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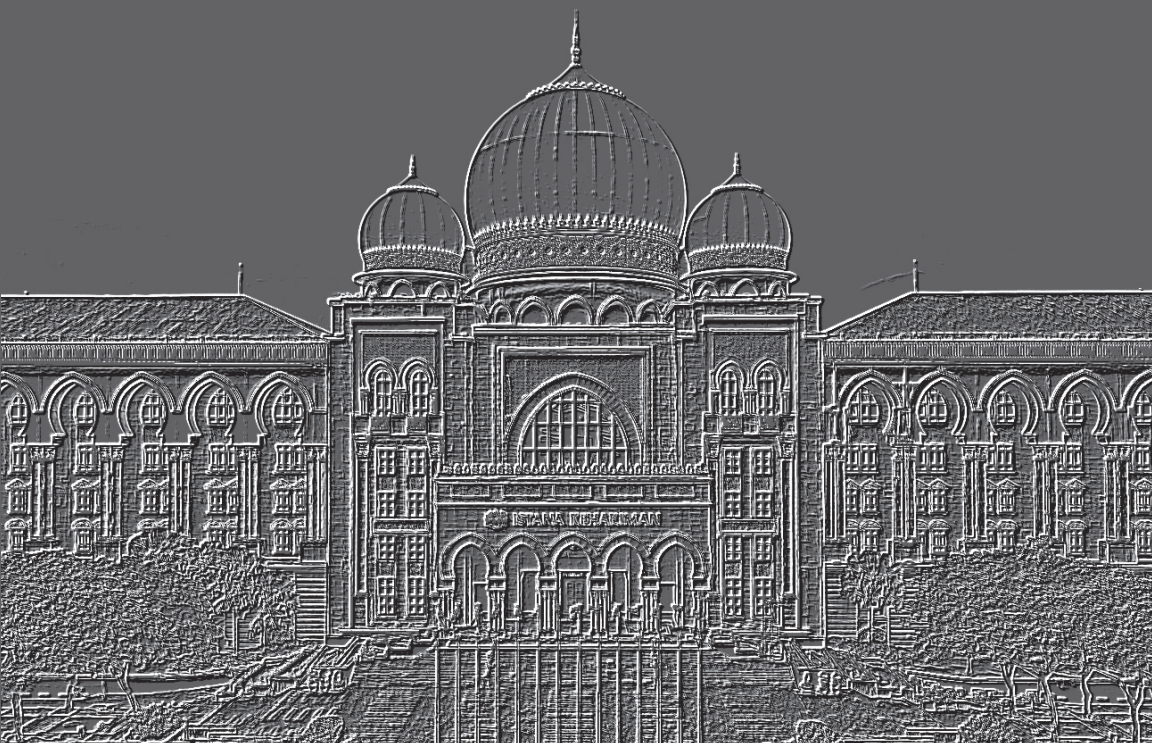
January 2022



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PREFACE

In this first edition of the *Journal of the Malaysian Judiciary* for 2022, we are privileged to publish no fewer than three articles from leading jurists in the region, the Right Honourable the Chief Justice of Malaysia, Tengku Maimun Tuan Mat and The Honourable the Chief Justice of Singapore, Sundaresh Menon. Both Chief Justices, in differing aspects, deal with the consequences and ongoing effects of the pandemic, that have constrained us to alter irrevocably, the manner in which we function within the law. More pertinently perhaps, it has also compelled us to review afresh the true priorities of the universal and omnipresent rule of law in the context of the pandemic, the phenomenon of globalisation and the need for the pursuit of economic prosperity on a sustainable basis for all tiers of society and humanity.

The famous quote attributed to Albert Einstein – "The measure of intelligence is the ability to change" is given practical effect and application in an illuminating article by Justice Ahmad Fairuz Zainol Abidin, where the experience of our civil courts, particularly the Kuala Lumpur Commercial Courts, in metamorphosing, over the course of the pandemic, from physical court hearings to virtual hearings, is discussed objectively.

Justice Amarjeet Singh gives us a comprehensive and practical study of the law relating to the adjudication of election petitions in his article entitled "Trying Election Petitions: A Practical Commentary". It provides an overview of the law in this difficult area, encompassing issues ranging from the forum for the presentation of a petition, the special jurisdiction of the High Courts, the rules governing such petitions, and the remedies available as well as other salient aspects. It serves as a short digest on the subject.

Tan Sri Datuk Suriyadi, the Director of the Asian International Arbitration Centre ("AIAC") and Ms Nur Nadhirah present a noteworthy legal commentary on "Islamic Banking and Alternative Dispute Resolution". It delves briefly into the development of Malaysia's Islamic banking legal framework and how arbitration fits into the current legal landscape. The authors advocate the use of arbitration vide the AIAC in preference to litigation as a means of settling Islamic finance disputes. They reason that in such arbitrations, unlike judicial proceedings, the parties are not precluded from calling an expert witness in Syariah law to assist the tribunal in resolving the dispute. They also point to the i-Arbitration rules introduced by the AIAC, which provide procedural rules for an arbitration tribunal to refer issues to the Shariah Advisory Council.

From Singapore we are fortunate to have the benefit of a legal treatise from Justice Kannan Ramesh, renowned for his expertise in cross-border insolvency,

globally. The article discusses two important issues in this complex field, namely synthetic proceedings and the legal treatment of integrated business groups on insolvency. The article argues for the wider acceptance and use of synthetic proceedings and more discourse on the treatment of insolvent business groups in cross-border insolvencies.

Dr Nurhidayah Abdullah from the world of academia enlightens us on both the concept of, and perspectives from, the doctrine of good faith in contract law, using doctrinal and empirical methods. Both civil and common law approaches are discussed by tracing the history and evolution of the doctrine in civil law as well as the common law. The doctrine is further reviewed from the aspects of its use in Australia, Canada, Singapore and Malaysia. This scholarly analysis of the subject is both stimulating and educational.

A second contribution from the field of arbitration, is found in a thought-provoking essay from Justice Tee Geok Hock, who focuses on specific aspects of the subject. Justice Tee discusses inter alia, fundamental features of international arbitrations, principles of law and statutory interpretation in this jurisdiction, in relation to several issues. The discussion provides an overview of potential problems postulated to arise as a consequence of a statute that encompasses both domestic and international arbitrations, and possible resolutions to such issues, the application of the doctrine of stare decisis in relation to domestic and international arbitrations in the Malaysian courts and a critique of the Arbitration Act 2005 in relation to international conventions.

We trust the reader will enjoy and benefit from these articles. On behalf of the Editorial Committee, I thank the authors once again for the considerable time and effort they have put into these admirable legal essays.

On behalf of the Editorial Committee
Nallini Pathmanathan

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Access to Justice and the New Normal*

by

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

Introduction

[1] On behalf of the Malaysian Judiciary, I would like to bid everyone a warm welcome to the Opening of the Legal Year 2022 ("OLY 2022").

[2] This ceremony is special because it marks the tremendous efforts and lengths that we have all gone through since the onslaught of COVID-19 into our lives in late 2019 and the onset of the pandemic in early 2020. We are congregated here physically while many of you are participating in these proceedings virtually. This encapsulates the concept of the "new normal".

[3] In apt fashion, the theme for OLY 2022 is "Access to Justice and the New Normal".

Access to justice and the new normal

[4] Justice is a nebulous and amorphous term that often times lies in the eye of the beholder. The same facts may sometimes give rise to different outcomes. The essence of justice is putting faith in a fair and independent system to decide cases according to law, principles of fairness, good conscience and equity.

[5] Access to justice means more than the ability to make one's way to court. It encompasses the element of effective access. Imbibed within the notion of effective access are the ability to have a fair trial or hearing, and the right to procure a remedy considered just and fair on the merits of the case. The result is preferably a remedy that ends not just the case but the dispute.

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* Speech by The Right Honourable The Chief Justice of Malaysia on the occasion of the opening of the Legal Year 2022, Friday, January 14, 2022, Palace of Justice, at Putrajaya and via zoom.

[6] Apart from the courts, we have the Legislature that passes laws, the Executive which enforces them through its agents and agencies, the Bar, the Attorney General's Chambers ("AGC"), legal aid schemes, non-governmental organisations, activists, the media, and so on. It is therefore important to appreciate that it is not only the Judiciary that holds the key to "access to justice".

[7] In point of fact, it is the Executive and the Legislature that have the power to make provision for access to justice for all of the citizenry of Malaysia. And in this context, it is our immediate stakeholders, namely, the Bar and the AGC who can facilitate access to justice by providing the requisite aid and services to enable the people of Malaysia at all levels of society to gain access to the courts.

[8] The crucial challenge for the Judiciary and the administration of justice now is that we have to also consider the state of access to justice within the context of the new normal. As everyone is aware, the COVID-19 pandemic has radically altered the way in which we go about our usual lives. Handshakes are now considered dangerous and staying or working from home has become more commonplace. We have had to reduce physical and in-person transactions and movement is generally discouraged to limit transmission of the virus.

[9] The change in lifestyle and business habits such as increased reliance on the virtual world and physical distancing has also affected the legal profession and the administration of justice given that it is a very people-centric service. This is especially so in criminal cases where the presumption of innocence and the right to a fair trial are maxims that reign paramount.

[10] While the pandemic has largely been debilitating, the reforms that we have introduced since 2009 have played a significant role in accelerating modern technological advancements and innovation at an unprecedented level, allowing us to cope with the pandemic.

[11] With that, please allow me now to zoom into recent developments.

Initiatives

Virtual courts and online hearings

[12] Speaking of "zooming" in, virtual courts have now become an indelible aspect of our system of advocacy. I say "indelible" because

some have queried when and whether the Judiciary will be "reverting" to physical hearings as the norm.

[13] I wish to make it clear that the Judiciary has always embarked on technological advancements, and online or virtual hearings mark our progress in this direction. The advent of online hearings is not merely a means to cope with the pandemic but a permanent feature of our justice system. There is, therefore, no question of "reverting".

[14] When the pandemic first began in March of 2020, the courts were forced to proceed with online cases on securing the consent of both parties, subject always to the interests of justice. This was because there was no clear permissive legislation stipulating that online hearings or trials are allowed at the behest of the court. Now, Parliament has affirmatively intervened to expressly allow for online hearings irrespective of consent but subject still to the interests of justice. There is no room for dispute as to the propriety of the method given that this shift is not unique to Malaysia.

[15] As such, allow me to emphasise the crucial change in the law by highlighting the newly inserted section 15A of the Courts of Judicature Act 1964 ("CJA 1964") which reads as follows:

> 15A. (1) Without limiting section 15, the Court may, in the interest of justice, conduct the proceedings of any cause or matter, civil or criminal, through a remote communication technology.

[16] Section 3 of the CJA 1964 in turn defines "remote communication technology" as a "live video link, a live television link or any other electronic means of communication" and as one can tell, this definition is very broad. Consequential amendments were also made to the Subordinate Courts Act 1948 signifying that the continued reliance on remote hearings in the subordinate courts, in addition to the superior courts, will subsist irrespective of the pandemic.[1]

[17] We as judges have adjusted well to remote hearings at least in the context of civil cases, criminal applications and criminal appeals. The screen-sharing technology, we find, assists us with reference to documents and the level and nature of advocacy has improved irrespective of whether counsel before us is senior or junior. We also

1 Subordinate Courts Act 1948, ss 2 and 101B.

think that remote hearings have made life easier for lawyers who have been relieved from having to waste time on travel.

[18] In terms of access to justice, the greater reliance on remote hearings has been a boon. More and more of the public and lawyers should feel less nervous about the grandiose nature of the courts, and I think the fact that the courts are more easily accessible by the click of a few buttons cuts us away from ritualism and form, and focuses more on the substantive aspects of justice – the case itself.

[19] I acknowledge that remote hearings are not perfect. There are sometimes issues with sound, internet connection and such hearings are sometimes not feasible when parties do not have the requisite means or access. Regardless, the overall gain and accessibility that remote hearings bring with them far outweigh their downsides which can be worked on.

[20] Accordingly, the Judiciary has invested a greater amount in technology in terms of hardware and software. In terms of hardware, we have purchased better and more sustainable screens and devices and in the Palace of Justice, at least, we have upgraded our Technology Court and courtrooms to cater to our increasing reliance on online hearings which have been equipped with video-face equipment, a voice-tracking conference system and a virtual conference set.

[21] In terms of software, we have invested in numerous Zoom accounts to enable more online hearings and meetings. We have also upgraded our internet services to handle the increased load. In addition, we have established a network operation centre and a security operation centre to monitor and maintain the courts' overall network stability, operation and security.

[22] The Judiciary cannot, however, work alone in this effort. The members of the Bar have, by and large, become accustomed to online hearings with many preferring it over physical hearings. The same is true of lawyers in the public sector. In terms of government agencies, much work is still needed to equip existing facilities or upgrade pre-existing facilities for online hearings. This is specifically true in the context of criminal cases.

[23] Accused persons cannot afford to have their cases being perpetually put on hold. The difficulty we have now is that the

participation of the accused at trial or an appellate hearing is necessary. By this, I mean even their virtual presence is necessary. Throughout the course of the past two years, my colleagues and I have received numerous applications for adjournment on the basis that the accused was unable to attend court because he or she or the prisons' personnel were infected by the coronavirus or had close contact with an infected person.

[24] Some prisons are able to support virtual hearings by having rooms available for detainees or prisoners whose cases are under appeal. But this is not possible for all prisons and as a consequence numerous criminal cases are adjourned due to the inability of accused persons to be physically or virtually present for their hearings.

[25] At the appellate level, we have been successful in disposing of criminal appeals from Sabah and Sarawak because they have and continue to be disposed of online. Accused persons are taken to the Kota Kinabalu Court Complex, for example, and their lawyers argue their appeals there while the appellate judges preside from here in Putrajaya or from home. This shows that the wheels of access to justice are not halted, because all parties are ready and willing to make full use of technology.

[26] The courts are ever ready to proceed with the cases that are before them and so we seek the cooperation of all parties, both governmental and from the private practice, to find solutions to the physical issue of attendance and to generally assist the court with infrastructural and technological issues at their end to overcome the case load.

[27] As proof that the courts are moving forward, we are formulating a new practice direction on hybrid criminal trials at the superior and subordinate courts. Parties may be present physically in open court or remotely from any suitable location. To ensure that an accused person is not being prejudiced in any way, this exercise will only be applicable to those who are represented by counsel. For accused persons who are under remand or detention, we propose that the proceedings be conducted from the prison's location, equipped with the necessary technological tools to support video conferencing. This proposed practice direction, which will apply only to certain types of criminal proceedings, will be issued sometime in the early part of this year, subject to consultation with stakeholders.

[28] I am proud to note that apart from some of the issues I highlighted earlier, the vast majority of the Bar, the AGC and the rest of the stakeholders have responded well to our shift to the online platform. This is borne out by the fact that even full civil trials proceed online these days, which is a considerable advancement from our initial steps towards working online in 2020.

[29] We have in a space of two years by reason of the pandemic achieved greater technological advancement than we would have in the course of 10 years without the pandemic.

Updates, technological advancements and enhancements

[30] As most of you are aware, our shift to the virtual platform, accelerated by the pandemic, is only one part of our goal to fully digitalise court processes, which we have been undertaking since 2009.

General developments

[31] In my 2021 New Year message, I mentioned that we intended to fully equip all courtrooms with the e-Courts platform. I am pleased to announce that all the courtrooms in Peninsular Malaysia have been equipped with the e-Courts platform save for the court in Yong Peng due to the need for physical infrastructural revamping.

[32] I am also pleased to announce that the Recording & Voice to Text ("RVT") system which replaced the old Court Recording Transcription ("CRT") system has been expanded throughout 320 locations in Peninsular Malaysia and only 114 courtrooms remain to be installed with the system. We are in the process of completing this.

Updated services

[33] In making better use of technology, again with a view to enhancing access to justice, we have also undertaken serious efforts to simplify and modify our processes. Some of these changes are legislative and quasi-legislative and will depend on action from Parliament or other bodies. I shall touch on them in greater detail later.

[34] For now, you will recall our e-Jamin system which was launched in 2020. The system allows bailors to make payment of bail completely online without having to travel to banks to open a new account. We have now further updated the e-Jamin system to eJTM or eJamin Teller Machine to also cater to members of the public who do not have online

bank accounts or who do not use online banking. This is because statistics indicate that there are a sizeable number of persons who do not use online banking. Such persons may still open an account for bail via the e-Jamin application but deposit the bail amount in cash into that account via an automated teller machine (ATM) at any bank.

[35] The Judiciary accepts that the trend now is to go cashless. In this regard, we will soon be accepting payment of fines and summonses via credit or debit card. This will be implemented gradually throughout Malaysia in stages. We believe this step will help speed up or eliminate entirely over-the-counter transactions as well as reduce or eliminate long queues.

[36] Another area of progress relates to traffic summonses. We have recently introduced a system called the e-Plead Guilty or ePG system to simplify the process, i.e. allowing accused persons to plead guilty to certain traffic offences without having to attend court physically.

[37] Under the present iteration of the Criminal Procedure Code, section 137 allows an accused person to plead guilty by way of letter. This aspect of the law, however, is seldom used. The ePG mechanism allows the accused person to enter his plea remotely via a system with the ability to state mitigating factors. The magistrate will then accept the plea and enter a conviction and any fine issued will be made payable online. This, too, should serve to simplify access to justice.

[38] I move now to artificial intelligence or "AI". A crucial facet of access to justice is equality before the law. Equality before the law is a concept that "permeates any democratic constitution and that it requires treating like cases alike and unlike cases differently as a general axiom of rational behaviour".[2]

[39] A large aspect of treating people fairly is ensuring the fairness or the measure of sentence.[3] In order to ensure that like cases are treated alike, sentences and punishments should be consistent. AI serves only as a guide and is not the final determinant of the punishment. Magistrates retain the ultimate discretion to pass sentences according to law especially in differing cases, bearing in mind the constitutional principles of fair trial and proportionality. The AI system is, in that

2 *Matadeen v Pointu* [1999] 1 AC 98 at 109.
3 *Alma Nudo Atenza v PP and another appeal* [2019] 4 MLJ 1 at [113]–[114].

sense, no different from the Bench Book relied on for personal injury civil claims or non-binding sentencing guidelines relied upon in other jurisdictions. In this context, we are also contemplating on introducing non-binding sentencing guidelines to complement AI sentencing.

[40] Currently, the AI system spans over 20 offences collectively under the Penal Code, the Dangerous Drugs Act 1952 and the Road Transport Act 1987. It is our hope that by April of this year, we can increase the number of offences covered by the AI system to at least 80 offences covering a wider range of areas, including offences relating to breaches of movement control orders.[4]

[41] Many of the initiatives that I have announced so far relate to the efforts undertaken by the Judiciary. The competence of the prosecutor and defence counsel also comprise key elements of a fair criminal trial. It therefore made for rather astonishing news just last year when the Federal Court acquitted and discharged an accused person for the reason that his counsel was found to be flagrantly incompetent, resulting in a breach of the constitutionally guaranteed right to a fair trial.[5] For this reason, maintaining an adequate level of competence for the legal profession is a matter that must be zealously supervised by the Bar and the AGC.

[42] In line with access to justice, the right to a fair trial and adequate representation, the Judiciary is revising the getting-up fees for assigned counsel for capital crime cases which proposal has been approved by the government on December 10, 2021. We are also revising the selection criteria for assigned counsel. Even though this form of assistance exists, the other legal aid mechanisms must continue to do their part. Likewise, lawyers should also look into doing more *pro bono* work.

Legislative and quasi-legislative changes

[43] As I have previously announced, the Judiciary has proposed amendments to certain laws in line with the need to enhance efficiency.

[44] One major initiative is the move to limit interlocutory appeals. The proposed amendments to the law are ready, and have been approved by the AGC. We understand that the Bill will be tabled during the first Meeting of Parliament this year.

4 Issued under the Prevention and Control of Infectious Diseases Act 1988.
5 *Yahya Hussein Mohsen Abdulrab v PP* [2021] 5 MLJ 811.

[45] The other proposed amendment is to section 137 of the Criminal Procedure Code to allow magistrates to accept online pleas of guilty consonant with our ePG reform which I mentioned earlier. Pending the finalisation of these amendments, the ePG system is being implemented pursuant to the Chief Justice's Practice Direction No. 3/2021.[6]

[46] Yet another important aspect is the proposed amendments to be made to the provisions of the Criminal Procedure Code relating to notices and records of appeal, that is, to allow for service of those documents via electronic means.

Physical infrastructure

[47] While we have made a permanent shift to the virtual platform, physical infrastructure remains relevant because such infrastructures still signify the physical existence of the courts.

[48] We have opened six new courtrooms in the High Court of Malaya with a view to hearing and disposing of more cases at any given time. These six new courtrooms comprise two new courtrooms in Kuala Lumpur, two in Shah Alam, one in Sungai Petani and one in Georgetown.

[49] Apart from opening new courtrooms, we have also been renovating or relocating court premises. This is to provide a more conducive and safer working environment for judges and court staff and additionally, to cater to the convenience of the general public. Examples include the complete relocation of the Kangar Court Complex as well as certain other locations in Sabah and Sarawak. We are building a new Ampang Court in Selangor and we are planning to find a new site to relocate the Shah Alam Court Complex.

[50] In the Opening of the Legal Year 2020 speech, I mentioned the establishment of a formal Judicial Academy with the aim to increase capacity building of judges by broadening the scope and standard of judicial education. I am happy to announce that just recently, the government has approved the use of approximately 25 acres of land in Negeri Sembilan which we propose to construct and use for the

6 Issued under s 3A of the Subordinate Courts Act 1948 as modified by the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) 2020.

Judicial Academy and alongside it, a proposed new Nilai Court and the proposed Chief Registrar's Office Data Centre.

International judicial cooperation

[51] Another important aspect for the Judiciary is international judicial cooperation.

[52] I echo the words of the learned Chief Justice of Singapore, Sundaresh Menon, who expressed in his speech during the Singapore Opening of the Legal Year 2022 that Malaysia and Singapore enjoy an especially close relationship.

[53] In July 2021, the Federal Court of Malaysia and the Supreme Court of Singapore agreed to collaborate on court-to-court communication and cooperation in proceedings concerning admiralty and shipping law matters as well as cross-border corporate insolvency matters. The protocols document a framework for cooperation and communication between the two courts to facilitate the efficient and timely coordination of shipping and admiralty cases as well as cross-border corporate insolvency cases. This is expected to enhance judicial effectiveness and reduce costs to the benefit of businesses and relevant stakeholders in both countries.

[54] Apart from reducing costs for businesses that are already facing challenging conditions in this raging pandemic, these protocols will go a long way towards facilitating the efficient and timely coordination and administration of cross-border cases and enhancing overall judicial efficacy.

[55] The Malaysian Judiciary regularly engages in several regional and world organisations with a view to enhancing judicial best practices. This includes the bi-annual Joint Judicial Conference between Brunei, Malaysia and Singapore, the Council of ASEAN Chief Justices (CACJ), the Standing International Forum of Commercial Courts (SIFFOC), the Association of Asian Constitutional Courts & Equivalent Institutions (AACC), just to name a few.

Statistics

[56] Having apprised you of the efforts taken by the Judiciary in tandem with access to justice in the new normal, allow me to now analyse the statistics up to *November 2021*.

[57] When I refer to cases pending disposal, I mean cases pending disposal as at November 2021. And, where I refer to the number of cases disposed of, I mean cases that have been disposed in 2021 as at November including cases filed pre-2021.

General disposal rate

The Federal Court and the Court of Appeal

[58] Having examined the trend of registration of cases from 2017 to 2021, I note that the number of cases filed annually in all levels of the judicial hierarchy show no substantial difference whether before or during the pandemic. I attribute this to the e-Filing system which has enabled litigants or lawyers to e-file cases, documents and applications no matter the situation and notwithstanding the pandemic.

[59] The Federal Court disposed of 659 civil cases, leaving 593 cases pending disposal. This translates to a disposal rate of 52.6%. As for criminal cases, 286 were disposed of, leaving 283 cases pending disposal. This is a disposal rate of 50.3%.

[60] The Court of Appeal cleared a total of 4,076 cases, leaving a total of 4,440 cases pending disposal. This is a disposal rate of 47.9%. In terms of criminal cases, the Court of Appeal disposed of 846 cases. There remain 1,751 cases pending disposal. This is a disposal rate of 32.6%. This rate is particularly acute in relation to criminal appeals as the presence of the accused is necessary, especially so for capital offences.

[61] As you can tell from the numbers, the pandemic has left us a sizeable backlog. This is being addressed urgently and our judges are working hard to reduce the backlog. In this context, the virtual courts platform has been immensely helpful, because it enables us to accommodate more sittings than our physical courtrooms allow.

[62] At the Federal Court, we have increased the number of sitting days in a week while the Court of Appeal has always had five sitting days in a week. In both the appellate courts, we have increased the number of panels that preside each day and we have also increased the number of cases fixed per day.

[63] Speaking specifically of the Federal Court, in November 2020, we introduced single-judge hearings especially for leave motions

filed in the Federal Court that arise from interlocutory appeals.[7] As at December 31, 2021, a total of 167 interlocutory leave motions were fixed for hearing. Of this, 133 cases were disposed of, indicating a disposal rate of approximately 80%.

[64] Consequently, insofar as the judges and officers are concerned, we are working at full capacity both physically and virtually. The support from the other stakeholders of the justice system, namely, the Bar, the AGC, the police, the Prisons Department and so on is most crucial. Cases should proceed with minimal delay and excuses.

The High Courts

[65] The two High Courts globally disposed of a total of 89,319 civil cases and 47,298 cases remain pending disposal. This is a disposal rate of 65.4%. As for criminal cases, the two High Courts globally disposed of 6,036 cases. 5,291 cases remain pending disposal. The disposal rate is 53.3%.

[66] Our High Court judges and judicial commissioners are also hard at work making full use of the online platform. All manner of trials and hearings are being conducted online for civil cases while criminal cases still pose some logistical problems as explained earlier.

[67] Human resource and more judges have always been perennial problems for the Judiciary. We project that the opening of more High Courts as mentioned earlier will better help manage and dispose of the increasing case load. We are therefore looking to appoint more qualified persons as judicial commissioners.

The subordinate courts

[68] The subordinate courts are the very face of access to justice for the country. They hear the vast bulk of civil and criminal cases and are thus the closest courts on the ground to the vast majority of the *rakyat*. Their performance is thus crucial.

[69] The Sessions Courts throughout Malaysia disposed of a total of 33,620 civil cases. A total of 23,430 cases remain pending disposal. That is a disposal rate is 58.9%. The number of criminal cases disposed of

7 See CJA 1964, s 97.

is 31,864 cases with a balance of 16,623 cases pending disposal. This is a disposal rate of 65.7%.

[70] As for our Magistrates' Courts, a total number of 154,465 civil cases were disposed of and 40,996 remain pending disposal. The disposal rate is a very healthy 79.0%. The total number of criminal cases disposed of is 1,317,681, though a staggering 424,555 cases remain pending disposal. The disposal rate is a healthy 75.6%.

[71] Our subordinate court judges have also been working hard and must be commended for making full use of technology to conduct their cases. They have largely kept to the timeline and have steadfastly worked towards clearing their docket.

[72] The large number of criminal cases registered in the Magistrates' Courts in 2021, namely, 1,352,614 cases, is largely attributable to the sizeable number of traffic summons cases in those courts comprising about 72.7% of the total number of criminal cases registered. Not all of the traffic offences registered can be resolved via the ePG system, but the number of cases that can be resolved by fully digitalising the conviction and sentencing aspect of traffic summons should greatly alleviate the load on such courts, as well as provide better access to justice for the public.

Analysis of the trend of cases

[73] Commercial cases are of significance, as they are, to some extent, an indicator of the country's economy as disputes are some measure of active business and trade. The number of commercial cases has been on the decline between 2017 and 2021. The drop from 2020 to 2021 was about 6%. However, only 55,305 cases were recorded in 2021 as compared to 119,258 in 2017. This is an alarming drop of about 53.6% over a short period of five years.

[74] Bankruptcy cases have seen an overall drop in the number of registrations between the years 2017 and 2021. Specifically, the period between 2020 and 2021 recorded a 36% decline in registrations. I postulate that the amendments to our bankruptcy laws that increased the threshold for bankruptcy claims along with other amendments has naturally reduced the number of such cases filed.

[75] In terms of corporate insolvency cases, a similar trend can be seen in that the number of cases registered yearly between 2017 and 2021

has been on the decline. The period between 2020 and 2021 recorded a decline in registrations of approximately 17%. The enactment of the Companies Act 2016 and the overall increase in the threshold for insolvency claims, I think, has helped bring down the number of insolvency cases.

[76] There has been no major change in the number of drugs cases recorded. In fact, there was only a very slight increase in registrations between 2020 and 2021 – about 1.8%. The number of cases registered between 2017 and 2021 seem to be the same. It appears that the deterrent sentences imposed for these types of offences including capital punishment have not been effective in curbing this category of crime.

[77] I turn now to sexual offences against children. By and large, there was a steep increase in the number of registrations by almost 42% between 2020 and 2021. Sexual offences against children are a serious problem and, in this regard, the Judiciary has had dialogues with the Executive about establishing more sexual crime courts to hear these cases. This will entail an increase in the number of posts allocated to the Judiciary to sit in these courts. We hope this step helps to bring down the numbers.[8]

[78] Street crime cases have been on the steady decline between the period of 2017 to 2021. The year 2021 recorded the lowest number with a 57.5% drop in the number of registrations. Perhaps the imposition of the various movement control orders and the resulting lockdowns left no one on the streets to commit such crimes, which might explain the reason for the drop.

[79] The number of corruption cases registered between 2017 and 2021 has not been consistent, with some years recording more cases than others. However, the total number of cases registered in 2020 and 2021 shows a small increase. As corruption is a scourge in society, it is important that this area is closely monitored as it is a measure of the nation's health and image, both domestically and internationally.

8 General sexual cases on the other hand appear to be recording a decreasing trend of registration for the period between 2017 to 2021. Specifically, the drop between 2020 and 2021 was 3%.

[80] As for environmental cases, registration has also been on the decline for the period between 2017 and 2021. The year 2017 recorded 1,612 cases whereas 2021 recorded only 741 cases or a mere 9% increase from 2020.

[81] The next item is cyber cases which can be either civil or criminal. Civil cyber cases, as I understand them, refer mostly to cyber defamation cases. There was a large increase of 40.6% of civil cyber cases between 2020 and 2021. The criminal cyber cases have been consistently increasing as well, with 2021 marking a slight increase from 2020 by 7.2%. The steady rise of such cases reflects the greater use of social media and perhaps the greater tendency to misuse it.

[82] The number of family cases dropped by 13.2% in 2021 compared to the previous year. However, this figure may not be reflective of the toll taken on numerous households during the pandemic as reported by the media.

[83] General civil cases also appear to have dropped by 11.4% in 2021 compared to 2020. The number of construction cases over the same period of time also shows a minimal drop with registrations averaging about 1,200 cases a year. This may well be traceable to the pandemic as well as the construction payment industry mechanism and the other alternative dispute resolution mechanisms in place.

[84] I now turn to human trafficking cases. The figures we have are between the years 2018 and 2021. Over that four-year period, the number of cases appear not to deviate too much from year to year although the trend appears to show a decline in the number of registrations. The pandemic has greatly reduced movement in and out of the country and it is possible that the decline in the number of cases from 402 cases in 2020 to 333 cases in 2021 is attributable to the pandemic. However, the statistics show that there was also a slight decline between 2018 and 2019, well before the pandemic.

[85] We are mindful of the drop in our international ranking. However, it is understood that in an adversarial system such as ours, the courts are, by constitutional design, incapable of taking active measures to weed out human trafficking. Even when such cases are before the courts, judges must decide them according to the law, the facts and evidence.

Conclusion

[86] In conclusion, I would like to acknowledge that the past two years under the pandemic have been difficult for all of us and how we wish that we could revert to the life before the pandemic. That said, every crisis has its silver lining and the lining here is the greater strides we have all made to advance access to justice to a higher level.

[87] I would like to take this opportunity to thank all my sister and brother judges for their hard work, all judicial officers who have toiled through the pandemic, members of the Bar and the AGC for supporting our initiatives and all agencies that have cooperated with us.

[88] I would also like to thank the Executive arm for allocating the funds we require for us to continue and advance our judicial initiatives. I would also like to thank the Legislature for passing the laws that made it all the more possible to conduct online hearings. It is the Judiciary's hope that all parties can continue to support us for the benefit of access to justice and the public.

[89] The Judiciary in turn remains committed to upholding access to justice and we will continue to decide cases without fear or favour in line with the rule of law and the supremacy of the Federal Constitution.

[90] With that, I wish everyone a very happy New Year. Please continue to stay safe. Thank you.

The 6th Joint Judicial Conference (Online) Brunei-Malaysia-Singapore*

by

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

Introduction

[1] It is a pleasure to meet each and every one of you again through this virtual platform. The fact that we are having our tripartite 6th Joint Judicial Conference online solidifies our continued commitment to embracing modern technological advancements. It is my fervent hope that this raging pandemic will meet its end soon and that we can all go back to how things were once before.

[2] The present theme is an important one and I am most pleased to note that we have lined up many distinguished speakers from our jurisdictions to enlighten us on these significant issues. We will be discussing topics relating to the cross-border protection of children, human trafficking and sentencing considerations as well as judges versus artificial intelligence. All of these topics fit nicely under the umbrella of our general theme: the role of the courts and judges in the protection of economic, social and cultural rights.

[3] I do not wish to trespass into the domain of our erudite speakers who will soon address us on those subjects. Instead, please allow me to speak generally and to share my views on the theme.

