person who may be affected by the relief sought, may intervene with the leave of the court.[41] Order 88A r 8 extends the same discipline to the resulting orders, namely, notice of every order must be given to the same persons within 14 days, a sealed copy must be served on the debtor, notice must be given to enforcement officers and to any person levying distress where a main proceeding has been recognised or the debtor's property is affected, and notice of every order must be published on the Insolvency Department's website.[42]

[61] The application is therefore *ex parte* in form and *inter partes* in substance. Malaysian creditors and other interested persons receive notice both of the application and of the order, from a published source, and have a route to be heard before recognition is granted. That is not the position in Singapore, where there is no legislative requirement for notification upon a recognition order being made and applications are in practice made *ex parte*, so that a secured creditor may have no

40 Rules of Court 2012, O 88A r 2(4) and (5). The persons to be served are the Malaysian insolvency office-holder acting in relation to the debtor, any receiver or receiver and manager of the debtor's property in Malaysia, any other foreign representative appointed in any other foreign proceedings concerning the debtor of whom the applicant is aware, the parties to any pending proceedings under Malaysian insolvency law relating to the debtor of which the applicant is aware, and any other person the court directs.

41 Ibid, O 88A r 2(6) and (7).

42 Ibid, O 88A r 8, and in particular r 8(2), (3), (5) and (6). By r 8(7), references to property in that rule are to property situated in Malaysia.

ready means of discovering that a stay is in force. Nor is it required by the Model Law, article 14 of which is concerned with notification to foreign creditors of local proceedings rather than with notification to local creditors of a recognition application.

[62] Order 88A is thus a further instance of the method described above. A protection that might have been left to the court's discretion at the hearing has instead been conferred by a published rule which any party may consult in advance. Two further features point the same way. The court is given an express power, exercisable on its own motion, to modify or terminate a recognition order or relief, subject to the foreign representative and the debtor having had an opportunity to be heard.[43] And the affidavit requirements for provisional relief and for relief after recognition compel the applicant to address in advance whether the interests of Malaysian creditors are adequately protected and whether the relief would interfere with the administration of the foreign main proceedings.[44] The questions which section 22 requires the court to consider are put in issue on paper rather than left to emerge at the hearing.

Public policy in Malaysian domestic law

[63] Section 7 does not write on a blank page. "Public policy" is a term of art that Malaysian courts have construed under at least two other statutes, in one case within an UNCITRAL Model Law regime closely analogous to this one. Any expectation that the content of the expression will be developed by the courts case by case therefore rests on a body of doctrine that already exists.

Arbitration: Section 37 of the Arbitration Act 2005 (Act 646)

[64] Section 37(1)(b)(ii) of the Arbitration Act 2005 Act 646 ("Act 646") permits an award to be set aside where it is in conflict with the public

43 Ibid, O 88A r 6, made in aid of ss 17(5), 20(6) and 22(3) of Act 877. The power is subject to the foreign representative and the debtor having had an opportunity to be heard or having consented in writing, and to notice being given to all relevant parties.

44 Ibid, O 88A rr 3(2)(e), (2)(f) and 4(2)(d), which require the applicant to depose as to whether the interests of creditors, including secured creditors and parties to hire-purchase agreements, and other interested persons including where appropriate the debtor, will be adequately protected, and as to whether the relief sought would interfere with the administration of the foreign main proceedings.

policy of Malaysia, and section 37(2) illustrates, without limiting the generality of that provision, two instances:

(a) where the making of the award was induced or affected by fraud or corruption; and

(b) where a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award.[45]

[65] In *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd* ("*Sigur Ros*"),[46] the Court of Appeal set out the approach. The phrase is not defined in Act 877. The section 37(2) illustrations are expressly non-exhaustive, but any other complaint must fall within the genre they establish, the *sui generis* rule applying, and the court should be slow to accede to any suggestion that the recognised and established categories be expanded. Having regard to the commercial and contractual context in which such disputes arise, the ground is to be read narrowly and restrictively and curial intervention used sparingly. The threshold is correspondingly high. It should be immediately obvious, or at least fairly rapidly apparent, that there has been such a conflict, and the court must be compelled to agree or a strong case made out, failing which the contractual arrangements of the parties must be maintained.[47]

[66] The Court of Appeal then made the distinction that matters most for present purposes. Public policy in this context is not the concept known to public law. An award is not set aside because it is irrational or unreasonable in the *Wednesbury* sense. The concept is to be taken in the higher sense, where some fundamental principle of law and justice is engaged, some element of illegality is present, where enforcement would involve clear injury to the public good, or where the integrity of the court's process and powers would thereby be abused.[48]

[67] One further passage is of particular value. The Court of Appeal endorsed the treatment of the question in *MMC Engineering Group*

45 Act 646, s 37(1)(b)(ii) and (2).

46 [2018] 3 MLJ 608, CA at [26] and [27]. The Federal Court dismissed the appeal and affirmed the order of the Court of Appeal in *Master Mulia Sdn Bhd v Sigur Ros Sdn Bhd* [2020] 6 MLRA 51; [2020] 12 MLJ 198, FC. The Federal Court differed from the Court of Appeal at [34] and [35] of the latter's judgment, holding that s 37(1) confers a residual discretion not to set aside an award even where a ground is established, but did not address the passages relied upon here.

47 [2018] 3 MLJ 608, CA at [31] and [32].

48 Ibid, at [33].

Bhd v Wayss & Freytag (M) Sdn Bhd[49] and *The Government of India v Cairn Energy India Pty Ltd*,[50] in which the High Court surveyed the authorities of Singapore, Australia, New Zealand, Hong Kong, the UK and Canada and concluded that the interpretation of what may amount to a conflict with public policy is at the end of the day quite similar in the various jurisdictions, and especially so among those that have adopted Model Law arbitration regimes.[51]

[68] That conclusion is the bridge, but it must be crossed with care. Malaysian courts have already held, in the context of one UNCITRAL Model Law instrument, that the content of Malaysian public policy converges with the international standard, and there is no principled reason why the same should not hold for another. The qualification is that the Guide treats public policy in matters of international cooperation as more restrictive than purely domestic public policy.[52] That qualification strengthens the argument for the reasons explained below. The contract category considered later does not transpose at all, and is used only to show the restraint which Malaysian courts bring to the expression, not to supply content for section 7.

[69] There is a further and more direct parallel. Section 37(1)(b)(ii) of Act 646 does not contain the word "manifestly" either. It speaks simply of an award in conflict with the public policy of Malaysia.[53] Yet the Malaysian courts have not treated that unqualified language as importing a low threshold. They have held the opposite, requiring that the conflict be immediately obvious or fairly rapidly apparent, that the categories not be expanded, and that the concept be taken in the higher sense. Malaysian law therefore already contains the answer to

49 [2015] 10 MLJ 689.

50 [2014] 9 MLJ 149.

51 Ibid, at [28] and [29], referring to *MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd* and *The Government of India v Cairn Energy India Pty Ltd & Ors*. The Court of Appeal recorded that both decisions were affirmed on appeal and that in the latter leave to appeal to the Federal Court was refused.

52 UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (United Nations, New York, 2014, Sales No E.14.V.2), para 103, p 52, available at https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf (accessed September 15, 2026). See also para 30, p 28.

53 Act 646, s 37(1)(b)(ii), which refers simply to an award "in conflict with the public policy of Malaysia". The International Arbitration Act 1994 (Singapore) is to the same effect, and the Singapore courts have likewise construed the unqualified expression restrictively: see *Re An Arbitration between Hainan Machinery Import and Export Corp and Donald & McArthy Pte Ltd* [1995] 3 SLR(R) 354.

the question raised by section 7. The absence of the qualifying adverb does not, of itself, lower the standard. That is not an inference from foreign practice. It is the settled construction of an unqualified public policy exception in Malaysia's own statute book.

[70] It may be objected that the two provisions operate in different fields, and so they do. Section 37(1)(b)(ii) of Act 646 is an exception to the finality of an award for which the parties themselves bargained, and the restraint shown in its construction is explained in part by that fact. On the other hand, section 7 of Act 877 protects no finality. It is the gateway through which comity is extended to a foreign proceeding. The reliance placed here on the arbitration authorities does not, however, depend upon finality, and it is of two sorts. The first is content, for the catalogue in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor*[54] describes what the public policy of Malaysia consists of, and that content is not supplied by the procedural vehicle in which the question arises. The second is the construction of unqualified language, which is a proposition about how Parliament's words are read and not about what the provision protects.

[71] The difference in field might be thought to favour a wider reading of section 7. It does the reverse. Section 37 of Act 646 is the domestic supervisory jurisdiction of the Malaysian courts over an award made in Malaysia, and the wider domestic conception of public policy is in principle available there. Section 7 of Act 877 is an instrument of international cooperation, where the Guide requires the narrower conception. If the courts have declined to read an unqualified public policy exception expansively in the field where the wider conception was open to them, there is less reason, and not more, to read section 7 expansively in the field where the narrower one governs. The absence of party autonomy does not argue for a freer hand. It means only that the restraint required under section 7 rests upon a different foundation, that of comity and of the modified universalism which underlies the Model Law. The high threshold contended for here does not in any event rest upon the arbitration analogy. It rests upon section 2(2) of Act 877, upon the Guide and *The Judicial Perspective*, upon the reasoning in *Re PT Garuda Indonesia (Persero) Tbk*, and upon the manner in which Act 877 has enacted its specific restrictions beneath section 7. The arbitration authorities are corroborative.

54 [2019] 2 MLJ 413, FC.

[72] The position in the Federal Court must be noted, and it strengthens rather than qualifies what has been said. The "very low threshold" formulation drawn from *Sigur Ros* and from *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd*[55] came before the Federal Court in *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and Another Appeal*,[56] which held that it is the correct test.[57] The same panel took a consistent stand in *Master Mulia Sdn Bhd v Sigur Ros Sdn Bhd*,[58] the appeal from the decision of the Court of Appeal considered above.[59] The court explained, however, what the expression means. The threshold under section 37 is "very low" only relative to that under section 42. The grounds in section 37 are exhaustive, and they are to be construed narrowly because they represent exceptions to the finality of an award.[60]

[73] That narrow and restrictive construction was said to be important in particular for the public policy ground, which the Federal Court had earlier interpreted in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor*[61] as encompassing only violations of the most basic notions of morality and justice, violations offending the fundamental principle of law and justice, some element of illegality, cases where enforcement involves clear injury to the public good, and cases where the integrity of the court's process and powers would thereby be abused. The court added a requirement of materiality, namely that the injustice must have had real effect and must have prejudiced the basic rights of the applicant.[62] The exposition relied upon above is therefore the settled position of the Federal Court.

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55 [2016] MLJU 64; [2016] 2 MLJ 697, CA.

56 [2021] 1 MLJ 1, FC.

57 Ibid, at [137]–[144], *per* Abdul Rahman Sebli FCJ. The first leave question was answered in the affirmative. The Federal Court holding that the threshold stated in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* and *Sigur Ros* is the correct test.

58 [2020] 6 MLRA 51; [2020] 12 MLJ 198, FC.