Economic, social and cultural rights – what they entail

[4] The Universal Declaration of Human Rights ("UDHR"), proclaimed by the United Nations General Assembly in 1948, classified rights into two broad categories, namely, civil and political rights and economic, social and cultural rights. The UDHR was merely a declaration and to formalise it in accordance with the broad yet diverging views of the international community, emerged the

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* Welcome address by The Right Honourable The Chief Justice of Malaysia, July 22, 2021.

International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[1]

[5] Despite the distinction drawn between the two classifications of rights, most jurists agree that at the heart of it, all the rights traceable to the UDHR are practically inseparable. For instance, the United Nations Office of the High Commissioner for Human Rights ("OHCHR") opines that the following rights can be classified as economic, social, and cultural rights:

(i) Workers' rights including the freedom from forced labour, and the right to fair conditions of employment including the right to partake in trade unions;

(ii) The right to social security and social protection;

(iii) Protection of and assistance to the family including the right to marriage by free consent and the protection of children from economic exploitation;

(iv) The right to an adequate standard of living;

(v) The right to health;

(vi) The right to education; and

(vii) Cultural rights including the right to participate in cultural life.

[6] If we pause to consider these rights within the context of what are classified as civil or political rights in the ICCPR such as the right to life, we should ultimately arrive at the conclusion that rights, no matter how they are classified, are essentially so inextricably linked that classification is at best an academic exercise or at worst, redundant.

[7] Both the ICCPR and the ICESCR were drafted in 1954 and initially signed in 1966. This period coincides roughly with the same time within which our nations gained independence and drafted our own written constitutions. Our historical records reflect that the

1 United Nations Office of the High Commissioner for Human Rights, *Fact Sheet No 33, Frequently Asked Questions on Economic, Social and Cultural Rights*, December 2008, No. 33, available online at: <https://www.refworld.org/docid/499176e62.html>.

Constitution of the Federation of Malaya, later Malaysia, was drafted after the written constitutions of India, the United States, Japan, Ireland, and so on – which were drafted around or long before the time the UDHR was proclaimed. It could therefore be said that the Malaysian Federal Constitution was, at that time, the more up-to-date version of the internationally codified list of rights and to that extent, represents the then international standard of human rights law with modifications to suit local conditions.

[8] In this regard, while our States are not State-parties to the ICESCR or the ICCPR for that matter, the existence of our written constitutional guarantees of fundamental rights/liberties more than makes up for this in our present discussion.[2]

[9] This now brings me to my next point on how these rights are derived and how the courts protect and enforce them.

Protection of economic, social and cultural rights

[10] Courts are often called the last bulwark against tyranny or the ultimate defender of human rights. This role, which has almost become a mantra, is easy enough to recite but not as easy to appreciate and apply, sometimes for even the best of us. In every adversarial system especially in that of a Westminster-style democracy, there are always stern reminders from and to the Bench that separation of powers must be staunchly preserved. This means that an institution of unelected people we call the Judiciary cannot arrogate unto itself the role of the Legislature – an elected body. Thus, in the context of the protection of economic, social and cultural rights or other fundamental rights/liberties, judges do not "make" or "unmake" law – or so some say.

[11] However, in the present context, I think this is only correct to an extent in a system where Parliament is supreme like in the United Kingdom or where it concerns only the interpretive role of the judge with respect to ordinary legislation.

[12] In the context of constitutional and administrative law litigation in Malaysia, having a written constitution, the powers of the Judiciary are

2 See generally for example, Art 5(1) (Right to Life), Art 9(1) (Freedom of Movement within the Federation), Art 10 (Freedoms of Speech, Assembly and Expression), Art 11(1) (Freedom of Religion), Art 12 (Right to Education) and Art 13 (Right to Property).

significantly more prominent. We have Article 4(1) which unreservedly declares that the Federal Constitution is supreme and that any law passed by Parliament inconsistent with it is void (to the extent of the inconsistency). The effect of this provision is that any law passed by Parliament is capable of being struck down as being utterly void if that law violates any provision of the Federal Constitution – most pertinently, the guarantees of liberty.

[13] Additionally, Article 162 of our Federal Constitution which applies in relation to pre-Independence laws empowers the Judiciary, in certain circumstances, to repeal, amend, modify or essentially bring into accord with the Federal Constitution any pre-Independence law which is inconsistent with the Federal Constitution. This, as you may have noticed, is reminiscent of legislative power.[3]

[14] The notion that judges do not, to an extent, "make" or "unmake" law within the context of constitutional adjudication is therefore not quite accurate for those of us who have a written constitution and are mandated to act upon it.

[15] To explain what I mean, albeit briefly, what I will say is that the guarantees the Federal Constitution offers operate on at least two levels which suggest that there is significant judicial input in the making and unmaking of laws. For this explanation, I take the example of Article 5(1) of the Malaysian Federal Constitution.

[16] Article 5(1) provides that no person shall be deprived of life or personal liberty save in accordance with the law. The first level of protection that it affords is that the Executive arm of the government is not allowed to take any measures contrary to that Article without the benefit of express sanction by way of written law. This then draws our attention to the Legislature, a body which is empowered to provide that sanction.

[17] Still at the first level, the Legislature is made up of elected representatives who are taken to act in accordance with the provisions of the written constitution when enacting written law. That is the presumption of constitutionality. Parliamentarians are in the best position to uphold the supremacy of the constitution by

3 *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2004] 4 CLJ 169 at 191.

scrutinising and if necessary, defeating Bills or provisions of Bills that are unconstitutional. These collectively constitute the first level of compliance.

[18] The second level of compliance is the Judiciary. It is correctly said that while separation of powers is fluid in a system where the legislative and executive branches are fused, the Judiciary must remain completely independent and the notion of check and balance takes centre stage. The most extreme measure is of course striking down legislation but there are often other less drastic or alternative recourses.

[19] For one, in enforcing fundamental rights, the court must, in most cases, approach constitutional interpretation with two fundamental principles of interpretation in mind.

[20] Firstly, the provisions which protect rights are to be construed in their widest sense which we have come to know as "prismatic interpretation". This method recognises that our rights are fluid, organic and evolving notions. That is how the right to life has now come to mean more than just mere animal existence and includes the right to a clean environment, the right to privacy and it has even been read to include the presumption of innocence. This, in my opinion, is not an act of judicial legislation but the continued development of constitutional guarantees which could be interpreted as "making" law.

[21] Secondly, any provisions whether statutory and more so constitutional, if they permit derogation from or the suspension of certain liberties, must be construed as narrowly as possible. Where the court can reasonably read down derogating legislative provisions, it should, and where it cannot, the Federal Constitution requires that the provision must be annulled. This can be viewed as the process of unmaking law to some or to others, a "law" was never "law" to begin with.

[22] These trite and accepted cannons of interpretation are recognised not just in Malaysia,[4] but throughout the world where there are written

4 For an example of a prismatic reading of a written constitution, see generally, *Lee Kwan Woh v PP* [2009] 5 MLJ 301, FC; *Alma Nudo Atenza v PP and other appeals* [2019] 4 MLJ 1, FC.

constitutions and they resonate with the judicial oath and most basic duties of a judge in a constitutional setting.[5]

[23] Tied to the courts' duty to recognise and protect these rights is the role of the courts in administrative law. Paragraph 1 of the Schedule to the Malaysian Courts of Judicature Act 1964, which is declaratory of the power, expressly enables the courts to mould relief in the form of prerogative reliefs or any other remedy suitable to meet the ends of justice.

[24] An example of this is the judgment of the Federal Court in a case called *Sobri Che Hassan* which concerned the right to employment.[6] There, the apex court held that it ought not to "effectively reinstate" the unlawfully dismissed public servant due to the acrimonious relationship between him and his employers and instead granted him back wages under the guise of public law relief. This, in my view, is consonant with the upholding of the right to gainful employment which, as highlighted earlier, is identified as an economic right.

[25] Be that as it may, whatever method one considers to protect rights, it is my firm belief that courts must also be protective of themselves. A vulnerable or complacent Judiciary unable to protect and preserve its own powers is hardly in any position to preserve the rights of those it serves. This, in my view, is a fundamental and sometimes an overlooked or less considered aspect of the role of the courts in the preservation of not only economic, social or cultural rights but any right for that matter. This speaks to the timeless point of judicial power and access to justice which the Judiciary must so jealously guard.

[26] In my considered view, the biggest obstacle in that regard is the prevalence of provisions such as ouster clauses. As alluded to earlier, Article 4(1) of the Federal Constitution provides that any law passed by Parliament which is inconsistent with the Constitution is void to the extent of the inconsistency.

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5 For cases where the right to life and liberty, for instance, were read broadly in other countries, see the examples of *State v Makwanyane* [1995] 1 LRC 269, Constitutional Court of South Africa; *Maneka Gandhi v Union of India* 1978 AIR SC 597, Supreme Court of India.

6 *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Mohd Sobri Che Hassan* [2020] 1 ILR 286.

[27] The Judiciary is the only organ that has the final say on the interpretation of the text of the constitution. As such, enforcing its terms is simply to reinstate the supremacy of the constitution and not an assertion of might or force by the Judiciary. To oust the courts' power to scrutinise any transgression of rights would render the notion that courts are the last bastion of justice, nugatory.

[28] If the judicial role within the context of a written constitution is understood correctly, the question of judicial supremacy simply does not arise. Only one thing reigns supreme and it is the written constitution.

[29] Ultimately, when it comes to rights, whether they are economic, social, cultural or other rights, it must be understood that more important than their classification is their protection. The protection of those rights stems from a proper understanding of the judicial role, that is, what it encompasses and what its limits are. And at the end of the day, the Judiciary must be ever ready to protect its own processes from undue control by any other entities whether they be the other two arms of the government or anyone else.

[30] The protection of economic, social and cultural rights will eventually lead to the discussion on individualism versus the role of the State in a collectivist society. As judges, I think we have little business discussing that. Our attention should be directed to sound legal principles and to weighing the legitimacy of governmental action against the guarantee of rights.

Conclusion

[31] With that, may I, on behalf of my colleagues and I, warmly welcome all our brother and sister judges from our neighbouring jurisdictions and all the respected judicial officers to this Conference. My colleagues and I would also like to thank Brunei for a job well done in organising this online conference.

[32] I hope the views that I have shared will help set the stage for discussions that are about to unfold.

Thank you.

"Justice in a Globalised Age"*

by

*The Honourable the Chief Justice Sundaresh Menon***

I. Introduction

[1] We live today in a highly interconnected world marked by decades of explosive growth in transnational trade and commerce. Such unprecedented prosperity and interconnectivity have been supported by a transnational justice infrastructure that has seen important, albeit piecemeal, changes over the years. While one may argue that what we need is a more thoughtful and holistic review of that infrastructure in order to come to a better understanding of how the system as a whole could be improved, the passage of time and the emergence of new challenges and developments in the world have raised doubts as to the continued viability of the fundamental assumption that underlies any discussion of this sort, namely that the connectedness and linkages that bind us in a globalised world are necessary elements for our common good. And so, in this article, I will focus on that anterior point and discuss its implications on the law and our legal systems.

[2] The term "globalisation" has been used to mean many different things to different people, but most definitions converge on the central idea that it refers to a growing interconnectedness and interdependence across the world in various spheres – whether economic, social, or cultural – and at an inter-nation level as well as between individuals, businesses, and communities.[1] The late Professor David Held, an

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* This article is prepared based on the Keynote Address delivered by Chief Justice Sundaresh Menon on September 29, 2021 at the 3rd Judicial Roundtable on Commercial Law jointly organised by the Shanghai University of Political Science and Law and the University of Hong Kong. Its themes will be more systematically explored in an upcoming publication in late 2022 by Hart Publishing, titled "Transnational Commercial Disputes in an Age of Anti-Globalism and the Pandemic".

** Supreme Court of Singapore.

1 Nayef RF Al-Rodhan and Gerard Stoudmann, "Definitions of Globalization: A Comprehensive Overview and a Proposed Definition" (June 19, 2006), available online at <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.472.4772&rep=rep1&type=pdf>.

eminent scholar of globalisation and global governance, perhaps put it best when he suggested that globalisation means that we now live in a world of "overlapping communities of fate".[2] Indeed, we are today interconnected to a degree never before seen in human history. As the ongoing pandemic reminds us, the choices we make and the actions we take within our own nations can have significant consequences for others half a world away.

[3] This article will focus on the relationship between globalisation and the law, and the mutually transformative effect that each has had, and will continue to have, on the other. There are perhaps two uncontroversial observations about this relationship that I can state at the outset and which might help explain why I have chosen to focus on the anterior question:

(a) The first is that the law has been a force that has helped to *sustain* globalisation. In an increasingly interconnected world, the law has served the essential function of bringing structure and order to an ever-expanding scope of relationships and connections that individuals, communities, and nations have with one another. This has certainly been the case in the context of transnational trade and commerce.

(b) The second observation, which follows from the first, is that globalisation has correspondingly also *shaped* the law. For if the object of the law is to bring order to societal relationships, and if globalisation has radically and fundamentally altered the nature, pattern, and intensity of those relationships, then the law and its institutions will naturally transform to meet the changing needs of those they serve and be shaped and influenced by the new realities of a globalised world.

[4] Taken together, these observations suggest that before we can turn to consider the future of the law, and especially international commercial law, we must first consider the future of globalisation itself. Indeed, this is particularly apposite given the *normative* uncertainty that has come to plague globalisation in recent years. Rising socio-

2 David Held, "Democracy and Globalization: MPIfG Working paper, No 97/5", Max Planck Institute for the Study of Societies (May 1997), available online at <www.mpifg.de/pu/workpap/wp97-5/wp97-5.html>.

economic inequality, growing distrust of public institutions, and the breakdown of traditional media and informational sources – all of which are trends stemming from or exacerbated by globalisation – together threaten to halt and even reverse the heretofore seemingly inexorable trend towards greater interconnectedness.

[5] In the light of all this, what does the future hold for the globalised world? I approach this question in three parts:

(a) In the first part, I set out a brief history of globalisation including its rise and decline since the World Wars. I then examine the role that the law has played in this journey, and suggest that, for better or for worse, globalisation and the law are symbiotically and inextricably linked.

(b) In the second part, I endeavour to identify and evaluate the reasons for the decline of globalisation, and the role that the law and legal systems might have played in exacerbating that decline. I then turn to weigh the strengths of globalisation and consider the reasons why it might yet remain our best hope in securing humanity's shared future.

(c) Finally, I argue that despite the present headwinds, what we need is not to jettison the idea of globalisation, but rather to take a concerted effort to develop a more *sustainable* vision of it – one that is grounded in the idea of legitimacy so that we might achieve a degree of consensus about the purposes and limits of globalisation, and the trade-offs that we should be willing to accept in exchange for its benefits.

II. Part 1: Globalisation and the law: A brief history

A. The twin triumphs of globalisation and law

[6] I begin with a brief history of globalisation and the law. The modern wave of globalisation was born out of the ashes of World War II, as the US-sponsored Marshall Plan kickstarted a worldwide economic recovery by rebooting cross-border trade and investment after years of global warfare and nationalism. This process of economic and cultural integration continued apace until the 1990s, at which time it became supercharged as the European single market began to take shape, and then even more so in the succeeding years as China and India became key players in the world economy.

[7] It is undeniable that globalisation has played a significant role in advancing global economic prosperity, and this has been marked by a broad trend of economic liberalisation that has facilitated the flow of capital and resources to where they can be most profitably applied, as well as the emergence of new technologies which have fostered global interconnectedness on an unprecedented scale.[3] Since 1990, transnational trade has seen tremendous growth. As a share of global output, it rose from under 40% in 1990 to almost 60% in 2018.[4] In the same period, global gross domestic product ("GDP") more than tripled.[5] Globalisation has also been instrumental in alleviating the plight of the poorest and most economically vulnerable in the global community. Between 1990 and 2010, the number of persons living in poverty as a share of the total population of developing countries *fell by half*! And about a *billion* people were freed of the scourge of poverty in just those two decades.[6] China alone accounted for three-quarters of that stunning achievement.[7] Other human development indicators, such as literacy and child mortality rates, have also improved significantly.[8]

[8] Whatever one's view on globalisation and its continued viability, it cannot be denied that globalisation has done a tremendous amount of good over the past decades. What is perhaps less known, but no less

3 *The Economist*, "The global list: Globalisation has faltered" (January 24, 2019), available online at <www.economist.com/briefing/2019/01/24/globalisation-has-faltered> ("Globalisation Has Faltered").

4 See Globalisation Has Faltered, ibid: world trade as a share of global GDP in 1990 was 39%, and had by 2018 increased to 58%.

5 See the World Bank, "GDP (current US$)", World Bank Data (updated as of August 20, 2021), available online at <data.worldbank.org/indicator/ny.gdp.mktp.cd?end=2018&start=1990>: In 1990, global GDP in current US dollars was $22.762 trillion, whereas this had increased to $86.344 trillion by 2018, an increase of approximately 3.8 times.

6 *The Economist*, "The world's next great leap forward: Towards the end of poverty" (June 1, 2013), available online at <www.economist.com/leaders/2013/06/01/towards the end of poverty>.

7 In 1990, more than 750 million Chinese lived below the international poverty line, and this was a staggering two-thirds of the national population. By 2012, however, that number had fallen to fewer than 90 million and, by 2016, it had further fallen to just over 7 million, or 0.5% of China's population. See Jack Goodman, "Has China lifted 100m people out of poverty?", BBC News (February 28, 2021), available online at <www.bbc.com/news/56213271>.

8 Mukhisa Kituyic, Secretary-General of UNCTAD, Foreword in the "Developmental and Globalisation: Facts and Figures 2016 Report" at p ii.

important, is the indispensable role that the law has played in bringing order to the tangle of invisible threads that increasingly bound and connected the world. There are at least three aspects to this.

[9] First, the law has served as the globalised *currency of trust*. The days are long gone when the sphere of one's interactions was largely limited to members of the same, close-knit community. Instead, globalisation has created a new *transnational* marketplace, and this has witnessed a proliferation of commercial relationships with counterparties whom one might not really know, fully understand, or even trust. Thus, while transactions of the past could stand on nothing more than one's word and a firm handshake, dealing in the modern global marketplace calls for a more "arms-length" regulatory framework – or a rules-based system – requiring the law to play a crucial role. We can see this at all levels of the economy. In businesses, legal contracts have supplanted the exchange of memos as the primary means of economic command and control.[9] Between nations, the international law of obligations has also lent structure and given order to international trade. The United Nations Convention on Contracts for the International Sale of Goods, and the World Trade Organisation's ("WTO") General Agreement on Tariffs and Trade, are but two well-known examples.

[10] If legal rights can now be considered the new *currency* of trust, then it follows that our legal frameworks have become the notional "bank" in which we can safeguard and realise those rights. Among the clearest illustrations of this are the methods for transnational commercial dispute resolution that have evolved dramatically in recent decades. Leveraging on the advantages of international enforceability, neutrality, and procedural flexibility, arbitration has emerged as the pre-eminent means of resolving transnational commercial disputes. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, widely regarded as one of the most successful international treaties,[10] boasts an impressive 168 Contracting States and has reshaped the manner in which transnational commercial justice is pursued and enforced. In like manner, instruments like the United Nations Commission on

9 Martin Shapiro, "The Globalization of Law" (1993) 1(1) *Indiana Journal of Global Legal Studies* 37–64 at 40.

10 Arbitration Academy, "Benefits of the New York Convention", available online at <https://arbitrationacademy.org/wp-content/uploads/2018/07/7.pdf>.

International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration and the International Centre for Settlement of Investment Disputes ("ICSID") Convention, Regulations and Rules for Investor-State Arbitration have gained significant currency and acceptance.[11] More recently, we have seen the rise of international commercial courts, which complement – and, some might say, *compete* with – international arbitration. These developments are but a part of the growing assembly of specialised institutions and procedures that pertain to the resolution of *international* commercial disputes, and this raises interesting and important questions as to whether and to what extent the internationality of such disputes justifies treating them differently than we would domestic commercial disputes. In any case, developments like these underscore how, in these and other ways, the law has played a crucial role in oiling the wheels of transnational commerce which are, in turn, powered by the engine of globalisation.

[11] Second, driven by the desire to overcome the risks and costs of regulatory fragmentation and arbitrage, global commercial laws have gradually been converging towards a set of shared principles that provide a measure of legal consistency regardless of locality. This has seen the blending of trade usages, model contracts, and standard clauses into a body of supranational norms and principles.[12] The success and proliferation of various standard form contracts – such as the Institution of Civil Engineers ("ICE") Conditions of Contract[13] – testify to the appetite for the law's standardising function. This is also reflected in the emergence of institutions such as the UNCITRAL, the European Law Institute, and the Asian Business Law Institute, among others, which are all engaged in the bid to minimise unnecessary

11 The UNCITRAL Model Law has been adopted in 85 States, and the ICSID Convention has 164 signatory and Contracting States: see United Nations, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006" (updated as of January 2021), available online at <uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>; International Centre for Settlement of Investment Disputes, "Database of ICSID Member States" (updated as of June 2021), available online at <icsid.worldbank.org/about/member-states/database-of-member-states>.

12 Marius Vacarelu, "Globalization, Modernity and Law" (2017) 5 *Academic Journal of Law and Governance* 58–65 at 62.

13 See Brian Eggleston, *The ICE Conditions of Contract: Seventh Edition* (Blackwell Science Publishing, 2001).

obstacles to free and seamless trade.[14] And even in judicial contexts, the ability to refer to the decisions of other jurisdictions – enabled by the proliferation of technologically-enabled research tools – has also facilitated a gradual convergence in the attitudes and approaches taken by national courts to commercial issues, with clear examples in the field of cross-border insolvency and international commercial arbitration.[15] Taken together, this trend towards the standardisation of commercial practices fostered by the law has provided something approaching a common framework within which any person from any jurisdiction could, with a reasonable degree of stability, engage and participate in the global economy.

[12] Third, the law has furnished the underlying infrastructure of rules and rights needed to encourage commercial entrepreneurship and innovation while limiting the potentially ruinous consequences of business failure. This includes legal developments in the recognition of a wider range of property rights from intellectual property to crypto assets, the trend towards a universalist approach in international insolvency and restructuring, the development of antitrust and competition law principles to guard against monopolistic excesses, and perhaps most foundationally, the principle of separate legal personality that limits the personal liability of businesspersons. In this sense, the law has undoubtedly, in the words of Lord Bingham, played a vital role as the handmaid of commerce.[16]

[13] Thus, it might be said that the triumphs of globalisation have in some ways also been the triumphs of the rule of law. Their intertwined histories showcase a relationship that has proven both profoundly

14 See, for example, the work of the Asian Business Law Institute and its reports on regulatory and legal approaches in Asia concerning personal data, corporate restructuring, and the recognition and enforcement of foreign judgments. See <https://abli.asia/Publications>. See also Sundaresh Menon, "Transnational Commercial Law: Challenges and A Call for Meaningful Convergence" [2013] SJLS 231.

15 See, for instance, the converging jurisprudence concerning the interpretation of the UNCITRAL Model Law on International Commercial Arbitration. See also Charles Molineaux, "Applicable Law in Arbitration: The Coming Convergence of Civil and Anglo-Saxon Law via Unidroit and Lex Mercatoria" (2000) 1(1) *The Journal of World Investment & Trade* 127.

16 Lord Bingham of Cornhill, "The Law as the Handmaid of Commerce", speech at the Sixteenth Sultan Azlan Shah Law Lecture 2001 on September 5, 2001.

symbiotic and immensely successful. If globalisation may be said to have built a system of superhighways for the more efficient movement and utilisation of money, materials, and labour, then the law has dutifully served as its system of traffic rules, road markers, and crash barriers – organising and regulating its flows, illuminating the cracks, and curbing its more brutish tendencies.

B. Globalisation on the rocks

[14] Yet, for all of globalisation's past achievements, a new page seems to have been turned in its history. One might trace the turning of the tide to the time just before the turn of the millennium, when a number of events with regional or global repercussions tore national economies apart.

[15] In 1997, Asia suffered a serious financial crisis after an economic bubble inflated by a rapid inflow of short-term funds into Thailand rapidly collapsed. A decade later, a collapse in the United States of America ("US") subprime mortgage market swiftly developed into a full-blown international banking crisis and global economic downturn,[17] plunging several nations into serious debt.[18] Out of the search for answers as to how the risks that had pooled in what were then relative backwaters of the global financial system had so rapidly and devastatingly impacted all corners of the world economy,[19] it emerged that at least part of that answer lay in the fact that the very connections that had propelled the world's markets to unprecedented

17 Academics have warned of signs of a similar impending collapse in late 2020 and early 2021. See Eben Harrell, "Are we on the verge of another financial crisis? An interview with John Macomber, Senior Lecturer at Harvard Business School", *Harvard Business Review* (December 18, 2020), available online at <hbr.org/2020/12/are-we-on-the-verge-of-another-financial-crisis>.

18 Robert McCauley, "The 2008 crisis: transpacific or transatlantic?", *BIS Quarterly Review* (December 16, 2018), available online at <www.bis.org/publ/qtrpdf/r_qt1812f.pdf>.

19 Michael Carson and John Clark, "Asian Financial Crisis", Federal Reserve History (November 22, 2013), available online at <https://www.federalreservehistory.org/essays/asian-financial-crisis>, noted that the crisis that had started in Thailand in July 1997 had by 1998 spread across East Asia and led to spillover effects as far away as in Latin America and Eastern Europe. Ian Goldin, "Globalisation has created substantial benefits, but global governance must evolve to meet the challenges posed by new systemic risks", London School of Economics Blogs (September 1, 2014), available online at <https://blogs.lse.ac.uk/europpblog/2014/09/01/globalisation-has-created-substantial-benefits-but-global-governance-must-evolve-to-meet-the-challenges-posed-by-new-systemic-risks>.

heights of prosperity had also served as conduits for the ensuing financial contagion.

[16] Furthermore, as we entered the first decade of the new millennium, a series of threats to our common peace and security also emerged in relatively quick succession which were perceived, whether justifiably or otherwise, as being a result of globalisation and the interconnectedness it necessarily entails.

(a) First, in 2001, the US was rocked by major terrorist attacks masterminded by a global terrorist organisation and executed by an international cell of attackers, one of whom had been born in Egypt, radicalised in Hamburg, and trained as a pilot in Florida.[20] The attacks sparked a global war on terror, the implications of which continue to reverberate throughout the world. Although often perceived as a preoccupation of the US, this is a war against an enemy that is insidious and invisible; is not uniformed; operates without significant resource; does not regard itself as being bound by any rules of war or engagement; and its sphere of operations is neither confined in geography nor affected by the military or civilian status of its targets. This, in fact, is a war that concerns and involves all of us. Some of the aftershocks of the 9/11 attacks were still being played out a month ago on the tarmac in Kabul.[21]

(b) Second, climate change has come to the fore as one of the gravest existential threats to humanity. In 2009, alarms were raised that the decade about to end had been the warmest since modern record-keeping started in the 1880s.[22] Two decades on,

20 Lara Keay, "9/11 anniversary: Who were the September 11th attackers and what are the links with the new Taliban regime?", Sky News (September 11, 2021), available online at <news.sky.com/story/9-11-anniversary-who-were-the-september-11th-attackers-and-what-are-the-links-with-the-new-taliban-regime-12402917>.

21 Frank Gardner, "'War on Terror': Are big military deployments over?", BBC News (June 20, 2021), available online at <www.bbc.com/news/world-asia-57489095>. See also "Afghanistan: Taliban carrying out door-to-door manhunt, report says", BBC News (updated as of August 20, 2021), available online at <www.bbc.com/news/world-asia-58271797>.

22 Adam Voiland, "2009: Second warmest year on record; end of warmest decade", NASA Global Climate Change (January 22, 2009), available online at <climate.nasa.gov/news/249/2009-second-warmest-year-on-record-end-of-warmest-decade>.

the situation has only deteriorated further.[23] In its recent 2021 Report, the Intergovernmental Panel on Climate Change found that the world was warming faster than previously expected, and warned that unless immediate, rapid, and large-scale reductions in emissions are achieved, humanity's ability to limit the warming of our planet will soon slip out of our collective reach.[24]

(c) Third, the ongoing COVID-19 pandemic has highlighted global public health as another pressing issue of worldwide concern. Within months, COVID-19 had spread throughout the world, paralysing economies and healthcare systems and illustrating in the starkest terms possible just how interconnected – and therefore vulnerable – we all are.

[17] This succession of existential crises has laid bare the costs of global interconnectedness. Each of these threats has powerfully demonstrated the extent of our interlocking fragility, and strengthened the case of those who view global interconnectedness not as a means of advancing collective progress but as a slippery slope towards excessive interdependence, shared vulnerabilities, and a loss of self-determination. This has led to calls for States to "take back control";[25]

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23 In its recent 2021 Report, the Intergovernmental Panel on Climate Change found that the world was warming faster than previously expected, and it warned that unless immediate, and large-scale reductions in emissions are achieved, humanity's ability to limit the warming of our planet will soon slip out of our reach: see Intergovernmental Panel on Climate Change, "AR6 Climate Change 2021: The Physical Science Basis", IPCC Sixth Assessment Report (updated as of August 7, 2021), available online at <www.ipcc.ch/report/ar6/wg1/#FullReport>. Despite the potentially devastating scenario we face collectively, the political will and incentive to take action against climate change appears wanting.

24 Intergovernmental Panel on Climate Change, "AR6 Climate Change 2021: The Physical Science Basis", ibid.

25 Rory Horner, *et al*, "How anti-globalisation switched from a left to a right-wing issue – and where it will go next", *The Conversation* (January 26, 2018), available online at <https://theconversation.com/how-anti-globalisation-switched-from-a-left-to-a-right-wing-issue-and-where-it-will-go-next-90587>, noted the rallying call for supporters of Brexit who seek to "take back control" from Brussels. In a speech at the 2017 World Economic Forum at Davos, British Prime Minister Theresa May acknowledged that "talk of greater globalization can make people fearful. For many, it means their jobs being outsourced and wages undercut. It means having to sit back as they watch their communities change around them".

some going as far as to declare that "globalisation is dead" and that the future of the world ahead lies instead in "deglobalisation".[26]

[18] Unfortunately, anti-globalisation rhetoric today is no longer the preserve of a vocal minority, but has manifested in ways that are much more concerning.

(a) Between 2008 and 2017, in the wake of the global financial crisis, measures of global trade openness indicated a decline for the first time since World War II.[27]

(b) In 2016, the European Union ("EU"), once the poster child of transnational integration, suffered a major setback when the United Kingdom ("UK") voted to leave the EU.

(c) Then in 2017, a change of administration in the White House brought with it a sharp pivot away from multilateralism and global free trade. In the ensuing years, negotiations of the Trans-Pacific Partnership[28] were abandoned, appointments to the Appellate Body of the WTO[29] were blocked, and the US withdrew from the Paris Climate Accord on the stated basis that the agreement

26 Michael O'Sullivan, *The Levelling: What's Next After Globalization* (PublicAffairs Publishing, 2019); see also *The Economist*, "Globalisation is dead and we need to invent a new world order" (June 28, 2019), available online at <www.economist.com/open-future/2019/06/28/globalisation-is-dead-and-we-need-to-invent-a-new-world-order>.

27 Shawn Donnan, "Globalisation in retreat: capital flows decline since crisis", *Financial Times* (August 22, 2017), available online at <www.ft.com/content/ade8ada8-83f6-11e7-94e2-c5b903247afd>; Douglas A Irwin, "Globalisation is in retreat for the first time since the Second World War", Peterson Institute for International Economics (April 23, 2020), available online at <www.piie.com/research/piie-charts/globalization-retreat-first-time-second-world-war>.

28 Mireya Solis, "Trump withdrawing from the Trans-Pacific Partnership", Brookings Institute (March 24, 2017), available online at<https://www.brookings.edu/blog/unpacked/2017/03/24/trump-withdrawing-from-the-trans-pacific-partnership>.

29 Peter Baker, "Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal", *New York Times* (January 23, 2017), available online at <www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>. See also an author's suggestion that the 2019 WTO crisis possibly presented "*déjà vu*", i.e. a pattern that has recurred in WTO over the years, albeit the author's view that the actions by the Trump Administration as regards the Appellate Body were arguably more severe: Rubens Ricupero, "Chapter 2 – WTO in crisis: *déjà vu* all over again or terminal agony?" in *The WTO Dispute Settlement Mechanism* (Springer, 2019), pp 17–23.

was prejudicial to American jobs.[30] The continuing trade tensions between the US and China is yet another example of the shift in attitude towards globalisation that has had implications not only for the US and Chinese markets,[31] but also for every other national economy.[32] It is too early to tell how this will be affected by the recent change of administration in Washington.[33]

[19] Given all of these, it may consequently be said that we are today, more than ever in the past 50 years, living in a world that is both intensely and intractably interconnected and yet also deeply divided; one that, in many respects, increasingly resembles a scatter of anxious States preoccupied by threats that they know to be common, but yet, somehow choosing to remain resolute in their decision to face these challenges within national or at best regional silos, rather than as part of a dynamic, unified whole.

III. Part 2: Evaluating globalisation: A faith misplaced?

A. The fall of an ideology

[20] The present situation portends a worrying future for globalisation and the globalised world. But what might account for this turning of

30 Julia Jacobo, "The US is leaving the Paris Agreement: How that will affect the global mission to affect climate change", ABC News (November 2, 2020), available online at <https://abcnews.go.com/US/us-leaving-paris-agreement-affect-global-mission-affect/story?id=73861889>: US President Trump had announced his intention to withdraw from the agreement, saying that it would "undermine [the US] economy, hamstring [US] workers, weaken [US] sovereignty [and] impose unacceptable legal risk".

31 Bloomberg Economics, "Trump's Tariffs Led to Billions of Losses, Fed Research Shows" (updated as of June 23, 2021), available online at <www.bloomberg.com/news/articles/2021-06-22/u-s-china-tariffs-distorted-trade-billions-lost-fed-says>.

32 Ken Itakura, "Evaluating the Impact of the US-China Trade War" (2019) 15(1) *Asian Economic Policy Review* 77–93, available online at <doi.org/10.1111/aepr.12286>; Sebastien Goulard, "The Impact of the US-China Trade War on the European Union" (2020) 12(1) *Global Journal of Emerging Market Economies* 56–68, available online at <doi.org/10.1177/0974910119896642>.

33 See Orange Wang, "US-China relations: American efforts to reshore supply chains blasted as 'empty talk' by former minister", *South China Morning Post* (June 28, 2021), available online at<www.scmp.com/economy/global-economy/article/3139057/us-china-relations-american-efforts-reshore-supply-chains>. Perhaps as a harbinger of what is to come, one *New York Times* headline from March 2021 proclaimed that "In Washington, 'Free Trade' Is No Longer Gospel". See Ana Swanson, "In Washington, 'Free Trade' Is No Longer Gospel", *New York Times* (March 17, 2021), available online at <www.nytimes.com/2021/03/17/business/economy/free-trade-biden-tai.html>.

the tide? And what lessons can we glean from trying to find answers to this? I make three principal points.

[21] The first is that much of the discontent with globalisation may be attributed to a fundamental failure to achieve consensus on its primary objectives and purposes, and therefore, also on its *limits*. The precursor to contemporary globalisation was the age of colonialism. The colonial powers saw the globe and its resources as theirs for the taking, and the "global interconnectedness" of that age was largely founded on starkly asymmetrical relationships between the colonisers and the colonised,[34] with few if any normative limits on the ability of a colonial power to exploit those relationships for economic gain. Over time, these attitudes have given way to a somewhat more inclusive and enlightened approach to globalisation that is more conscious of the need to ensure that all are allowed to *share* in the benefits of the global economic growth.[35] But what has not changed is our seemingly single-minded desire to maximally exploit our global resources without restraint – relying on the trade and legal infrastructure provided by globalisation – in a bid to sustain what in truth are the *unsustainable* levels consumption and affluence that we aspire to, even though we know that those levels will only be attained by very few and at inordinate cost. And today, even in the face of overwhelming evidence that our current practices are unsustainable,[36] we continue to resist the idea that there are costs associated with the untrammelled exploitation of our natural resources,[37] and that *sustainable* development requires

34 As evidenced by, for example, what has been called the "Scramble for Africa", which took place in the late 19th century. The colonisers – 13 European countries and the US – met in Berlin to agree the rules of African colonisation, and promptly proceeded to divide up the continent amongst themselves: see St John's College, University of Cambridge, "The Scramble for Africa", available online at <www.joh.cam.ac.uk/library/library_exhibitions/schoolresources/exploration/scramble_for_africa>.

35 See Jacobus A Du Pisani, "Sustainable development – historical roots of the concept" (2006) 3(2) *Environmental Sciences* 83 at 88 ("Pisani"). This latest iteration of globalisation has as a central concern the widening gap between the developed and developing countries, and there seems to be acknowledgment that high international economic growth rates could only be maintained if wealth could be distributed more evenly on a global scale.

36 See, among others, the United Nations Intergovernmental Panel on Climate Change ("IPCC") Special Reports on Global Warming dated October 8, 2018 and August 9, 2021.

37 Pisani, supra n 35 at 87–88 and 90.

us to take these costs into account even as we continue to pursue economic prosperity.[38]

[22] Second and relatedly, lulled perhaps into a false sense of security by the past successes of globalisation, we have failed to trim the sails of globalisation to better navigate the changing winds of threats to our collective humanity. Our inability to develop a cohesive response to the dangers posed by climate change is a prime example of this. So too is our inability to develop any meaningful or concerted effort to address the problem of global economic inequality. Despite the unprecedented prosperity brought about by globalisation, the World Inequality Report stated that between 1980 and 2016, income inequality had increased sharply in nearly *all* world regions, and that even as there was general economic growth across all income groups, the global top 1% earners had captured twice as much of the growth in global income as the poorest 50%. While globalisation may not at its core be a *distributive* concept, these numbers highlight that we have yet to come to terms with the distributive *consequences* of globalisation or to develop a consensus on the distributive *norms* that could and perhaps should have underpinned globalisation as the defining trend of the 20th century.

[23] The third observation I wish to make relates to the role of the law in the decline of globalisation. Just as the law has played a complementary role to the rise of globalisation, I suggest it is also at least partly responsible for its decline. If legal rights are the *currency* of trust in a globalised world, they seem to suffer the very same problems that the fiat currencies now suffer from – that of unequal distribution and a growing sense that they may no longer be fit for purpose.

[24] Across the developed and developing worlds, the issue of access to justice has been an enduring problem that manifests itself in various ways – long waiting times for hearings, delayed judgments, and the

38 UN Conference on the Human Environment (Stockholm, 1972): "A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well being depend. Conversely, through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes … To defend and improve the human environment for present and future generations has become an imperative goal for mankind", cited in Pisani, supra n 35 at 92.

prohibitive costs of legal services and court fees, among others.[39] The issue of *inadequate* access comes hand in hand with the problem of *unequal* access,[40] since it tends to be the poorest and most marginalised who lack the resources necessary to surmount these barriers to justice. In its 2016 report on inclusive growth, the Organisation for Economic Co-operation and Development ("OECD") stated that the "inability to resolve legal problems diminish access to economic opportunity, reinforces the poverty trap, and undermines human potential and inclusive growth".[41] To this end, target 16.3 of the UN Sustainable Development Goals (or "SGDs") expressly commits member States to "promote the rule of law at the national and international levels, and ensure equal access to justice for all". Yet, on a global scale, there remains a disquieting justice gap despite the economic gains of the past decades. According to one UN estimate, 85% of the populations of 179 developing nations live in areas that are beyond the reach of the law, meaning that over *four billion people* lack effective recourse to justice through the law.[42] Even in countries as developed as the US, it has been reported that four-fifths of low-income Americans have no effective access to legal help.[43] It should be a matter of deep concern that instead of serving as a bulwark against evolving threats and growing

39 See for example Endang Hadrian, "Optimizing the implementation of mediation to overcome civil case backlog in Indonesia" (2019) 20(5) *South East Asia Journal of Contemporary Business, Economics and Law* 151–157, available online at <www.endanghadrian.co.id/images/Journal%20internasional.pdf>; Sital Kalantry, "Litigation as a Measure of Well-Being: The Threat of India's Case Backlog" (2013) 62 *DePaul Law Review* 247–292, available online at <osf.io/preprints/lawarxiv/dr92f>; Lizzie Dearden, "Crown court backlog hits record high of 60,000 cases as victims wait years for justice", *The Independent* (June 24, 2021), available online at <www.independent.co.uk/news/uk/home-news/crown-court-backlog-coronavirus-cuts-b1872051.html>; Paul Stinson and Joyce E Cutler, "Texas Court backlog could last five years without more funding", Bloomberg Law (May 24, 2021), available online at <news.bloomberglaw.com/us-law-week/Texas-court-backlog-could-last-five-years-without-more-funding>.

40 Chief Justice Sundaresh Menon, "Technology and the Changing Face of Justice", speech at the Negotiation and Conflict Management Group ADR Conference 2019 delivered in Lagos, Nigeria on November 14, 2019 ("NCMG speech") at para 9.

41 OECD, "Towards Inclusive Growth – Access to Justice: Supporting people-focused justice services" (2016).

42 UN Report of the Commission on Legal Empowerment of the Poor, "Making the Law Work for Everyone", vol 1 (2008), pp 19 and 90, available online at <un.org/ruleoflaw/files/Making_the_Law_Work_for_Everyone.pdf>.

43 *The New York Times*, "Addressing the Justice Gap" (August 23, 2011), available online at <nytimes.com/2011/08/24/opinion/addressing-the-justice-gap.html>.

inequality in a globalised world, the law and legal systems might in fact have perpetuated and exacerbated the failings of globalisation.[44]

B. The case for hope

[25] The common thread underlying these three contributory factors to the decline of globalisation is that they are complex, multi-faceted, and near-intractable problems that cannot easily be resolved or mitigated. But before we conclude that globalisation should therefore be abandoned, I suggest that we must consider another perspective – namely, the strengths of globalisation and the reasons why it might remain our best hope in securing humanity's shared future.

[26] From that perspective, I suggest there is a simple but compelling argument for doubling down on our commitment towards a certain vision of globalisation, and that is that the most urgent, important, and existential issues that plague humanity today *require* multilateral solutions, and our best chances of achieving them lie in an interconnected and open global society with a realistic appreciation of both our inter-dependency and our shared vulnerabilities. As the saying goes, "global problems require global solutions".[45] I earlier identified three such issues – the threat of terrorism, climate change, and the ongoing pandemic. And there are of course others; in a speech to the UN General Assembly in September 2021, Singapore's Foreign Minister stressed the importance of *multilateral* action to tackle a range of global issues including data regulation and the governance of the world's oceans and ocean resources.[46] The underlying commonality that all of these problems share is that they cannot be solved by any one State alone; they require collective action and multilateral solutions.

[27] Take the fight against climate change, for example. Limiting global warming requires that we keep greenhouse gas emissions to

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44 NCMG speech, supra n 40 at para 9.

45 United Nations News Centre, "Global problems need global solutions, UN officials tell ministers at development forum" (July 17, 2017), available online at <https://www.un.org/development/desa/en/news/intergovernmental-coordination/high-level-segment.html>.

46 Ministry of Foreign Affairs Singapore, "Minister for Foreign Affairs Dr Vivian Balakrishnan's National Statement at the General Debate of the 76th Session of the United Nations General Assembly in New York, 25 September 2021" (September 26, 2021), available online at <www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2021/09/j20210926-76th-UNGA-national-statement>.

a certain level. Individually, each country lacks both the capacity and the incentive to achieve this; and since no single country *can* do it alone, no country standing alone *will* do it. Issues like these, which implicate the global commons, require that we stand together. Uneven participation, even if involving a relatively small band of abstainers, creates a free-rider problem that undermines the incentives for those onside to stay onside. Take, for instance, the commitments made by the signatories to the Kyoto Protocol and the Paris Agreement to reduce greenhouse gas emissions, for which the fruits of participation – the slowing of global warming – accrue to the benefit of *all*, even the abstainers who share none of the costs of participation.[47]

[28] The COVID-19 pandemic is another contemporary example of the need for multilateralism. It cannot be denied that hyperconnectivity, whether in terms of economic relations or physical travel, had contributed to the speed and reach of the pandemic's impact. Within half a year of COVID-19 being declared a global pandemic, every economy had plunged into recession.[48] As it now stands, COVID-19 is estimated to have spread to at least 220 countries and territories, sickened well over 200 million people, and killed nearly five million.[49]

[29] Across the world, the initial response of almost every State was to shut its borders and turn inward. By May 2020, *every* country in the world had imposed travel and entry restrictions. In Singapore, we took the unprecedented step of closing our land border with Malaysia, one of the busiest land crossings in the world that used to see over 300,000 people and 145,000 vehicles crossing each day.[50] By April 2020, more than half of humanity – or just under four billion people – had their travel restricted and had been asked or ordered to stay at

47 See Elinor Ostrom, *Governing the Commons* (Cambridge University Press, 1990) (online republication in October 2015).

48 George Yip, "Does COVID-19 Mean The End For Globalization?", *Forbes* (January 8, 2021), available online at <https://www.forbes.com/sites/imperialinsights/2021/01/08/does-covid-19-mean-the-end-for-globalization?sh=4d538881671e>.

49 Statista, "Number of coronavirus cases worldwide as of September 17, 2021 by country", available online at <https://www.statista.com/statistics/1043366/novel-coronavirus-2019ncov-cases-worldwide-by-country>.

50 ChannelNewsAsia, "Clearing the Causeway" (June 23, 2018), available online at <https://infographics.channelnewsasia.com/interactive/causewayjam/index.html>.

home to prevent the spread of the virus.[51] Globally, air travel came to a standstill and plummeted to levels not seen since the 1970s.[52] Fears over the scarcity of medical resources also prompted some countries to introduce legislation to ban the export of face masks and other medical supplies.[53]

[30] The pandemic has shown us that in the face of an existential threat, the State's priority is to offer protection and support to its own people, and it is to the State, rather than the global community, that people tend to turn in times of crisis. This is not a new idea, and in some senses, we can see its contribution to the Westphalian construct of nationhood and sovereignty.

[31] But imagine an ideal world. In the face of a serious global pandemic, the optimal course of action to stop its spread at minimal collective cost might have been a simultaneous, globally coordinated lockdown across the world. Such a lockdown would likely have been more effective than the patchwork of national lockdowns that we saw, because like a forest fire that cannot be put out without a coordinated plan, there will be flareups, re-infections, and cross-infections if our responses are silo-ed and indifferent to the plight and situation of others.

[32] Of course, this is an *ideal* world scenario, and we do not live in a utopia. But thankfully, the concepts of collective action and shared consequence are not unknown even in our *reality*. The COVAX initiative is one example. It aims to bring countries, businesses, and civil society together with the goal of providing equitable access to COVID-19 vaccines.[54] The initiative has seen considerable success – the US recently announced that it would donate 500 million doses,

51 Alasdair Sanford, "Coronavirus: Half of humanity now on lockdown as 90 countries call for confinement", Euro News (April 3, 2020), available online at <https://www.euronews.com/2020/04/02/coronavirus-in-europe-spain-s-death-toll-hits-10-000-after-record-950-new-deaths-in-24-hou>.

52 *Washington Post*, "The virus that shut down the world" (June 26, 2020), available online at <www.washingtonpost.com/graphics/2020/world/coronavirus-pandemic-globalization>.

53 Richard Fontaine, "Globalization Will Look Very Different After the Coronavirus Pandemic", *Foreign Policy* (April 17, 2020): <https://foreignpolicy.com/2020/04/17/globalization-trade-war-after-coronavirus-pandemic>.

54 Seth Berkley, "COVAX explained", Gavi Vaccine Alliance (September 3, 2020), available online at <https://www.gavi.org/vaccineswork/covax-explained>.

while the UK announced a donation of a further 100 million doses.[55] The EU has pledged €500 million, and Chinese manufacturers have agreed to provide up to 550 million vaccines.[56]

[33] Whether this is borne out of altruism or enlightened self-interest, responses to the pandemic like COVAX illustrate that when faced with a global problem, we know, in our rational minds, that a global response is optimal and indeed necessary. Our nativist instincts may lead us to turn inward when threatened, but we eventually seek multilateralism and tap on our global infrastructure and relationships because that is the *only* way to truly resolve the threats that confront us. And this is so, I suggest, not only for the pandemic but for most of the major challenges that plague humanity.

[34] I make a final point on why we should remain hopeful for the future of globalisation – and it is that we are perhaps already past the point where globalisation *can* be reversed or disavowed. The reality is that we live in a world today that will not easily be untied. Through our shared history, the evolution of technology, and the need to collectively confront global issues and threats, we are *already* inextricably interconnected and integrated. In the words of the great 18th century philosopher Immanuel Kant, we are all "*unavoidably side by side*".[57] On this view, a "de-globalised world" is simply unimaginable. And if we did renounce multilateral cooperation and desert its institutions today, what would be the alternative? All *that* would accomplish is to abandon the governance and regulation of this vast, interconnected economy of people, goods, and services to nothing more than the whims of fate! By stepping away from engagement and integration, we would not, in fact, be taking back power for ourselves; rather, we would be *giving up control* over our futures – futures that are and will remain inextricably tied to one other.

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55 BBC, "COVAX: How many Covid vaccines have the US and the other G7 countries pledged" (June 11, 2021), available online at <https://www.bbc.com/news/world-55795297>.

56 Emma Farge, "Chinese drugmakers agree to supply more than half a billion vaccines to COVAX", Reuters (July 12, 2021), available online at <https://www.reuters.com/world/gavi-signs-covid-19-vaccine-supply-deals-with-sinovac-sinopharm-covax-2021-07-12>.

57 See David Held and Paul Hirst, "Globalisation: the argument of our time", openDemocracy (January 22, 2002), available online at <https://www.opendemocracy.net/en/article_637jsp/>.

IV. Part 3: Keeping a light on for globalisation

[35] As I come to the last section of this article, which looks at the future of globalisation, I want to take stock of where our discussion thus far has brought us. I have sought to establish two propositions:

(a) First, that globalisation has serious conceptual and distributive issues almost all of which will not be easy to correct, and some of which are in fact contributed to by the failings of the law and legal systems.

(b) And second, that globalisation nonetheless remains the best if not the only solution to meet the major challenges that confront the world, and that it offers the best hope for securing humanity's shared future.

[36] There is admittedly some tension between the two propositions, but I have argued that the unescapable reality is that we must live in and with a globalised world. If we accept that we are better off together than apart, then we have no choice but to confront and overcome the failings of globalisation, to revisit its assumptions, and to remodel it in a manner that will better serve the demands of the times.[58] This will not be an easy task, but if we are to begin somewhere, then there are three aspects we should consider: (a) *first*, to place globalisation on a more sustainable footing; (b) *second*, to build a more robust and constructive space for discourse about globalisation; and (c) *third*, to ground globalisation, like the law, in a notion of legitimacy. In all of these, the law can and should have an important role to play.

A. A more sustainable footing

[37] First, we must place globalisation on a more sustainable footing. What do I mean by "sustainable"? There are several dimensions to this, and I have already touched on some of them. One such dimension

58 Martin Wolf, "Globalisation and Interdependence", speech to the UN General Assembly (October 2004), available online at <www.un.org/esa/documents/un.oct.2004.globalisation.and.interdependence.pdf>: "What we must do is build upon what has been achieved, not, as so many critics wish, throw it all away. In the era after 11 September 2001, that co-operative task has certainly become far more difficult. For people to sustain openness to one another is far harder at a time of fear than at a time of confidence. But the task has also become more urgent. A collapse of economic integration would be a calamity."

is the idea that there are normative limits on the extent to which globalisation should permit and facilitate the exploitation of our natural and human resources. The heady optimism and unbridled expectations of unlimited economic growth sparked by the post-war economic boom of the 1950s must, especially with our current understanding of the sciences and the world we inhabit, give way to a realisation that there are limits to our resources and that exceeding those limits carries serious human and environmental consequences for us and for our future generations.[59] This is not new, and steps have already begun to be taken to introduce the concept of sustainability into the global economic agenda. I earlier mentioned the UN's SDGs. Adopted in 2015 and intended to be achieved by the year 2030, the SDGs are a collection of 17 interlinked global goals designed to serve as a "blueprint to achieve a better and more sustainable future for all".[60] We have also started to see, since a little over a decade ago, the inclusion of sustainability clauses in free trade agreements.[61]

[38] Similar observations may also be made regarding distributive inequality arising from the uneven impact of, and opportunities from, globalisation. Ed Miliband, a UK politician once remarked: "They used to say a rising tide lifts all the boats. Now the rising tide just seems to lift the yachts."[62] One may or may not agree with the politics, but it is undeniable that there is now an emerging sense that a more sustainable approach to globalisation is needed, and that ensuring the social sustainability of globalisation requires that inequality be kept in check.[63] As Larry Summers, a former US Treasury Secretary and Chief Economist of the World Bank puts it, "there is little hope for maintaining integration and cooperation if [globalisation] continues to be seen as leading to local disintegration while benefiting only a

59 Pisani, supra n 35 at 87–88, and 90.

60 See UN Department of Economic and Social Affairs, Sustainable Development Unit, available online at <sdgs.un.org>.

61 See, for an overview, Bronckers and Gruni, "Retooling the Sustainability Standards in EU Free Trade Agreements" (2021) 24(1) *Journal of International Economic Law* 25 ("Bronckers and Gruni").

62 Patrick Wintour, "Ed Miliband stakes the house on huge new-build programme and tax cut", *The Guardian* (September 24, 2013), available online at <https://www.theguardian.com/politics/2013/sep/23/labour-ed-miliband-housebuilding-pledge>.

63 Emma Aisbett, "Why are the Critics So Convinced that Globalization is Bad for the Poor?" in Ann Harrison (ed), *Globalization and Poverty* (University of Chicago Press, 2007), p 41.

mobile, global elite".[64] Indeed, I would submit that inequality that is sustained and extreme is the *very antithesis* of sustainability. While there remains debate on the adequacy of the initiatives taken to address these sustainability dimensions,[65] the point remains that these are promising developments reflecting a growing recognition and awareness that economic growth is not the unitary policy objective, and that there needs to be a weighing of costs and policies to arrive at a balance we are prepared to live with.

B. A robust, truth-based space for discussion

[39] The second idea I propose is that we should encourage and facilitate a more robust global discourse about the purposes and limits of globalisation, and the trade-offs that we are willing to accept in exchange for its benefits. This might seem obvious and uncontroversial today, but the truth is that discussions about globalisation have not always been as critical or robust as they should have been. In its heyday, few dared to question the wisdom of globalisation. An American journalist, George Packer, recalled that at the turn of the millennium, the prevailing attitude was that "[r]ejecting globalisation was like rejecting the sunrise. Only the shortsighted, the stupid, the coddled, and the unprepared would turn against it."[66] We now know that such attitudes have not aged well; but the fact that propositions like these were seemingly unassailable just two decades ago speaks to the importance of breaking free of echo chambers and building a safe and truth-based space for the discussion of the issues that matter. Equally, as a global community of communities, we must recognise that the path of globalisation will not be singular. As with our own communities, we must come together to discuss, debate, and build consensus on our choices and the trade-offs that we are willing to accept.

[40] The construction of a healthy and constructive space for discourse on globalisation will not be easy. The first challenge is the

64 Lawrence H Summers, "Global Trade Should be Remade from the Bottom Up", Social Europe (April 18, 2016), available online at <socialeurope.eu/global-trade-remade-bottom>.

65 See for instance, Bronckers and Gruni, supra n 61 on the adequacy of the EU-championed sustainability standards in FTAs.

66 George Packer, "Hillary Clinton and the Populist Revolt", *The New Yorker* (October 31, 2016), available online at <www.newyorker.com/magazine/2016/10/31/hillary-clinton-and-the-populist-revolt>.

politicisation of the issues. The second is what has been referred to as "truth decay",[67] which is the worrying erosion of truth in the modern society as traditional, trusted sources of information – ranging from government authorities to the mainstream media – are increasingly being supplanted by a jungle of unverified facts and opinions, enabled by the rise of social and alternative media which have afforded just about anyone a platform to reach a global audience and project any message. The worry is that this will, in time, lead to the emergence of "alternative facts", echo chambers, the blurring of the line between opinion and fact, and, ultimately, the decline of the role of facts and reason in public discourse. This will not be conducive to *any* rational, constructive, fact-based debate, including one about globalisation.

[41] As we continue to grapple with this problem, I suggest that the law will assume an increasingly significant role in regulating the veracity and flow of information in this emergent post-truth era. In Singapore, the government introduced legislation in 2019, titled the Protection from Online Falsehoods and Manipulation Act, that empowers a minister to issue a take-down or correction order against falsehoods published on the internet, provided that the statutory requirements are satisfied and subject to appeals to the court and other processes. The law was recently used in response to online circulation of an allegation that there was a new Singapore-variant of COVID-19 that had spread from Singapore to a foreign State.[68] Other jurisdictions may choose to adopt different responses, but ultimately, because information and fake news do not respect geographical borders or national identity, this is yet another example of a global problem that calls for a multilateral response.

C. Building legitimacy

[42] I come finally to the idea of legitimacy, which should, I suggest, be the basis upon which we ground all aspects of globalisation. The concept of "legitimacy" will not be unfamiliar to an audience of judges and lawyers. Here, I use the term to refer to the willingness of people

67 Jennifer Kavanagh and Michael D Rich, *Truth Decay: An Initial Exploration of the Diminishing Role of Facts and Analysis in American Public Life* (RAND Corporation, 2018). The book is available for download at https://www.rand.org/pubs/research_reports/RR2314.html.

68 Michael Yong, "POFMA directive issued to Facebook, Twitter, SPH Magazines over 'Singapore variant' of COVID-19 falsehood", ChannelNewsAsia (May 20, 2021).

to respect the institutions, principles, and practices associated with globalisation, and the decisions and outcomes that are derived by those actors and from those norms, even if individually, they may not agree with any particular instantiation of the globalist philosophy.[69]

[43] In my view, the future of globalisation will depend almost entirely on its ability to build and regain legitimacy in the eyes of the global polity. There are a few reasons for this. First, a true sense of legitimacy is the best long-term response to the present climate of growing anti-globalisation sentiment. Second, the issues that globalisation gives rise to operate on an international plane, where there is no supranational mechanism of compulsion and enforcement. It is therefore moral suasion, deriving from legitimacy, that will enable us to agree on the norms and standards of conduct and nudge us towards adherence.[70] Third, legitimacy bears a self-compounding effect. An institution considered to be legitimate will benefit from greater influence and compliance; this begets stability and efficacy, which will, in turn, allow it to command greater respect.[71] The converse also holds true, and therefore on this premise, it is simply impossible to conceive of any effective or sustainable model of globalisation without legitimacy.

[44] Admittedly, many of the challenges associated with securing the legitimacy of globalisation lie in the realm of extra-legal factors such as politics, geopolitics, and economics.[72] But the law too has a vital role to play. For one, if the law is truly to serve as the currency of trust in a globalised world, then we need to fundamentally rethink and re-engineer our justice systems in a manner that will better serve

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69 Chief Justice Sundaresh Menon, "A Tale of Two Systems: The Public and Private Faces of Investor-State Dispute Settlement", Lalive Lecture 2021 (May 27, 2021) ("Lalive Lecture") at para 5.

70 Daniel Bodansky, "Legitimacy in International Law and International Relations" in *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge: Cambridge University Press, 2010) at p 327, citing Andrew Hurrell, "Legitimacy and the Use of Force: Can the Circle Be Squared?" (2005) 31, Supp S1 *Review of International Studies* 15-32 at 29.

71 Ibid.

72 See Bruegel, "Should we give up on global governance?" (October 24, 2018), available online at <https://bruegel.org/reader/global_governance#>, citing problems of: (i) the over-representation of certain countries (Europe, the US and Japan) in key institutions and the need to redistribute power and influence in favour of emerging and developing countries; and (ii) difficulties arising from governance through sectorial institutions, each of which dealing with a specific field, but none dealing with cross-sectoral issues.

that purpose. As I have argued elsewhere,[73] part of this effort includes widening our conception of the rule of law to focus on providing *accessible* and *proportionate* justice – *accessible*, because justice that is out of reach to some in our society is not justice, and will instead erode trust and build resentment against the system; and *proportionate*, because in a world of limited judicial resources, we should dispense with the fallacy that justice requires an unlimited outpouring of resources towards an exhaustive search for the truth, and instead recognise that what parties truly require is a fair and acceptable resolution to a real problem, and accordingly tailor the structure and complexity of our legal processes to the nature and size of that problem. Adherence to rule of law values might also serve as a useful guide as we address some of the unique issues that arise in the context of transnational commercial litigation, such as forum shopping, and, relatedly, the repeated or concurrent litigation of disputes and the refusal to accept finality when the stakes are so high. If we accept that globalisation must be grounded upon the rule of law and therefore commit to the realisation of this vision of justice on a global level, we would, I think, have taken an important step towards shoring up the normative and distributive weaknesses of globalisation and addressing the cracks that have appeared in its façade.

[45] Let me illustrate an aspect of this with an example from the field of investor-state dispute settlement ("ISDS"), which is one of the core aspects of the transnational legal infrastructure developed to support globalisation. In another lecture I delivered in May 2021, I examined the growing well of discontent that has plagued this field and considered what had led to, and how we may deal with, ISDS's "crisis of legitimacy".[74] One of the observations I made was that the arbitration community had understandably accepted certain features of the arbitral process, such as confidentiality, party-appointment, and the lack of an appellate mechanism, even though these might run counter to key rule of law values. This could be justified because arbitration originated as means of resolving *private* disputes and the sacrifice of some of these values resulted in other valuable benefits. But ISDS by contrast is also concerned with important issues of *public* law and policy, and the unthinking adoption of a *private* means of

73 NCMG speech, supra n 40.

74 Lalive Lecture, supra n 69 at para 7, citing Chief Justice Sundaresh Menon, "SIAC Virtual Congress Lecture" at paras 11–14.

dispute resolution for such disputes with the accompanying erosion of commitment to key rule of law values may account for some of ISDS's loss of legitimacy. And so, to regain that legitimacy, I suggested that ISDS needed to reconsider its structure and processes and reaffirm its commitment to the core rule of law values including upholding the rules of natural justice, ensuring greater transparency, and providing avenues for public scrutiny of its reasons and decisions. I accept that this might not be a complete answer, for there remain difficult questions as to whether a tribunal consisting of privately-appointed arbitrators is best placed to decide issues touching on public interest and policy. But nonetheless, if we do manage to reform and revitalise the system of ISDS, this could stand as a shining example of how meaningful legal reform can influence the legitimacy of globalisation itself, since the legitimacy crisis affecting ISDS concerns not only its own future, but indeed also the public perception of the fairness and normative authority of our frameworks for the governance of global issues.

[46] Finally, apart from structural legal reforms, we should also not underestimate the role that individual lawyers, judges, and legal professionals can play in contributing to the legitimacy of globalisation. One way we can do this is by norm building, through the articulation and where appropriate institutionalisation of rule of law values whenever we discuss and debate transnational legal systems and issues. This extends also to taking a strong and unified stance against the known ills of globalisation, such as cross-border corruption, money laundering, and tax evasion, all of which may seem like disparate wrongs but in fact insidiously contribute to our current climate of distrust. Another way is by fostering legal convergence in areas of shared interest. Even if full convergence is not possible or ideal, there may be benefit in maintaining open lines of communication in fields that require coordinated solutions. The Hague International Network of Judges is an example of an institution that addresses the problem of international child abduction in such a way;[75] and the Judicial Insolvency Network is yet another example that seeks to improve the management of cross-border restructuring matters.[76] One of the realities of our multipolar, globalised world is the dispersal of power into the

75 HCCH, "The International Hague Network of Judges", available online at <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction/ihnj>.

76 Judicial Insolvency Network: "Judicial Insolvency Network: A network of insolvency judges from across the world", available online at <jin-global.org>.

hands of different actors who must commit to coming together and acting collectively in the many areas where it is sensible, and indeed *necessary* to do so. Within that context, legal professionals can play a significant part as honest brokers, whose role as interlocutors is to bring the relevant actors together, facilitate communication, and assist them with solving their problems, all in adherence to the framework of a more sustainable version of globalisation.[77]

V. Conclusion

[47] In the foregoing discussion, I have sought to explain my views on the mutually transformative effect that globalisation and the law have had, and will continue to have, on each other. As we stand here buffeted by headwinds that seem to push us away from a unified world, I have no doubt at all that we cannot abandon the project of globalisation. The real challenge is to muster the will and the ability to formulate a better vision of globalisation. This is a necessary undertaking because the most pressing problems that the world faces require more, not less, multilateral cooperation. The significant scale, proliferation, and consequences of our contemporary problems mean that no State alone, however powerful, can effectively serve as a bulwark. And so, if we accept that globalisation remains the best, and perhaps only, solution to these major challenges of our times, then we must directly confront the reasons for its decline and acknowledge that we cannot continue to enjoy its benefits without also sharing in its costs and addressing its failings. The real question is how those downsides can best be managed, and to that end, I suggest that it will fall ultimately on the global polity, as well as all of us within the law and justice systems worldwide, to steer globalisation onto a more sustainable footing, grounded in a restored sense of legitimacy.

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77 Frank J Garcia, "Introduction: Globalization, Power, States, and the Role of Law" (2013) 54 BCL Rev 903 at 910–911, citing Prof Anne-Marie Slaughter: "Globalization, however, has brought to the fore another kind of power more suited to the new, flatter, and multi-polar environment: horizontal power … One consequence of globalization is that on an international level, nation-states must increasingly operate through the mode of horizontal power. This mode also brings law and lawyers to the fore, as law creates spaces for horizontal power and structures for interconnection and cooperation. Moreover, to be able to achieve desirable outcomes through horizontal power, someone must bring together actors to solve problems and mediate disputes. As lawyers are trained to think in terms of rights and obligations from all sides of an issue, they are ideally placed to exercise power in a globalized world."

A Year of COVID-19: The Use of Technology and the Experience of the Kuala Lumpur Commercial Courts

by

*Justice Dato' Ahmad Fairuz Zainol Abidin**

Prologue

[1] In every crisis there is opportunity. The crisis is the pandemic. The opportunity being the chance to provide greater access to justice. The enabler being technology. This article discusses how technology enabled the civil courts to function in times of the COVID-19 pandemic. It also gives an insight into how the Kuala Lumpur Commercial Courts have weathered the challenges during the testing times. The discussion ends with some questions on where courts and technology should be in the future.

Technology

[2] Technology has seen disruption occurring across the entire strata of life. The banking and finance sectors have seen the biggest disruptions. Financial intermediaries have been by-passed causing traditional banking halls and tellers to be a thing of the past. E-commerce has challenged industries. It has provided a platform for small- and medium-sized businesses and entrepreneurs to take their business to a different level.

[3] Artificial intelligence ("AI") platforms are now able to automate routine litigation tasks. AI, too, has been marketed as a solution for drafting early phase response documents, helping legal firms save time, drive down costs and shift strategic focus.[1] New software, platforms, and communications systems are transforming the legal profession.

[4] Virtual legal assistants ("VLAs"), or AI-powered chatbots, are a fast-growing trend, especially for larger firms in more developed

* Judge of the High Court of Malaya.