59 Ibid, at [58], *per* Vernon Ong FCJ, agreeing with the view expressed by the Court of Appeal that the threshold under s 37 is very low as compared with that under s 42 of Act 646.

60 *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and Another Appeal* [2021] 1 MLJ 1, FC at [141] and [142].

61 [2019] 2 MLJ 413, FC.

62 *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and Another Appeal* [2021] 1 MLJ 1, FC at [143], applying *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor*, ibid, at [58], *per* Ramly Ali FCJ. The Federal Court there held that the ground may be invoked only in a deserving case, namely where there appears a violation of the most basic notions of morality and justice, and that it covers

[74] One further feature of that jurisprudence bears directly on section 7. The Federal Court has held that the opening words of section 37(1), that an award "may be set aside", are plain and unambiguous and preserve a residual discretion not to set aside an award even though a ground for setting aside is made out. The discretion falls to be exercised upon an evaluation of relevant factors, among them the seriousness of the breach, its materiality and whether it affected the outcome.[63] Section 7 is framed in the same permissive terms. It provides that nothing in Act 877 shall *prevent* the court from refusing to act, and so confers a liberty rather than imposes a duty. A conclusion that recognition or relief would be contrary to the public policy of Malaysia does not therefore compel refusal. The court retains a discretion as to what, if anything, follows, and may in an appropriate case refuse only the particular relief that offends rather than recognition itself.

Contract: Section 24(e) of the Contracts Act 1950 (Act 136)

[75] The second category arises under section 24(e) of the Contracts Act 1950 ("Act 136"), which renders unlawful a consideration or object that the court regards as immoral or opposed to public policy.

[76] In *Dato' Shazryl Eskay bin Abdullah v Merong Mahawangsa Sdn Bhd*,[64] the High Court observed that Act 136 does not define the expressions

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fundamental principles of law and justice in substantive as well as procedural respects, including instances where upholding the award would shock the conscience, be clearly injurious to the public good, or be wholly offensive to the ordinary reasonable and fully informed member of the public. The expressions "patent injustice", "substantial injustice" and "manifestly unlawful and unconscionable" do not denote injustice which is more than *de minimis*; what is required is that the injustice had real effect and had prejudiced the basic rights of the applicant, following *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28; [2007] 3 SLR(R) 86.

63 *Master Mulia Sdn Bhd v Sigur Ros Sdn Bhd* [2020] 6 MLRA 51; [2020] 12 MLJ 198, FC at [46] and [53], *per* Vernon Ong FCJ, where the Federal Court so held and stated eight guiding principles for the exercise of the discretion, the second, fifth and seventh of which turn upon the seriousness of the breach, its materiality and its possible effect on the outcome. See also *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and Another Appeal* [2021] 1 MLJ 1, FC at [138]–[140], adopting the factors identified in *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] NZSC 150; [2015] 3 NZLR 644.

64 [2014] 2 MLJcon 43, HC.

"public policy" or "opposed to public policy", that the expressions are incapable of precise definition, that neither the nature of things nor the circumstances are exhaustive, and that public policy is not the policy of a particular government but connotes what concerns the public good and the public interest.[65] Adopting the Indian authorities on the provision *in pari materia*, the High Court recorded the following propositions:

(a) that reference to public policy requires taking into account the interests of persons other than the parties;

(b) that the doctrine should be invoked only in clear and incontestable cases of harm to the public;

(c) that although the heads are not closed it is not advisable, in the interests of the stability of society, to attempt to discover new ones;

(d) that the duty of the court is to expound and not to expand the doctrine; and

(e) that harm to the public must be substantially incontestable and must not depend upon the idiosyncratic inferences of a few judicial minds.[66]

[77] Two features of this category make it useful beyond its subject-matter. First, it concerns a second Malaysian statute that employs the term without defining it, which meets any suggestion that the course taken in section 7 is unusual. Second, it calls for the same restraint as in *Sigur Ros*, arrived at independently and from a different starting point.

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65 Ibid, at [13]. The decision was reversed on appeal in *Dato' Shazryl Eskay bin Abdullah v Merong Mahawangsa Sdn Bhd & Anor* [2014] 3 MLJ 892, CA, but on the construction of the letter of undertaking. The Court of Appeal did not address s 24(e) of Act 136 or the public policy reasoning relied upon here.

66 *Dato' Shazryl Eskay bin Abdullah v Merong Mahawangsa Sdn Bhd & Anor* [2014] 2 MLJcon 43, HC at [14], adopting *Halsbury's Laws of India*, Vol 11 (Butterworths), on s 23 of the Indian Contract Act 1872, which the High Court treated as *in pari materia* with s 24 of Act 136, and the Indian and English authorities there cited, in particular *Gherulal Parakh v Mahadeodas Maiya* 1959 Supp (2) SCR 406; AIR 1959 SC 78; *Central Inland Water Transport Corp Ltd v Brojo Nath Ganguly* AIR 1986 SC 1571; (1986) 3 SCC 156; and *Janson v Driefontein Consolidated Mines Ltd* [1900–03] All ER Rep 426, HL.

Arbitrability: Section 4(1) of the Arbitration Act 2005 (Act 646)

[78] The third category runs in the opposite direction, and it would be wrong to suppress it.

[79] Section 4(1) of Act 646 provides that a dispute which the parties have agreed to submit to arbitration is not arbitrable where the arbitration agreement is contrary to public policy or the subject-matter of the dispute is not capable of settlement by arbitration.[67] In *Khong Yoon Loong v Asia Plantation Capital Pte Ltd*[68] and in *Samalaju Industries Sdn Bhd v Malaysian Phosphate Venture Sdn Bhd*,[69] Mohd Arief Emran Arifin J reviewed the authorities. A dispute will generally not be arbitrable if it involves an issue of public policy, public rights or the interests of third parties, or where the dispute is clearly covered by a statutory provision providing for inalienable access to the courts.[70] Where a comprehensive statutory code governs the rights in question, an attempt to contract out of that code is void as contrary to public policy. The point is illustrated by the treatment of statutory charges under the National Land Code.[71] The insolvency material is engaged directly, the category recognising that disputes arising from the operation of statutory insolvency provisions belong to the court rather than to a private tribunal.[72]

[80] The same line is drawn in Singapore. In *Larsen Oil and Gas Pte Ltd v Petroprod Ltd*[73] the Court of Appeal held that the drafters of the arbitration legislation regarded arbitrability as subject to public interest considerations, and recognised insolvency as an area replete with public policy considerations too important to be settled by parties privately through the arbitral mechanism. The distinction drawn was between claims stemming from the company's pre-insolvency rights and obligations and those arising only upon the onset of insolvency

67 Act 646, s 4(1).
68 [2024] MLJU 3754.
69 [2024] MLJU 2656, HC.
70 *Khong Yoon Loong & 161 Ors v Asia Plantation Capital Pte Ltd & 24 Ors* [2024] MLJU 3754, HC at [63] and [64].
71 *Samalaju Industries Sdn Bhd & Anor v Malaysian Phosphate Venture Sdn Bhd* [2024] MLJU 2656, HC. The reasoning substantially overlaps with that in *Khong Yoon Loong & 161 Ors v Asia Plantation Capital Pte Ltd & 24 Ors*, ibid.
72 *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805, SC.
73 [2011] SGCA 21; [2011] 3 SLR 414.

through the operation of the insolvency regime, the latter being non-arbitrable even where the parties expressly agreed otherwise.[74]

[81] Here, then, public policy operates expansively. It is invoked not to restrain the court from interfering but to prevent the displacement of a statutory scheme which exists for the protection of persons who are not parties to the private bargain.

Islamic finance: The binding ruling

[82] The fourth category has no counterpart in any other adopting jurisdiction, and it is the hardest case this article has to meet. Where a question concerning a Shariah matter arises in proceedings relating to Islamic financial business, a Malaysian court does not weigh expert opinion. Section 56 of Act 701 requires the court either to take into consideration a published ruling of the Shariah Advisory Council or to refer the question to the Council, and section 57 makes any ruling so made binding upon the court. Section 58 gives the Council's ruling precedence over that of an institution's own Shariah body or committee.[75] Sections 31ZN to 31ZP of Act 498 make corresponding provision for the Islamic capital market, the last of them giving the Council's ruling precedence over that of a registered Shariah adviser.[76]

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74 Andrew Chan Chee Yin, Jonathan Chan Tuan San and Jo Tay Yu Xi, "Cross-Border Insolvency and its Impact on Arbitration" (2014) 26 *Singapore Academy of Law Journal* 999 at 1032–1033, paras 91–93, discussing *Larsen Oil and Gas Pte Ltd v Petroprod Ltd*, ibid, at [30]. The authors note at para 94 that how a Singapore court or tribunal should treat claims arising by reason of a foreign insolvency has not been worked out.

75 Act 701, ss 55–58. By s 56(1), where in any proceedings relating to Islamic financial business before any court or arbitrator a question arises concerning a Shariah matter, the court or arbitrator shall take into consideration any published ruling of the Shariah Advisory Council or refer the question to the Council for its ruling. By s 57, any ruling so made is binding on the court or arbitrator making the reference. By s 58, where a ruling of an institution's own Shariah body or committee differs from that of the Council, the Council's ruling prevails.

76 Act 498, ss 31ZN–31ZP, inserted by Act A1489/2015. By s 31ZN, where a question concerning a Shariah matter in relation to Islamic capital market business or transactions arises in any proceedings before any court or arbitrator, the court or arbitrator shall take into consideration any ruling of the Shariah Advisory Council or refer the matter to the Council for its ruling. By s 31ZO, any ruling so made is binding on the court or arbitrator. By s 31ZP, where a ruling given by a registered Shariah adviser differs from that of the Shariah Advisory Council, the ruling of the Council prevails. A registered Shariah adviser is defined by s 31ZP(2) as a person registered under guidelines issued by the Commission under s 377 of Act 671.

[83] That the obligation is binding rather than advisory is not open to argument. In *JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Berhad*[77] the Federal Court held that sections 56 and 57 are not in breach of the Federal Constitution, rejecting the contention that they vest judicial power in the Council or offend the separation of powers.[78] The mechanism is therefore not merely statutory but constitutionally tested at the highest level.

[84] The counterparty is under a corresponding duty. Section 28 of Act 759 requires an institution to ensure at all times that its business and activities comply with Shariah, deems compliance with a ruling of the Council to be compliance with Shariah, obliges an institution aware of non-compliance to cease the activity immediately and to rectify it, and makes contravention an offence.[79] The institution itself will not be the debtor before the court, since institutions under Act 759 are excluded from Act 877 altogether. The case contemplated here is the ordinary trading company within the Act whose Islamic financing sits on the books of an institution excluded from the Act.[80]

[85] Suppose, then, that a foreign main proceeding is recognised and that the relief sought would give effect to a restructuring which recharacterises sukuk as conventional indebtedness, or which treats Islamic financing in a way that a binding ruling of the Council forbids. The court would be asked to make an order inconsistent with a ruling by which the court itself is bound, and to require of a Malaysian institution conduct which section 28 forbids on pain of

77 [2019] MLJU 278, FC.

78 Ibid. The reserved questions, which included whether ss 56 and 57 vest judicial power in the Shariah Advisory Council and offend the separation of powers, were each answered in the negative.

79 Act 759, s 28. By subsection (1) an institution shall at all times ensure that its aims and operations, business, affairs and activities are in compliance with Shariah; by subsection (2) compliance with a ruling of the Shariah Advisory Council is deemed to be compliance with Shariah; by subsection (3) an institution aware of non-compliance must immediately notify the bank and its Shariah committee, immediately cease the activity, and submit a rectification plan within 30 days; and by subsection (5) contravention of subsection (1) or (3) is an offence.

80 Act 877, s 3(2) read with Sch, Pt I. See also Act 671, s 316D, by which a reference to a "borrower" in Div 4 of Pt VI is construed as a reference to an issuer of *sukuk* or of an Islamic structured product.

criminal liability. The objection is not that the foreign scheme differs from the Malaysian one, for the Guide says that a difference between insolvency schemes does not of itself engage the exception. The case is closer to *In re Toft*, one of the few reported instances in which the exception has succeeded, where relief was refused because the order sought would have required conduct that was criminal under the law of the receiving state.

[86] It does not follow that a court faced with such an application is confined to a choice between granting the relief and refusing recognition. Section 56 of Act 701 permits the question to be referred to the Council before anything is decided, and neither the timing of a reference nor the preservation of the assets stands in the way of that course. Where the question arises before recognition, an application for recognition is to be determined at the earliest possible time, but provisional relief under section 19 is available from the filing of the application until it is determined, and must in any event be consistent with any order that has been made or may be made under Act 877 or any other written law, so that a reference need not leave the foreign representative without protection or the assets without preservation.[81] Where the question arises after recognition, as in the example given above, the stay and the suspension under section 20(1) are already in force, so that the property of the debtor is protected while the reference is answered. Section 21(1) then permits the court to grant any appropriate relief as it thinks fit, and so to grant part of what is sought while withholding the part that offends.[82] When the ruling is given, section 7 confers a liberty and not a duty, and the court may refuse the particular order or relief that offends while leaving recognition itself undisturbed. Order 88A,

81 Act 877, ss 17(1) and 19(1)–(3). By s 17(1), an application for recognition is to be determined at the earliest possible time. By s 19(1), provisional relief may be granted from the time the application is filed until it is determined; by s 19(2), such relief must be consistent with any order that has been made or may be made under Act 877, Act 777, Act 441 or any other written law; and by s 19(3), it terminates upon the determination of the application unless extended under s 21(1)(f).

82 Act 877, s 20(1), by which the commencement or continuation of individual actions, any execution against the property of the debtor, and the right to transfer, encumber or otherwise dispose of that property are respectively stayed or suspended upon recognition of foreign main proceedings; and s 21(1), by which the court may grant any appropriate relief as it thinks fit upon recognition, whether of main or non-main proceedings.

moreover, allows the court on its own motion to modify or terminate recognition or relief, after hearing the foreign representative and the debtor, should the position later change.[83] The hardest case therefore falls to be handled by the same method as the rest of the Act, namely, the specific provisions do the work, and the residual exception is confined to the precise relief which cannot be granted.

[87] That category accordingly qualifies, but does not displace, what has been said above. The convergence for which this article contends is convergence as to threshold and method, not as to the catalogue of fundamental principles, which remains national and which the Guide expressly leaves to the enacting state. Malaysia has a category of fundamental principle that is statutorily fixed and judicially binding, and which no other adopting state possesses. A court applying section 7 at the international standard would still have to give that category its due. Nothing in this article should be read as suggesting how such a case ought to be decided. The purpose of raising it is to identify a question which Act 877 leaves open and which is likely to arise.

[88] Of the four categories considered in Malaysian domestic law, two point towards restraint, and they do so in materially identical terms, namely:

(a) the categories are not closed but they should not be expanded;

(b) the doctrine is engaged only where harm to the public is clear and incontestable; and

(c) the court expounds and does not expand.

[89] The third category is expansive, but it is expansive in a defined situation, namely where a comprehensive statutory scheme protecting third parties would otherwise be displaced by private arrangement.

[90] The obvious objection to a narrow construction of section 7 is that cross-border insolvency is the third situation and not the first two. Insolvency is a collective proceeding. Recognition of a foreign main proceeding stays individual actions and suspends dealings

83 Rules of Court 2012, O 88A r 6, made in aid of ss 17(5), 20(6) and 22(3) of Act 877. The power is subject to the foreign representative and the debtor having had an opportunity to be heard or having consented in writing, and to notice being given to all relevant parties.

with the debtor's property and the persons affected are creditors who are not before the court. If Malaysian courts treat the displacement of a comprehensive statutory scheme as engaging public policy, the recognition of a foreign proceeding that displaces the Malaysian distribution scheme is on the face of it such a case.

[91] The answer is that Act 877 has itself provided for that concern, and has provided for it by specific enactment rather than by leaving it to the residual exception. The collective interest that would otherwise be vindicated through public policy is secured by section 13 as to ranking, by section 21(2) and (3) as to the export of assets, by section 22 as to adequate protection, and by sections 28 to 32 as to concurrent proceedings. The expansive categories of the domestic doctrine are thus not excluded from cross-border insolvency. It has been codified within it. That is a further reason why the residual section 7 need not, and should not, be made to carry the same weight.

The comparative position

[92] The comparison undertaken in this part is confined to the UK and Singapore, together with the text of the Model Law. The confinement is deliberate. Both are common law jurisdictions whose corporate insolvency legislation share a lineage with Malaysia's legislation. Both enacted the Model Law as a schedule to a principal statute rather than by re-enacting it in a freestanding form; and the decisions of both are regularly cited in Malaysian courts. They are, accordingly, the two adopting jurisdictions against which the Malaysian modifications may most usefully be measured.

[93] References below to articles of the two instruments are to the Model Law as enacted in each, and not to the Model Law *simpliciter*.

Exclusion from application

[94] The three jurisdictions took three different routes.

[95] Singapore delegated. Article 1(2) of the Third Schedule provides only that the Model Law does not apply to proceedings concerning such entities or classes of entities as the Minister may prescribe by order in the *Gazette*. Nothing is named in the instrument itself.

[96] The UK enumerated, and the list is not confined to the financial sector. Article 1(2) of Schedule 1 to the CBIR excludes proceedings

concerning water and sewerage undertakers under the Water Industry Act 1991 and Scottish water under the Water Industry (Scotland) Act 2002. It protected railway companies under the Railways Act 1993, air traffic licence companies under the Transport Act 2000, public private partnership companies under the Greater London Authority Act 1999, protected energy companies under the Energy Act 2004, and the Channel Tunnel concessionaires under the Channel Tunnel Act 1987, in addition to building societies, credit institutions, insurers and reinsurers.[84]

[97] Malaysia enumerated, but only within the financial sector, as described above. Every one of the 17 categories in Part I of the Schedule is a financial services or Labuan entity. There is no exclusion for entities carrying on essential infrastructure functions in energy, water, transport, telecommunications or defence.

[98] The contrast is material. The UK excluded by name undertakings carrying on essential infrastructure functions, and did so by reference to the subject-matter of the special administration regimes governing those industries rather than by reference to the ownership of the undertaking. The Malaysian exclusions are confined to the financial sector. The consequence is that a class of case which falls outside the CBIR altogether can, in Malaysia, be dealt with only under section 7.

The restriction provisions and the recognition decision

[99] Article 1(4) of Schedule 1 to the CBIR provides that the court shall not grant any relief, or modify any relief already granted, or provide any cooperation or coordination, to the extent that this would be prohibited under Part 7 of the Companies Act 1989, Part 3 of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 or Part 3 of the Financial Collateral Arrangements (No 2) Regulations 2003, or would interfere with the rights of a collateral taker under Part 4 of the last of those instruments.

[100] Article 1(3) of the Third Schedule to the IRDA is to like effect, and in materially the same opening words. It applies by reference to the IRDA itself, the Banking Act 1970, the Deposit Insurance and Policy Owners' Protection Schemes Act 2011, the Financial Services and

84 CBIR, Sch 1, art 1(2).

Markets Act 2022, the Insurance Act 1966, the International Interests in Aircraft Equipment Act 2009, the Payment and Settlement Systems (Finality and Netting) Act 2002 and the Securities and Futures Act 2001, together with any other written law prescribed by the Minister.

[101] Section 5(2) of Act 877 is the Malaysian analogue and its subject-matter closely tracks the Singapore list. It differs in one respect. The opening words of article 1(4) of the CBIR and of article 1(3) of the IRDA are confined to relief, the modification of relief, cooperation and coordination. Neither reaches recognition. Section 5(2) provides that the court shall not recognise any foreign proceedings, grant any relief, or modify any relief already granted, or provide any cooperation or coordination.

[102] Malaysia has therefore brought the financial stability bar forward to the recognition decision itself. In the UK and in Singapore a foreign proceeding concerning an entity within the prohibition may still be recognised, the consequences of recognition being constrained by the prohibition. In Malaysia recognition is itself barred. Given that recognition under the Model Law scheme is a gateway and not a remedy, the extension is of some consequence.

The regulator gateway

[103] Paragraphs 2 to 4 of Part II of the Schedule, described above, have no analogue in either of the two comparators considered here. Neither the CBIR nor the IRDA contains any provision conditioning recognition, relief or cooperation upon the prior written approval of a financial regulator. No comparable mechanism has been identified in the wider body of enacting legislation, but the comparison made here is confined to the UK and Singapore, and the claim is accordingly put no higher than that.

The absence of a forum filter

[104] A final divergence operates at the front end of the process. Article 4(2) of Schedule 1 to the CBIR confers jurisdiction on the court of a part of Great Britain where the debtor has a place of business, in the case of an individual a place of residence, or assets situated in that part, or where the court considers for any other reason that it is the appropriate forum. Article 4(3) requires the court, in considering

whether it is the appropriate forum to hear a recognition application, to take into account the location of any court in which a proceeding under British insolvency law is taking place and the likely location of any future such proceedings. Article 4(2) of the Third Schedule to the IRDA is to substantially the same effect.[85]

[105] Section 5(1) of Act 877 provides only that the functions in relation to the recognition of foreign proceedings and cooperation with foreign courts are to be performed by the High Court in Malaya or the High Court in Sabah and Sarawak as the case may be. It identifies the competent court and stops there. There is no connecting factor and no appropriate forum test. Once the conditions in section 17(2)(a) to (d) are satisfied the court shall recognise the foreign proceedings by making a recognition order, subject only to section 5(2) and section 7.

[106] The consequence is not merely theoretical. Where a debtor has no place of business in Malaysia, no assets here, and no other connection with the jurisdiction, a court in Great Britain or in Singapore may decline to entertain the application on that ground alone. In Malaysia there is no such ground. One qualification should nonetheless be entered. The applicant must depose to, and exhibit evidence of, the debtor's centre of main interests or establishment in the state where the foreign proceeding is taking place,[86] so that the connecting factor relied upon is before the court from the outset and open to challenge by an intervener under Order 88A r 2(7) of the Rules of Court 2012. The absence of a forum filter therefore leaves the court without a discretion to decline, but it does not leave the court without information. Subject to that, the only discretionary control available remains section 7.