1 <https://www.ibm.com/my-en/analytics/put-ai-to-work?>.

countries. Chatbots are also changing how people access legal information. With the rise of smartphone technology, people have access to large quantities of legal information at their fingertips.

[5] Various applications can be downloaded that will allow legal questions to be asked. Sometimes, the questions are not answered by an actual lawyer but by a computer. Potential litigants can have recourse to applications for mundane legal questions that they do not want to have to pay a lawyer to answer.[2] Contracts can now be concluded by entering into smart contracts which are simply programs stored on the Etherium blockchain that run when predetermined conditions are met.

[6] The courts, judges, and those administering the courts must embrace technology.

[7] The Malaysian Judiciary embarked on the automation of the court filing system a decade ago via the e-Filing system ("EFS"). It was part of the modernisation of court services. Today, paperless proceedings have now been introduced in phases, utilising the case management system ("CMS") digital platform. Courtrooms have also seen the introduction of the court recording and transcription ("CRT") system while the latest system introduced today is the court recording and voice to text ("RVT") system.

[8] In February 2020, the Sabah and Sarawak courts launched an AI tool as a guide to help judges with sentencing decisions. It was the first step towards embracing the sophistication of technology by the courts.

[9] Without a doubt, technology has been employed in the justice delivery system in Malaysia. It has been a journey that has seen many milestones being recorded and is often seen as comparable to the more technologically advanced jurisdictions around the globe. The next phase of technological adoption by the courts is in the area of facilitating proceedings using remote communication technology.

COVID-19: The catalyst

[10] In March 2020, the World Health Organisation formally declared the outbreak of COVID-19 a worldwide pandemic. A survey has found

2 <https://www.expertinstitute.com/resources/insights/new-technology-and-its-impact-on-the-practice-of-law/>.

that responses to COVID-19 have hastened the adoption of digital technologies by several years and that many of these changes could be here for the long haul.[3]

[11] The response by courts globally has been almost immediate. It almost forced the acceptance of the use of technology by all stakeholders in the dispensation of justice. This observation was also shared by Professor Richard Suskind, a renowned author on the future of legal services who wrote an article in July 2020 entitled, "The Future of Courts"[4] where he observed:

> In the middle of March 2020, court buildings around the world began to close in response to the rapid spread of a newly identified coronavirus, SARS-CoV-2 (the "virus"). Within days, alternative ways of delivering court service were put in place in many jurisdictions. The uptake of various technologies, especially video, was accelerated in the justice systems of numerous countries. There remain some sceptics and critics, but in light of the experience during the crisis, there is certainly greater acceptance now than in February 2020 — amongst lawyers, judges, officials, and court users — that judicial and court work might be undertaken very differently in years to come. Minds have been opened and changed over the past few months. Many assumptions have been swept aside.

[12] While the use of technology and internet-based communication had previously been introduced, the COVID-19 pandemic has been the agent of necessity that was instrumental in forcing the adoption and acceptance of online and virtual proceedings in the last 15 months. Various measures have been taken around the world to address the impact on the justice delivery system due to COVID-19. In May 2020, the United Nations Development Programme ("UNDP") for the Judicial Integrity Network in ASEAN organised a webinar seeking feedback from member countries on the respective steps taken during the onset of the COVID-19 pandemic.

[13] The Chief Judge of Malaya, Tan Sri Azahar Mohamed, in his speech updated Malaysia's position where the Chief Judge explained Malaysia's experience on the use of technology as:

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3 <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/how-COVID-19-has-pushed-companies-over-the-technology-tipping-point-and-transformed-business-forever#>.

4 <https://thepractice.law.harvard.edu/article/the-future-of-courts/>.

> In terms of ICT infrastructure, the Malaysian Judiciary is ready to conduct remote hearings. The shift towards using technology in court processes has been gradual, incorporating new innovations incrementally according to the times. The pandemic did not start this change, but created an urgent and immediate need for a more radical change to ensure hearings can still proceed during these unusual times. In the current challenges that we are facing, it motivates us to move even faster in adapting technology to deal with the fallout of the pandemic.

[14] There were many common messages in the speeches of the senior judicial representative at the webinar. Foremost is to ensure that justice does not grind to a halt and at the same time not compromising the safety of court users, judges and administrators. The common panacea was the use of technology.

[15] In a video message recorded via remote communication on June 20, 2020, the President of the United Kingdom ("UK") Supreme Court, the Right Honourable Lord Reed of Allermuir, gave an update on how the Supreme Court and the Judicial Committee of the Privy Council have continued to conduct their day-to-day business during the COVID-19 lockdown period. In his speech, he committed that "We were determined to ensure that the Court continued to meet its obligation to ensure access to justice and that we continued to do our work openly and transparently."

[16] The UK Supreme Court was lauded for quickly moving its entire caseload from physical hearings to video hearings. It was observed that the Supreme Court has responded more emphatically and successfully than any of its equivalents internationally.

[17] In Australia, the Federal Court issued a series of Special Measures Information Notes ("SMIN") beginning from March 23, 2020. The Federal Court released the SMIN on Appeals and Full Court Hearings ("SMIN-3")[5] and applied it to all appeals and full court matters to minimise in-person attendance. The SMIN-3 advised the following:[6]

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5 April 7, 2020.

6 Toby Boys and Ashleigh Sams, "COVID-19 and the virtual courtroom – is technology a friend or foe?", available online at <https://www.holdingredlich.com/COVID-19-and-the-virtual-courtroom-is-technology-a-friend-or-foe>.

(a) parties were to provide electronic, hyperlinked versions of appeal record books and lists of authorities;

(b) documents were to be tendered via Microsoft Teams, a nominated file-sharing service or by email;

(c) parties were to warn the court at the earliest opportunity before tendering confidential or commercially sensitive material; and

(d) parties were expected to conduct themselves during remote hearings in a way consistent with the overarching purpose set out in section 37 of the Federal Court of Australia Act 1976 (Cth).

[18] Todate, the Judicial College of Victoria maintains a webpage entitled "Coronavirus and the Courts" to help courts, and court users understand the different practices that have been put in place across Australia. Importantly, it is to manage the delivery of justice during the restrictions in line with the latest public health advice.[7]

[19] There were many similar steps outlined by other jurisdictions. However, suffice to say that all jurisdictions stood up to the challenges of the pandemic and came out with the various methods to ensure court services remained undisrupted albeit needing to brace the disruption of court operations at the beginning stages.

[20] In Malaysia, to reassure court services were back on track, two press releases dated May 11, 2020, captioned by the press as "The Judiciary's Standard Operating Procedures (SOP) During The COVID-19 Pandemic" and "Notification on Court Operations Beginning 13 May 2020", were published.

[21] The message was clear – the provision of court services will carry on despite the setback caused by the pandemic, giving full assurance that access to justice will not be denied and in the same breath, the safety of court users, judges, and officials will not be compromised.

Amendments to the law

[22] To have a structured regulatory regime on remote hearings, three main statutes were amended to cater for online and virtual proceedings. They include the Courts of Judicature Act 1964 ("CJA"),

7 <https://www.judicialcollege.vic.edu.au/resources/coronavirus-and-courts>.

the Subordinate Courts Act 1948 ("SCA") and the Subordinate Courts Rules Act 1955 ("SCR").

[23] Among the key amendments was the introduction of the definition of "remote communication technology" in the CJA and SCA. Remote communication technology is defined as "a live video link, a live television link or any other electronic means of communication".[8]

[24] Under the CJA, the court may now conduct the hearings or trials of any cause or matter, be it civil or criminal, through remote communication technology to ensure access to justice is available to the public.[9] For High Court cases, the place in which the High Court conducts the proceedings through remote communication technology shall be deemed to be conducted within the local jurisdiction of such High Court.[10]

[25] The amendments to the SCA allowed courts to conduct hearings and trials or hold any inquiries via remote communication technology, in the interest of justice.[11] The place in which the court conducts the proceedings or holds any inquiry through remote communication technology shall be deemed to be conducted within the local limits of jurisdiction as assigned in section 56 or 76 of the SCA.[12] If there are no such local limits of jurisdiction being assigned to, it shall be deemed to be conducted in any part of Peninsular Malaysia. The word "place" under both the CJA and SCA means cyberspace, virtual place or virtual space.[13]

[26] Both the CJA[14] and the SCA[15] also provide powers to the Chief Justice, after consulting the President of the Court of Appeal or the Chief Judge, to issue practice directions for the purposes of carrying into effect the provisions of the respective Acts.

[27] The amendments to the CJA, the SCA and the SCR were gazetted on October 22, 2020.

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8 CJA and SCA, s 2.
9 CJA, s 15A.
10 Ibid, s 15A(2).
11 SCA, s 101B.
12 Ibid, s 101B(2).
13 CJA, s 15A(4); SCA, s 101B(4).
14 CJA, s 17A.
15 SCA, s 107A.

[28] The Rules of Court 2012 ("Rules") which govern civil procedure, was also amended. The amendments came into effect on December 15, 2020 and codified remote communication technology into the Rules. To facilitate the process of online proceedings, Order 33A was introduced where the court may on its own motion or upon an application made by any party, direct that any cause or matter under the Rules be conducted through remote communication technology.[16]

[29] The court is also able to direct that any person, witness or prisoner as witness or party, to attend proceedings or give evidence by way of remote communication technology.[17] Order 33A also allows the public to see and hear the proceedings, either by broadcasting for members of the public, or by recording the proceedings to keep an audio-visual record.[18]

[30] However, the court has the power to revoke, suspend or vary the direction made pursuant to Order 33A r 2, if the remote communication technology stops working and causes unreasonable delay; if it is necessary for the court to do so to ensure the proceedings are conducted fairly; if there has been a material change in circumstances; and if it is necessary in the interests of justice.[19]

Online and virtual proceedings

[31] Online proceedings typically involve email and the e-Review exchanges. They are asynchronous communications. In short, it means two or more people can communicate without the requirement that they be "present" at the same exact moment in time. There is no visual or audio interface between parties in the proceedings. However, when utilised as online proceedings, the expectation is for the proceedings to be conducted in real time. This is to ensure that proceedings are completed within a defined time frame and not left open due to the nature of the communication.

[32] In contrast, virtual proceedings are usually conducted utilising live real time audio-visual means. The interaction is simultaneous and

16 The Rules, O 4 Definition; "Remote Communication Technology" has the same meaning assigned to it by the CJA, the SCA and the SCR, i.e. "a live video link, a live television link or any other electronic means of communication".

17 Ibid, O 33A r 3.

18 Ibid, O 33A r 5.

19 Ibid, O 33A r 4.

parties can have full audio-visual contact with all the participants in the proceedings.

Practice Direction for civil cases

[33] For guidance on civil cases, the Chief Justice of Malaysia Practice Direction No. 1 of 2021 was issued.

[34] The Practice Direction sets out the procedures on the conduct of civil cases through remote communication technology. It confers the court with the discretionary power to direct cases to be conducted through a digital platform. It can be done through the exchange of emails, e-Review, video conferencing or any other remote communication technology that the court deems fit.

[35] However, in doing so, the court may consider the following factors:

(a) firstly, the type of proceedings which includes case management, hearing of applications, trials, submissions, clarifications or delivering of judgments/orders and secondly, the complexity of the case;

(b) duration of proceedings by taking into account:

(i) urgency of the proceedings;

(ii) period or the time limit prescribed under any provision for a proceeding to be disposed of;

(iii) expected period of time a proceeding will be completed;

(iv) expected time for disposal of cases where it involves compliance with the court's direction by the parties with regard to the filing of a bundle of documents, label, index and cross-reference by parties to all documents and materials to facilitate reference during the proceeding; and

(v) expected duration of the adjournment of proceeding to enable parties to attend court and the possibility of any prejudice due to such adjournments;

(c) ability of witnesses giving evidence through remote communication technology;

(d) if parties involved in the proceedings are represented;

(e) availability and quality of the technology to be used taking into account the hardware, software and the speed of internet access;

(f) mobility of parties in attending court;

(g) right to a fair trial is preserved notwithstanding the utilisation of remote communication technology;

(h) right of the parties to raise objections before a direction is given by the court; and

(i) such other considerations as the court deems fit and proper.

The experience of the Kuala Lumpur Commercial Courts

[36] During the first lockdown announced by the government in March 2020, proceedings in the Kuala Lumpur Commercial Courts ("KL commercial courts")[20] were almost at a standstill. Uncertainty reigned and scheduled hearings and trials were given new dates. Cases were managed by registrars via email and the e-Review platform. Judges were updated on the cases and notified of the various queries. Directions were given within the limitations that prevailed.

[37] How cases were handled across the board including at the KL commercial courts cannot be better described by the Chief Judge of Malaya in his speech at the UNDP webinar. The Chief Judge astutely described the courts functioning as follows:

> To ensure hearings, where possible, can still proceed, we looked at solutions out of necessity. With creativity and technology, we subsequently expanded the use of the existing systems to conduct remote hearings for civil matters. Three routes are available to parties who apply: exchange of emails; e-Review system; or video conferencing.
>
> Urgent *ex parte* applications such as interim injunctions are conducted by way of the exchange of emails between the judge and counsel. Systematic applications such as e-Review are fully utilised for case management and pre-trial conferences. The e-Review system that has been implemented in 2018 allows the preliminary case management of a particular case filed in court to be done online.

20 The KL commercial courts comprise of the New Commercial Courts ("NCC"), Construction, Intellectual Property, Muamalat and Admiralty, Insolvency Courts.

Thus, lawyers need not come to court to attend case management. Video conferencing hearings, as a start, were confined to applications filed together with a certificate of urgency. Later, it was extended to uncontested applications, brief interlocutory applications and hearing of interlocutory appeals.

[38] Online proceedings were thus, allowed to be carried out almost immediately after the courts were directed to resume operations under strict standard operating procedure guidelines.

[39] The KL commercial courts begun issuing notices for the adoption of online and virtual proceedings upon guidance received from the Chief Registrar's office. It began with notices being issued to parties informing of the option for a physical or virtual proceeding to be carried out. The initial bewilderment that hit the users was not unexpected. Confusion reigned as to when trials could start or continue given the imposition of the Movement Control Order ("MCO"). The changing categories of the MCO did not help. Applications that involved complex issues were also asked to be put on hold. At the initial stages, only uncontested matters proceeded via online proceedings. It was a decision taken then that the conduct of matters via online and virtual proceedings could only be done with the mutual consent of parties. Even then, lawyers were questioning the legality of the proceedings.

[40] By May 2020, the courts resumed physical operations. However, the adoption of online and virtual proceedings began to pick up. Courts were allowed to offer virtual proceedings utilising video conferencing platforms such as Zoom, Skype, Google Meet and Microsoft Teams. Consent of parties was still crucial to enable the cases to progress. Where parties insisted on physical hearings, cases were staggered according to time slots. The intent was to ensure that there would not be overcrowding of the courtrooms.

[41] During the initial period, registrars were pivotal in ensuring that cases were rescheduled according to the revised timelines and agreed modes. Not only were the registrars playing the role of intermediaries between the court users in scheduling cases and responding to queries, they were also playing a crucial role in ensuring that all parties were familiar with the online platforms. Some registrars were even playing the role of tutors to lawyers when utilising the online platform features. This included tutoring lawyers on basic features such as logging on

using links and utilising features on the platform such as the share-screen mode.

[42] In the process, the registrars, too, learned a fair bit from the lawyers. It was a mutually enriching experience for all involved. Registrars were the unsung heroes of the KL commercial courts. But for their efficiency in rescheduling and fixing of cases, the scheduling and fixing of cases would have descended into chaos.

[43] As time went by, more clarity was provided. The Chief Registrar was tireless in providing guidelines and directives. As part of the initiative to ensure full buy-in of court users, a draft of the "Protocol for Online Hearing" was circulated to the Bar Council. The resistance at the initial stages was apparent.[21]

[44] Meanwhile, cases continued to be managed in the courts. Credit must be given to members of the Malaysian Bar; despite the initial pushback, they provided full cooperation to the courts in accepting the online and virtual proceeding modes but for a few cases which were encumbered by unavoidable reasons. Complex commercial matters were set down for trial. Steps were taken to ensure the online trials proceeded on the determined dates.

[45] The KL commercial courts saw trials being conducted virtually using platforms such as Zoom and Skype. One of the first few virtual trials saw the Construction Court conducting a trial with witnesses testifying from India. The teething problems were immense. The main challenges were technological in nature. Echoes bellowed from the speakers, video lags and frozen images were the common interruptions experienced. One of the courts in the KL commercial courts conducted a hybrid trial as lead counsel for the plaintiff was unable to return to Malaysia to physically conduct the trial. This led to the trial being conducted with all parties (including part of the plaintiff's team) being physically in court while lead counsel for the plaintiff was located remotely in Singapore. Cross-examination was carried out by counsel via Zoom, with the witness facing the cross-examining counsel in front of a laptop on the witness stand. Several tranches of the trial went fully virtual with witnesses testifying from

21 FMT, "Lawyers don't want to go online to cross-examine witnesses during trial" (June 22, 2020).

Singapore, New Zealand and the UK until its eventual completion. The trial eventually concluded and is a testament to the parties' and the court's commitment to be undeterred by the limitations bought by the pandemic.

[46] To date, the KL commercial courts have carried out trials involving witnesses in remote locations located in various countries. They include Singapore (7), Pakistan (1), India (1), Taiwan (2), China (3), Japan (1), Australia (1), New Zealand (1), the UK (2) and the United States of America (2).

Case management – The crucial enabler

[47] It bears emphasis that consistent with Order 34 of the Rules, case management proceedings are critical in ensuring that online and virtual proceedings are successfully carried out. Apart from ensuring that the pre-trial directions are complied with by lawyers, a crucial outcome that must be reached is the agreement between parties on how the virtual trial is to be conducted. This agreement is usually termed as a Protocol.

The Protocol

[48] Practice Direction No. 1 of 2021 issued by the Chief Justice is an embodiment of the Protocol. Essentially, the Protocol outlines the agreed parameters on how the virtual proceeding is to be conducted. The subsequent paragraphs are some of the practical issues to be considered by courts when guiding parties to arrive at a final Protocol. It is by no means exhaustive but offers a practical insight based on the experience of the KL commercial courts. It can be divided into several segments. They include:

A. The pre-trial obligations

(i) Identifying the type/mode of trial:

- Even in the same trial, different modes of virtual proceedings can be employed. It can be virtual proceedings from start to end. This essentially means that all parties are located at their respective remote locations including the witnesses. There is no requirement for parties to be present in court.

- A hybrid trial is where the witness and some parties are in court physically while other parties are remotely located.
- A hybrid trial can also be one where all parties are in court except for the witness who is remotely located.

(ii) The identification of common dates:

- Parties must determine with certainty the days on which the trial is to take place. More importantly, on which days the relevant witnesses will be called. This is to ensure that the necessary logistical preparations can be made.

(iii) The determination on specific commencement and end times:

- There is a need to specify the exact time in which the trial is to commence. This will ensure efficient utilisation of judicial time. Ideally, when the judge logs on to the system, parties must be ready to begin the proceedings for the day. This will also allow witnesses to be called at the appointed time to ensure costs and expenses are efficiently managed.
- Determining the exact time the trial is to commence will be critical when it involves a witness who is located in other jurisdictions in different time zones. Thus, it must be emphasised that the foreign witness must as a default accommodate the operation hours of the Malaysian courts. This may result in a witness having to take the stand over several days given the different time zones involved.

(iv) Logistical arrangements:

- Each party must commit to ensuring that the telecommunication facilities are available at the designated locations. This essentially means that the internet facilities where the lawyers and witnesses are located do not suffer from any disruptions or interference.
- Physical copies of trial documents (if agreed between parties) must be sent ahead of time to the location where the witnesses are to testify. In this respect, arrangements must be made to ensure that the witness is aided by the documents when giving testimony.

(v) The need for dry runs:

- Parties are encouraged to conduct dry runs before the actual trial date. The dry run should ideally be conducted utilising the actual logistical equipment and infrastructure that would be utilised on the actual trial day. It should be carried out at an appointed time and date determined by the registrar of the court.

- The dry run intends to determine whether the internet connection and other technical devices can support the proceedings. All parties scheduled to be present on the trial date should participate in the dry run.

- Trivial as it may sound, dry runs will also allow the sitting position of witnesses to be identified before the court begins the actual proceedings. Some judges prefer a full-frontal view of the witness. In this respect, the upper part of the witness's body is visible on the screen, giving the judge a "newscaster" view of the witness.

- Some lawyers prefer witnesses not to be too far from the screen, to enable eye contact when asking questions. The permutations are many.

(vi) The appointment of supervising solicitors:

- Where a witness testifies from a remote location, parties may appoint an independent supervising solicitor to be present at the witness's location. If there is an inability to land on a common supervising solicitor, each party may elect to appoint their respective solicitors to be present at the witness's location. The supervising solicitor is also required to assist the witness if hard copy documents are at the location of the witness;

- A supervising solicitor must be a qualified advocate and solicitor and a member of the Malaysian Bar. Pupils reading in chambers are not allowed to act as supervising solicitors. The equivalent standing is expected of the foreign supervising solicitors who would be present at the jurisdiction where the witness is located.

(vii) The determination of a witness's location:

- The location of where witnesses will testify will need to be identified upfront. This is to allow documentations to be served for reference during trial. The issue is less complicated if the witness is located in the office of the respective parties where it would only require the representative of the opposing party or supervising solicitors to be present at the said location.

- The determination of the location will also be crucial to enable the supervising solicitors to be at the same venue as the witness.

B. The obligations during trial

(i) The presentation of evidence:

- Given the virtual nature of the trial, references or documents to be used during the trial must be accessible and available via the prescribed platforms.

- Commercial trials in particular, as in most other complex civil trials, would involve references to copious amounts of documentation. Therefore, to simplify the proceedings during the trial, parties are encouraged to identify the relevant documents to be used during the examination of each witness.

- The relevant enclosures must be identified upfront to the court for ready access to the relevant documents or exhibits. Parties are also required to familiarise themselves with the features of the relevant platform to maximise the true utility of each platform.

- As an illustration, under the Zoom platform, a share-screen function can be used to share documents with all participants. The objective is to ensure that the witness is referred to the documents seamlessly when the witness is being examined during his testimony. A certain level of competence is expected from counsel executing the screen-share mode. Very often, lead counsel should be assisted by another counsel in sharing the said documents. This will ensure minimal disruption to the proceedings.

- Similarly, parties can also upload their own Google Drive link with the relevant documents to be used during the trial as the digital bundle. The options are many but the best approach is to use the most common and easily accessible method.

C. The obligations after trial

(i) It is crucial for parties to obtain the recording of the proceedings from the court. This will allow parties to prepare the notes of evidence for the onward action by parties. This is nothing different to trials which are normally carried out physically in open court where a recording of the proceedings is made available at the end of the trial.

D. Costs

(i) All costs involving the trial should be agreed upon by the parties when finalising the Protocol. This includes all cost that are to be borne by each party and those which shall be the subject-matter of assessment after the trial.

[49] Ultimately, the Protocol is an agreement between parties. It is for the parties to agree upon and be bound by the arrangements stated in the said Protocol. The judge will not impose or insist on the terms to be agreed upon but will hold both parties accountable to the set of agreed arrangements.

Third meeting of the Standing International Forum of Commercial Courts

[50] The Standing International Forum of Commercial Courts ("SIFoCC")[22] of which Malaysia is a member, had its third meeting online over two days and was hosted by Singapore from March 11–12, 2021.

[51] A thought-provoking speech live-streamed from London, was delivered by Sir Jeffrey Vos, the Master of Rolls during the Judicial

22 Established in 2017, the SIFoCC facilitates collaboration between the world's commercial courts, to promote and support best practices and the just and effective resolution of commercial disputes.

Roundtable Discussion. In his speech entitled "Technology in a New World", he urged municipal justice systems in general and commercial courts, in particular, to urgently acquire a better understanding of the disputes that they are required to resolve in the new technological era.

[52] While acknowledging jurisdictions internationally have done well to undertake remote hearings during the pandemic, more, however, needs to be done. While it has led away from paper towards an entirely paper-free digital environment, the Master of the Rolls remarked "But none of that is using new technologies, nor is it changing either the way we resolve disputes or the kinds of dispute we are resolving."

[53] On the kind of ways disputes are resolved, he emphasised that commercial life is on the verge of a digital revolution. As such it would not be long before "almost all business will be undertaken by the use of electronic documentation, electronic signatures, smart legal contracts and on-chain records. Immutable digital records will abrogate the need for courts to resolve many of the factual disputes that now arise". He went on to identify impediments to the "inevitable eventual and ubiquitous" use of on-chain smart contracts.

[54] On how disputes are being resolved, he remarked "Our justice and trial systems are still very much based on a 19th-century model, even if the hearings can now be undertaken remotely. In an era in which everything can be delivered with 2 or 3 clicks on a smartphone, I do not think that international business people will accept the cost and delay caused by our current approach. But, as yet, very little thought has gone into the fundamental reforms that are necessary."

[55] Despite the candid manner in which the speech was delivered, it left a point for the meeting participants to ponder: while technology has been used in ensuring the justice delivery systems remain uninterrupted, the bigger issue remains whether jurisdictions appreciate the types of issues technology can bring about and how they are to be resolved.

[56] During the said meeting, a presentation was made by a participant from China on how far technology has played a role in the courts of China. The insights provided left the audience marveling at the level where China has reached in terms of the use of technology in the judicial system.

[57] In an article published on the International Bar Association's website,[23] the following excerpts can be taken as one of the best summaries of how China has embraced technology in its judicial system:

> Since 2012, four official websites have been set up by the highest judicial authority in China, the Supreme People's Court (SPC) to provide for online research into laws and regulations, as well as finalised court judgments, court decisions and enforcement orders. A platform was later established to provide live broadcast of court hearings, as well as big data platform to archive court files on a daily basis, significantly improving judiciary transparency.
>
> As at 31 October 2019, more than 1.1 billion case status information of about 22 million cases have been posted on China Judicial Process Information Online.
>
> 5.5 million cases had been broadcasted live on China Court's Live Trial website, attracting more than 20 billion viewers. China Judgment Online published over 80 million court decisions and attracted over 37 billion visits from more than 210 countries and regions, which makes the website the world's largest judicial information database.
>
> It was to no surprise that the first e-court was set up in Hangzhou in 2015, the birthplace of Alibaba, the world's largest e-commerce provider. This was followed by two more e-courts. Beijing began in August 2017, and Guangzhou, southern China in September 2018.
>
> On 6 September 2018, SPC issued the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by E-Courts (SPC Provisions) to provide further guidance on how e-courts or e-tribunals should administer cases. According to the SPC Provisions, these online courts are designed as primary courts with designated jurisdiction over e-commerce-related cases. The SPC identified more than 11 types of e-commerce-related cases, including contracts for online purchases, financial loans, services, and copyright, etc, to be handled by such e-courts.
>
> Such e-courts are widely recognised for their judicial quality and efficiency. For cases filed to such e-courts, litigants and their

23 Update on information technology used by Chinese courts and arbitration institutions – Ariel Ye; King & Wood Mallesons https://www.ibanet.org/article/6dbaf025-9b9f-40c2-8d62-96f1893c2efe

representatives have access to 24-hour online self-service through a computer or mobile phone who can enjoy functions including online filing, online submission of document and evidence, payment of court fees and online hearing.

Lawyers are also able to check case status online and raise questions to courts via the online platform, remarkably saving time and cost. Since its establishment, judges working in such e-court have concluded an overage of more than 700 cases per year. As of 31 October 2019, the three e-courts served 96,857 documents via phone, email, WeChat, SMS, and official online accounts.

Traditional courts are no longer "traditional", as an increasing number of them have been embracing new technologies. By 13 December 2018, across China, 2,995 courts had set up official court websites. Of these, 1,623 courts offered litigation service mobile applications. Beijing courts have launched their online filing system to provide full-coverage online filing services for the parties and their representatives so that case documents can be filed at any time.

[58] Such is the prowess of China in utilising technology in its justice delivery system.

The advantages and disadvantages of virtual proceedings – The debate

[59] There have been many discussions in this area. It is worth highlighting some of the common issues. The advantages are usually linked to convenience, cost and time savings. Parties need not travel to court, braving traffic and weather conditions which can get unpredictable. Time, too, is more efficiently managed as parties can be certain when their cases are scheduled. There is more discipline among parties to complete the online or virtual proceedings according to the allotted time. More importantly, virtual proceedings can be conducted even in situations where access to courts is restricted.

[60] The case against the implementation of virtual proceedings is more readily made. The most common excuse given is the inability to test the credibility of the witness. Commentators have argued that there is an epistemic difference between testimony given in virtual proceedings and in court, as the latter offers greater opportunity for the court to evaluate both the witness and the testimony.

[61] Indeed, John Henry Wigmore, an American lawyer and legal scholar known for his expertise in the law of evidence, once said that "cross-examination is the greatest legal engine ever invented for the discovery of truth". In a virtual trial, the art of cross-examination, as argued, is lost. The challenge is also lesser in value due to the inability of the judge to assess the demeanor of witnesses.

[62] Nevertheless, counter arguments are being made over this issue. Given the judge's attention is directed to the screen at all times, the judge has better focus on the witness. The concentration of attention is higher in virtual proceedings than it is in physical proceedings. As such, facial expressions and any movement of the eye can easily be detected.

[63] It has also been argued, and perhaps more as courtroom trivia, that physical hearings triumph over virtual proceedings when it comes to the nuances of the trade. A lawyer is said to be able to understand the mood of judges and stands a better chance of convincing them during physical hearings.[24]

[64] It has also been raised that with a virtual trial, less control is with the judge. Judges cannot see beyond what is on the screen and thus unable to exert their authority throughout the proceedings. Recordings of the proceedings can also be secretly captured by third-party observers. The judge is also unable to know who is following the trial as there may be a live link set up for an audience located in a different venue.

[65] This further leads to the worry that sensitive or confidential information that is revealed during the virtual trial will be exposed. Documents such as tax records, bank statements or even psychological evaluations are at the risk of being shared publicly. However, this issue is inherent not only during virtual proceedings. As it is, documents are being filed electronically. Any electronic online system is not immune from improper or unauthorised access or simply put, hacking. If this remains as a weakness albeit in the slightest chance of it occurring, it must be addressed.

24 <http://www.legalserviceindia.com/legal/article-3595-virtual-courts-challenges-and-a-way-forward.html>.

[66] However, online and virtual proceedings take away the grandeur of court proceedings. The impact of having proceedings in a courtroom located in a grand court complex, with all the characteristics of a courtroom trial, cannot be understated. The unique characteristics of a trial play a role in the administration of justice. The need for litigants to conduct themselves with decorum in keeping with courtroom etiquette often leaves a feeling of awe and respect for the venue and occasion even if they encounter the courtroom experience only once in their lifetime.

[67] It has been observed that "a courthouse is not home. Rather than comfort and convenience, the court is designed to express governmental power. The symbolic structure of the courtroom is meant to represent certain feelings and values. For example, people rise when the judge enters the courtroom; the judge sits above all others present, with the national and state flags conveying his authority. The witnesses are meant to be intimidated: They testify in uncomfortable and imposing conditions, under oath or affirmation, with deputies and bailiffs present, and without food or drink. The court often induces a feeling of awe in the witness. This deters witnesses who might be tempted to testify falsely".[25]

[68] The above quotation simply means that the focus on the witness is lesser. Nothing can be more daunting than having to testify under the solemnity of the oath taken, sitting in a witness box isolated away from many and under the watchful eyes of a full gallery before a judge whose duty is to evaluate every answer given by the witness.

[69] The argument for and against virtual proceedings can never end. As time goes by, the positive experience will grow and so will the negative ones. There will certainly be gaps. There will also be no winner in this debate. However, one must not lose sight of the efficiencies technology has brought to the courts.

[70] It cannot be denied that remote communication technology proceedings will be the way forward. Resistance to change and adaptation is proverbially futile. The proven efficiencies brought by remote communication technology are by no means a myth.

25 Doron Menashe, "A Critical Analysis of the Online Court" (2018) 39 *U Pa J Int'l L* 921, available online at <https://scholarship.law.upenn.edu/jil/vol39/iss4/1>.

The demise of the "open court" principles?

[71] It has been said that the open court principle finds its origins in the much revered 1215 Magna Carta. The specifically relevant portion is clause 40, which translates to:

> To no one will we sell, to no one will we refuse or delay, right or justice …

[72] This term envisages not only the right of litigants to have their case resolved by court but also the right of the public to attend legal proceedings. This clause has laid the foundation stone for many subsequent constitutional provisions that articulate for open courts.[26]

[73] It is argued that the right to have a trial held under the open court principles is not absolute. It has seen departures during trials conducted *in camera* where only parties directly relevant to the proceedings are allowed to be present in the courtroom. It has also seen certain categories of information being shared with only the presiding judge in certain cases such as those involving national security matters.

[74] It is perhaps a bigger issue to be considered in a criminal trial as compared to a civil trial. Where damages and declaratory reliefs are the objectives of the parties in a civil trial, with time often being of the essence, the merits of ensuring the disposal of the matter efficiently override the necessity of open court proceedings. In any event, if for some reason any party feels that virtual proceedings would deprive him or her of a fair trial, it is open to the relevant parties to make representations to the judge and justify why the matter ought to proceed via physical open court proceedings.

Court's user committee

[75] Feedback must be obtained from the users of the courts. By this, it means the parties that deal with the courts either as lawyers, persons who appear in person as a litigant or even witnesses. The expectation of both parties, namely the service provider and the user of the services, must be aligned. For this reason, court-user committees are the best avenue in which members of the guild can exchange ideas

26 Pramod Kumar Dubey, "Virtual Courts: A sustainable option?", available online at <https://www.barandbench.com/columns/virtual-courts-a-sustainable-option>.

and suggest improvements to ensure that the user experience can be improved upon.