The cumulative effect

[107] The modifications examined in this part were made independently of one another, and their combined effect is more discriminating than a simple tally of restrictions would suggest.

85 Ibid, Sch 1, art 4(2) and (3); IRDA, Third Sch, art 4(2).
86 Rules of Court 2012, O 88A r 2(2)(g) and (3)(c).

	Model Law	CBIR (Great Britain)	IRDA, Third Sch (Singapore)	Act 877 (Malaysia)
"Manifestly" in the public policy exception	Yes (Article 6)	Yes (Article 6)	No (Article 6)	No (Section 7)
Object of the exception	Action governed by the Model Law	Action governed by the Model Law	Action governed by the Model Law	Any action, order or relief under Act 877
Uniformity clause	Article 8	Article 8	Article 8	Section 2(2)
Excluded entities	Not specified	Enumerated, including infrastructure (Article 1(2))	Delegated to Minister (Article 1(2))	Enumerated, financial and Labuan only (Section 3(2); Schedule, Part I)
Restriction provision reaches recognition	Not applicable	No (Article 1(4))	No (Article 1(3))	Yes (Section 5(2))
Regulator prior approval gateway	None	None	None	Schedule, Part II, paragraphs 2 to 4
Forum or connecting factor filter	Not specified	Article 4(2), (3)	Article 4(2)	None

[108] The direction of those choices is not uniform, and it is worth being precise about which way each cuts. The omission of "manifestly" lowers the apparent threshold at which section 7 may be invoked. The narrower list of excluded entities and the absence of a forum filter each enlarge the class of case in which the court, having no other means of declining, must decide the matter under section 7. But the two remaining choices operate in the opposite direction. Extending the section 5(2) bar to the recognition decision itself, and conditioning recognition upon the prior written approval of a regulator, each remove cases from the reach of section 7 altogether, because recognition is

barred before any question of public policy is reached. The wider object of section 7, for the reasons given above, changes nothing either way.

[109] The pattern that emerges is therefore not one of uniform expansion. Malaysia has lowered the threshold of the residual exception while diverting much of the work that might otherwise fall to it into rules which operate automatically and in advance. That is consistent with the design described above. Where Parliament identified a domestic interest with precision, it protected it by a specific bar and removed the question from the court's discretion. Where it did not identify the interest, as with infrastructure, or did not provide a control at all, as with forum, section 7 is all that remains. The remedy in each case lies in the same method that produced the specific bars, and not in a broader construction of section 7.

Conclusion

[110] Act 877 lowers the textual threshold of the residual public policy exception by omitting "manifestly", and states the scope of that exception more fully than the Model Law without, for the reasons already given, enlarging it. It withholds two controls that both comparators retain, a connecting factor requirement and a sectoral exclusion reaching beyond the financial sector, so that once the conditions of section 17(2) are met no discretion to decline recognition remains other than under section 7. At the same time it removes a class of case from section 7 altogether, by barring recognition outright where the Schedule applies and by conditioning it upon regulatory approval where a regulator has intervened.

[111] Were the first of those movements allowed to reinforce the second, the result would be a jurisdiction in which recognition is nominally mandatory and practically discretionary, decided case by case under a standard Act 877 does not define. That would sit uneasily with the objectives stated in the Preamble, which include greater legal certainty for trade and investment.

[112] The outcome is avoidable on Act 877's own terms. Section 2(2) controls, the uniformity clause governing the construction of the Act as a whole, including section 7. An interpretive command applying to every provision is not displaced by the omission of a single adverb

from one. The closest comparator supplies the better answer. Singapore made the identical omission, and although its courts have divided upon the consequence, the later and fuller consideration holds that the omission works no reduction in the standard, for reasons resting on the UNCITRAL materials, the purposes of the Model Law and the uniformity clause itself. The domestic doctrine is already settled and already restrained, section 37 of Act 646 and section 24(e) of Act 136 each confining an unqualified public policy exception to cases of clear and substantially incontestable harm, and the former converging expressly with the Model Law jurisdictions. And the specificity of the Schedule tells against expansion. Where a Legislature has enumerated its public interest carve outs to that degree, and has provided in section 34 a standing mechanism for adding to them, the residual exception is naturally read as residual.

[113] Underlying each of those is the manner in which Parliament chose to protect domestic interests. Malaysia accepted the international framework without a reciprocity requirement and protected domestic business by transparent and specific enactment, so that a foreign representative may ascertain in advance what will and will not be permitted. A broad construction of section 7 would return to an open-textured discretion the work that Parliament placed in provisions capable of being consulted, and would forfeit the predictability the method was designed to secure.

[114] This article proposes three recommendations. First, no statutory definition is required, and there is much to be said for leaving the expression undefined as Act 646 and Act 136 leave it. What is needed is early judicial articulation, on a suitable occasion, that section 7 is to be read at the international standard and that the threshold is not lowered by the omission of "manifestly". Secondly, the gap in the first layer is better closed by the first layer than by section 7, by an order under section 34 adding the essential infrastructure sectors to Part I of the Schedule, as the UK has done. Thirdly, the forum-shopping concern is mitigated by Order 88A but not answered, and a connecting factor requirement of the kind found in article 4 of both comparators should be considered when Act 877 is next reviewed.

[115] Act 877 has been in operation only since August 28, 2026 and applies only to proceedings commenced on or after that date. No case

has yet come before the Malaysian courts in which section 7 falls to be construed. The first to do so will be of considerable importance, and the argument of this article is that the Act, properly read as a whole, does not require the wide construction that its most conspicuous departure from the Model Law appears at first sight to invite.

Malaysia: Judicial Duty in the Digital Justice System

by

*Dr. Teoh Shu Yee**

Introduction: Justice in this digital age

[1] In today's rapidly evolving world, technology is permeating every aspect of society, including the legal field.[1] The Malaysian Judiciary faces the challenge of adapting to these changes in the digital justice system while maintaining its judicial duty of upholding the rule of law. One significant transformation is the rise of artificial intelligence ("AI") in legal processes, as seen in the courts of Sabah and Sarawak, where AI is being applied for sentencing in drug possession under section 12(2) of the Dangerous Drugs Act 1952 due to the availability of comprehensive datasets.[2]

[2] AI offers a solution to long-standing issues such as inconsistent and inefficiency in sentencing. Judges can use AI recommendations to determine sentencing with no necessity for prosecutors and the defence to submit past court decisions for consideration in sentencing. However, these AI recommendations are not binding. YAA Tan Sri Dato' Amar Abang Iskandar, Chief Judge of Sabah and Sarawak (as he then was) emphasised that judges retain full discretion and authority, ensuring that AI serves only as a reference. Currently, AI evaluates factors such as employment status, age, marital status, nationality, gender and

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* PhD, The National University of Malaysia (UKM); Master of Criminal Justice (MCJ), University of Malaya; LLB (Hons), Multimedia University Melaka (MMU); currently Magistrate, Magistrates' Court of Alor Gajah, Malacca. The contents here are strictly the author's own views and are not intended to represent that of the Malaysian Judiciary.

1 M McLuhan, *Understanding Media: The Extensions of Man* (London: MIT Press, 1965), pp 71–75.

2 e-Kehakiman Sabah and Sarawak, "Artificial Intelligence (AI)" (January 22, 2021), available at https://ekss-cmsc.kehakiman.gov.my/portals/web/home/article_view/0/5//1 (accessed October 22, 2024).

past acquittals.[3] Despite AI's benefits in improving efficiency, human judgment remains irreplaceable in sentencing decisions.

[3] As technology continues to advance, the Judiciary duty must evolve and adapt to the changes. The rise of cyberspace has introduced new challenges, from hacking to intellectual property theft, while the era of big data has generated vast amounts of information, with many disputes never reaching the courts. Issues like overcharges, credit-report errors, online harassment and conflicts in the sharing economy often go unaddressed by the traditional legal system. Given this, there is no reason not to harness the power of online dispute resolution ("ODR") to address and prevent the challenges faced by the public today.[4] To ensure justice in this digital age, it is important to develop tools or systems as powerful as the technologies driving these modern conflicts.

Judicial duty and independence

[4] Globally, digital justice initiatives are gaining recognition as judicial independence plays a crucial role. Structurally and instrumentally, judicial independence ensures impartial decision making, free from AI influence and personal interests. Public confidence in the Judiciary depends on the belief that judicial decisions are based on law and facts. As emphasised by Tun Tengku Maimun, the former Chief Justice of Malaysia, judges must remain vigilant about potential misuse of AI tools by lawyers and litigants, underscoring the need for robust governance frameworks to regulate AI use in the legal field.[5] Judges must maintain impartiality in carrying out their judicial duty by evaluating all presented arguments fairly until the evidence proves otherwise.

3 Ming En Liew, "How Courts in Sabah and Sarawak are Sentencing With the Help of AI" , GovInsider (November 24, 2021), available at https://govinsider.asia/intl-en/article/how-courts-in-sabah-and-sarawak-are-sentencing-with-the-help-of-ai-abang-iskandar-malaysia (accessed October 22, 2024).

4 Ethan Katsh and Orna Rabinovich-Einy, "Digital Justice: Introduction" (2016) 3 IJODR 102.

5 V Anbalagan, "Tech in Courts Must Aid the Poor in Access to Justice, Says Top Judge", FMT (October 13, 2024), available at https://www.freemalaysiatoday.com/category/nation/2024/10/13/tech-in-courts-must-also-aid-the-poor-in-access-to-justice-says-chief-justice/ (accessed October 22, 2024).

[5] In Malaysia, several digital justice systems have been adopted, such as e-case management, audio and video recordings of court proceedings (Voice Recording to Text System), remote hearings, online publication of judgments and the Artificial Intelligence in Court Sentencing ("AiCOS") system in Sabah and Sarawak[6] which won a national award for information and communications technology ("ICT") innovation in 2023.

[6] Judicial independence is tightly linked to the rule of law and constitutionalism. For this reason, digital justice systems must respect fundamental rights such as access to courts and the right to a fair trial. At this juncture, monitoring the delivery of justice is as crucial as the system itself, ensuring accountability and transparency. Advances in technology can both support and undermine judicial independence. ICT systems may appear to ensure consistent sentencing, but risk introducing bias based on socioeconomic class. AI-driven sentencing, while seeming to uphold the rule of law, could obscure its influence on human decisions, potentially hiding bias or unfairness behind a façade of legal legitimacy.