[76] During the third SIFoCC meeting, a roundtable discussion on court-user feedback was held. It was agreed upon by members that a Court's User Committee is important as it will be the channel where court users and court officials exchange views and ideas on the experiences.

[77] The KL commercial courts have to date established several committees to capture the above intent. Already in existence are the Construction and Admiralty Courts committees. Added to this is the Commercial, Insolvency, Technology and Intellectual Property Courts committee. Each committee is headed by a High Court judge and members of the committees are made up of senior members of the Malaysian Bar with the relevant expertise in the various areas of practice.

How have we fared?

[78] The Chief Justice, Tun Tengku Maimun Tuan Mat, in her address[27] welcoming 2021 remarked as follows:

> For the Judiciary, there is a ring of truth in the phrase "adversity breeds innovation". I would say that we have achieved more in one year than we have in the past decade if we compare the time taken to roll out our initial e-Court reforms.

[79] The Chief Justice went on to quote the statistical figures on the disposal of cases at the lower courts up to the apex court. 2020 was a year that was challenging but yet full of achievements.

[80] There is an all-around sense of achievement by many. But certainly, more can be done especially in embracing technology. The mindset of all must gear towards accepting technology as the enabler that will enhance the justice delivery system in time to come.

[81] There may well be dedicated judges to carry out full online and virtual proceedings. There may also be no physical courtrooms required for judges. Support staff can be connected via remote communication

27 Tun Tengku Maimun Tuan Mat, "Reflections on 2020 & Aspirations for 2021", available online at <www.kehakiman.gov.my>.

technology. It is something that is not at all impossible. It is food for thought.

[82] Radical changes can be made. The backing of the policymakers is crucial as it will involve budgetary and long-term commitments. It requires wisdom and foresight which must be aligned with the objective of upholding the rule of law, no matter how justice is dispensed.

Conclusion

[83] The efficiencies brought about by technology has shown that traditional methods of judicial proceedings may be a thing of the past. The transition into an even more efficient technology-enabled court system needs to continue and the momentum must not taper.

[84] COVID-19 has certainly hastened the acceptance of the use of technology in court proceedings among court users and judges but surely, the next leap forward cannot be precipitated by another pandemic.

[85] The courts must continue to embrace and champion the use of technology. There is urgency in doing so given the new normal that the world is experiencing. Perseverance by all stakeholders is key, not forgetting judicial adaptability. The time is nigh.

Trying Election Petitions: A Practical Commentary

by

*Justice Dato' Amarjeet Singh Serjit Singh**

Introduction

[1] After every general election, the High Court is faced with the task of hearing election petitions. It is the only method to call into question an election to the House of Representatives and the Legislative Assembly of a State. A successful petition will result in an election being held again for the constituency in respect of which the election was called into question. The jurisdiction to hear an election dispute is provided by Article 118 of the Federal Constitution ("FC") and not under the general jurisdiction of the High Court provided by Article 121(1) of the FC or in the Courts of Judicature Act 1964.

[2] The jurisdiction is a special jurisdiction. Malaysia adopted this jurisdiction as did many countries which were former colonies of Great Britain. Historically, it was the sole right of the House of Commons in England to examine and determine all matters relating to the election of its own members until it was decided that for a fair and independent outcome, since deliberations were apt to be governed by political considerations of the majority, the House of Commons by its own volition vested the jurisdiction to determine disputed elections onto an independent tribunal. The vesting created an entirely new and until then an unknown jurisdiction to the courts, the common law and equity.[1]

[3] The jurisdiction does not concern the personal rights and obligations of individuals, corporations or political societies in the sense covered by the ordinary civil jurisdiction of the High Court.[2] It

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* Judicial Commissioner of the High Court of Malaya.

1 *Yong Kuan Teik v Devan Nair* [1965] 2 MLJ 162, FC; *Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261, PC; *NP Ponnuswami v Returning Officer, Namakkal Constituency & Ors* 1952 SCR 218; *Mahari Endut v Dato' Hj Mat Razali Kassim, Pegawai Pengurus Pilihan Raya Bagi Kawasan Dewan Undangan Negeri N15 Ladang & Ors* [2009] 4 CLJ 488.

2 *Parti Islam Se-Malaysia & Ors v Tan Sri Dato' Seri Abdul Aziz Mohd Yusof & Ors* [2015] 9 CLJ 749.

is a jurisdiction that deals with matters affecting on the one hand the integrity of the Legislature and on the other hand the representation in that Legislature of constituencies comprising all electors in each constituency. It is for the interest of the public as a whole. Therefore, constitutionally an election can only be challenged by way of an election petition and no other method. The legislation that was enacted under Article 118 of the FC conferring the High Court with this special jurisdiction is the Elections Act 1958 including the regulations made thereunder and the Election Offences Act 1954 ("EOA"). The EOA, like similar legislation in many countries, is designed to ensure that the dispute is determined speedily so that the Legislature can be properly constituted and proceed with its important work.[3] The focus of this article is an attempt to bring clarity on certain key issues that arise at the hearing of election petitions.

Issues on the forum for presenting an election petition

[4] Until recently it was the thought that election petitions could only be presented at the local jurisdiction of the branch of the High Court of Malaya where the election was held. Presenting an election petition at any other branch of the High Court was fatal and resulted in the petition being struck out *in limine*. This position was changed by the Federal Court in *Khairuddin Abu Hassan v Datuk Seri Hj Ahmad Hamzah & Ors and another appeal*[4] where the meaning of "High Court having jurisdiction where the election was held" in Article 118 of the FC was construed to mean either the High Court of Malaya or the High Court of Sabah and Sarawak. With this decision, any election held in the States of Malaya can be filed at any branch of the High Court of Malaya. This would also of course mean that a petitioner is prohibited from presenting an election petition disputing an election held in the State of Sabah in Kuala Lumpur.

[5] The decision has settled the law but has given rise to the following pertinent if not practical issues: (i) the issue of *forum non conveniens* which would obviously delay the hearing of the election petition giving rise to another issue as to whether an election judge has power to transfer the election petition to another High Court; and (ii) the issue of providing an additional sum of money by way of security under rule 12(2) of the Election Petition Rules 1954 as costs, charges and

3 *Tengku Abdullah v Ali Amberan* [1970] 1 LNS 162.
4 [2019] 9 CLJ 315.

expenses. Depending on the grounds raised, some election petitions challenging the conduct of elections at various polling stations would require many witnesses, all of whom are residents in the constituency where the election was held. In the above case, the only parties in Kuala Lumpur where the election petition was presented were the advocates while the parties, their witnesses and the witnesses for the Election Commission were all in Malacca.

[6] Only an election judge can hear an election petition although an election petition is presented to the High Court. The resident High Court judge does not assume the right to try an election petition. The High Court judge who hears an election petition is referred to as an election judge and must be nominated for that purpose by the Chief Judge of that High Court. This power is specifically conferred on the Chief Judge by subsection (1) of section 33 of the EOA. There is no separate establishment of an election court. It is the High Court that tries an election petition but under a different jurisdiction than the High Court's ordinary civil jurisdiction.

Issues on the manner in exercising this special jurisdiction

[7] The issue that arises concerns the manner an election judge is to exercise this special jurisdiction. Because it is presented in the High Court, many are lulled into thinking that the original civil jurisdiction of the High Court, the common law and rules of equity will apply. This is certainly not the case and has resulted in many election petitions being struck out.

[8] This special jurisdiction concerning election petitions has two fundamental rules:

(i) the jurisdiction is to be exercised in accordance with the law which creates it and must be subject to the limitations imposed by it; and

(ii) the statutory requirements of election laws are mandatory and must be strictly observed.[5]

5 See amongst others, *Tengku Korish v Mohamed Jusoh & Anor* [1970] 1 MLJ 6; *NP Ponnuswami v Returning Officer, Nammakkal Constituency & Ors* 1952 SCR 218; *Khairuddin Abu Hassan v Datuk Seri Hj Ahmad Hamzah & Ors and another appeal* [2019] 9 CLJ 315; and *Mahari Endut v Dato' Hj Mat Razali Kassim, Pegawai Pengurus Pilihan Raya Bagi Kawasan Dewan Undangan Negeri N15 Ladang & Ors* [2009] 4 CLJ 488.

[9] What follows and is equally important is the approach in construing or interpreting the provisions of the election laws. *Khairuddin Abu Hassan v Datuk Seri Hj Ahmad Hamzah & Ors and Another Appeal*[6] is instructive where Tengku Maimun Tuan Mat FCJ (as her Ladyship then was) said that when interpreting election laws, the court should:

(i) adhere as closely as possible to the literal meaning of the words as the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it;

(ii) not rewrite the statute in a way which it considers reasonable where the language used is clear and unambiguous; and

(iii) apply the words and phrases of a statute in their ordinary meaning and construe the phrases and sentences according to the rules of grammar.

[10] In *Mahari Endut v Dato' Hj Mat Razali Kassim*,[7] counsel urged the Federal Court to overcome the harshness of section 41 of the EOA and regulation 25(10) of the Elections (Conduct of Elections) Regulations 1981 ("the 1981 Regulations") – which provided that the rejection of ballot papers at the counting stage cannot be questioned – by applying common law principles instead. Richard Malanjum Chief Judge of Sabah and Sarawak, speaking for the court, held as follows:

> The interpretation of the two sections may appear harsh. However, we are dealing with an election petition which is subject to strict interpretation of the relevant election laws. Common law and equity principles have no application when determining election petition cases.

[11] In *Danny Anthony Andipai v Tan Sri Joseph Kurup & Anor*,[8] the learned election judge applied the original civil jurisdiction of the High Court including using the purposive approach stipulated in section 17A of the Interpretation Acts 1948 and 1967 in interpreting regulation 6(2) and (2A) of the 1981 Regulations. These regulations are couched in imperative terms and require that nomination papers of a candidate must be delivered between 9.00 a.m. and 10.00 a.m.

6 Supra, n 4.
7 [2009] 4 CLJ 488.
8 [2008] 6 CLJ 273.

and forbid the returning officer to accept nomination papers which are not delivered within the stated period. The undisputed facts in that case were that the petitioner had come into the nomination centre but could not deliver his papers because of the queue in front of him. He could only deliver his papers at 10.25 a.m. His nomination was objected to and after considering the objection the returning officer rejected his nomination papers. The learned election judge held that in the circumstances the purposive approach should be adopted and that regulation 6(2) and (2A) of the 1981 Regulations should be treated as "mere guidelines" which ought to be followed but if the circumstances demand, need not be strictly adhered to. In other words, the returning officer is entitled to accept nomination papers outside the stipulated time where circumstances so demand. The Federal Court in *Tan Sri Joseph Kurup v Danny Anthony Andipai; Attorney General Malaysia (Intervener)*[9] reversed the learned election judge's decision and held that the said regulations were mandatory provisions and the returning officer was expressly forbidden by the words "shall not accept" to accept nomination papers not delivered to him within the permitted time. The fundamental rules governing the special jurisdiction were applied, effectively rejecting the liberal and progressive approach applied by the learned election judge in interpreting election provisions.

[12] In *Chiew Chiu Sing v Dato' Seri Tiong King Sing*,[10] it was opined that there was no room to adopt the purposive approach in election matters and if the purposive approach was to be applied at all, it was to be in line with the general principle of the election laws which require clear provisions to be complied with strictly.

Issues concerning the rules governing election petitions

[13] The EOA, uniquely also provides for the rules that govern election petitions in its Second Schedule. The rules are known as the Election Petition Rules 1954 ("EPR"). Thus, the rules are not subsidiary legislation but an integral part of the EOA and can only be amended by the Legislature. Section 42 of the EOA provides for the procedure and practice of election petitions in its two subsections which are reproduce below:

9 [2009] 3 CLJ 523.
10 [2004] 8 CLJ 82.

(1) The procedure and practice on election petitions shall be regulated by the Election Petition Rules 1954 as provided for in the Second Schedule.

(2) When any matter is not expressly provided for in the Election Petition Rules 1954, the Rules of Court 2012 shall apply.

[14] Section 42 clearly provides that the EPR are the governing rules while the Rules of Court 2012 are only to be resorted to if a matter is not expressly provided for in the EPR. Where the statute provides for this type of situation, there is a presumption that if the court is invested with jurisdiction to determine certain matters additional to its ordinary jurisdiction it is intended to include all the procedures of the court in the absence of express words to the contrary or of reasonably plain intendment.[11]

[15] Thus, where the EPR expressly provide for the manner of doing something and the time for doing something or if not in express words but the intendment is reasonably plain, the Rules of Court 2012 do not apply. There can be no extension of time or treating non-compliances as mere irregularities. The special jurisdiction requires strict compliance of the election laws failing which the election petition is a nullity which cannot be cured.

Issues concerning reliefs sought and decision of an election judge

[16] It is trite that the determination of an election judge includes striking out a defective election petition either on a preliminary objection or on a notice of application for that purpose. The law on this point is settled.[12] Experience shows that a preliminary objection is most preferable as a notice or letter is sufficient. Preliminary objections are on points of law which attack the pleadings where no evidence is necessary. If evidence is required then the respondent must proceed by way of notice of application supported with an affidavit.

[17] Issues usually arise concerning the reliefs that can be granted by an election judge. The EOA *vide* section 35 provides that the petitioner is only entitled to claim the following three reliefs:

11 *Dr Lee Chong Meng v Returning Officer (Abdul Rahman Abdullah) & Ors (No 1)* [2000] 3 CLJ 519, *per* Augustine Paul J.

12 See *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729; *Ahmad Jamaluddin bin Abd Majid v Rafidah bt Aziz & Ors* [2009] 2 MLJ 646; and *Wan Sagar bin Wan Embong v Harun bin Taib* [2008] 6 MLJ 473.

(a) a declaration that the election is void;

(b) a declaration that the person was not duly elected or ought not to have been returned;

(c) (*Deleted by Act A1177*);

(d) where the seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, a scrutiny.

[18] An election judge under subsection (1) of section 36 of the EOA is empowered to make the following determinations at the conclusion of the trial:

(i) whether the candidate whose return or election is complained of was duly returned or elected or not duly elected or returned; or

(ii) whether the election is void or not.

[19] A determination declaring an election void occurs when the petitioner is successful in proving its case under any of the five paragraphs stipulated in section 32 of the EOA and conversely, a determination declaring that the candidate whose return or election complained of was duly returned or elected occurs when the petitioner is unsuccessful in proving any of the said same grounds. Prior to its deletion, section 35(c) of the EOA provided that the election judge could grant *a declaration that any candidate was duly elected and ought to be have been returned*. This meant that the election judge could declare an unsuccessful candidate who had actually won the election as duly elected and return that person as the elected representative of the constituency. Before it was deleted, section 35(c) was not a stand-alone relief but was a necessary relief that went hand in hand with the relief of scrutiny which is provided by section 35(d) of the EOA.

[20] A novel issue arose in *Hashim bin Hj Jasin v Pegawai Pengurus Pilihanraya, Mohd Daud bin Abdul Hamid & Ors*[13] with the deletion of section 35(c). In that case, there was an addition mistake when tallying the votes from all the polling stations. As a result, the candidate who had lost by 47 votes was wrongly returned as the duly

13 [2008] 8 MLJ 402.

elected representative of the constituency. An election petition was presented seeking the election judge to declare the petitioner as the rightfully elected candidate and return him as the representative of the constituency. It was conceded that there was a mistake in tallying the votes. The election judge held that he was not empowered to declare the petitioner as duly elected or returned because section 35(c) which would have empowered the court to grant the prayer was deleted and as such there is no *lacuna* in the law that could be overcome by using the inherent powers of the court. It was opined that it was not within the powers of an election judge to rewrite, alter, vary or add on to any substantive law as such an act would amount to an encroachment or usurpation of legislative power. The learned election judge proceeded to declare the election void which determination would pave the way for a fresh election to be held. On appeal, the Federal Court reversed the election judge's decision and duly returned the petitioner as the representative of the constituency. Unfortunately, there is no written judgment of the Federal Court for us to know the legal reasoning and the *ratio decidendi* of the case. The reasoning for such decision is still at large.

[21] The issue that arises is what reasons would an election judge give if the situation were to arise again. I would respectfully volunteer the following perspective on the issue. One is only required to examine carefully the provisions as they appear now in the EOA. Whatever was the reason to delete section 35(c) should not concern us anymore. It is trite law that the powers of an election judge are circumscribed by the provisions of the EOA and therefore an election judge can only exercise powers in accordance with the law which creates it and not beyond what is provided. Thus, the jurisdiction of an election judge as regards election petitions depends entirely upon the four corners of the EOA and the determination of election judges must be governed by its provisions.

[22] The petitioner claimed that the election was validly conducted according to election laws. The non-compliance was the act of the returning officer declaring the person who lost the election as the winner when it was the petitioner who had won the election. It is also clear that an election judge does not possess power under the EOA to declare a validly conducted election void except on the grounds mentioned in section 32. An election judge would therefore be acting beyond his powers by declaring an otherwise perfectly conducted

election void. The corollary is that an election judge must possess inherent power to give effect to his determination under section 36 that the candidate whose return or election is complained of is not duly returned or elected because it is the other candidate who has been duly elected. This reasoning is based on the decision in *Devan Nair v Yong Kuan Teik*[14] where it was held that election petitions are of immense public interest and it is the public interest that gives rise to the invocation of such inherent power.

[23] The other issue concerns the relief of scrutiny. Scrutiny is provided by section 35(d) of the EOA. It is a remedy of returning an unsuccessful candidate on the ground that the said candidate has the majority of the lawful votes casted. The relief provided by the deleted section 35(c) was always prayed together with the relief of scrutiny. So, as discussed above, if the unsuccessful candidate proves that he obtained the majority of the votes, it would be beyond an election judge's power to declare an otherwise perfectly valid election void just because the remedy in section 35(c) has been deleted. If it were so, then such decision would render the relief of scrutiny otiose. The words "where the seat is claimed for an unsuccessful candidate" in section 35(d) will be rendered meaningless which cannot be the case as it would defeat the intention of the Legislature providing such relief.

[24] The canons of construction are also against such construction. In *Dato' Ismail Kamus v Pegawai Pilihan Raya (Zainal Abidin Azim) & Ors*,[15] Alauddin Mohd Sheriff FCJ (as his Lordship then was) stated that the court is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. The court reiterated the presumption that the Legislature does nothing in vain and the court must endeavour to give significance to every word of the statute, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. Thus, for this reason and the reasons opined in the preceding paragraph it is submitted that, if after scrutiny, it is found that the unsuccessful candidate actually has the majority votes, the election judge has the inherent power to give effect to such determination by declaring such candidate as duly elected and return such candidate as the representative of the constituency.

14 [1967] 1 MLJ 261.
15 [2005] 2 CLJ 237.

[25] In this regard, it is useful to illustrate how scrutiny works. In the EOA, the remedy of scrutiny entails the striking out or cancelling of votes of the following persons listed in section 40 of the EOA:

(i) a person whose name was not on the register of electors assigned to the polling station at which the vote was recorded;

(ii) a person whose vote was procured by bribery, treating, or undue influence;

(iii) a person who committed or procured the commission of personation;

(iv) a person proved to have voted in more than one constituency or electoral ward;

(v) a person, who, by reason of a conviction of a corrupt or illegal practice or by reason of the report of an election judge, or the registrar of the Federal Court or by reason of his conviction of an offence under section 3, was incapable of voting at the election; and

(vi) votes given for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification, or when the disqualification or the facts causing it were notorious.

[26] So, only subtraction of such votes from the earlier tallied votes is allowed under the EOA. Previously, the remedy was wider as it allowed votes to be added but no more. Presently, when an election judge is satisfied on evidence and orders that scrutiny be carried out, a physical examination of the impugned votes must be done to establish who the impugned voters voted for. The exercise of scrutiny is conducted by the returning officer under the supervision of the registrar of the court and in the presence of the candidates or their agents. After the votes of such persons are cancelled, the valid votes are adjusted. The result will be conveyed to the election judge. If the result does not affect the successful candidate, the election judge will make a determination that the successful candidate is duly elected and returned. If the result is in favour of the unsuccessful candidate, the election judge will, as reasoned above, have to declare the unsuccessful candidate as duly elected as that is the only and proper determination that could be made.

[27] This brings us to the next issue. Is the relief of scrutiny viable? The remedy as shown above is only viable, if and only if the votes casted by any one or more of the six categories of persons can be struck out. To be able to strike out the impugned votes one must know which candidate the identified persons voted for and subtract from that candidate's total the number of impugned votes. The crucial question is how this exercise is to be carried out. Previously, there was no problem because the ballot clerk at the polling station would record on the counterfoil of the ballot paper the serial number of the voter as it appears in the register of voters for the polling station. One would then only need to open up the sealed packet containing the valid counted ballot papers of the polling station concerned and retrieve the ballot paper which will show for whom the vote was casted.

[28] This cannot be done now because the recording of the serial number of the voter as it appears in the register of voters is no longer recorded on the counterfoil. The Election Commission ceased the procedure as a result of the pressure generated by various parties complaining that the secrecy of vote is violated and voters feared they would be penalised for voting against the candidate of a particular political party. The decision of the Election Commission succumbing to such pressure has effectively rendered the relief of scrutiny useless and no longer viable because the ballot paper of such persons can no longer be retrieved for the exercise of scrutiny to be carried out. So, unless the Election Commission revives the practice, the relief of scrutiny will be in a permanent coma.

Issues concerning the manner of presentation of an election petition

[29] The manner an election petition is to be presented in the High Court is expressly provided in the EPR *vide* rules 3, 9 and 12 and therefore the Rules of Court 2012 are not applicable. All three rules are couched in mandatory terms, unambiguous and therefore must strictly be complied with. These rules envisage a presentation by hand at the office of the registrar. Rule 3(2) of the EPR states that when an election petition is presented there "shall also be left with the said petition two copies thereof" – meaning three copies of the election petition must be left with the registrar of the High Court. It is trite that the said duty is on the petitioner to do so as non-compliance is fatal.[16]

16 *Dr Lee Chong Meng v Returning Officer (Abdul Rahman Abdullah) & Ors (No 2)* [2000] 3 CLJ 532; *Ramely Mansor v Suruhanjaya Pilihanraya Malaysia & Ors* [2000] 6 CLJ 56.

[30] The introduction of electronic e-filing of documents in the High Court has caused conflicting decisions on the issue of presenting an election petition. Now, with the e-filing system at the High Court, the filing of an election petition into the virtual file of the electronic case management system of the court is available pursuant to Order 63A of the Rules of Court 2012. In *Abu Backer Sidek Mohammad Zan v Ramkarpal Singh Deo & 2 Ors*,[17] the learned election judge dismissed a preliminary objection where it was contended that notwithstanding the e-filing system, two copies of the election petition must still be left at the office of the registrar. It was held that Order 63A is applicable pursuant to subsection (2) of section 42 of the EOA. The decision rendered the requirement of leaving two copies of the election petition under rule 3(2) "illusory" as it was opined that the election petition is always in the database of the court's computer system and may at any time be printed out upon request. In *Hii King Chiong v Ting Tiong Choon*,[18] the issue was whether the petitioner had availed the e-filing system or filed the election petition manually. The evidence showed that the election petition was filed manually and as such a physical election petition file was opened by the High Court and in it was only one copy of the election petition. The election petition was struck out for the failure to leave two copies of the election petition at the office of the registrar. Then came the decision in *Martin Tomy v Ellron Angin*[19] where it was emphatically held that rule 3(2) must be strictly complied with and the petitioner must physically leave the original and two copies of the election petition at the office of the registrar. If a file search is made there must be two copies of the election petition apart from the original election petition.

[31] The issue is crucial in the practice of election petitions. The conflict of decisions must be resolved. The view that rule 3(2) is rendered "illusory" and does not apply where e-filing is done as opposed to manual presentation of an election petition gives raise to these pertinent questions: (i) whether Order 63A can apply when a matter is expressly provided for in the form of rule 3(1) and (2) of the EPR; (ii) whether Order 63A can override rule 3(1) and (2) of the EPR which are not subsidiary legislation but a Schedule in an Act of Parliament; and (iii) whether rule 3(1) and (2) which are couched in imperative

17 [2014] 1 LNS 1277.
18 [2016] 1 LNS 1172.
19 [2018] 1 LNS 1983.

terms and envisage only manual filing of an election petition must strictly be complied with.

[32] The failure to comply with rule 9 of the EPR is another issue that is frequently raised as a preliminary objection to strike out election petitions. According to this rule, a document in writing under the hand of the petitioner stating the name of the advocate whom he has authorised to act on his behalf or that he is acting on his own behalf is to be presented together with the election petition. The petitioner of course has the right to authorise more than one advocate to act for him. In such cases, the name of each advocate is stated in the said document. There is a conflict of decisions on this point. In some decisions, it has been held that a separate document in writing is required for each advocate if the petitioner wants to authorise more than one advocate while in others it is sufficient to state the names of all the advocates in one document. Respectfully, the better view is that the rule merely requires the name of the advocate or advocates to be stated. The purpose is for confirming such appointment and also to effect service of notices and proceedings on such advocates as is envisaged by rules 34 and 35 of the EPR. In practice, apart from the names of the advocates, one address for service will be stated in the written document signed by all the advocates. This has been held to be sufficient to literally meet the requirement of the rule.

[33] At the time of the presentation of the petition, rule 12 of the EPR requires that the petitioner pays into court security for the payment of all costs, charges, and expenses that may become payable. The security must be by a deposit of money of not less than RM10,000 and if it is not given the election petition cannot be registered. If for some reason the election petition is registered, the same can be struck out for non-compliance with the rule. The question that arises is how are the words "deposit of money" to be interpreted? Must the deposit be made by cash or is a cheque sufficient?

[34] In *Hii King Chiong v Ting Tiong Choon*,[20] at the time the election petition was filed the petitioner gave the initial sum of RM10,000 as security required under rule 12 of the EPR in the form of a cheque. The respondent applied to strike out the election petition on the ground that the rule expressly required the security to be in the form of "deposit

20 Supra, n 18.

of money", meaning actual cash relying on the decision in *Ding Kuong Hiing v Wong Ling Biu & 2 Ors*.[21] Ravinthran J (as his Lordship then was), sitting as election judge, agreed with the submission of counsel and held that a cheque in its nature can only be cashed at a later date upon presentation to the bank and therefore it was impossible to hold that the security was paid at "the time of presentation of the election petition". His Lordship after referring to the legal position in established cases said that a cheque merely denotes conditional payment of money owed and that it would not have the equivalence of cash or a bank draft.

Issues concerning the right to present an election petition

[35] Section 34 of the EOA provides that the right to present an election petition is accorded only to three categories of persons. The right is not accorded to persons who are not registered voters, societies, political or otherwise, or corporate or incorporate organisations. But one or more of the stipulated persons can present an election petition. This means that more than one election petition may be presented calling in question the same election. The presentation of two election petitions is very rare and almost non-existent as the unsuccessful candidate's political party is usually behind the person who presents an election petition. In the event there are more than one election petitions presented concerning the same election, rule 6 of the EPR provides that all such petitions shall be dealt with as one petition, so far as the inquiry into the same is concerned.

[36] The three categories of persons who have *locus standi* to present an election petition are:

(i) *A person who voted* or *had a right to vote* at the election to which the election petition relates. The words "to have voted or have the right to vote" means that the person is a registered voter of the said constituency.

(ii) *A person claiming to have a right to be returned or elected* at such election. This refers to a person who stood for the election and was unsuccessful.

(iii) *A person alleging himself to have been a candidate* at such election. This again refers to an unsuccessful candidate at the said election.

21 Sibu High Court Election Petition No 26EP-1/6 of 2013.

[37] Rule 4(1)(a) of the EPR requires that the petitioner must plead in the petition one of the three rights stipulated in section 34 of the EOA. It is a mandatory requirement. In *Vasantha Kumar Krishnan v Saravanan Murugan & Ors*,[22] it was pleaded that the petitioner was a registered voter and therefore entitled to present the election petition. Abdul Rahman Sebli J (as his Lordship then was) opined that the statement was inadequate. It must be stated that the petitioner had voted or was a voter of the Tapah constituency which election was in dispute. It turned out that the petitioner was not even a voter of the Tapah constituency but was a registered voter of the Merbok constituency. It was held that the petitioner had no *locus standi* to present the election petition. It was also held that the petitioner could not during submissions argue that he fell within section 34(c) of the EOA, that is to say, he was a candidate at the election. In this regard, election judges are generally of the view that stating one right to present an election petition is sufficient and it is not fatal if more than one right is pleaded.

Issues concerning service of election petition on the respondent

[38] One of the most frequently raised preliminary objections concerns service of the notice of presentation of an election petition and the election petition on the respondent which is provided by rule 15(1) of the EPR. The rule states as follows:

> Notice of the presentation of a petition, accompanied by a copy of the petition, shall, within fifteen days of the presentation of the petition, be served by the petitioner –
>
> (a) *on the respondent personally* which shall be effected by delivering the notice and a copy of the petition to the respondent [personal service];
>
> (b) by sending the notice and a copy of the petition by *pre-paid registered post* addressed to the respondent at his usual or last known place of residence or business [service by pre-paid registered post]; or
>
> (c) by *posting a notice on the notice board of the High Court* in the State in which that constituency or electoral ward is situated and by *publishing a notice in a national language newspaper and in any other newspaper* circulating within the constituency

22 [2014] 1 LNS 68.

> or electoral ward in which the election was held stating that such petition has been presented and that a copy of the notice of presentation of the petition and a copy of the petition may be obtained by the respondent free of charge on application at the office of the Registrar [service by posting and advertisement].

[39] There are two parts in rule 15(1): the first part specifies the period of time to effect service and the second part specifies how service is to be effected. Both limbs are expressed in mandatory terms and therefore must be strictly adhered to. There are two documents that must be served on the respondent: (i) the notice of presentation of the election petition; and (ii) a copy of the election petition.

[40] The first part requires that both these documents must be served within 15 days of the presentation of the election petition at the High Court. The failure to serve both documents within the stipulated time results in a jurisdictional defect rendering the election petition a nullity and liable to be struck out *in limine*.[23]

[41] The second part concerns the method such service can be effected. Paragraphs (a), (b) and (c) were introduced by an amendment to rule 15(1) – each paragraph providing a separate and complete method of service by itself. The purpose of the amendment was to introduce an easier, workable and less cumbersome method of service. The present rule 15(1) introduced for the first time personal service and service by pre-paid registered post while revamping the previous service by way of posting and advertisement.

[42] The issue that arises concerns the proper construction to be placed on rule 15(1). It has been consistently held that the three methods of service is to be read disjunctively. This means that the petitioner has a choice to utilise any one or more of the three methods if he so chooses. In practice, many petitioners attempt two or all three modes of service. Whatever the petitioner may decide, it is the requirement of rule 15(1) that any one of the methods of service is utilised and satisfied within the time stipulated.[24]

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23 *Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261; *Ruhimin Adzim v Bernard Dompok & Anor* [2004] 1 LNS 461; *Mohd Zaid Ibrahim v P Kalamanathan & Ors* [2010] 8 CLJ 608; *Abu Backer Sidek v Ramkarpal Singh & 2 Ors* [2014] 1 LNS 1277.

24 *Mohd Zaid Ibrahim v P Kalamanathan & Ors*, ibid; *Abu Backer Sidek v Ramkarpal Singh & 2 Ors*, ibid.

[43] However, there is an opposite view where it has been held that two modes of service must be satisfied: personal service and either service by pre-paid registered post or service by way of posting and advertisement.[25] This conclusion is arrived at by construing the semi-colon followed by the word "or" at the end of paragraph (b) and before paragraph (c) of rule 15(1) as requiring paragraph (a), and either paragraph (b) or paragraph (c) must be satisfied to constitute a valid service under the rule.

[44] Strictly speaking, according to drafting rules, rule 15(1) requires either the method of service stated in paragraph (a) or paragraph (b) or paragraph (c) to be utilised. The interpretation given by Lee Swee Seng J (as his Lordship then was) in *Abu Backer Sidek* is apposite when his Lordship construed rule 15(1) as follows:

> Rule 15(1) of the EPR allows for any one of the 3 modes of service of the Petition as can be seen in the word "or" after rule 15(1)(b) and before (c). The legislator could have used the word "and" at the same place but quite deliberately it did not do so. I would hold that a petitioner may serve the Petition by any one of the modes prescribed in rule 15(1)(a) or (b) or (c).

[45] The other issue that also often arises is that the requirements of each method of service is not complied with. The elements of serving by pre-paid registered post or by posting and advertisement is provided by rule 15(2) and (3). The failure to comply with any of the elements for each method of service is fatal. However, there are also election petitions that have been struck out because the affidavit of service fails to comply with the elements that make up an affidavit of service. Rule 15(4) provides the following elements that make a valid affidavit of service:

(i) stating by whom the documents were served which must have particulars clearly identifying the person serving the documents;

(ii) stating the day of the week and date on which the documents were served;

(iii) where the documents were served; and

25 *Asmara Abdul Rahman v Musa Aman & Ors* [2019] 1 CLJ 75.

(iv) how the documents were served (which clearly requires the particulars to describe the service, whether the respondent had acknowledged or refused to acknowledge service if it was by way of personal service).

Issues concerning applications to amend an election petition

[46] The current position appears to be that subject to express provisions in the EOA and EPR, an application to amend an election petition is permitted by applying the established principles relating to amendment of pleadings, i.e. that the amendment will not embarrass, prejudice or cause any injustice to the other party. This position was established by the Federal Court in *Mahari Endut v Dato' Hj Mat Razali Kassim, Pegawai Pengurus Pilihan Raya Bagi Kawasan Dewan Undangan Negeri N15 Ladang & Ors*.[26] In that case, an amendment to the election petition was sought at the submissions stage. The amendment was refused as it would cause undue advantage over the respondent. Apart from that, amendments such as: (i) merely give an existing allegation a perfunctory label such as adding the words "contrary to section 32(b) of the Election Offences Act 1954" where facts to support the ground have already been pleaded; (ii) correction of clerical mistakes; and (iii) correction of minor differences in the election petition are invariably allowed without any issue.[27]

[47] The limitation period to amend a petition based upon an allegation of corrupt practice or illegal practice is expressly provided under section 38(2) of the EOA which reads as follows:

> An election petition presented in due time may, for the purpose of questioning the return or the election upon an allegation of a corrupt or illegal practice, be amended with the leave of a Judge of the High Court within the time within which an election petition questioning the return or the election upon that ground may be presented.

[48] This provision clearly provides that any amendment to an election petition premised on corrupt practice or illegal practice must be made within the presenting period of such election petition. An application to amend such election petition which is filed outside the period limited for presentation of such petition will be dismissed *in limine*.

26 [2009] 4 CLJ 488.
27 *Mohd Nor bin Ismail v Mohd Zain bin Abdullah & Anor* [1987] 1 LNS 68.

Section 38(2) requires the determination of the time within which an election petition premised on corrupt practice or illegal practice is to be presented.

[49] The provision in the EOA providing the time within which to present an election petition including election petitions premised on corrupt practice and illegal practice is section 38(1). It first provides the general rule within which all election petitions are to be presented: which is within 21 days of the date of publication of the result of the election in the *Gazette*. It then provides three provisos to the general rule as follows:

(i) Proviso (a) states that an election petition based on corrupt practice alleging payment of money or other act "since the date aforesaid" must be presented within 28 days after the date of such payment or commission of such act. The words "since the date aforesaid" are crucial and I would respectfully associate with the interpretation given to these words by Hasnah Mohammed Hashim J (as her Ladyship then was) in *Mahdi Hasan v Ahmad Zahid Hamidi*[28] and Ravinthran J (as his Lordship then was) in *Raymond Ahuar v Arthur Joseph Kurup & Ors*.[29] In these cases, it was reasoned that the "date aforesaid" refers to the "date of publication of the result in the *Gazette*" based on the literal interpretation. This construction means that only in cases where a corrupt or illegal practice is completed after the date of publication of the result of the election in the *Gazette*, does the proviso apply.

(ii) Proviso (b)(i) states that an election petition based on illegal practice concerning election expenses must be presented within 14 days immediately after the date of the publication in the *Gazette* of the notice required by section 24 as to the election expenses of the person whose election is questioned.

(iii) Proviso (b)(ii) states that an election petition based on illegal practice involving the payment of money or other act, by the person whose election is questioned or his agent, after the date of publication of the result in the *Gazette* is 28 days from the date of such payment or commission of such act.

28 [2014] 1 LNS 183.
29 [2018] 1 LNS 1914.

[50] The preceding paragraph gives the time period within which an election petition based on corrupt practice and illegal practice is to be presented. Take for example the case of *Mahdi Hasan*[30] where a preliminary objection was raised alleging that the election petition was not presented within time. The relevant dates there are as follows:

April 19, 2013: payment made for an act of corrupt practice.

May 22, 2013: publication of the result of the election in the *Gazette.*

June 11, 2013: election petition presented.

[51] The respondent alleged that the 28 days ran from the date of the corrupt payment and therefore the last day for the presentation of the petition was May 17, 2013 and since the petition was presented on June 11, 2013, it was presented out of time. This argument is not correct because the time limit in proviso (a) only applies in cases where the payment of the alleged corrupt practice takes place after the date of the publication of the results in the *Gazette*. In the instant case, the impugned payment was made before the date of the publication of the results in the *Gazette*. Therefore, the general rule applies: the election petition must be presented within 21 days from the date of the publication of the results in the *Gazette*. Thus, the last day to present the election petition was on June 12, 2013, i.e. 21 days from May 22, 2013. On this basis, the learned election judge held that the election petition presented on June 11, 2013 was presented within time. On the other hand, purely as an illustration, if the impugned payment is alleged to have been made on May 25, 2013 – after the date of the publication of the results in the *Gazette* – the proviso would apply and the last day to present the election petition would be June 22, 2013, that is to say, 28 days from May 25, 2013.

[52] Once the date of presentation is known, then for the purposes of section 38(2) of the EOA, an election petition premised on corrupt practice or illegal practice that has already been presented can be amended with leave of a judge of the High Court before the last day the election petition may be presented. The reason why leave of a judge of the High Court is sought is because it is envisaged that

30 Supra, n 28.

an election judge may not have been appointed at that date. The application would be *ex parte* because at that time the election petition may not have been served on the respondents. The fact that a High Court judge may give leave to amend such petition as opposed to an election judge indicates that time is of the essence.

[53] The failure to file an application for amendment within the stipulated time of presenting an election petition will result in the application for amendment being struck out for being barred by the special period of limitation provided by section 38(2) of the EOA.[31]

Issues regarding pleading election petitions

[54] The failure to plead an election petition in accordance with the mandatory requirements of rule 4(1)(b) of the EPR renders the election petition defective. This is by and large the preliminary objection most relied on. Rule 4(1)(b) requires an election petition to briefly contain the facts and grounds relied on to sustain the prayer or relief that is claimed. It is settled law that failure to so plead will result in the striking out of the petition.[32]

[55] The only grounds that a petitioner can rely on are the various grounds that are housed in the five paragraphs of section 32 of the EOA. Each ground has its own ingredients which must be satisfied. The facts and particulars pleaded must be sufficient and if proven at the trial must satisfy each ingredient of the ground that is relied on. Only then a cause of action is constituted which will sustain the relief sought (which is one or more of the reliefs stipulated in section 35 of the EOA) and the pleadings can then be said to be in compliance with rule 4(1)(b) of the EPR.

[56] In this article certain prevalent issues regarding the two most popular grounds relied by petitioners will be discussed: paragraphs (b) and (c) of section 32 of the EOA. I begin with paragraph (b) which is in the following terms:

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31 *Zulkarnaini bin Mohamed Noor v Syed Omar bin Mohamed* [1979] 2 MLJ 143; *Ustaz Akmal Hj Kamaruddin v Dato' Mohamad Daud Mohd Yusoff & Anor* [2013] 9 CLJ 924; *Raymond Ahuar v Arthur Joseph Kurup* [2018] 1 LNS 2220.

32 *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729; *Mohd Nazri Hj Din v Dato' Seri Raja Ahmad Zainuddin Raja Hj Omar & Ors* [2009] 3 CLJ 221; *Wan Sagar Wan Embong v Harun bin Taib (No 2)* [2009] 1 CLJ 457.

(b) non-compliance with the provisions of any *written law relating to the conduct of any election* if it appears that the election was not conducted in accordance with the principles laid down in such written law *and that such non-compliance affected the result of the election*;

[57] If a petitioner pleads infringement of paragraph (b) he must satisfy two ingredients:

(i) non-compliance with the provisions of any written law *relating to the conduct* of the election; and

(ii) that such non-compliance affected the result of the election which has been interpreted to mean the success of one candidate over the other and not merely an alteration in the number of votes given to each candidate.[33]

[58] The petitioner must therefore plead such material facts, with such particulars where necessary, to show on the face of the petition that he has cause to complain of an infringement of a specific provision in a written law relating to the conduct of the election and that such infringement had reduced the votes to the extent that the winning candidate no longer has the majority. He must also be able to show that the facts complained of relate or associate the complaints with the provision of election laws relating to the conduct of elections alleged to have been transgressed. Only then would there be a cause of action to sustain the relief sought.

[59] A good illustration is the case of *Dato' Ismail Kamus*.[34] There the petitioner alleged that the extension of the voting period from 5.00 p.m. to 7.00 p.m. was in contravention of regulations 11(5) and 23 of the 1981 Regulations. Regulation 11(5) provides for the hours the polling stations will be opened and regulation 23 provides that no ballot paper can be given after the time fixed for closing of the poll. In this case, there was some confusion as to the applicable electoral roll to be used at some polling stations which led to a delay in the opening of the said polling stations at the designated time. To compensate for the delay, a decision was taken to extend the voting period by two hours at the affected polling stations. The petitioner relied on paragraph (b)

33 *Dato' Ismail Kamus v Pegawai Pengurus Pilihanraya & Ors* [2005] 2 CLJ 237.
34 Ibid.

of section 32 of the EOA as the ground to avoid the election. In his petition the petitioner had identified the provisions of the law relating to conduct of elections that were transgressed and stated the facts showing how the said provisions were transgressed. The respondents raised a preliminary objection contending that rule 4(1)(b) was not satisfied because the second limb of paragraph (b) of section 32, i.e. the pleaded facts, did not show that the alleged non-compliance had affected the result of the election.

[60] The Federal Court said that the first limb was satisfied. The provisions relating to conduct of elections were identified and the facts pleaded showed that the provisions were infringed. But it was held, agreeing with the learned election judge, that the petitioner could not satisfy the second limb. The petitioner was only able to show that a total of 318 persons voted during the extended period at the affected polling stations while the majority of the returned candidate was 2,728 votes. In other words, the non-compliance did not affect the result of the election.

[61] The issues concerning paragraph (c) of section 32 are also very technical in nature. The provision is worded as follows:

> (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;

[62] Paragraph (c) talks of corrupt practice and illegal practice. For the purpose of this article the focus is on corrupt practice. In such a case the petitioner has to plead facts satisfying the following ingredients: (i) a corrupt practice was committed by the candidate; or (ii) a corrupt practice was committed with the candidate's knowledge or consent; or (iii) a corrupt practice was committed by any agent of the candidate. Section 11 of the EOA provides that committing bribery is a corrupt practice while the preceding section 10 provides nine paragraphs of acts amounting to bribery of which paragraph (c) of section 10 provides as follows:

> (c) every person who, before, during or after an election, directly or indirectly, makes any such gift, loan, offer, promise, procurement, or agreement as aforesaid to or for any person in order to induce such person to procure or endeavour to procure the election of any person, or the vote of any elector or voter at any election;

[63] Since paragraph (c) of section 32 is relied on by the petitioner the following facts must be pleaded: that an act of bribery as defined in paragraph (c) of section 10 was committed by the successful candidate or with his knowledge and consent or by his agent. Material facts and particulars must be given so that a cause of action is constituted to sustain the prayer or relief sought.

[64] A good illustration is the case of *Mohd Nazri v Raja Ahmad Zainuddin*.[35] The petitioner alleged three acts of bribery in violation of paragraph (c) of section 10. The Federal Court upheld the decision of the learned election judge who struck out the petition for the non-compliance with rule 4(1)(b) of the EPR on the ground that the facts pleaded were insufficient to constitute a cause of action.

[65] The Federal Court said that the facts to be pleaded by the petitioner would be the ingredients that constitute bribery within the meaning of paragraph (c) of section 10. Essentially the facts are governed by the use of the words "… to or for any person in order to induce such person …" in the said paragraph. The making of any gift, loan, offer, etc. "… to or for any person …" means that it must be made to a particular person. The purpose of making the gift, loan, offer, etc. is determined by the use of the word "… induce …" which is to influence the voter such as persuading the voter to vote or refrain from voting.

[66] It is now pertinent to look at each complaint. In the first complaint, the charge was that on March 4, 2008 in the vicinity of the house belonging to one Kandasamy, the candidate in the presence of 50 to 100 registered voters of the constituency had said, " … *undi kasi BN menang, apa-apa mintak kita boleh kasi. Sumpah!*". It was alleged that the candidate uttered these words to the crowd including 37 persons who were named. The second complaint was that at the same date and place, an agent of the candidate named Gopal had distributed 80 packets of rice weighing 5 kgs per packet to a crowd of people who were in attendance. The distribution was done in the presence of the candidate and the said 37 named persons. The third complaint was that on February 28, 2008 at a temple at Ladang Hibernia, in the presence of 300 registered voters which included the said named 37 persons, the candidate had said, "*Kalau saya menang, janji akan beri bantuan baik*

35 [2009] 3 MLJ 589.

pulih kuil", and "*minta undi BN, kalau menang, bagi bangunan sekolah di kawasan Selama*".

[67] It was held that all three complaints had a common defect: (i) in the first complaint there was no statement that the 37 persons who had been identified were registered voters; (ii) in the case of the second complaint the distribution of the sacks of rice was done in front of the 37 named persons and there was no statement that the sacks of rice were also given to them; and (iii) in the third complaint it was merely stated that the promise was made in front of the 37 named persons and not to them. The court held that this meant that none of the persons to whom the promise was made had been identified. Thus in all the three complaints the promise or gift, as the case may be, was not made to any particular voter or voters but to a crowd and no distinction was made between the voters who were favourably inclined towards the first respondent and those who were not.

[68] It was further held that the first complaint of a promise made in return for votes was defective as it did not set out the full text of what the candidate had said. The part left out may have neutralised the part pleaded. The second complaint did not state that the gift was made in return for votes unlike the facts pleaded in the other two complaints. The third complaint related to a promise of public action in return for votes made to a crowd of about 300 people in front of the 37 named persons. Such a promise did not amount to a corrupt practice. The court adopted the statement of law in *Re Pengkalan Kota Bye-Election, Teoh Teik Huat v Lim Kean Siew & Anor*[36] where it was held that a promise by a candidate while canvassing for votes that he would do his best to help a class of people in retaining an old mosque and for getting land for building houses did not amount to bribery.

[69] One final issue on paragraph (c) of section 32 that needs to be highlighted is the meaning of "agent". The meaning has been held not to be in accord with the rule of common law agency. The law is lucidly stated by Raja Azlan Shah J (as His Royal Highness then was) in the case of *Ali Amberan v Tunku Abdullah*[37] in the following passage which was adopted and applied in *Manogaran Marimuthu v Sivaraj Chandran*:[38]

36 [1981] 1 MLJ 265.
37 [1970] 1 LNS 162.
38 [2018] 1 LNS 2062.

> Inspired and guided by English and Indian election law I take the view that the rule of extended scope of agency holds good in our election law; and other view would tend to make it impossible to preserve the purity and freedom of elections. Accordingly a candidate at an election is responsible for the acts of agents who are not or would not necessarily be agents under the common law of agency. Therefore a political party and its prominent members who set up the candidate and with his consent, either expressly or by necessary implication, sponsor his cause and work actively to promote his election, may aptly be regarded as "agents" of the candidate for election purposes.

Conclusion

[70] This article is intended to do no more than provide a snapshot of the vast array of issues that form the bulk of the work when trying election petitions. I hope that the discourse will be helpful.

Some Problematic Aspects of Arbitration

by

*Justice Tee Geok Hock**

1. Introduction

[1] This article is an attempt to highlight some problematic aspects of international arbitration which, by virtue of a single arbitration statute combining domestic and international arbitrations legislated in the same statute, have also affected domestic arbitrations in Malaysia. Attempts are made in this article to suggest possible ways to resolve the problems by reference to the fundamental features of international arbitrations, principles of law and principles of statutory interpretation in Malaysia.

2. Fundamental features of law and practice of arbitration

[2] When interpreting a specific provision of a statute modelled upon the UNCITRAL Model Law on International Commercial Arbitration 1985 ("Model Law"), some understanding of the fundamental features of the law and practice of arbitrations under the Model Law (which in turn assimilated many parts of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")) would be useful.

Exclusive jurisdiction of the seat court to set aside an arbitral award

[3] A fundamental feature of law and practice of arbitration is that it is only the court which has territorial jurisdiction at the seat of the arbitration (i.e. the seat court) that is competent to hear and decide on an application to set aside an arbitral award. This fundamental feature of arbitration law and practice is well recognised in our statute as well as in the international treaty signed by our country, as explained in the paragraphs below. Section 3(3) of the Malaysian

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Arbitration Act 2005 ("MAA 2005") expressly excludes Part III (which contains the section 37 challenge against awards) from being applied to "international arbitration, *where the seat of arbitration is in Malaysia*", unless the parties mutually agree to opt in.[1]

[4] Implicit in section 3 of the MAA 2005 is that any arbitration *where the seat of arbitration is outside Malaysia* is not governed by the MAA 2005 except where the express provision of the MAA 2005 specifically stipulates otherwise. Section 37 (setting aside of arbitral award) is included in Part II of the MAA 2005. Section 38 (recognition and enforcement of award) and section 39 (refusal to recognise the award) are also included in Part II of the MAA 2005. As explained below, sections 38 and 39 are expressly stipulated as also applicable to an arbitral award where the seat of arbitration is outside Malaysia provided the seat is within a state which is a party to the New York Convention adopted by the United Nations Conference on International Commercial Arbitration in 1958.[2]

[5] For ease of reference in this article, the terms "local award" is used to describe an arbitral award in an arbitration where the *seat* of arbitration is *in* Malaysia and "foreign award" is used to describe an arbitral award in an arbitration where the *seat* of arbitration is *outside* Malaysia, i.e. in a foreign state (other than Malaysia) which is a party to the New York Convention adopted by the United Nations Conference on International Commercial Arbitration in 1958.

[6] The MAA 2005 recognises the fundamental feature of arbitration law that the seat court has jurisdiction to set aside an arbitral award. This is also judicially recognised by our Federal Court which held:

> … the appellant had accepted Kuala Lumpur as the seat of arbitration. *It is trite law that such a challenge can only be made in the jurisdiction which is the seat of arbitration. (See Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd* [2010] 1 CLJ 137 (FC); *A v. B* [2007] 1 Lloyd's LR 237; *C v. D* [2007] EWHC 1541).[3]

1 See MAA 2005, s 3(4).

2 Ibid, s 38(1) and (4).

3 *Government of India v Petrocon India Ltd* [2020] 6 CLJ 321 at [37], *per* Ariffin Zakaria CJ. Similarly, see the judgment of Lee Swee Seng J (now JCA) in *Kejuruteraan Bintai Kindenko Sdn Bhd v Serdang Baru Properties Sdn Bhd and another case* [2018] 2 MLJ 706; [2018] 1 CLJ 369 at [23] and [24].

Co-existence of active remedy and passive remedy (or "choice of remedies" policy)

[7] Another fundamental feature of arbitration law and practice is that after an arbitral award is published in a Convention country, the award can be enforced in any of the other Convention countries. Accordingly, a party who wants to put a complete stop to the enforcement of an arbitral award where the seat of arbitration is in a Convention country, must apply for setting aside the foreign award at the Convention country whose court has territorial jurisdiction at the seat of the foreign arbitration (i.e. the seat court). On the other hand, if a dissatisfied party successfully opposes the recognition and enforcement of the arbitral award at a country *outside* the seat of arbitration, the winning party in the arbitration can still apply for recognition and enforcement of the award in other Convention countries.

[8] This is also the UNCITRAL's official position as stated in Explanatory Note 44 to the Model Law:

> 44 … Secondly, and more importantly, *the grounds for refusal of recognition or enforcement are valid and effective only in the State (or States) where the winning party seeks recognition and enforcement, while the grounds for setting aside have a different impact: The setting aside of an award at the place of origin prevents enforcement of that award in all other countries by virtue of article V(1)(e) of the 1958 New York Convention and article 36(1)(a)(v) of the Model Law*.

[9] The co-existence of the "active remedy" (i.e. applying at the seat court to set aside the arbitral award) and the "passive remedy" (i.e. resisting recognition or enforcement at the court of any country) is well-recognised internationally including in Malaysia, though the courts in different countries seem to accept different extents of such co-existence.

[10] Primarily in line with the fundamental features of the arbitration law and practice, Lee Swee Seng J (now JCA) in *Kejuruteraan Bintai Kindenko Sdn Bhd v Serdang Baru Properties Sdn Bhd and another case*[4] has explained the section 38 application to set aside as an "active

4 [2018] 2 MLJ 706; [2018] 1 CLJ 369.

remedy" and the section 39 request for refusal of recognition or enforcement as a "passive remedy" in paragraphs [18] to [34] of the reported judgment.

[11] The use of the terms "active remedy" in the context of attack by an application to set aside awards and "passive remedy" in the context of defence by opposing recognition or enforcement of arbitration awards have been in widely-accepted use and is well settled by various decided authorities and textbook authors in Malaysia as well as outside Malaysia.[5]

[12] Based on the current state of the laws, non-arbitrability and public policy are valid grounds of "passive remedy" to oppose the recognition and enforcement of foreign arbitral awards under section 39(1)(b) of our MAA 2005 even if such grounds were not raised at any time during the course of the arbitration proceedings. Similarly, where the ground relied upon in the "passive remedy" defence to oppose an enforcement application does not overlap with or fall within the seemingly preclusive provisions of section 7 or section 18(3) and (5) of the MAA 2005, there should be no doubt that such ground can be relied upon to oppose the enforcement application.

[13] Difficulties and complications may probably arise in cases where a party opposes an application for enforcement of arbitral award on ground of alleged lack of or excess of jurisdiction on the part of the arbitral tribunal or another ground which overlaps with or falls within the seemingly preclusive provisions of section 18(3) and (5) or the waiver clause in section 7 of the MAA 2005 at the enforcement stage by way of the passive remedy defence, as illustrated in the Singapore

5 Examples include: (1) Sir Michael Mustill and Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 1982), cited with approval by Edgar Joseph Jr SCJ in *State Government of Sarawak v Chin Hwa Engineering Development Co* [1995] 4 CLJ 1; [1995] 3 MLJ 237 and by Sundaresh Menon CJ in *PT First Media TBK v Astro Nusantara International BV & Ors* [2013] SGCA 57; [2014] 1 SLR 372; (2) Richard Garnet, Henry Gabrial, Jeff Waincymer and Judd Epstein, *A Practical Guide to International Commercial Arbitration*, p 8, §1.20; (3) Dr Haji Hamid Sultan bin Abu Backer, *Janab's Key to International Arbitration: Commentary to Malaysian Arbitration Act 2005* (Janab (M) Sdn Bhd, 2016); and (4) Nata Ghibradze, "Preclusion of Remedies Under Article 16(3) of the UNCITRAL Model Law" (2015) 27(1) *Pace International Law Review* 345 at 359-360 (Commercial Edition).

cases *PT First Media TBK v Astro Nusantara International BV & Ors*,[6] *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Ltd*,[7] and Hong Kong case of *Astro Nusantara International BV v PT First Media TBK*.[8]

No total surrender of state sovereignty to foreign arbitral awards

[14] Another fundamental feature is that when the sovereign states negotiated the Model Law, they did not accept unconditional recognition of foreign arbitral awards. It was finally accepted that the enforcement of arbitral awards would be reciprocal between the Convention countries and the recognition and enforcement of foreign arbitral awards will be subject to the reservation of the local court's jurisdiction to refuse recognition in cases where the arbitral award is contrary to the public policy of the country or its subject-matter is not arbitrable under the laws of that country. With this right of reservation to refuse recognition of foreign arbitral awards, the Model Law became widely accepted by Convention countries including Malaysia.

[15] In Explanatory Note 48 to the Model Law, the UNCITRAL Secretariat also recognises the permissible differences between the substantive laws of various Convention countries regarding arbitrability and public policy, as is evident from the extract of the note:

> 48. Although the grounds for setting aside as set out in article 34(2) are almost identical to those for refusing recognition or enforcement as set out in article 36(1), a practical difference should be noted. An application for setting aside under article 34(2) may only be made to a court in the State where the award was rendered whereas an application for enforcement might be made in a court in any State. For that reason, *the grounds relating to public policy and non-arbitrability may vary in substance with the law applied by the court (in the State of setting aside or in the State of enforcement).*

6 [2014] 1 SLR 372.
7 [2019] SGCA 33.
8 [2018] HKCFA 12.

[16] In Malaysia, we have section 39(1)(b) of the MAA 2005 which reserves Malaysia's residual national sovereignty over foreign arbitral awards by conferring upon our courts the discretion to refuse recognition of foreign arbitral awards on, *inter alia*, the grounds of non-arbitrability or public policy. The questions of non-arbitrability and public policy of Malaysia are to be decided according to the substantive laws of Malaysia, and such substantive laws can be different from those of other Convention countries. This is recognised and accepted by the Model Law and is also consistent with the corresponding provisions in the New York Convention.

Competence-Competence

[17] According to German legal terminology, the German expression "*Kompetenz-Kompetenz*" would imply arbitrators are empowered to make a final ruling as to their jurisdiction, with no subsequent review of the decision by any court.[9]

[18] In adopting article 16 of the Model Law into section 18 of the MAA 2005 with limited right of appeal to the court, our MAA 2005 has in effect adopted a diluted version of the principles of *Kompetenz-Kompetenz*. Some authors and practitioners of international arbitration prefer to use the terminology "Competence-Competence" for the extent of the doctrine adopted in the Model Law instead of the German terminology "*Kompetenz-Kompetenz*" in order to avoid confusion or misunderstanding of the ambit of the applicable doctrine. To them, the Competence-Competence doctrine can be defined both (a) positively, with respect to the powers granted to arbitral tribunals; and (b) negatively, with respect to those of national courts.

[19] Section 18 of the MAA 2005, in providing for the competence of the arbitral tribunal to rule on its own jurisdiction in a binding decision subject to limited right of appeal, has incorporated the principles of "Competence-Competence", a diluted version of the principles of "*Kompetenz-Kompetenz*". This forms a fundamental feature of the law and practice of arbitration.

9 Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer, 1999), pp 396–397.

3. Some problematic aspects of arbitration

Extent of co-existence of active remedy and passive remedy in Malaysia (or "choice of remedies" policy)

[20] The extent of the co-existence of "active remedy" and "passive remedy" to be recognised can be a very fluid and controversial topic. In Malaysia, the appellate courts have not specifically decided on the exact extent of the co-existence of the "active remedy" and the "passive remedy" to be accepted in Malaysia. There are different schools of thought regarding the extent to which a domestic court should accept the co-existence of "active remedies" and "passive remedies", or the extent of acceptance of the "choice of remedies" policy in an arbitration statute.

[21] As correctly observed by Prof Jonathan Hill of University of Bristol Law School in his article, "Enforcement of Awards Under the New York Convention: Choice of Remedies and the Significance of Time Limits",[10] courts of different Model Law jurisdictions have adopted different interpretations, some deciding that article 16.3 as a preclusive provision stipulates for a "one-shot remedy" (for example, Germany), while others, like the Singapore Court of Appeal in the *Astro Nusantara* case, have decided that article 16.3 is to be seen as part of the Model Law's "choice of remedies" framework but not as a preclusive provision.

[22] On one side of the scale, the Singapore court's and the Hong Kong court's recognition of the co-existence of the "active remedy" and the "passive remedy" is *almost to the fullest extent* whereby a party whose jurisdictional challenge which was rejected by the arbitral tribunal but which was not brought on appeal to the court within the statutory time limit during the stage of arbitration proceedings could, at the enforcement stage after the receipt of the arbitration award, be re-opened and decided afresh by the court at the "passive remedy" stage as a ground for refusing recognition and enforcement.[11] In the *Astro Nusantara* case, the Singapore Court of Appeal held to the effect that where a party has raised a jurisdictional challenge which

10 University of Bristol Law School Blog, posted on June 25, 2018 by legalsearch.

11 See *PT First Media TBK v Astro Nusantara International BV & Ors* [2014] 1 SLR 372; *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Ltd* [2019] SGCA 33; *Astro Nusantara International BV v PT First Media TBK* [2018] HKCFA 12 (Hong Kong Court of Final Appeal).

was overruled by the arbitral tribunal but merely reserved his right to continue with such jurisdictional objection without any timely appeal against such jurisdictional ruling to the court, the fact that the party continued its participation in the arbitration under such protest does not deny him the right to raise the defence of lack of jurisdiction when subsequently opposing the enforcement of the arbitration award. In the *Rakna Arakshaka Lanka Ltd* case, the Singapore Court of Appeal held that where a party has objected to the arbitral tribunal's jurisdiction and therefore abstained from participation in the arbitration proceedings, that party can rely upon the lack of jurisdiction to oppose the recognition of the award at the enforcement stage.

[23] On the other side of the scale, there are the German courts and some international jurists including Nata Ghibradze who accept article 16(3) of the Model Law as preclusive provisions thereby precluding the party, who fails to raise the timely challenge pursuant to article 16(3) at the arbitration stage, from relying upon the grounds for opposing the enforcement of award at the enforcement stage. The German court recognised section 1060 of the German statute as a preclusive provision. Nata Ghibradze in her article "Preclusion of Remedies under Article 16(3) of the UNCITRAL Model Law"[12] concluded that:

> Keeping in mind the *sui generis* mechanism of Article 16(3) and the underlying purposes behind its adoption, the article concludes that it is to be considered as "one shot" remedy which as noted by Prof. Klaus Peter Berger, decides the jurisdiction "once and for all" at least within the seat of arbitration. … While analyzing the pertinent *travaux* and case law, the article identified the co-existence of two rather conflicting frameworks. Namely, while the Model Law allows for choice between "active" and "passive" remedies, it also establishes strict preclusion rules on waiver as well as challenge procedures closely analogous to Article 16(3) of the Model Law. Moreover, it has been established that the effect of such preclusions also extends to the post-award stages.

Her learned opinion was that the express preclusive provisions of the Model Law ought not to be stultified by the co-existence of the "active remedy" and "passive remedy". In Malaysia, Datuk Hamid Sultan in his book, *Jainab's Key to International Arbitration: Malaysian*

12 Supra, n 5.

Arbitration Act 2005,[13] has impliedly criticised the decisions of the Singapore Court of Appeal and the Hong Kong Court of Final Appeal in the *Astro v Lippo* case which gave full-scale extent of recognition to the co-existence of "passive remedy" and expressed his view that the co-existence of "passive remedy" in Malaysia would be to a limited extent and that *Astro v Lippo* should not be followed in Malaysia.

[24] As whatever position that is taken by the courts in Malaysia would not be the same as those in other Model Law countries, the Malaysian courts ought not to be overly concerned with whether the Malaysian courts' decision on the extent of co-existence of "active remedies" and "passive remedies" (or "choice of remedies" policy) would fit in with all the other countries' positions on this topic – that is an impossibility. In the opinion of the author, the extent of co-existence of "active remedy" and "passive remedy" (or "choice of remedies" policy) which is or should be recognised in Malaysia ought to be analysed and determined according to the express provisions of the MAA 2005, interpreted according to the settled principles of statutory interpretation in Malaysia and, in so far as it is not inconsistent with the intent and purpose of the MAA 2005, read in light of the fundamental features of the law and practice of arbitration which have been embodied in the Model Law read together with the New York Convention. The express provisions in the arbitration statutes in other countries are not exactly the same as our MAA 2005, though there are similarities between them. In the wise advice of the Privy Council in *Alcock Ashouldown v Chief Rev Authority*[14] and other apex court decisions to similar effect, where there are similarities *and* also differences between our statute and a foreign statute, it is often incorrect to simply follow the decisions of courts in the other country as if the two statutes are identical or exactly the same.

[25] For ease of reference, the express provisions of the MAA 2005 relevant to the topic regarding the extent of co-existence of "active remedy" and "passive remedy" which is or should be recognised in Malaysia are reproduced below together with a note of comparison with the corresponding provisions of the Model Law (with amendments adopted in 2006):

13 Supra, n 5, Second chapter: "Astro Lippo: Is 'Passive Remedy' An Anathema To The Enforcement of International Arbitration Award?".

14 AIR 1923 PC 138 at 145–146; 50 IA 227.

Chapter 7

Recourse Against Award

37. *Application for Setting Aside*

(1) An award may be set aside by the High Court only if –

(a) *the party making the application provides proof that* –

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

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

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

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

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

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

(b) the High Court finds that –

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

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

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where –

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

(b) a *breach of the rules of natural justice* occurred –

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

(4) *An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award* or, if a *request* has been made under section 35, from the date on which that *request* had been disposed of by the arbitral tribunal.

(5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(6) On an application under subsection (1) the High Court may, where appropriate and so requested by a party, adjourn the proceedings for such period of time as it may determine in order to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(7) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into the High Court or otherwise secured pending the determination of the application.

Notes of comparison: Article 34(1) of the Model Law, which provides that "(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article" is not included in the MAA 2005. Section 37(2), (3), 7(5) and (7) of the MAA 2005 have no corresponding provisions in the Model Law. Ignoring minor re-arrangement of words and minor alteration of the structure of sentences which are of no consequence to the meaning and effect of the provisions, section 37(1) of the MAA 2005 is identical to article 34(2) of the Model Law except for the change of the words "the court specified in article 7" to "the High Court". Section 37(4) of the MAA 2005 is identical to

article 34(3) of the Model Law except for the change of the words "three months" to "ninety days", and section 37(6) of the MAA 2005 is identical to article 34(4) of the Model Law. It is to be noted that the change of the words "the court specified in article 6" in article 34(3) of the Model Law to the words "the High Court" in section 37(1) of the MAA 2005 does not lead to any difficulty or complication due to the fact that the High Court, being defined as the High Court of Malaya and the High Court of Sabah and Sarawak in section 2(1), is also the seat court for arbitrations where the seat is *in* Malaysia and section 37 being applicable only to arbitrations where the seat is *in* Malaysia.[15] Unfortunately, the repetition of the same change of words from "the court specified in article 6" in article 34(3) of the Model Law to "the High Court" in section 38(1)(a)(vii) of the MAA 2005 has led to confusion and complications (see paragraphs [87]-[89] below), because section 38 applies to both the arbitrations where the seat is *in* Malaysia (in respect of which the High Court is the seat court) and the arbitrations where the seat is *outside* Malaysia (in respect of which the High Court is not the seat court). Article 6 of the Model Law, which stipulates for the particular court in the state to be specified as the court for certain functions or arbitration assistance and supervision, provides as follows:

> **Article 6. Court or other authority for certain functions of arbitration assistance and supervision**
>
> The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by … [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

Pursuant to article 6 of the Model Law, the state where the seat of arbitration is situated, may specify which particular court in that state is to have the competence to handle certain functions stipulated in its arbitration statute, and this general enabling provision does not derogate from the fundamental feature of international arbitration law and practice that only the seat court has the jurisdiction to hear and decide on an application to set aside the arbitral award, a feature which is also embodied in the express provisions of our MAA 2005: see paragraphs [3]-[6] above.