[7] China's Judiciary had planned for the smart-court strategy that by the end of 2025 all courts would use AI to support both judicial services and internal management. By 2030, AI is expected to be fully operational and provide advanced support in judicial processes. One example is the Intelligent Auxiliary System of Criminal Case Handling (also known as the "206 System") developed by the Shanghai High People's Court together with iFlyTek to assist the judges in criminal trials by analysing case facts, identifying relevant legal issues, and suggesting applicable laws and sentencing guidelines. It is now in its fourth version. The system aims to improve consistency and efficiency in criminal decisions.[7] This level of automation is remarkable when offering the possibility of clearing case backlogs faster. However, it raises an important question about the meaning of justice and whether faster decision making means fairer outcomes. Can an algorithm truly

6 Ersie Anjumin, "AiCOS System Takes the Lead: Sabah and Sarawak's AI in Court Sentencing Wins Top Honours", NST (January 19, 2024), available at https://www.nst.com.my/news/nation/2024/01/1003365/aicos-system-takes-lead-sabah-and-sarawaks-ai-court-sentencing-wins-top (accessed on October 22, 2024).

7 Oxford Institute of Technology and Justice, "China" (September 2025), available at https://www.techandjustice.bsg.ox.ac.uk/research/china (accessed February 26, 2026).

understand human circumstances and personal hardship? This article is here to highlight the efficiency that AI can bring, which cannot be ignored, and further examine how people can benefit from the speed of AI while still preserving human judgment, compassion and the core values of justice.

[8] The protection of judicial independence faces challenges with the rise of advanced artificial judicial intelligence. A key concern is whether AI can match or improve upon human decision making, especially in balancing fairness and reducing bias. Human judgment, as noted by Crootof, is highly valued due to its ability to adapt to changing social norms and guide legal evolution.[8] Replacing human judges with AI could weaken the legal community's influence and lead to a decline in attention to the law, potentially threatening judicial duty, power and independence.

[9] AI tools like the COMPAS recidivism algorithm (in the US courts) have been criticised for potentially discriminating through neutral factors like zip codes or education levels. Nonetheless, research by Kleinberg and colleagues suggests that AI could reduce both crime and detention rates while lowering discrimination, showing that AI's potential is not just theoretical but achievable today.[9] In this vein, concerns remain around AI's democratic legitimacy, transparency, and its ability to replicate the human elements of decision making such as empathy and bias awareness. Digital justice systems may also pose cybersecurity risks and become the black box, making the decision-making process opaque without technical expertise. This opacity raises questions on whether such systems uphold or threaten judicial independence.

[10] While digital justice systems and AI technologies are crucial for modernising justice, their use must not undermine fundamental rights, create inequality, or hinder the defence rights of individuals. AI tools should not replace human judgment but serve as assistance in decision making. Judicial duty in exercising discretion remains

8 R Crootof, "Cyborg Justice and the Risk of Technological-Legal Lock-In" (2019) 119 *Columbia Law Rev Forum* 233–251.

9 Christoph K Winter, "The Challenges of Artificial Judicial Decision-Making for Liberal Democracy" in P Bystranowski *et al* (eds), *Judicial Decision-Making, Economic Analysis of Law in European Legal Scholarship*, Vol 14 (Springer, Cham, 2022), https://doi.org/10.1007/978-3-031-11744-2_9.

essential, which allows judges to interpret the law fairly and justly, particularly in complex cases where laws may conflict or have gaps.[10] AI and digital justice systems should be governed by human oversight, ensuring that justice and fairness are prioritised. For instance, e-CODEX (e-Justice Communication via Online Data Exchange) was introduced as part of the multi-annual e-Justice Action Plan (2009–2013) to promote the digitalisation of cross-border judicial proceedings and aimed to facilitate communication between the judicial authorities of EU Member States.[11] It is able to connect all courts' judicial duty to enable case information exchange.

[11] AI plays a significant role in the judicial process but remains subordinate, assisting judges rather than replacing them. When exercising judicial duty for decisions, the process involves complex moral, ethical and practical reasoning that AI cannot fully replicate. While statistical models and rules can guide AI in legal cases, judicial judgment requires more than one-dimensional reasoning.[12] In essence, AI can enhance fairness, but judges must adapt to evolving roles, becoming more professional, rational, and empathetic. For the judges to be effective in their role, they need not only legal knowledge but also non-professional insights, combining legal expertise with broader understanding, emotional intelligence and use of digital justice systems to make well-rounded decisions. The challenge lies in the legal field's lack of advanced research, not AI's limitations, highlighting the need for better integration of AI in law.

Practice direction and statutory provision in Malaysia

[12] With the adoption of Chief Justice's Practice Direction No. 1 of 2021 which establishes online courts and makes remote communication technology a vital component of the legal process, the Malaysian Judiciary has embraced such digital change. Section 15A of the Courts of Judicature Act of 1964 and section 101B of the Subordinate

10 Valentina Aleksandrovna Rodikova, "Artificial Intelligence vs Judicial Discretion: Prospects and Risks of Judicial Practice Automation" (2023) 4 *Legal Issues Digit Age* 59.

11 Gabriela Fierbinteanu and Vasile Nemes, "Digital Tools for Judicial Cooperation across the EU – The Benefits of Digital Technologies in Judicial Proceedings" (2022) 29 Lex ET Scientia Int'l J 7.

12 Zichun Xu, "Human Judges in the Era of Artificial Intelligence: Challenges and Opportunities" (2022) 36(1) *Applied Artificial Intelligence*, https://doi.org/10.1080/08839514.2021.2013652.

Courts Act of 1948 were added respectively to support this change of conducting proceedings through remote communication technology. These newly inserted statutory provisions which have been in effect since October 22, 2020, give courts the authority to use remote communication technologies to carry out civil or criminal processes in the interest of justice. By modernising the conventional structure of physical court hearings and ensuring continued public access to justice, the virtual court system represents a significant advancement in Malaysia's judicial system.

[13] It is essential to observe that section 3 of the Courts of Judicature Act 1964 broadly defines "remote communication technology" to include live-video links, live-television links or any other electronic means of communication, providing flexibility for virtual court operations. This definition covers communication via email[13] and allows for witness cross-examination to be conducted with the aid of remote communication technology.[14] Courts can now choose to hold sessions in person, online or in a combination of these formats. There are established protocols in the said Practice Direction for notifying parties of remote hearings, with instructions sent via email one week before the proceeding or within a shorter period, depending on the suitability of the case.[15]

[14] Nevertheless, the COVID-19 pandemic spurred this digital adaption, which has had a long-lasting effect on court procedures and made virtual hearings a crucial component of the Malaysian legal system. The change has enhanced case management and overall efficiency by streamlining operations, lowering travel costs for lawyers, and expanding access to judicial services. Order 33A of the Rules of Court 2012 ("ROC") sets out the procedures for conducting court proceedings via remote communication technology. Under Order 33A r 2 of the ROC, the court or registrar has the authority to direct that any cause or matter be heard, or any proceeding be conducted, remotely either on its own motion or upon application by a party involved in the proceeding. Additionally, Order 33A r 4 of the ROC grants the court or registrar the power to revoke, suspend, or vary a direction made under rule 2 in specific circumstances,

13 *Ang Gee Guan v Janice Ng Kerh Chin* [2022] MLJU 2574, HC.
14 *H & Anor v W*(F)(2) [2022] MLJU 79, HC.
15 Lampiran A3, Chief Justice's Practice Direction No. 1 of 2021, para 2(a).

including when remote communication technology fails and waiting for a functional system would cause unreasonable delays; when necessary to ensure fairness in the proceedings for all parties; when a material change in circumstances occurs after the order is made; or when it is required in the interests of justice. It is noteworthy that the court's adaptation to remote proceedings should extend beyond the COVID-19 pandemic, as this technological advancement has become an essential tool for modernising court processes and supporting the future judicial workforce.[16]

Efficiently producing judgments digitally

[15] It is well recognised that Professor Richard Susskind, a legal tech expert and long-time technology adviser to the Lord Chief Justice of England and Wales (1998–2023), has been appointed as the Special Envoy for Justice and AI to the Secretary-General of the Commonwealth in July 2024. In this role, he will support the 56 Commonwealth countries in advancing equal access to justice through AI by 2030, aligning with the UN Sustainable Development Goal 16, which aims to establish peace, justice and strong institutions.[17] Professor Richard Susskind highlighted two major obstacles to accessible justice: the inaccessibility of public courts and the unaffordability of legal guidance that helps people understand their rights. He argued that traditional court services including human judges and physical courtrooms are no longer sufficient. Instead, digital solutions are needed to address these challenges at scale.[18]

[16] Therefore, the judicial system is increasingly integrating technology to improve access, transparency and efficiency for legal

16 Siti Nurfatihah Pirdaus, "Virtual Hearing Remain As Part of Judicial System – Tengku Maimun" (January 14, 2022), available at https://www.sinardaily.my/article/170714/focus/national/virtual-hearings-remain-as-part-of-judicial-system--tengku-maimun (accessed November 4, 2024).

17 Caroline Hill, "Richard Susskind Appointed As Special Envoy for Justice and AI to the Secretary-General of the Commonwealth", *Legal Insider* (July 4, 2024), available at https://legaltechnology.com/2024/07/04/richard-susskind-appointed-as-special-envoy-for-justice-and-ai-to-the-secretary-general-of-the-commonwealth/ (accessed November 5, 2024).

18 Isha Marathe, "Q&A Richard Susskind, Now Special Envoy for Justice and AI, Talks AI's Role in A2J" (August 22, 2024), available at https://www.law.com/legaltechnews/2024/08/22/richard-susskind-now-special-envoy-for-justice-and-ai-talks-ais-role-in-a2j/?slreturn=2024110433541 (accessed November 5, 2024).

professionals, courts, and the public in pursuit of digital justice. This transformation is holistic, requiring both substantive legal reforms and cultural change. While technological tools can assist the Judiciary in managing vast volumes of evidence, these changes must also uphold the foundational values of fairness and justice, ensuring a consistent focus on the people involved in court processes and legal practice.[19] The ultimate aim is to leave no one behind and to better achieve justice by enabling judges to efficiently produce judgments digitally.

[17] AI-assisted legal research, through tools like ChatGPT, offers significant promise in supporting judges with judgment writing by quickly providing legal information and assisting with drafting tasks. When OpenAI launched ChatGPT on November 30, 2022, the potential of generative AI became clear: it could rapidly analyse vast amounts of information to generate coherent content from simple prompts. Within months of ChatGPT's release, law firms and legal tech companies began exploring its use to produce various legal documents and assist with research. However, ChatGPT can sometimes generate responses that are inaccurate or lack depth on complex legal principles, which vary by jurisdiction, potentially resulting in incomplete or unauthorised legal content.[20]

[18] Nonetheless, these AI tools should not replace the professional judgment required in developing legal principles, as they cannot fully account for the complex and case-specific nuances essential in law according to the different jurisdictions.[21] Moreover, while ChatGPT can generate general legal information that may be helpful for self-represented litigants, it should not be viewed as a replacement

19 Justice Aedit Abdullah (Judge of the High Court of Singapore and Judge in Charge of Transformation and Innovation), "Technology As a Bridge to Justice" (May 30, 2024), available at https://www.judiciary.gov.sg/news-and-resources/news/news-details/justice-aedit-abdullah--speech-delivered-at-conversations-with-the-community-on-30-may-2024 (accessed November 5, 2024).