15 See MAA 2005, s 3(3).

Chapter 8

Recognition and Enforcement of Awards

38. *Recognition and Enforcement*

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

(2) *In an* ***application*** *under subsection (1)* the applicant shall produce –

(a) the duly authenticated original award or a duly certified copy of the award; and

(b) the original arbitration agreement or a duly certified copy of the agreement.

…

(4) For the purposes of this Act, "foreign State" means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.

Notes of comparison: Ignoring minor re-arrangement of words and minor alteration of the structure of sentences which are of no consequence to the meaning and effect of the provisions, section 38 of the MAA 2005 is substantially similar to article 35 of the Model Law. However, section 38(4) of the MAA 2005 incorporates the concept of reciprocity of recognition by limiting the recognition of foreign awards to those from a Convention State, whereas article 35 of the Model Law uses the phrase "arbitral award, irrespective of the country in which it was made". It is to be noted that the concept of reciprocity of recognition in section 38(4) is consistent with Malaysia's treaty obligations under the New York Convention.

39. *Grounds for Refusing Recognition or Enforcement*

(1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the ***request*** of the party against whom it is invoked –

(a) *where that party provides to the High Court proof that –*

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

(ii) the *arbitration agreement is not valid under the law* to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;

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

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

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

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

(vii) *the award has not yet become binding on the parties or has been* ***set aside or suspended by a court of the country in which, or under the law of which, that award was made***; or

(b) ***if the High Court finds that –***

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

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

(2) ***If an application for setting aside or suspension of an award has been made to the High Court on*** *the grounds referred to in subparagraph (1)(a)(vii), the High Court may,* if it considers it proper, *adjourn its decision and may also, on the* ***application*** *of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.*

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

Notes of comparison: Ignoring minor re-arrangement of words and minor alteration of the structure of sentences which are of no consequence to the meaning and effect of the provisions, section 39(1) of the MAA 2005 is similar to article 36(1) of the Model Law except for the subdivision of the Model Law's article 36(1)(a)(i) into two subparagraphs, i.e. section 39(1)(a)(i) and (1)(a)(ii) of the MAA 2005, which isolates the expression "under some incapacity" from the Model Law's combined expression "under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made". The 2006 amendments to the Model Law modified the first ground on the list as contained in the New York Convention (which provides that recognition and enforcement may be refused if "the parties to the arbitration agreement were, under the law applicable to them, under some incapacity") to the amended expression "under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made". Article V(1}(a) of the New York Convention provides that one of the grounds for refusal of recognition and enforcement of the award is where "(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made". In paragraphs [50]-[55] and [87]-[89] below, we shall discuss the difficulty and controversy arising from such change in wording in section 39(1)(a) in connection with foreign arbitral awards.

With the exception of the change of words from "a court referred to in paragraph (1)(a)(v) of this article" in article 36(2) of the Model Law to "the High Court on the grounds referred to in subparagraph (1)(a)(vii)", section 39(2) of the MAA 2005 is similar to article 36(2) of the Model Law. In the context of article 36(2) of the Model Law, "a court referred to in paragraph (1)(a)(v) of this article"

means "a court of the country in which, or under the law of which, that award was made" in article 36(1)(a)(v) of the Model Law, i.e. the seat court. At a subsequent part of this article, we shall discuss the difficulty and controversy arising from such change in wording in section 39(2) in connection with foreign arbitral awards.

Section 39(3) of the MAA 2005 does not have a corresponding provision in article 36 of the Model Law.

7. *Waiver of Right to Object*

A party who knows —

(a) of any provision of this Act from which the parties may derogate; or

(b) that any requirement under the arbitration agreement has not been complied with,

and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived its right to object.

Note of comparison: Ignoring the re-arrangement of words which is of no consequence to the meaning and effect of the provision, section 7 of the MAA 2005 is identical to article 4 of the Model Law.

15. *Challenge Procedure*

(1) Unless otherwise agreed by the parties, any party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or of any reasons referred to in subsection 14(3), send a written statement of the reasons for the challenge to the arbitral tribunal.

(2) Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall make a decision on the challenge.

(3) Where a challenge is not successful, the challenging party may, within thirty days after having received notice of the decision rejecting the challenge, apply to the High Court to make a decision on the challenge.

(4) While such an application is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

(5) No appeal shall lie against the decision of the High Court under subsection (3).

Note of comparison: Ignoring minor re-arrangement of words and minor alteration of the structure of sentences which are of no consequence to the meaning and effect of the provisions, section 15 of the MAA 2005 is identical to article 13 of the Model Law.

18. *Competence of Arbitral Tribunal to Rule on its Jurisdiction*

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

…

(3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.

(4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator.

(5) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.

(7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.

(8) Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within thirty days after having received notice of that ruling appeal to the High Court to decide the matter.

(9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

(10) No appeal shall lie against the decision of the High Court under subsection (8).

Note of comparison: Ignoring minor re-arrangement of words and minor alteration of the structure of sentences which are of no consequence to the meaning and effect of the provisions, section 18

of the MAA 2005 is *in pari materia* with article 16 of the Model Law. This section incorporates the Competence-Competence doctrine, a diluted version of the principles of *Kompetenz-Kompetenz*, from article 16 of the Model Law.

[26] In Malaysia, there is an express statutory provision which requires the courts to adopt a purposive approach in the interpretation of statutes and this requirement has been reiterated in several recent judgments of our apex court. In the recent judgment delivered by Tengku Maimun CJ in *Yong Tshu Khin & Annie Quah Lay Nah v Dahan Cipta Sdn Bhd & N Letchumanan*[16] it was held:

> [56] We prefer the second possible construction for the reason that it accords with the purposive rule of construction. Section 17A of Act 388 requires that in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object. In this case, a provision which supports the intention of Parliament is to be preferred over the one which militates against it. It is a settled principle of law that the purposive rule applies where there is ambiguity in a statute such as when a literal reading of it opens it to two or more meanings. The interpretation which favours the provision's intendment is to be preferred (see *Malayan Estates*, at paragraph 12).

Similarly, in another recent decision of our Federal Court, Vernon Ong FCJ in *Tebin bin Postapa (as administrator of the estate of Haji Mostapa bin Asan, deceased) v Hulba-Danyal bin Balai & Sophee Sulong bin Balia (as joint administrators of the estate of Balia bin Munir, deceased)*[17] also adopted the same approach of interpretation to promote the object or purpose of the statute and the interpretation of the statute as a whole.

[27] Further aids to the interpretation of statutes can be derived from other decisions of the appellate courts on specific principles of statutory interpretation, including those summarised below:

(a) The Legislature does not legislate in vain, and the interpretation of words in a section of the statute should not to the extent of rendering redundant or superfluous other words used in another section in the same statute: *per* Eusoffe Abdoolcader SCJ in *Foo*

16 [2021] 1 MLJ 478.
17 [2020] 4 MLJ 721.

Loke Ying v Television Broadcasts Ltd,[18] following the House of Lords in *Southwest Water Authority v Rumbles*.[19] In *Foo Loke Ying*, the Supreme Court held that all words in a statute are to be considered; on presumption that the Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment and it is presumed that if a word or phrase appears in a statute it was put there for a purpose. See also the Privy Council decision in *Enmore Estates v Darsan*.[20] The need to interpret a particular section of the statute together with the other sections of the same statute is also emphasised by the Federal Court in the recent judgment delivered by Zabariah FCJ in *Orchard Circle Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & 4 Ors*.[21]

(b) A statute ought to be so construed that, if it can be prevented, no clause or sentence or words shall be superfluous, void or insignificant: *per* Cockburn CJ in *R v Bishop of Oxford*.[22]

(c) Where different words are used in a statute, they refer to different things; this is particularly so when the different words are used repeatedly: *per* Thomas CJ in *Lee Lee Cheng v Seow Peng Kwang*.[23] This is echoed by the judgments of our Court of Appeal in *Lai Soon Ong v Chew Fei Meng and other appeals*,[24] *Dr Lee Hong Meng v Returning Officer (Abdul Rahman Abdullah) (No. 1)*,[25] and *Dr HK Fong Brainbuilder Pte Ltd v SG Maths Sdn Bhd*.[26]

(d) In construing a domestic statute designed to give effect to an international convention, where the words in such domestic statute giving rise to an obligation are vague and ambiguous, the court should not interpret them in a sense which would render the government in breach of such international treaty: the Federal Court in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri & 3 Ors*.[27]

18 [1985] MLJ 35.
19 [1985] 2 WLR 405 at 411.
20 [1970] AC 497 at 506.
21 [2021] 1 MLJ 180 at [34], [35], [50]–[54].
22 (1879) 4 QBD 245; 5 App Cas 214.
23 [1960] MLJ 1, CA at 3.
24 [2018] 10 CLJ 48 at 66.
25 [2000] 3 CLJ 519 at 527.
26 [2021] 1 MLJ 549.
27 [2021] MLJU 943.

(e) The MAA 2005 "provides a complete and comprehensive codification of the law relating to arbitration, which sits harmoniously with the Federal Constitution, there is no basis to allow for the imposition, inclusion or conflation of the principles of adjudication of civil disputes under domestic legislation, such as *s. 23 of the CJA*, to be applied to arbitrations, domestic or international, for the purposes of ascertaining which particular courts enjoy supervisory jurisdiction over a particular arbitration. This latter issue is governed by the AA.": the Federal Court in *Masenang Sdn Bhd v Sabanilam Enterprise Sdn Bhd*.[28]

[28] A table of comparison between the seemingly preclusive provisions in the MAA 2005 and the grounds for refusing the recognition of award under section 39 of the MAA 2005 is set out below for ease of reference and comparison:

Seemingly preclusive provisions	**Section 39(1) subparagraph**
7. *A party who knows –* *(a) of any provision of this Act from which the parties may derogate; or* *(b) that any requirement under the arbitration agreement has not been complied with,* *and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay* or, if a time limit is provided for stating that objection, within that period of time, *shall be deemed to have* ***waived*** *its right to object*	(a)(iii) the party making the application was *not given proper notice of the appointment* of an arbitrator or of the arbitral proceedings *or was otherwise unable to present that party's case;*
15. (1) Unless otherwise agreed by the parties, *any party who intends to challenge an arbitrator shall,* ***within fifteen days after becoming aware*** *of the constitution of the arbitral tribunal or of any reasons referred to in subsection 14(3), send a written statement of the reasons for the challenge to the arbitral tribunal.* (3) *Where a challenge is* ***not successful****, the challenging party may,* ***within thirty days*** *after having received notice of the decision rejecting the challenge, apply to the High Court to make a decision on the challenge.* (5) ***No appeal*** *shall lie against the decision of the High Court under subsection (3).*	(a)(vi) the *composition of the arbitral tribunal* or the arbitral procedure was *not in accordance with the agreement* of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, *or*, failing such agreement, was *not in accordance with this Act;*

28 [2021] 9 CLJ 1 at [138].

18. (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. (3) A *plea that the arbitral tribunal does not have jurisdiction shall be raised* ***not later than the submission of the statement of defence****.* (4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator. (5) A *plea that the arbitral tribunal is exceeding the scope of its authority* shall be raised ***as soon as*** *the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.* (6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified. (7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits. (8) *Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may,* ***within thirty days*** *after having received notice of that ruling* ***appeal to the High Court*** *to decide the matter.* (10) ***No appeal*** *shall lie against the decision of the High Court under subsection (8).*	(a)(i) a *party* to the arbitration agreement was under any *incapacity;* (a)(ii) the *arbitration agreement is not valid under the law* to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made; (a)(iv) the award deals with a *dispute not contemplated by or not falling within the terms of the submission* to arbitration; (a)(v) subject to subsection (3), the award contains decisions on *matters beyond the scope of the submission* to arbitration; or
Nil.	(a)(vii) *the award has not yet become binding on the parties or has been* ***set aside or suspended by a court of the country in which, or under the law of which, that award was made****.*
Nil. Arbitrability is defined in section 3 of the MAA 2005 but there is no preclusive provision on the question of arbitrability.	(b)(i) the subject-matter of the dispute is *not capable of settlement by arbitration under the laws of Malaysia;* or
Nil.	(b)(ii) the award is in conflict with the public policy of Malaysia.

The abovementioned table of comparison, when perused carefully, can probably show that there is no compelling reason to interpret the literal words of one section or part thereof to the extent of stultifying or nullifying or rendering otiose the entirety or substratum of the provisions in another section or part thereof, as the various sections and parts can operate together harmoniously within their respective ambits, each operating within its own ambit under factual scenarios appropriate to it, if interpreted properly and in the context in accordance with the applicable principles of statutory interpretation in light of the fundamental features of the law and practice of arbitration which have been assimilated into our MAA 2005.

[29] In respect of arbitration where *the seat is **in** Malaysia*, an interpretation which gives the full prominence to "passive remedies" under section 39 grounds at the expense of section 7 (waiver provision) or section 18 (timeous challenge and limited appeal provision) would have the effect of stultifying the express provisions in sections 7 and 18 of the MAA 2005, and therefore probably contrary to the principles of statutory interpretation (see paragraphs [26]-[27] above), contrary to the purpose of stipulating for timeous challenge and limited appeal in section 18 of the MAA 2005 and/or giving the liberty to a litigant to circumvent the limited appeal provision (which ends at the High Court) by postponing the jurisdictional challenge to the enforcement stage thereby having three-steps of appeal until the Federal Court. If failure to make a timeous challenge and limited appeal in section 18 does not in any way deprive the relevant party of a second chance to oppose the recognition of the arbitral award at the enforcement stage, then the timeous challenge and limited appeal provisions in section 18 do not serve any real and meaningful purpose in the MAA 2005 – that would be as good as saying that it is pointless to have these timeous challenge and limited provisions in section 18 because they do not mean anything at the end of the arbitration proceedings. An interpretation which gives the full or almost full prominence to the "choice of remedies" policy in view of section 39(1) at the expense of the express provisions in section 18 (prompt appeal and limited appeal up to the High Court) would also stultify the Competence-Competence doctrine in section 18 or would render the section 18 jurisdictional challenge and jurisdictional ruling an academic exercise or an exercise in futility.

[30] An interpretation which gives full prominence to the "passive remedies" in respect of an arbitration where the *seat is* ***outside*** *Malaysia* may or may not have the same stultifying or contravention or circumvention effect, depending on the laws of the seat country. If the laws of the seat country recognise article 16(3) of the Model Law or its corresponding section as a preclusive provision (e.g. Germany), then such interpretation would have the same effects as stated above. Where the laws of the seat country does not permit the postponement of jurisdictional challenge until the enforcement stage, it would be rather intrusive for the Malaysian courts to entertain a jurisdictional challenge as a "passive remedy" at the enforcement stage to oppose the enforcement of the foreign award – a supposed right which the relevant defendant does not have at the seat country. On the other hand, if the laws of the seat country do not recognise article 16(3) of the Model Law or its corresponding section as a preclusive provision (e.g. Singapore), then such interpretation would not have any the effects as stated above, as the Malaysian courts would, in entertaining a jurisdictional challenge as a "passive remedy" at the enforcement stage to oppose the enforcement of the foreign award, be merely considering the opposition to enforcement on the same reason and based on the same approach as that of the seat court and therefore not acting in an intrusive manner. Jurisprudentially, it is arguably objectionable that an arbitration award made in a Convention country should be subjected to a "passive remedy" of being opposed in enforcement in a foreign court of another Convention country in a manner and extent which is materially different from what is permitted at the seat court except on public policy or arbitrability grounds. However, as part of the combining of domestic arbitration and international arbitration into a single statute, subparagraph 39(1)(a)(i) of the MAA 2005 has also deleted the expression "under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made" in article 36(1)(a)(i) of the Model Law (ground of party's incapacity) from this supposedly corresponding provision in subparagraph 39(1)(a)(i) of the MAA 2005 and there is also a change from the expression "the law of the country where the arbitration took place" in article 36(1)(a)(iv) of the Model Law (ground of composition of the tribunal) to the expression "a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act" in the supposedly corresponding provision in subparagraph 39(1)(a)(vi) of the MAA

2005. These changes, while not posing any difficulty for the awards where the seat of arbitration is within Malaysia, can lead to confusion and complications in respect of foreign awards where the seat of arbitration is outside Malaysia. A literal and simplistic interpretation without due regard to the fundamental features of international arbitrations would probably lead to the proposition that Malaysian courts, in deciding the validity of a foreign arbitration award, can apply Malaysian laws to decide on the capacity of contracting parties or the composition of foreign arbitral tribunals in a manner and to an extent which differ from the *lex arbitri* of the seat court. On the other hand, binding the hands of the Malaysian courts in deciding the validity of the tribunal's composition in accordance with the *lex arbitri* of the seat country may probably do some violence to the express words in subparagraph 39(1)(a)(vi) of the MAA 2005 which uses the words "a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act". It must be very strange if a foreign tribunal's composition, which is invalid by the laws of the seat country, could probably be held to be valid under Malaysian laws for enforcement purposes in Malaysia. As far as the author knows, there is no solution apart from reverting the statutory words in these two subparagraphs to the same words used in the corresponding articles of the Model Law.

[31] For both an award where the seat is *in* Malaysia and an award where the seat is *outside* Malaysia, an interpretation which gives full prominence to "passive remedies" under section 39 grounds at the expense of the section 18 timeous challenge and limited appeal provision would also have the effect of defeating or stultifying the principles of Competence-Competence as incorporated by the express provisions in section 18 of the MAA 2005. The main purpose of the incorporation of the principles of Competence-Competence or a diluted version of the principles of *Kompetenz-Kompetenz* into an arbitration statute is to enable the arbitral tribunal to make a binding and effective prompt ruling or decision on its own jurisdiction with limited right of appeal: see *SBP & Co v Patel Engineering Ltd*[29] wherein the Indian Supreme Court states that the doctrine of *Kompetenz-Kompetenz* indicates that an arbitral tribunal is empowered and has the competence to rule on its

29 [2005] 8 SCC 618.

own jurisdiction, including determining all jurisdictional issues, and the existence or validity of an arbitration agreement. The underlying object of this doctrine is to minimise judicial intervention in order to ensure that the arbitral process is not thwarted at the very threshold, merely because a preliminary objection is raised by one of the parties. The UNCITRAL Secretariat's commentary in Explanatory Note 26 regarding the corresponding article 16 of the Model Law states as follows: "The competence of the arbitral tribunal to rule on its own jurisdiction (i.e. on the foundation, content and extent of its mandate and power) is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) allows for immediate court control in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court. In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36." In the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, there is a commentary on the Competence-Competence principle under article 16(2) and (3) as follows:

> **Timeliness requirements and consequences of a party's failure to object to the arbitral tribunal's jurisdiction in a timely manner**
>
> 12. Article 16(2) is intended to ensure that objections to the arbitral tribunal's jurisdiction will be raised *promptly*. …
>
> 13. One question of practical importance is *whether a party's failure to raise a jurisdictional objection in a timely manner precludes it from challenging the validity of the arbitration agreement in subsequent setting aside (article 34) or recognition and enforcement (articles 35 and 36) proceedings. According to the travaux préparatoires, this question should be answered in the affirmative, except where the arbitral tribunal's jurisdiction is challenged on public policy grounds, including the inarbitrability of the dispute* (articles 34(2)(b) and 36(1)(b)). The *preclusionary effect* of a party's failure to object in a timely manner to the arbitral tribunal's jurisdiction has been affirmed by courts. However, in one case, a party that had not raised any jurisdictional objection before the arbitral

> tribunal was later allowed to do so in setting-aside proceedings (article 34), but the circumstances of that case were unusual as that party had never been properly informed of the commencement of the arbitration. (See below, section on article 34, para. 45 and section on article 36, para. 22). …

In light of the abovementioned express statutory provisions and the commentaries of the UNCITRAL and the positions of international jurists, it is difficult to find justification for the Malaysian courts to adopt the same approach as the Singapore Court of Appeal in *Astro v Lippo* on the extent of the "choice of remedies" policy.

Moreover, there are differences between the MAA 2005 and the Singapore International Arbitration Act 1994 ("SIAA") in relation to the enforcement of an award, and these differences include those highlighted by Datuk Hamid Sultan in his book. Apart from these, what the author of this article can identify as the differences between the Singapore statutory provisions and the Malaysian statutory provisions on this topic would include the following items: (a) the Singapore Court of Appeal's decision in the *Astro* case is very much an interpretation of section 19 of the SIAA read in light of the Model Law's "choice of remedies" policy as gathered from documents of the UNCITRAL and its working group for the preparation of the Model Law, including the *travaux préparatoires*; (b) the SIAA is comprised of several parts including the SIAA's Singapore overriding provisions in the Model Law incorporated as it is in the First Schedule thereof; the MAA 2005 is a re-drafted Act which is modelled on the Model Law with amendments and modifications; (c) under section 18 of the MAA 2005, the appeal against jurisdictional ruling ends at the High Court in Malaysia, whereas in Singapore the appeal against jurisdictional ruling can, with the leave of the High Court, go to the Court of Appeal: see section 10 of the SIAA which overrides the Model Law; and (d) under the SIAA, the Singapore courts in the interpretation of the Model Law in the First Schedule to the SIAA may make reference to the documents of the UNCITRAL and its working group for the preparation of the Model Law (see section 4 of the SIAA); in Malaysia, there is no similar provision in the MAA 2005.

The SIAA has express statutory provisions for reference to the *travaux préparatoires* for interpretation (which has no equivalent provision in the MAA 2005). The *travaux préparatoires* became a centrepiece of the Singapore Court of Appeal's analysis and reasoning in arriving at the

conclusion as they did in *Astro v Lippo*. The existence of the differences in the express provisions between the SIAA and the MAA 2005 and the applicable principles of statutory interpretation in Malaysia ought to form sufficient basis for the Malaysian courts to differ from the Singapore Court of Appeal's decision in *Astro v Lippo* regarding the extent of the co-existence of active remedies and passive remedies under the MAA 2005 and/or the extent of the acceptance of the "choice of remedies" policy under the MAA 2005. If additional reason be needed, one can study Ghibradze's article, "Preclusion of Remedies Under Article 16(3) of the UNCITRAL Model Law",[30] including her following comments and conclusion:

> Contrary to the interpretation of the Singapore Court of Appeal, none of the above mentioned, including the Analytical Commentary, can be used as grounds for reasoning that Article 16(3) falls within the "choice of remedies" policy.
>
> All parts of the *travaux* referred to above and highlighted by the court were in relation to the drafts of Article 16(3) that contained the possibility of challenge only at a post-award stage through setting aside proceedings. Having in mind the discussion in section 1.3 and the determination of general policy of "choice of remedies" between setting aside and enforcement proceedings, none of the proposals discussed above come as a surprise. In fact, the important point that the Singapore Court of Appeal failed to indicate was that immediate court review under Article 16(3) appeared in the text of the Model Law only at the end.
>
> All subsequent commentaries by countries, the Analytical Commentary as well as the Report of the Commission, concerned post-award stage challenge procedure. The reason for omission in interpretation of the *travaux* by the Singaporean court could be due to the fact, that representatives of Astro never made this point available to the court.
>
> While the Singapore court based its decision on the inapplicable part of *travaux*, it should be pointed out that there are explicit indications to the contrary. After amending the text of the Model Law to reflect immediate court review, the *travaux* draws a clear line between the challenge mechanism under Article 16(3) being the sole recourse on

30 Supra, n 5.

the one side and "choice of remedies" available between setting aside and enforcement proceedings on the other side:

> "Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) provides for instant court control in order to avoid unnecessary waste of money and time. […] In those less common cases where the arbitral tribunal combines its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36."

The same document in subsequent paragraphs again explicitly reiterates the choice available between setting aside and enforcement proceedings, without any similar language used in relation to Article 16(3). Therefore, nothing in the *travaux* is suggestive of its alternative nature or that it falls under a "choice of remedies" policy of the Model Law. The whole drafting process rather demonstrates that the mechanism of immediate court review was formed as "unique" and "sui generis" nature falling outside the general policy. Gary Born, in the latest edition of his book, has qualified Article 16(3) to be "specialized judicial review" highlighting that positive judicial rulings are only subject to such review mechanism. For the sake of fulfilling the main purpose of timely resolution of jurisdictional matters and obtaining legal certainty on this issue, it seems that Article 16(3) of the Model Law was designed to be "carved out" from the system of "choice of remedies."

…

Furthermore, if finality and certainty at the seat of arbitration is accepted, then the Singapore Court of Appeal strikes against its own conclusion allowing for a "passive" remedy under Article 36 of the Model Law to still apply. Since domestic international award's enforcement also takes place at the seat under Article 36 of the Model Law, it is somewhat unclear how desired certainty could be challenged via "passive remedy" of enforcement. Interestingly, in support of its conclusion, the Singapore Court of Appeal interpreted QCCP to also provide for the possibility to refuse enforcement of a domestic international award (homologation) in the same framework as Singapore. However, the court failed to observe that relevant case law from Quebec goes against the alleged "choice of remedies" policy extension to Article 16(3) and takes the stance of a preclusionary nature of Article 16(3).

Finally, for policy purposes, making the recourse of Article 16(3) merely optional would serve as a promotion of bad faith actions by obstructing the arbitral process and its enforcement by keeping silent and raising objections only after they lose. In the realm of ambiguity as to the preclusive nature of Article 16(3) of the Model Law, to avoid possible opportunistic behaviors from the parties, the tribunal's jurisdiction should no longer be subject to further challenges at setting aside or enforcement proceedings in the case of unfavorable award on the merits. Keeping in mind the *sui generis* mechanism of Article 16(3) and the underlying purposes behind its adoption, the article concludes that it is to be considered as "one shot" remedy which as noted by Prof. Klaus Peter Berger, decides the jurisdiction "once and for all" at least within the seat of arbitration.

[32] Appropriate consideration should also be given to the UNCITRAL Secretariat's Explanatory Note on article 16(1) of the Model Law which is reproduced below:

4. *Jurisdiction of arbitral tribunal*

(a) Competence to rule on own jurisdiction

24. Article 16(1) adopts the two important (not yet generally recognized) principles of "*Kompetenz-Kompetenz"* and of separability or autonomy of the arbitration clause. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. … Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time.

25. The arbitral tribunal's competence to rule on its own jurisdiction, i.e. on the very foundation of its mandate and power, is, of course, subject to court control. *Where the arbitral tribunal rules as a preliminary question that it has jurisdiction,* ***article 16(3) provides for instant court control in order to avoid unnecessary waste of money and time. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision is not appealable****, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending with the court.* ***In those less common cases where the arbitral tribunal combines its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36****.*

Even in a Convention country which has modelled its arbitration statute on the Model Law without any express statutory requirement to refer to the *travaux* for its interpretation, the domestic court ought to exercise the utmost hesitation in attempting to interpret the recognition and enforcement provisions to the extent of stultifying or overriding the Competence-Competence doctrine (i.e. a diluted version of the principles of *Kompetenz-Kompetenz*) embodied in the Model Law.

[33] In *Astro v Lippo* (supra), the Singapore Court of Appeal was confronted with an arbitration award which included Astro's affiliated companies who were legal entities with no arbitration agreement with Lippo but were brought into the arbitration proceedings pursuant to the arbitral tribunal's consolidation decision and Lippo strenuously objected to such consolidation. Faced with the enabling statutory provision for recognition and enforcement of arbitral awards in the form of section 19 of the SIAA which expressly and specifically stipulated that "An *award on an arbitration agreement* may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award", the author of this article can see the justification for the court's conclusion that parts of the *Astro v Lippo* award did not constitute "*an award on an arbitration agreement*" simply because there was no arbitration agreement between Lippo and the affiliate companies of Astro, and therefore leave to enforce such parts of the award was refused pursuant to section 19 of the SIAA. The reproduction of an old section of the repealed previous Arbitration Act (which was modelled on the old English Arbitration Act 1950) into the modern SIAA 2012 which is modelled on the Model Law (first edition in 1985 and the revised edition in 2006) has probably proved to be a misfit leading to adverse reactions from the international arbitration community. The subsequent decision of the Singapore Court of Appeal in the *Rakna Arashaka Lanka Ltd* case (supra) is also justifiable by the fact that the respondent did not participate in the recommenced arbitration proceedings which it considered as null and void from its date of recommencement for want of jurisdiction and as such had not in any way placed itself within the ambit of article 16 of the Model Law or its corresponding provision. It is submitted that the court of each Convention country should decide on the recognition and enforcement of a Convention award in accordance with the applicable

statutory provisions in the country read in light of the fundamental features of the law and practice of international commercial arbitration which have been incorporated into the Model Law upon which the local arbitration statute is modelled and interpreted according to the principles of statutory interpretation applicable in the country. As it is, there is (and will be) no complete uniformity in the adoption or interpretation of the provisions in the Model Law among all the Convention countries, and therefore any attempt by the court in a Convention country to copycat the decision of a court in another Convention country irrespective of the differences in the relevant statutory provisions between the two countries would not change the overall picture of such lack of complete uniformity.

[34] In a factual situation where there was an arbitration agreement between all the parties in an arbitration, it would probably be unjustifiable for the court to hold that in the face of the arbitral tribunal's jurisdictional ruling which was not timeously challenged in the court under article 16 of the Model Law or its corresponding statutory provision, the losing party would still be allowed to challenge the jurisdiction of the arbitral tribunal at the stage of the enforcement of award. As far as the author can see, allowing a belated jurisdictional challenge would be contrary to article 16 of the Model Law. From the crux of the factual scenario in *Astro v Lippo*, Astro was refused recognition and enforcement of the parts of an award which did not fall within the definition of "award on an arbitration agreement" under section 19 of the SIAA. As such, one cannot assume that the Singapore Court of Appeal's decisions in *Astro v Lippo* and the *Ratna Arashaka Lanka Ltd* case would be applicable to all limbs under article 36(1) for opposing enforcement on jurisdictional grounds. In article 36(1) of the Model Law, there are also limbs of jurisdictional grounds not covered by the factual scenarios in *Astro v Lippo* and the *Ratna Arashaka Lanka Ltd* case.

[35] Considering the fundamental features of the law and practice of arbitrations and the principles of statutory interpretation in light of the purposes and underlying principles of the relevant provisions, it can be postulated that legal positions on co-existence of "active remedies" and "passive remedies" in Malaysia should probably be as follows:

(1) In respect of arbitration where *the seat of arbitration is in Malaysia*:

(1.1) Where a party knows of any provision of the MAA 2005 from which the parties may derogate or that any requirement under the arbitration agreement has not been complied with, and yet proceeds with the arbitration without timeously stating its objection to such non-compliance he shall be deemed to have waived its right to object.[31] However, this waiver provision does not apply to lack of jurisdiction, as under the settled laws, want of jurisdiction of a decision-making tribunal cannot be waived and section 7 does not constitute clear statutory provision to the contrary: see the Federal Court's judgment in *Federal Hotel v National Union of Hotel, Bar & Restaurant Workers*.[32] The section 7 waiver applies to non-jurisdictional improprieties such as where "the party making the application was *not given proper notice of the appointment* of an arbitrator or of the arbitral proceedings",[33] or where "the arbitral procedure was *not in accordance with the agreement* of the parties".[34] By avoiding an interpretation which would render the express words of a section redundant or superfluous, for an award where the *seat of arbitration is **in** Malaysia*, the section 7 waiver applies to a party who falls within the scope of waiver under section 7 thereby being deprived of the right to oppose the enforcement of the award on grounds of either of the two non-jurisdictional improprieties stated in section 7, but the section 7 waiver does not apply to a party who falls outside the scope of waiver under section 7 and who, therefore, can still oppose the enforcement of the award by way of "passive remedy" under section 39 of the MAA 2005. Knowledge which fall under this section means actual or imputed knowledge, and the section should not be interpreted to extend to "ought to know" or "have reasons to know"

(1.2) Where a party in the course of arbitration proceedings omits or neglects to raise a plea that the arbitral tribunal does not have jurisdiction or that the arbitral tribunal is exceeding the scope of its authority, that by itself does not deprive him of

31 MAA 2005, s 7.
32 [1983] 1 MLJ 175 at 178.
33 MAA 2005, s 39(1)(a)(iii).
34 Ibid, s 39(1)(a)(vi).

the right to oppose the enforcement of the award by way of "passive remedy" under section 39 of the MAA 2005 because (a) even the arbitral tribunal may admit a late jurisdictional plea;[35] (b) under the settled principle of common law, want of jurisdiction cannot be waived and section 18(3) and (5) do not constitute clear statutory provisions to the contrary; and (c) the "choice of remedies" under section 39 should not be taken away except where the implication of such choice would be contrary to another clear express provision in the MAA 2005, e.g. the section 7 waiver.

(1.3) Where a party in the course of arbitration proceedings has raised a plea that the arbitral tribunal does not have jurisdiction or that the arbitral tribunal is exceeding the scope of its authority and that plea has been rejected by the arbitral tribunal and also by the High Court on appeal under section 18, the party has lost the right to oppose the enforcement of the award by way of "passive remedy" under section 39 of the MAA 2005 because of the doctrine of *res judicata* and the limited appeal provision in section 18(10) of the MAA 2005. This is also the *dictum* of Lee Swee Seng J (now JCA) in paragraph [34] of his judgment in *Kejuruteraan Bintai Kindenko Sdn Bhd v Serdang Baru Properties Sdn Bhd and another case*,[36] and is consistent with giving meaningful effect to the principles of Comptence-Competence (a diluted version of *Kompetenz-Kompetenz*) assimilated into the Model Law and subsequently adopted into section 18 of our MAA 2005. This is also consistent with the position stated in the UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration: see paragraph [31] above.