20 Andrew Perlman, "The Implications of ChatGPT for Legal Services and Society", *The Practice Magazine* (March/April 2023), available at https://clp.law.harvard.edu/knowledge-hub/magazine/issues/generative-ai-in-the-legal-profession/the-implications-of-chatgpt-for-legal-services-and-society/> (accessed November 5, 2024).

21 Christopher Cody Shattuck, "ChatGPT Artificial Intelligence: Will It Replace Lawyers and Legal Staff?", *Wisconsin Lawyer* (February 7, 2023), available at https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=96&Issue=2&ArticleID=29597 (accessed November 5, 2024).

for the expertise of lawyers and judges. The author advocates for cautious application of AI in judicial research but warns against overreliance on it when writing judgments. For instance, Indian judges have experimented with ChatGPT in their deliberations, such as Justice Anoop Chitkara of the Punjab and Haryana High Court, who used it in March 2023 to review jurisprudence on bail in homicide cases involving "cruelty".[22] More recently, on May 23, 2024, the Manipur High Court used ChatGPT to conduct research before passing an order concerning Md Zakir Hussain, a retired member of the Village Defence Force who was dismissed in 2021 without receiving a copy of his dismissal order.[23]

[19] However, AI-generated information, while sometimes helpful, can also be misleading. The Delhi High Court ruled that ChatGPT cannot be used to adjudicate legal issues as it provides different responses depending on how queries are framed.[24] There is a risk of AI generating fictitious, incorrect or imaginative data, if not carefully verified. In other words, using ChatGPT for judgment writing faces challenges due to the variability of its responses based on input phrasing. It may lack the depth of human reasoning necessary for fair judgment and could include discriminatory material found on the internet, which the AI tool may incorporate into its responses. For AI-assisted legal research to be truly beneficial, any content generated must be rigorously cross-checked for accuracy, relevance and jurisdictional appropriateness. While courts can use AI to improve administrative efficiencies, judgment writing in adjudication on legal and factual issues requires human elements of reasoning, empathy and ethical judgment.[25]

[20] The United Kingdom, for example, issued AI guidelines in December 2023 restricting the use of AI language models in courts.

22 Shivani Bhargava, "Manipur High Court Uses ChatGPT to Conduct Research during Verdict", Medianama (May 30, 2024), available at https://www.medianama.com/2024/05/223-manipur-hc-chatgpt-usage-research-verdict/ (accessed November 5, 2024).

23 Ibid.

24 Charu Singh, "Courts Can't Rely on ChatGPT to Adjudicate, But AI Can Assist Processes", NDTV Profit (September 16, 2023), available at https://www.ndtvprofit.com/law-and-policy/courts-cant-rely-on-chatgpt-to-adjudicate-but-ai-can-assist-processes (accessed November 5, 2024).

25 Ibid.

The guidance suggests that the Judiciary use AI assistance to summarise large bodies of text, draft presentations, compose emails and memoranda. However, it cautions against using AI for legal research and legal analysis due to the inability to verify the results independently.[26] Thus, while AI can enhance digital justice by improving research and access to information, it should only serve as a supplementary tool, not a replacement for the critical thinking and discretion essential to judicial judgment writing. This approach reflects the Judiciary's adaptability to evolving technology, though with necessary caution. With proper adherence to these guidelines, generative AI holds potential as a valuable secondary tool in legal and judiciary processes. In this context, the author suggests that Malaysian judicial offices consider establishing guidelines for using AI tools to support their work, ensuring these tools are used appropriately and within permitted boundaries.

[21] The development of AI tools like ChatGPT in the legal field offers valuable assistance to lawyers and judges, such as generating initial drafts. Since ChatGPT has been trained on legal texts, it can suggest appropriate language, allowing users to refine the draft by requesting adjustments until it meets their standards. However, these AI-generated drafts require careful review and should not be adopted automatically. Additionally, courts could explore ChatGPT and similar AI tools to communicate rules to the public in a clear and summarised way. This use of AI may enhance public engagement by making complex or technical rules more accessible in plain language.[27] In the current era, AI research tools like ChatGPT serve as essential resources for swiftly grasping complex subjects. Although verifying the provided information remains crucial, these tools offer a broad overview that can be exceptionally beneficial. Several sophisticated AI tools, including Scite Assistant, SciSpace and Petal, are engineered

26 Fiona Campbell, "UK Guidelines For the Use of AI in Courts and Tribunals (December 2023)", Fieldfisher Insights (January 9, 2024), available at https://www.fieldfisher.com/en/insights/uk-guidelines-for-the-use-of-ai-in-courts-and-tribunals-december-2023#:~:text=The%20guidance%20suggests%20that%20the%20judiciary%20use%20AI-assistance,results%20independently%20or%20produce%20convincing%20analyses%20or%20reasoning (accessed November 6, 2024).

27 Stephen M Johnson, "Rulemaking 3.0: Incorporating AI and ChatGPT into Notice and Comment Rulemaking" (2023) 88 Mo L Rev 1021.

to produce responses grounded in reputable sources.[28] These tools frequently incorporate footnotes or references, enabling users to confirm the information's accuracy. This approach highlights the creators' dedication to improving the tools' trustworthiness. By offering easily verifiable source citations, these AI assistants strive to enhance efficiency and simplify the research and writing workflow. Nonetheless, AI tools like ChatGPT and other AI tools as above-mentioned should not replace human judgment and the legal expertise essential to judicial decision making and the development of judge-made law.

[22] Other AI-powered tools are advancing rapidly and hold significant potential, providing broader legal assistance. For example, courts are increasingly exploring AI-powered tools to enhance legal assistance, particularly for self-represented litigants. The Singapore courts have begun testing generative AI in their Small Claims Tribunals ("SCT"), with potential plans to expand its use to areas such as maintenance in matrimonial matters and civil claims. In August 2023, the Singapore courts signed a memorandum of understanding with Harvey.AI to use this technology for two years, aiming to develop a generative AI program that assists SCT users by applying AI trained specifically on Singapore's laws and court procedures. Later, the Singapore Judiciary in collaboration with Harvey.AI under a renewed memorandum of understanding signed on September 8, 2025, introduced a generative AI tool for the SCT that summarises case documents, helps self-represented individuals understand their cases and next steps, and supports better access to justice and amicable dispute resolution.[29] In other words, this AI seeks to provide automated pre-court guidance and assist with auto-filing forms. It may also offer insights into likely

28 Jennifer Gu, "Five AI Research Tools That Referencing Genuine Sources", The Hong Kong University of Science and Technology (January 22, 2024), available at https://library.hkust.edu.hk/sc/ai-tools-with-genuine-sources/ (accessed November 18, 2024).

29 Lydia Lam, "Generative AI Being Tested For Use In Singapore Courts Starting With Small Claims Tribunal", CNA (September 27, 2023), available at https://www.channelnewsasia.com/singapore/artificial-intelligence-court-small-claims-singapore-chatgpt-3801756 (accessed November 6, 2024); SG Press Centre, "New Generative AI-Powered Case Summarisation Tool to help Small Claims Tribunals Users" (September 10, 2025), available at https://www.sgpc.gov.sg/detail?url=/media_releases/sgcourts/press_release/P-20250910-1&page=/detail&HomePage=home (accessed February 26, 2026).

case outcomes, encouraging parties to settle or consider mediation.[30] Meanwhile, Justice Aedit Abdullah, the judge of Singapore in charge of transformation and innovation, emphasised that the importance of adapting to such advancements is to ensure access to justice for all.[31] Experimental chatbot interfaces using the generative AI are also available to guide users on issues like neighbour disputes, criminal cases and wills, reflecting the inevitable influence of AI on legal practice.[32]

[23] It is postulated that AI has the potential to transform the Judiciary, offering tools that can reduce administrative burdens and assist with decision making. However, fully replacing judges and lawyers could lead to significant issues, as many judicial roles require creativity, skill and moral judgment that technology cannot replicate. Judges not only make decisions but also serve as educators and contribute to public understanding of the law, shaping societal values and norms.[33] Technological advances today can greatly enhance judicial efficiency, offering more transparent visible justice. While clear rules, consistent policies and precedents guide the Judiciary, the true nature of law is shaped by experience rather than pure logic. Real-life cases are complex, making discretion a necessary part of judicial decision-making process. Even the most skilled judges can be limited by personal experience and individual perspectives, leading to challenges in ensuring fair and consistent rulings.[34]

[24] The function of counsel is paramount to assist the court. The Malaysian Bar has warned lawyers about the dangers of using generative AI tools, specifically ChatGPT. According to Circular No. 342/2023 dated November 24, 2023, the Bar noted that practitioners should conduct their own legal research and independently verify any output produced by AI. Under no circumstance can lawyers rely solely on unverified responses provided by such generative AI tools.

30 Lee Li Ying, "Small Claims Tribunals to Roll Out AI Program to Guide Users Through Legal Processes", *The Straits Times* (September 27, 2023), available at https://www.straitstimes.com/singapore/small-claims-tribunal-to-roll-out-ai-program-to-guide-users-through-legal-processes (accessed November 6, 2024).

31 Lydia Lam, see n 29 above.

32 Ibid.

33 Sachu Saji Thomas, "AI and Revolution to Judicial System" (2021) 3 Indian JL & Legal Rsch 1.

34 Ibid.

The Bar Council's Technology, Cyber and Privacy Laws Committee also produced its own short paper on the risks and precautions in using generative AI in the legal profession, specifically ChatGPT.[35] From here, it is clear to us that generative AI is not endorsed or regulated by the Malaysian Bar Council, but some legal practitioners may turn to generative AI tools to improve efficiency in delivering legal services. Hence, it is essential that the Circular identifies key risks, namely bias and inaccuracy, as generative AI tools do not have the emotional intelligence and human empathy that might matter in certain legal contexts. ChatGPT and other generative AI products can therefore only be considered guidance tools, and not replacements for independent legal analysis.

[25] The application of generative AI in the Judiciary is a good opportunity as well as a risk. On the one hand, AI technology supports increased utility, efficiency and access for justice, which can offer to help the administration to do bureaucracy and management, process data faster and assist courts in managing high caseloads.[36] The UNESCO's "AI Essentials for Judges" is useful while addressing the issue of the integration of AI in courts with risks and corrective actions.[37] The message is clear. With adequate standards, safeguards and training, AI can help facilitate and deliver justice more easily and fairly but it must always be rooted in human judgment. On the other hand, the application of generative AI could introduce imbalance and bias, particularly depending on its application. This concern is not just about lawyers but the whole legal and judicial profession. For lawyers, the Malaysian Bar has already cautioned lawyers to use AI tools as guidance tools, and it is important to independently verify all outputs. Since the Judiciary and the legal profession work closely together, that same caution applies to the courts. Judicial use of AI might be constitutional and warranted, as long as it does not usurp

35 Bar Council Malaysia, "The Risks and Precautions in Using Generative Artificial Intelligence in the Legal Profession, Specifically ChatGPT" (November 24, 2023), available at https://www.malaysianbar.org.my/cms/upload_files/document/Circular%20No%20342-2023.pdf (accessed February 28, 2026).

36 UNESCO News, "AI in the Courtroom: UNESCO'S New Guidelines for the Judiciary" (December 3, 2025), available at https://www.unesco.org/en/articles/ai-courtroom-unescos-new-guidelines-judiciary (accessed February 28, 2026).

37 UNESCO Digital Library, "AI Essentials for Judges" (2026), available at https://unesdoc.unesco.org/ark:/48223/pf0000396991 (accessed February 28, 2026).

human judicial decision making. Reference can always be made to the UNESCO's Guidelines for the Use of AI Systems in Courts and Tribunals 2025, which developed 15 universal principles to guide the oversight of AI in the Judiciary.[38] Simply put, AI might be able to assist with research, grammar and managing cases, but it should not replace the judge's reasoning.

[26] A recent current example of this problem is addressed in the case of *United States v Deleon ("Deleon")*[39] delivered in September 2024. In that case, Judge Newsom, in a concurring opinion, considered whether AI tools could assist in identifying the "ordinary meaning" of the phrase "physically restrained" under the Federal Sentencing Guidelines. It was the question between pointing a gun at a cashier during a robbery and "physical restraint", which would merit a longer sentence. Judge Newsom asked the three top large language models such as GPT, Claude, and Google's Gemini 1.5 Flash at 10 times each on the meaning of the said phrase "physically restrained". Though those responses varied slightly, his Lordship found a consistent pattern that the models tended to conclude that "physical restraint" needed tangible force. His Lordship saw this as confirmation of common sense and it was a way to observe how people generally use language.[40] However, there are important concerns with this approach. Large language models produce fluent answers by means of statistical patterns in language, but they fail to grasp the true meaning. This is because they are not legal reasoning as predictions based on likelihood, but rather on probability. Though their outputs might mirror common language practices, they serve no replacement for judicial interpretation. *Deleon*'s case illustrates danger when AI outputs are turned into evidence and evidence becomes judgment, however, it is easy to argue that the human responsibility which at the heart of law can diminish. Law, as we can say, derives legitimacy from

38 UNESCO, "UNESCO Guidelines for the Use of AI Systems in Courts and Tribunals 2025" (2025), available at https://jusmundi.com/en/document/rule/en-unesco-united-nations-educational-scientific-and-cultural-organization-guidelines-for-the-use-of-ai-systems-in-courts-and-tribunals-2025-unesco-guidelines-for-the-use-of-ai-systems-in-courts-and-tribunals-2025-wednesday-1st-january-2025 (accessed February 28, 2026).

39 116 F 4th 1260 at 1270 (11th Cir 2024).

40 Zachary L Catanzaro, "The Dead Law Theory: The Perils of Simulated Interpretation" (forthcoming 2027) *Florida Law Review*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6164388 (accessed February 26, 2026).

the judicial power exercised by human judges who weigh, interpret and decide.[41]

[27] In other words, statistical prediction will not substitute for that human element. In practical terms, generative AI could be a useful tool for judges to understand common language usage, particularly for multi-word expressions and areas that dictionaries cannot explain fully. It may act as an aid in reading ordinary meaning. Nevertheless, it cannot stand in for dictionaries, law, precedent or judicial thinking. For instance, referring back to *Deleon*'s case above, even though Deleon never actually touched the cashier, the three-judge panel of the Eleventh Circuit unanimously upheld the sentence enhancement. The panel had considered and interpreted the term "physically restrained" to include situations where no physical contact occurred.[42] Hence, generative AI tools may act as an aid in reading ordinary meaning but cannot stand for judicial thinking. Technology is a central part of the future of justice, but justice must always be human-oriented. AI can assist but it can never decide.

[28] For this AI technology to truly serve justice, it must be carefully designed to address preconceptions and value biases, ensuring that cases with similar facts receive comparable outcomes while preserving the rule of law. Judicial AI can address these challenges by using algorithmic modelling, data labelling, case detail extraction, and knowledge mapping to create a "robot judge" that leverages vast databases of similar cases and verdicts.[43] In this aspect, the AI technology can surpass individual judges' limitations, offering insights based on extensive case data that help reduce subjective biases.[44] No doubt, ensuring that justice is delivered in a timely manner is of paramount importance. As Professor Richard Susskind eloquently puts it, what truly matters is the delivery of justice itself, not the physical

41 John G Browning, "The Dawn of the 'AI Judge'? Generative Artificial Intelligence and Its Impact on Appellate Courts" (Summer 2025) 25(2) *The Journal of Appellate Practice and Process* 341.

42 Clay Calvert, "The Judiciary, Generative AI, and Ordinary Meanings: Kevin Newsom Leads the Way", *AEIdeas* (2024), available at https://www.aei.org/technology-and-innovation/the-judiciary-gen-ai-and-ordinary-meanings-kevin-newsom-leads-the-way/ (accessed March 2, 2026).

43 Changshan Ma, "The Reshaping Effects and Limitations of the Judicial AI" (2022) 17 Frontiers L China 42.

44 Ibid.

location from which it is provided. His 2019 book, *Online Courts and the Future of Justice*,[45] explores this concept in depth, challenging traditional views on the importance of venue. Just months after its release, the global pandemic made online courts a reality, advancing Professor Richard Susskind's vision sooner than anticipated.[46] This encourages the Judiciary to adapt by incorporating digital solutions into the justice system. In sum, overreliance on AI could undermine the unique contributions of judicial professionals, including critical thinking and problem-solving skills. It is therefore crucial for the judicial system to carefully balance the benefits of automation with the indispensable human elements involved in delivering justice.

Courtroom technology and public access to digital justice

[29] The author advocates for digital justice, emphasising the importance of advancing courtroom technology to promote public scrutiny, access and overall accountability within the judicial system. In Malaysia, the focus on AiCOS, particularly in Sabah and Sarawak, has sparked discussion on how AI could influence sentencing decisions. Dennis Khong and Chiung Ching Ho,[47] in their article, discussed the application of AI in criminal sentencing in Malaysia through the case of *PP v Denis P Modili*[48] where the AI system recommended a 10-month imprisonment, with a "recommended percentage" of 54.31%. However, the precise meaning of this figure remains unclear, potentially referring to the probability predicted by logistic regression. If this is the case, the percentage might only indicate the likelihood of the correctness of the sentence, without reflecting the accuracy of fines or imprisonment terms. Furthermore, there are concerns regarding the exclusion of bias variables, such as race, in the model. The Khazanah Research Institute's report did not clarify whether these biases were removed during or after model development. Omitting race in training could lead to a proxy variable representing race emerging in the model, reflecting latent biases in previous sentencing decisions.

45 Professor Richard Susskind, *Online Courts and the Future of Justice* (OUP, 2019).

46 Sonam Narayan, "Online Courts and the Future of Justice by Richard Susskind" (2021) 11 Nirma U LJ 99.

47 Dennis WK Khong and Chiung Ching Ho, "Case Commentary: Artificial Intelligence in Malaysian Courts: *PP v Denis P Modili*" (2022) 2(2) *Asian Journal of Law and Policy* 127.

48 [2020] 2 *Sessions & Magistrates' Cases* 381, Magistrates' Court.

[30] To mitigate such risks, it is suggested that further research be conducted to refine the application of machine learning in sentencing. Predictive actuarial models, while holding the promise of evidence-based judicial decision making, must be approached with caution.[49] It is noted that, proponents of such models argue they could enhance objectivity in assessing the risk an individual poses to society, thereby shifting away from less structured judicial methods. These models could also serve as a constraint on the unpredictability of judicial discretion. In line with this, amendments to Malaysia's Penal Code can be made to require a sentencing commission to develop actuarial tools to identify low-risk offenders. This allows courts to impose community sanctions or shorter prison terms for such individuals, promoting rehabilitative rather than retributive justice. The author humbly suggests that the framework for actuarial sentencing can be made to reduce incarceration rates by diverting low-risk offenders to community-based sanctions while reserving prison resources for high-risk individuals. For instance, in the US, Virginia's adoption of actuarial sentencing models since 1997,[50] illustrated how these tools have been used to divert drug and property offenders from incarceration, and later in 2001, to predict recidivism among sex offenders. These models rely on accurate statistical data to guide judicial decisions, balancing public safety with rehabilitative efforts.

[31] Not surprisingly, the advancement of technology has become essential in modernising the justice system, integrating science and technology innovation to improve the Judiciary system and ensure efficient justice delivery. While virtual court proceedings and e-filing systems have started transforming judicial processes in Malaysia, the pandemic accelerated the need for tech adoption resulting in virtual court proceedings via Zoom. Taking a popular example from China as mentioned above, the "smart courts" employ AI to streamline procedures. For instance, in Hangzhou, the Xiao Zhi 3.0 AI system assists judges by handling procedural tasks, analysing case data, and

49 Alexandra Lyn, "Risky Business: Artificial Intelligence and Risk Assessment in Sentencing and Bail Procedures in the United States" (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3831441 (accessed October 28, 2024).

50 Richard Kern and Mark Bergstrom, "A View From the Field: Practitioners' Response to Actuarial Sentencing: An 'Unsettled' Proposition" (2013) 25 FED SENT R 185.

enabling quick case resolutions in matters such as financial disputes, traffic incidents, and even sentencing predictions in criminal cases.[51]

[32] The author advocates for a cautious integration of AI in courts to support judges without replacing human oversight. AI's role in Malaysian courts could enhance resource access, but it must uphold judicial values such as fairness, impartiality and public participation. Reference is made to the example of China as mentioned earlier, where cases are decided by internet courts that do not require citizens to appear in person and use AI-powered non-human judges in the digital hearings.[52] It is essential for the Malaysian Judiciary to ensure that similar values remain intact as virtual hearings become more common. Undoubtedly, the recent pandemic has highlighted the need to reshape the Malaysian court system to improve virtual hearings through digital transformation as an administrative tool to support human judges. Such advancements would create valuable opportunities for legal professionals and improve access to justice across the nation from remote locations. Importantly, the author emphasises that AI should assist but never replace human judges, as only human judges are accountable to the rule of law and the Federal Constitution.

[33] The integration of technology in courtrooms and virtual court proceedings emphasises the need for transparency, ensuring that digital open courts via video conferencing and live-streamed proceedings are accessible to the public. In Malaysia, only selected cases are live-streamed.[53] The issue that may arise here is with hearings occurring on third-party platforms like Zoom, raising cybersecurity concerns as sensitive proceedings may be vulnerable to hacking. Therefore, for civil cases with minimal witness testimony, such as those in domestic law, torts, and property disputes, virtual courts offer significant benefits

51 Alena Zhabina, "How China's AI is Automating the Legal System", DW (January 20, 2023), available at https://www.dw.com/en/how-chinas-ai-is-automating-the-legal-system/a-64465988 (accessed October 28, 2024).

52 Bryan Lynn, "Robot Justice: The Rise of China's Internet Courts", Learning English (December 11, 2019), available at https://learningenglish.voanews.com/a/robot-justice-the-rise-of-china-s-internet-courts-/5201677.html (accessed October 28, 2024).

53 Nurbaiti Hamdan, "Historic First as Court of Appeal Successfully Hears Appeal Via Tele-Conference", *The Star* (April 23, 2020), available at https://www.thestar.com.my/news/nation/2020/04/23/historic-first-as-court-of-appeal-successfully-hears-appeal-via-teleconference (accessed October 28, 2024).

which enable access to justice from home.[54] This can save time and resources and reduce court-related delays, especially for stakeholders like the elderly and working professionals. Certain cases, such as those involving matrimonial disputes, sexual offences, gender-based violence, child abuse and sensitive evidence, are excluded from live-streaming or virtual proceedings to maintain privacy and avoid inciting public tension.[55] The important point is, courts shall retain the discretion to exclude additional case types or delay the broadcast to uphold decorum.

[34] Hence, the current system needs modernisation to keep pace with technological demands. There is a call to revisit the current implementation of the principle of open justice and the constitutional right to fair trials, as new technologies bring challenges in balancing transparency with privacy and the said rights of a fair trial. Solutions are available including the use of pseudonyms, limited public access to records and restricted access to certain case materials. Courts can also consider an electronic system to expunge or limit access to convictions after a set period, preserving privacy without compromising transparency.[56] It is also to be kept in mind that live-streaming court proceeding is viewed as an extension of open justice, but achieving digital justice depends heavily on universal technology access, digital literacy and strong cybersecurity.

[35] The author, therefore, suggests live-streaming all court proceedings through secure portals in Malaysia to ensure transparency and uphold the right to public access except for the certain cases which need restricted access in nature. Designated viewing rooms within court premises for authorised individuals and accessible live-video links for interested parties would reduce courtroom congestion. While the Malaysian Judiciary has practised live-streaming high-profile appellate cases, expanding this practice to all levels of court could further promote justice accessibility and uphold courtroom decorum under clear guidelines to balance public access with digital justice.

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54 Richa Jain and Sarthak Chaudhary, "The Renaissance of Virtual Courts: Towards the Digital Age" (2021) 4 Int'l JL Mgmt & Human 5722.

55 Akshay Baburao Yadav and Shivanjali Mane, "Online Stream and Recording of Court Proceedings: A Constitutional Right" (2022) 13 Indian JL & Just 171.

56 Daniel Stepniak, "Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions" (2004) 12 Wm & Mary Bill Rts J 791.

[36] Effective court proceedings rely on the concept of "co-presence", the need for participants to be aware of both, their virtual and physical settings, including who is present, the availability of relevant documents, and necessary adjustments to technology. In physical courtrooms, spatial protocols and hierarchies are clear, with designated positions and ceremonial traditions that reflect the roles and relationships among judges, lawyers, defendants, witnesses, observers in the public gallery and personnel who keep order of the court hearing. In contrast, virtual hearings, such as those on video-conferencing platforms, flatten these hierarchies, placing all participants on an equal plane, which can impact the dynamics and perceived authority within the court environment.[57]

[37] No doubt, immersive virtual technology, enhanced by holographic developments, can restore some of these courtroom cues by simulating panoramic views, directional sound and interactive 3D holograms of participants. Holography, a technology for creating three-dimensional images through light beams, was pioneered in 1947 by Hungarian physicist Dennis Gabor and improved in the 1960s with laser technology, resulting in clearer holograms. Unlike photography which captures only the intensity of light, holography records both the intensity and the phase (direction) of light waves. This added dimension enables holograms to render realistic 3D images.[58]

[38] In a courtroom context, holographic technology can make remote court appearances feel as if all parties are physically present. For example, in cases where parties are located in different places, each lawyer and client could be captured in their respective locations. These images would then be transmitted digitally to the courtroom, where a laser projector would recreate their 3D likenesses, allowing the judge, interpreters and other parties to interact as though everyone is seated in the courtroom. This set up would enable all parties to see, hear and respond to each other's expressions and statements, regardless of physical distance.[59]

57 Meredith Rossner and David Tait, "Virtual Technology and the Changing Rituals of Courtroom Justice" (2024) 98 Chi-Kent L Rev 251.

58 Susan Nauss Exon, "The Internet Meets ObiWan Kenobi In the Court of Next Resort" [2002] BUJSCI & TECH L 1.

59 Ibid.

[39] Meanwhile, this holographic technology could also allow judges to assess witness credibility through non-verbal cues, eye contact and body language, enhancing the depth of engagement beyond typical video calls. In essence, holography's unique ability to project 3D and life-like images allows a closer simulation of traditional and in-person interactions. It enables full engagement in virtual resolution or court proceedings while preserving essential communication nuances like voice inflection, emotional tone, and physical expressions, which are often crucial in determining credibility and intentions.[60] This advancement not only holds promise for reducing time and costs associated with legal proceedings but also addresses limitations in assessing witness credibility. As virtual technology grows, holograms enable efficient dispute resolution without requiring physical attendance, reducing travel and logistical barriers, and thus making justice more accessible digitally.

Online dispute resolution assists the judge

[40] Access to justice is a long-standing issue exacerbated by overcrowded courtrooms. The rapid advancement of technology, however, offers new perspectives on reforming digital justice under judicial duty in this digital age. The author wishes to highlight that online dispute resolution ("ODR") encompasses a broad spectrum of digital tools and methods for resolving disputes, ranging from online consultations and negotiation tools to mediation, arbitration and even automated decision making.[61] In China, for instance, ODR has revolutionised public access to justice, empowering disputants with a greater voice in decision making.[62] This shift has not only increased the efficiency and accessibility of digital justice but also redefined the roles of traditional legal stakeholders, enabling litigants to engage more directly in their cases.

[41] As for ODR, it must not be overlooked which is often easier to access than traditional courts. It usually involves a simple procedure with only a few steps, lower costs and faster resolution. It can also enforce outcomes effectively within the platform's own online system. However, there are important disadvantages, such as the process is

60 Meredith Rossner and David Tait, see n 57 above.
61 Carrie Shu Shang and Wenli Guo, "Towards Online Dispute Resolution-Led Justice in China" (2020) 7 IJODR 119.
62 Ibid.

often not transparent. While the visible steps may seem clear, platforms rarely explain how decisions are actually made or what rules guide them. There may also be bias, as platforms can have economic interests in the outcome. Some may misuse their stronger position against consumers or weaker parties. Unlike court proceedings, ODR usually prioritises efficiency over a full investigation of the facts. Parties submit their claims digitally and are not heard in person. There may be limits on the types of complaints allowed and the evidence that can be considered. In some cases, decisions may even be made fully by technology without clear human involvement.[63]

[42] At the same time, the ODR platform can play a useful supporting role in assisting the judge but not replacing judicial discretion. It can resolve simple and straightforward cases, leaving more complex matters to the courts. Digital submission systems can also help individuals to organise their claims and gather evidence which may make subsequent court proceedings more structured. As such, technology is becoming an essential part of the future of justice. However, no matter what tools are used, justice and resolution must remain fundamentally fair to all parties involved.

Conclusion

[43] As the world advances rapidly, the author humbly prays that the Malaysian Judiciary will consider improving the ODR system to avoid falling behind, as justice need not be confined to a physical courtroom setting. To keep pace, courts should invest in ODR technology, offering flexible procedures such as automated settlement, assisted negotiation, mediation and arbitration, which allow disputes to begin with direct online negotiation between parties. Recognising this potential, it is prudent to view the ODR system as a means to handle small claims online, enabling judges to focus on more complex cases. Prioritising online justice will undoubtedly help ensure that all litigants have access to efficient and equitable solutions through digital justice.

[44] A judge's independence and impartiality must be upheld, even with the integration of AI systems. The Malaysian Judiciary must encourage ongoing education around AI, most particularly

63 Elena Alina Ontanu and Eric Tjong Tjin Tai, "Digital Technology and Procedural Justice: Towards a Geography of Justice" (2025) 30(2) *Tilburg Law Review* 96.

generative AI. Regular training programmes or workshops on how to use specific technologies, and digital learning material should enable judges and court staff to understand how AI tools can be used, and also their benefits and risks. Such sessions, if held regularly, will ensure knowledge is solidified and the practical expertise is developed in an ecosystem where best practices are shared. In this digital era, judges should not be blindly ignorant of the need to better understand AI, for instance, Judge Kevin Newsom in *Deleon*'s case recently found that AI is beginning to enter judicial reasoning and claimed AI is not a hindrance to legal interpretation, rather it reflects the type of interpretation already commonly employed in originalist interpretation. If AI generates patterns instead of real meaning, the weakness is not in the technology but in the process. As such, human oversight is important but will require substantial oversight. Judges should understand the advantages and shortcomings of AI.

[45] AI may aid in the analysis of language and handling of vast amounts of data, but it cannot substitute for human judgment, reasoning and accountability. As courts are ever more digitised and powered by systems that make data decisions, good governance is even more important. If AI tools are abused or things go wrong, there needs to be a legal framework to resolve professional responsibility. And at the same time, the majority believe that there needs to be guidelines in place on the use of AI in the Judiciary. A recent case has demonstrated the dangers of misadministration, for instance, in Singapore, a lawyer had to pay costs personally to the opposing counsel after referencing a fake AI-generated case.[64] The court reiterated that the seriousness of the misconduct pertained not only to wasted judicial time but also to the credibility of the legal system itself. The burden is even greater when judges exercise the capability of using AI in decision making in public interest matters.

[46] Innovation thus must co-exist with integrity. Judges would require regular training to maintain an understanding of AI, its risks and its development. AI can improve efficiency and access to justice, but it must be based on human judgment and ethical standards. Malaysia could also explore creating its own judicial AI platform developed by specialists with judicial and legal experience. In China, for instance,

64 *Tajudin bin Gulam Rasul & Ors v Suriaya binti Haja Mohideen* [2025] SGHCR 33.

its Supreme People's Court deployed an AI-powered system that analyses a host of past cases to support judges. Building on a vast volume of high-quality judicial information, its National Judicial AI Platform efficiently interprets documents, identifies key issues and pulls from relevant information for its users.[65] A Malaysian version which is intentionally developed and governed, could assist judges in research and case management while also allowing for the final judgment to remain fully in human hands. Having laws in place with appropriate standards, accountability and education, the Malaysian Judiciary can use AI responsibly and protect the law, its integrity, independence and humanity of the law.

[47] Relying on AI to guide the decision-making process, there is a risk that judges independence might be compromised. To avoid this, judges should always have the discretion to deviate from AI recommendations. Ensuring judicial independence in an AI-assisted environment requires that judges gain a thorough understanding of AI's capabilities and limitations. This can be achieved through dedicated training on new technologies and collaboration with researchers, engineers and developers involved in AI's legal applications.[66] In short, implementing a digital justice system is complex and requires input from diverse stakeholders including government officials, lawyers, technologists and the general public, in addition to the judicial duty contributions of judges.

65 Oxford Institute of Technology and Justice, "China" (September 2025), see n 7 above.

66 Jasper Ulenaers, "The Impact of Artificial Intelligence on the Right to a Fair Trial: Towards a Robot Judge?" (2020) 11 Asian JL & Econ 1.

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