(1.4) Where a party in the course of arbitration proceedings has raised a plea that the arbitral tribunal does not have jurisdiction or that the arbitral tribunal is exceeding the scope of its authority and that plea has been rejected by the arbitral tribunal but the party continued with the arbitration *without* further protest and did not appeal against the arbitral tribunal's jurisdictional ruling, the party has lost the right to oppose the enforcement of the award by way of "passive

35 Ibid, s 18(6).

36 [2018] 2 MLJ 706; [2018] 1 CLJ 369.

remedy" under section 39 of the MAA 2005 because (a) of the limited appeal provision in section 18(10) of the MAA 2005; and (b) a party is not permitted to have additional and more tiers of appeal by circumventing section 18(10) of the MAA 2005. In so far as arbitration is concerned, the common law principle against waiver of jurisdiction (decided by Eusoffe FCJ in *Federal Hotel v National Union of Hotel, Bar & Restaurant Workers*) can be considered as having been altered by the specific express provisions in section 18 of the MAA 2005. However, in a case where the lack of jurisdiction is premised upon an express prohibition of a substantive statute (such as the Malay Reserve Enactment in *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Bhd*[37] decided by the Federal Court), then, irrespective of whether or not it was raised before the arbitral tribunal, the award can still be set aside under section 39(1)(b) of the MAA 2005 as being non-arbitrable or in conflict with the public policy of Malaysia. This is also consistent with the position stated in the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*: see paragraph [31] above.

(1.5) Where a party in the course of arbitration proceedings has raised a plea that the arbitral tribunal does not have jurisdiction or that the arbitral tribunal is exceeding the scope of its authority and that plea has been rejected by the arbitral tribunal but the party reserved his jurisdictional objection and then continued with the arbitration under protest and did not appeal against the arbitral tribunal's jurisdictional ruling within the statutory time frame, the party has lost the right to oppose the enforcement of the award by way of "passive remedy" under section 39 of the MAA 2005 because (a) of the limited appeal provision in section 18(10) of the MAA 2005; (b) a party is not permitted to have additional and more tiers of appeal by circumventing section 18(10) of the MAA 2005; and (c) the act of reservation of objection, be it in arbitration or a court proceeding, does not extend the statutory time limit for making an appeal or for mounting a jurisdictional challenge. In so far as arbitration is concerned, the common law principle against waiver of jurisdiction

37 [1998] 1 MLJ 393.

(decided in *Federal Hotel v National Union of Hotel, Bar & Restaurant Workers*) can be considered as having been altered by the specific express provisions in section 18 of the MAA 2005. However, where the lack of jurisdiction is premised upon an express prohibition of a substantive statute (such as the Malay Reserve Enactment in *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Bhd* (supra)), then, irrespective of whether or not it was raised before the arbitral tribunal, the award can still be set aside under section 39(1)(b) of the MAA 2005 as being non-arbitrable or in conflict with the public policy of Malaysia. This is also consistent with the position stated in the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*: see paragraph [31] above.

(2) In respect of arbitration where *the seat of arbitration is* ***outside*** *Malaysia*:

(2.1) For an award where the *seat of arbitration is* ***outside*** *Malaysia*, the section 7 waiver in Part II of the MAA 2005 does not apply at all,[38] and therefore the fact that a party knew about the non-jurisdictional improprieties and yet participated in the arbitration without any objection by itself *may or may not* deprive him of the right to oppose the enforcement of award by way of "passive remedy" under section 39 of the MAA 2005, depending on the *lex arbitri* or the laws of the seat country. Section 39 of the MAA 2005, by its subparagraph 39(1)(a)(iii), appears to limit this non-jurisdictional ground to "the party making the application was not given proper notice of appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case". If the laws of the seat country recognise article 4 of the Model Law or its corresponding section as a preclusive provision (see, for example, Germany), then the party has thereby lost his right to oppose the enforcement of the award by way of "passive remedy" under section 39 of the MAA 2005; however, if there is no such preclusive provision recognised by the laws of the seat country (for example, Singapore), then the party still has his subsequent right to oppose the enforcement of the award by way of "passive remedy" under section 39 of the MAA 2005.

38 MAA 2005, s 3(3).

(2.2) Where a party in the course of arbitration proceedings omits or neglects to raise a plea that the arbitral tribunal does not have jurisdiction or that the arbitral tribunal is exceeding the scope of its authority, that by itself *may or may not* deprive him of the right to oppose the enforcement of award by way of "passive remedy" under section 39 of the MAA 2005, depending on the *lex arbitri* or the laws of the seat country. If the laws of the seat country recognise article 16(3) of the Model Law or its corresponding section as a preclusive provision (see, for example, Germany), then the party has thereby lost his right to oppose the enforcement of the award by way of "passive remedy" under section 39 of the MAA 2005; however, if there is no such preclusive provision recognised by the laws of the seat country (for example, Singapore), then the party still has his subsequent right to oppose the enforcement of the award by way of "passive remedy" under section 39 of the MAA 2005.

(2.3) Where a party in the course of arbitration proceedings has raised a plea that the arbitral tribunal does not have jurisdiction or that the arbitral tribunal is exceeding the scope of its authority and that plea has been rejected by the arbitral tribunal and also by the seat court on appeal, the party has lost the right to oppose the enforcement of the award by way of "passive remedy" under section 39 of the MAA 2005 because of the doctrine of *res judicata* and by the principle of comity of nations under private international law. Moreover, any permissible opposition to enforcement should be only to the same extent as recognised by the *lex arbitri*, the laws of the seat country.

(2.4) Where a party in the course of arbitration proceedings has raised a plea that the arbitral tribunal does not have jurisdiction or that the arbitral tribunal is exceeding the scope of its authority and that plea has been rejected by the arbitral tribunal but the party continued with the arbitration without further protest and did not appeal against the tribunal's jurisdictional ruling, the party *may or may not* have lost the right to oppose the enforcement of the award by way of "passive remedy" under section 39 of

the MAA 2005, depending on the *lex arbitri* or the laws of the seat country. If the laws of the seat country recognise article 16(3) of the Model Law or its corresponding section as a preclusive provision (see, for example, Germany), then the party has thereby lost his right to oppose the enforcement of the award by way of "passive remedy" under section 39 of the MAA 2005; however, if there is no such preclusive provision recognised by the laws of the seat country (for example, Singapore), then the party still has his subsequent right to oppose the enforcement of the award by way of "passive remedy" under section 39 of the MAA 2005. The permissible opposition to enforcement should be only to the same extent as recognised by the *lex arbitri*, the law of the seat country.

(2.5) Where a party in the course of arbitration proceedings has raised a plea that the arbitral tribunal does not have jurisdiction or that the arbitral tribunal is exceeding the scope of its authority and that plea has been rejected by the arbitral tribunal but the party reserved his jurisdictional objection and then continued with the arbitration under protest and did not appeal against the arbitral tribunal's jurisdictional ruling, the party *may or may not* have lost the right to oppose the enforcement of the award by way of "passive remedy" under section 39 of the MAA 2005, depending on the *lex arbitri* or the laws of the seat country. If the laws of the seat country recognise article 16(3) of the Model Law or its corresponding section as a preclusive provision (see, for example, Germany), then the party has thereby lost his right to oppose the enforcement of the award by way of "passive remedy" under section 39 of the MAA 2005; however, if there is no such preclusive provision recognised by the laws of the seat country (for example, Singapore), then the party still has his subsequent right to oppose the enforcement of the award by way of "passive remedy" under section 39 of the MAA 2005. The permissible opposition to enforcement should be only to the same extent as recognised by the *lex arbitri*, the law of the seat country.

One-stage or two-stage process for section 39 enforcement proceedings?

[36] Recent court decisions in Malaysia regarding the process and procedure of opposing the enforcement of arbitral awards have raised some questions which warrant further research and discussions on the topic.

[37] Section 37 of MAA 2005 (setting aside of awards) applies only to arbitral awards where the seat of arbitration is *in* Malaysia ("local awards"). Sections 38 and 39 of the MAA 2005 (recognition and refusing recognition) apply to both local arbitral awards and foreign arbitral awards from a Convention State: see the provisions and analysis above. An application to set aside a local award is defined as an "arbitration claim" in Order 69 r 2(1)(i) of the Rules of Court 2012. Order 69 r 4(1) of the Rules of Court 2012 provides generally that "An arbitration claim under rule 2 or rule 3 may be made using the originating summons procedure and Form 5 shall be filed in the High Court. An arbitration claim originating summons shall … (e) specify the respondents on whom the arbitration claim originating summons is to be served, stating their role in the arbitration." Order 69 r 4(3) provides that "unless the Court orders otherwise, an arbitration claim originating summons and the affidavit shall be served on the respondents specified in subparagraph (1)(e) within thirty days from the date of issue." Order 69 r 4(4) provides that "Where relevant, rules 5 and 8 shall additional apply." Form 5 is an *inter partes* originating summons. Form 6 is *ex parte* originating summons, but none of Order 69 rr 4, 5 or 6 cross-refer to Form 6.

[38] Order 69 r 5 provides for the specific procedure of application to set aside an award. Order 69 r 5(5) provides that "The originating summons and affidavit shall be served on each arbitrator and the respondents." Order 69 r 8 provides for the specific procedure of application for permission to enforce an award. Order 69 r 8(1) provides that "An application for permission to enforce an award in the same manner as a judgment or an order ***may*** *be made without notice* in an arbitration claim originating summons". Order 69 r 8(4) provides that "The *Court may specify* parties to the arbitration *on whom* the arbitration claim originating summons shall be served". Order 69 r 8(7) and (8) provide for the procedure and time frame for the respondent to apply to set aside the *ex parte* order. Order 69 r 9 provides as follows:

Registration in High Court of foreign awards (O. 69, r. 9)

9. Where an award has, under the law in force in the place where it was made become enforceable in the same manner as a judgment given by a Court in that place, an applicant may enforce the award in the manner provided for under rule 8.

[39] The aforesaid provisions suggest that the procedure for recognition and enforcement of award is *primarily* a two-stage process, subject to the court's discretion to direct service upon the respondent which has the effect of converting it into a one-stage process – as decided and explained by the Federal Court in *CTI Group Inc v International Bulk Carriers SPA*.[39]

[40] In this context, it is important to note that:

(a) The statutory provisions in sections 38 and 39 of the MAA 2005 do not stipulate the procedure as a two-stage process or one-stage process.

(b) It is the provisions in Order 69 r 8 of the Rules of Court 2012 which stipulate that the procedure can be either a two-stage process or one-stage process, depending on the applicant's choice and subject to the High Court's order: see the word "may" in Order 69 r 8(1), which gives the applicant the choice of commencing his application by either an *ex parte* originating summons in Form 6 or an *inter partes* originating summons in Form 5. If the applicant chooses to commence by *ex parte* originating summons under Order 69 r 8(1) in Form 6, the enforcement application becomes a two-stage process – this was what happened in the *CTI Group Inc* case.

(c) However, the enforcement application can become a one-stage process if: (i) the court orders the *ex parte* originating summons to be served on the respondent (as is provided in Order 69 r 8(4) and was noted in the *CTI Group Inc* case); or (ii) the applicant chooses to commence the enforcement application by an *inter partes* originating summons in Form 5.[40]

(d) As the application to set aside the *ex parte* order is made in a pending suit, the application is by notice of application.[41]

39 [2017] 9 CLJ 499.
40 See Rules of Court 2012, O 69 rr 8(1) ("may"), and 4(3) and (4).
41 Ibid, O 32.

(e) If the respondent fails or neglects to apply to set aside the *ex parte* order, the procedure of enforcement then reverts to a one-stage process from the originally intended two-stage process, as the process would in such event end with the *ex parte* order.

(f) In the *CTI Group Inc* case, the Federal Court did not state that all applications for the enforcement of awards must invariably be commenced by *ex parte* originating summonses.

(g) As the specific provision in Order 69 r 8(1) gives the applicant the choice of commencing an enforcement application by an *ex parte* originating summons, it is still correct to say that the Order 69 r 8 procedure for the enforcement of awards is *primarily* a two-stage process subject to the power of the High Court to order it to be served, thereby converting it into a one-stage process, as described in the *CTI Group Inc* case.

(h) In a two-stage process under Order 69 r 8, the two stages envisaged are: (1) *ex parte* stage where the applicant may obtain an *ex parte* order for enforcement;[42] and (2) *inter partes* stage where the respondent, after being served with the *ex parte* enforcement order, applies to set aside the *ex parte* enforcement order.[43]

(i) The application to set aside under Order 69 r 8(7) is directed against the ***ex parte court order*** which granted the *ex parte* permission to enforce the award, and it is ***not*** directed against or for the purpose of setting aside *the arbitral award*. An application to set aside an arbitral award must be made to the court having jurisdiction at the seat of arbitration. Even after the *ex parte* court order (for enforcement) has been set aside by the High Court here, the arbitral award remains intact and can be the subject of enforcement applications in other Convention countries.

Procedure for raising an opposition to an application for enforcement of award

[41] Is it correct to say that by reason of the two-stage process for enforcement application, the respondent who opposes an application for enforcement *must* do so by making a separate application by way

42 Ibid, O 69 r 8(1) to (6).
43 Ibid, O 69 r 8(7).

of an originating summons? Is any failure of the respondent to proceed by a separate originating summons fatal to his rights under section 39(1) to oppose the application for recognition and enforcement? A multi-pronged approach is adopted below to consider and analyse this question.

Analysis of relevant provisions in MAA 2005

[42] Section 39 provides for two broad categories of situations when arbitral awards, be they local awards or foreign awards, are to be refused recognition or enforcement by the Malaysian courts. These two broad categories are both to be at the request of the party against whom the recognition or enforcement is sought, and the modes the court will handle such request appear to be different, as shown from the relevant words of section 39(1) that are reproduced below:

> 39. (1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the *request* of the party against whom it is invoked –
>
> (a) where that party provides to the High Court proof that –
>
> (i) …
>
> (b) if the High Court finds that –
>
> (i) the award of the dispute is not capable of settlement by arbitration under the laws of Malaysia, or
>
> (ii) the award is in conflict with the public policy of Malaysia.

[43] Subparagraphs (b)(i) and (b)(ii) of section 39 relate to matters of Malaysian law, and the requesting party's proof is not necessary, although in practice the requesting party will almost invariably put forward his proof and arguments to persuade the court for a case for refusal of recognition or enforcement. Nevertheless, if the requesting party neglects to provide proof or arguments on the law or public policy of Malaysia, the court on its own volition may still refuse recognition or enforcement if the court finds that the subject-matter of the award is not arbitrable under Malaysian laws or the award is in conflict with the public policy of Malaysia. This is also consistent with the principle decided by the courts that where a matter concerns public policy (such as *res judicata*), the court can decide on it although

it is not pleaded: see the judgment of the Supreme Court in *Asia Commercial Finance Bhd v Kawal Teliti Sdn Bhd*[44] that *res judicata* may be relied upon even if it is not pleaded because it is a matter of public policy that no re-litigation should be entertained. In Explanatory Note 44 to the Model Law, this is what the UNCITRAL stated:

> 44. Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement, two practical differences should be noted. Firstly, the grounds relating to public policy, including non-arbitrability, may be different in substance, depending on the State in question (i.e. State of setting aside or State of enforcement).

[44] The Legislature is presumed to know the law as at the date of passing the statute, hence it is reasonably safe to interpret the Legislature's choice of using the words "if the Court finds that" in subparagraph (b)(ii) in the context of public policy and non-arbitrability in the same sense as that propounded by the apex court in *Asia Commercial Finance Bhd v Kawal Teliti Sdn Bhd*, namely, on a matter of public policy, the court can take judicial notice and make a finding on it even if the parties do not prove them to the court.

[45] Section 37 of the MAA 2005 (setting aside of awards) applies only to arbitral awards where the seat of arbitration is *in* Malaysia ("local awards"). Sections 38 and 39 of the MAA 2005 (recognition and refusing recognition) apply to *both* local arbitral awards and foreign arbitral awards: see paragraphs [3]-[6] above.

[46] In section 39(1) of the MAA 2005, the word "request" is used to connote a party's request to refuse recognition or enforcement. The word "request" is also used in sections 35 and 37(4) to connote a party's request for the interpretation of an award or supplemental award or the correction of an award. The word "request" is used in other provisions of the MAA 2005, including: (a) section 13(6) (a party's request to the Director of the AIAC for the appointment of an arbitrator); (b) section 32(1) (request to record the settlement in the form of an award); (c) section 37(6) (a party's request to adjourn the challenge proceeding); and (d) section 44(1)(b) (request the arbitrator to tax the costs of arbitration).

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44 [1995] 3 CLJ 783 at 795.

[47] In the MAA 2005, the words "apply" and "application" to the High Court are used in several sections, including: (a) section 37 (application to set aside local awards); (b) section 38 (application by the winning party for recognition and enforcement of arbitral awards, local or foreign); and (c) section 39(2) (If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1)(a)(vii)).

[48] Applying the principle of statutory interpretation that where different words are used in a statute, they refer to different things (see paragraph [27](c) above), the more probable result is that the expressions "the party … provides proof" and "the Court finds" are intended by the Legislature to have different meanings and effects. Read in the context of the statutory provisions and in line with the UNCITRAL Secretariat's Explanatory Notes, the first expression "the party … provides proof" refers to the need for the party to provide proof to the court before the court will act on it to exercise its discretion, whereas the second expression "the Court finds" refers to the court making its finding on its own initiative. The very concept of the court making a finding on its own initiative is akin or similar to the court taking judicial notice of a thing or matter in arriving at its finding, and such concept of the court making a finding on its own initiative is different from making a finding only upon the proof produced by a party.

[49] On the mode of application, section 50 of the MAA 2005 specifically provides that "Any application to the High Court under this Act shall be by an originating summons as provided in the Rules of High Court 1980", (i.e. now Rules of Court 2012). In contrast, wherever the MAA 2005 uses the word "request" there is no statutory provision to require that such request be made by way of an originating summons or even a separate application. Even where a statute uses the word "application" to the High Court without specifying any particular mode of application, such application can be made by a notice of application in a pending suit or action.[45] It is also settled practice that some types of applications can be made orally or informally in a pending suit or action, and examples include: (a) oral applications for minor amendment to pleading; (b) oral applications for extension

45 Rules of Court 2012, O 32 r 1.

of time to serve pleadings or submissions; (c) oral applications for directions or orders at case management sessions; (d) oral applications for withdrawal of actions; (e) oral applications for variation of interlocutory orders; (f) oral applications for judgment under Order 34; and etc. Such being the position, it is difficult to conceive the use of the word "request" in section 39(1) of the MAA 2005 as imposing a mandatory obligation upon the requesting party to make a *formal* written application *by way of an originating summons* to oppose the opposite party's application for recognition or enforcement of an arbitral award in a pending suit or action.

[50] Section 39(2) with the expression "if an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph 1(a)(vii)":

(a) does not apply to a foreign arbitral award (i.e. award where the seat of arbitration is *outside* Malaysia) because the High Court (i.e. the High Court of Malaya and the High Court of Sabah and Sarawak, as defined in section 3 of the MAA 2005) has no jurisdiction to hear or decide on any application to set aside a foreign arbitral award: see the analysis in paragraphs [3]-[6] above); and

(b) cross-refers to subparagraph 1(a)(vii) wherein the relevant part stipulates "the award … has been set aside or suspended by a court of the country in which, or under the law of which, that award was made" – as the Malaysian courts have no jurisdiction to set aside or suspend a foreign arbitral award, this subparagraph 1(a)(vii) is only operative as applicable to *local* awards (i.e. awards where the seat of arbitration is *in* Malaysia): see paragraphs [3]-[6] above.

[51] The specific provision on the High Court's power on setting aside of local awards is in section 37. If section 39(2) were to make a simple cross-reference to section 37 instead of the otiose cross-reference to subparagraph 1(a)(vii) of section 39, there would probably be no confusion or misinterpretation of the same. This is perhaps the result of combining section 39's applicability to both local awards and foreign awards while also trying to segregate part of them as applicable to only local awards. Brevity of words in the drafting process has led to this difficult and confusing state of affairs in the interpretation of section 39. In a case involving a foreign arbitral award (i.e. where the seat of arbitration is *outside* Malaysia), both

section 39(2) and subparagraph (1)(a)(vii) do not apply to the foreign arbitral award. This non-applicability of both section 39(2) and subparagraph (1)(a)(vii) has made the task of interpretation and application to foreign awards easier, as compared with the question of applicability of the said provisions to local arbitral awards.

[52] As both section 39(2) and subparagraph (1)(a)(vii) have been ruled out due to their non-applicability to foreign arbitral awards here, the said provisions should not be allowed to govern or control the meaning of "request" in section 39(1) in the context of a foreign arbitral award.

[53] Applying the principle of interpretation decided by our Federal Court in *Tebin bin Postapa (as administrator of the estate of Haji Mostapa bin Asan, deceased) v Hulba-Danyal bin Balai & Sophee Sulong bin Balia (as joint administrators of the estate of Balia bin Munir, deceased)* (supra) and our Supreme Court in *Foo Loke Ying* (supra), it is submitted that a party who requests for the refusal of recognition or enforcement of a foreign arbitral award in the High Court may put forward his request by way of affidavit proof and submissions (if he relies on one or more limbs of section 39(1)(a)) or by way of submissions (if he relies only on either of the limbs of section 39(1)(b)). By that line of argument, a party who requests for the refusal of recognition or enforcement of an arbitral award in Malaysia does not have to file a separate application or a separate originating summons to oppose an existing application for recognition or enforcement of the arbitral award in a pending suit or action.

[54] The abovementioned interpretation of the statute is also consistent with the purpose of the relevant statutory provisions. The actual words used in section 39(4) of the MAA 2005 are:

> 39. (4) *If an* ***application*** *for* ***setting aside or suspension*** *of an award has been made to the* ***High Court*** *on the grounds referred to in subparagraph (1) (a)(vii), the* ***High Court may***, if it considers it proper, ***adjourn its decision and may also***, *on the application of the party claiming recognition or enforcement of the award,* ***order the other party to provide appropriate security***".

[55] Following the principle of statutory interpretation laid down in section 17A of the Interpretation Acts 1948 and 1967 to give effect to the purpose of the statutory provision (which principle is accepted

by our Federal Court in a number of recent cases stated above), it can be seen from the express words that the *purpose of section 39(2)* is to confer upon the High Court a discretionary power to adjourn its decision or to order the respondent to provide appropriate security pending the High Court's hearing and disposal of an application for setting aside or suspension of an award. The specific grounds stipulated in subparagraph (1)(a)(vii) are "*the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made*". Reading subparagraph (1)(a)(vii) together with the opening part of section 39(2) which stipulates *"If an* ***application*** *for* ***setting aside or suspension*** *of an award has been made to the* ***High Court*** *on the grounds referred to in subparagraph (1) (a)(vii)*", this means in an application to the High Court for setting aside or suspension of a *local* award on the specific grounds stated in subparagraph (1)(a)(vii). This is because the High Courts in Malaysia have no jurisdiction to entertain any application to set aside or suspend a *foreign* award. This interpretation will give effect to the purpose of section 39(2). Conversely, it is not consistent with the principles of statutory interpretation to stretch the words in section 39(2) to the extent of holding that the said subsection has laid down an additional ground and basis for making an application for setting aside or suspending a local award under subparagraph (1)(a)(vii) over and above the grounds specified in section 37 of the MAA 2005. Such an overstretched interpretation would also be contrary to Malaysia's treaty obligation under the New York Convention to recognise and enforce foreign awards from Convention countries except where refusal of recognition or enforcement is expressly permitted under the grounds specified in the New York Convention, which grounds are the same as those repeated in article 36(1) of the Model Law and except where the foreign award has been set aside or suspended by the seat court.

[56] As shown above, when the relevant express provisions of the MAA 2005 are interpreted according to several principles of statutory interpretation, they all seem to point towards the same conclusion that a party who requests for the refusal of recognition or enforcement of an arbitral award in Malaysia does not have to file a separate application or a separate originating summons to oppose an existing application for recognition or enforcement of the arbitral award in a pending suit or action.

Analysis of provisions of Order 69 of the Rules of Court 2012

[57] Reference is made to the provisions of Order 69 of the Rules of Court 2012 ("ROC 2012") quoted in paragraphs [37] and [38] above.

[58] In Order 69 r 2(1) of the ROC 2012, "arbitration claim" is defined to mean "application to the Court under the 2005 Act", and the specific items enumerated thereunder expressly mention a claim to – "(i) set aside an award under section 37 of the 2005 Act; … (k) enforce an award under section 38 of the 2005 Act", with the mode of application stipulated in r 4(1) as an originating summons – similar to section 50 of the MAA 2005. A request for the refusal of recognition or enforcement of an award under section 39(1) of the MAA 2005 is excluded from the definition of "arbitration claim" in Order 69 r 2(1) of the ROC 2012.

[59] When describing the types of matters or processes which come under the term "application to the Court", the Legislature in Order 69 r 2(1) of the ROC 2012 has excluded a request for the refusal of enforcement or recognition, the passive remedy, from the definition of "arbitration claim". This is indicative of the legislative intention that "application to the Court" is different from " request" under section 39(1) of the MAA 2005.

[60] Where a statute uses the word "application" to the High Court without specifying any particular mode of application, such application can be made by a notice of application in a pending suit or action.[46] It is also settled practice that some types of applications can be made orally or informally in a pending suit or action, and examples include: (a) oral applications for minor amendment to pleading; (b) oral applications for extension of time to serve pleadings or submissions; (c) oral applications for directions or orders at case management sessions; (d) oral applications for withdrawal of actions; (e) oral applications for variation of interlocutory orders; (f) oral applications for judgment under Order 34; and etc. Such being the position, it is difficult to conceive the use of word "request" in section 39(1) of the MAA 2005 as imposing a mandatory obligation upon the requesting party to make a *formal* written application *by way of an originating summons* or by way of separate notice of application to oppose the opposite party's application for recognition or enforcement of an arbitral award in a pending suit or action.

46 Rules of Court 2012, O 32 r 1.

[61] As shown above, there is nothing in the express provisions of the ROC 2012 to point towards the necessity that a party who requests for the refusal of recognition or enforcement of an arbitral award in Malaysia must file a separate notice of application or a separate originating summons to oppose an existing application for recognition or enforcement of the arbitral award in a pending suit or action.

Analysis of the Model Law

[62] Reference is made to the co-existence of "active remedy" and "passive remedy" and the difference in their characteristics in paragraphs [7]-[13] above.

[63] As section 39(1) of the MAA 2005 has been modelled upon article 34(2) of the Model Law, it is pertinent to consider the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* which states as follows:

> **The grounds for setting aside an arbitral award— paragraph (2)**
>
> **General issues**
>
> **Construction and application**
>
> 23. The grounds provided in article 34 (2) are set out in ***two categories. Grounds which are to be proven by one party*** are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law. ***Grounds that a court may consider of its own initiative are as follows: nonarbitrability of the subject-matter of the dispute or violation of public policy*** (which is to be understood as serious departures from fundamental notions of procedural justice) …

[64] The words "request" and "provides to the High Court proof" in section 39(1)(a) of the MAA 2005 and the words "if the High Court finds that" in section 39(1)(b) of the MAA 2005 are *in pari materia* with their corresponding provisions in the New York Convention and the Model Law. The Explanatory Note 46 by the UNCITRAL Secretariat states as follows:

> 46. As a further measure of improvement, the Model Law lists exhaustively the grounds on which an award may be set aside. This list essentially mirrors that contained in article 36(1), which is taken from article V of the New York Convention. The grounds provided in article 34(2) are set out in *two categories. Grounds which are to be proven by one party* are as follows: lack of capacity … *Grounds that a court may consider of its own initiative* are as follows: non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).

[65] Reference is also made to the commentary by the UNCITRAL to article 35 of the Model Law pertaining to the refusal of recognition and enforcement of an award, which states:

> (a) Application for setting aside as exclusive recourse
>
> 45. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34(1) provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (article 34(3)). *In regulating "recourse" (i.e., the means through which a party may* ***actively "attack"*** *the award), article 34 does not preclude a party from seeking court control by* ***way of defence in enforcement proceedings*** *(articles 35 and 36). Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State).* However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades).
>
> (b) Grounds for setting aside
>
> 46. As a further measure of improvement, the Model Law lists exhaustively the grounds on which an award may be set aside. This list essentially mirrors that contained in article 36(1), which is taken from article V of the New York Convention. *The grounds provided in article 34(2) are set out in two categories. Grounds which are to be proven by one party are as follows:* lack of capacity … *Grounds that a court may consider of its own initiative are as follows:* non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).

[66] The abovementioned commentary of the UNCITRAL is consistent with the express provisions of the MAA 2005 in section 39(1)(a) which uses the words "… may be refused only at the *request* of the party against whom it is invoked – (a) *where that party provides to the High Court proof that*" in contrast to section 39(1)(b) which uses the words "… may be refused only at the *request* of the party against whom it is invoked – (b) *if the High Court finds that*". As the grounds under both section 39(1)(a) and (1)(b) are to be "at the request of the party against whom it is invoked" and the section 39(1)(b) grounds are those which the court can consider on its own initiative, it is highly improbable that the Legislature intended the defendant who wishes to oppose an application for the recognition and enforcement of an award to make a separate application as a condition precedent or mandatory requirement to exercise such statutory right of "passive remedy" defence.

[67] Articles 34 to 36 of the Model Law is also *in pari materia* with article V of the New York Convention. As such, the UNCITRAL's commentary and Explanatory Note on articles 34 to 36 of the Model Law is reflective of the international consensus on the interpretation of the "passive remedy" as a defence which can be raised to oppose the winning party's application for the recognition and enforcement of an arbitral award in any Convention country where the recognition and enforcement is being sought, as contrasted with an "active attack" by way of application to the seat court to set aside the arbitral award.

[68] In line with the meaning and effect which the UNCITRAL has officially recognised, it is very difficult to see how a separate application must be mandatorily filed by a resisting party in order to provide a procedural platform for him to be allowed to argue his opposition to the enforcement of an award or his "passive remedy" defence. It is also difficult to see how a separate application to challenge or attack the recognition of an award can come under the description of "grounds that a court may consider of its own initiative".

[69] As shown above, when the relevant express provisions of the MAA 2005 are interpreted according to several principles of statutory interpretation and in light of the Model Law, it seems to point towards the same conclusion that a party who requests for the refusal of recognition or enforcement of an arbitral award in Malaysia does not

have to file a separate application or a separate originating summons to oppose an existing application for the recognition or enforcement of the arbitral award in a pending suit or action.

Analysis of reported decisions

[70] In *Alami Vegetable Oil Products Sdn Bhd v Hafeez Iqbal Oil & Ghee Industries (PVT) Ltd*,[47] Hamid Sultan JCA,on behalf of the Court of Appeal, held that:

> [2] For s. 39 to apply, the application must be made by the respondent to the award. In this case, the respondent to the award was the appellant and no such application had been filed. *Instead, the appellant had only filed an opposing affidavit stating why the respondent's application should not be allowed. What was before the court was a s. 38 application which was in respect of the merit of the award, which was irrelevant consideration at the stage of s. 38 application.* Therefore, the appeal had no merit and was an abuse of judicial process as the appellant had not taken the argument before the court by a proper application under s. 39 of the AA 2005.
>
> [3] The appellant had not appreciated the distinction between ss. 38 and 39 of the AA 2005. *Section 38 procedure is a "recognition procedure" to convert an arbitration award to a judgment. This can only be done by a person holding an arbitration award. If the respondent to the award wants to object to the procedure, he can file an affidavit to do so.* (See *International Bulk Carriers SPA v. CTI Group Inc* [2014] 8 CLJ 854; [2014] 6 MLJ 851). *If the respondent to the award wants to object to its enforcement, then an application under s. 39 setting out one of the grounds must be made by the respondent to the award. To put it in another way, the appellant in the instant case was attempting to convince the court "to put the cart before the horse", that too without making an application under the mandatory provision to challenge the enforcement of the award.*

[71] In *Siemens Industry Software GMBH & Co KG (Germany) v Jacob and Toaralf Consulting Sdn Bhd & Ors*,[48] there is a paragraph in the judgment of the Federal Court which vaguely refers to this procedural point:

> [50] Having regard to all the above, we therefore agreed with the High Court that only the dispositive portion of the arbitral award

47 [2016] 7 CLJ 19.
48 [2020] MLJU 363.

> ought to be registered for purposes of enforcement of the arbitral award. The reasoning or findings of the arbitral tribunal would be relevant, if at all, to a court which is considering the merits of the award, *for example in an application to set aside the arbitral award under s. 39 of the AA 2005.* And this will be done by way of an affidavit evidence, not by way of registration as a judgment of the High Court. *Nevertheless, as stated earlier, there is no application filed by the appellant under s. 39 of the AA 2005*.

[72] In *Siemens Industry Software GMBH & Co KG (Germany) v Jacob and Toaralf Consulting Sdn Bhd & Ors* (supra), the question posed for the decision of the Federal Court was whether, in registration of an arbitral award, the court should only register the dispositive part of the award or the entirety of the award including the arbitrator's reasons and grounds of decision. The Federal Court held that only the dispositive part of the arbitral award should be registered as an order or judgment in court. To me, the words "for example in an application to set aside the arbitral award under s. 39 of the AA 2005 … Nevertheless, as stated earlier, there is no application filed by the appellant under s. 39 of the AA 2005" constitute an observation or *obiter dictum* which do not form part of the *ratio decidendi* of the Federal Court in that case. A cursory reading of the existing words in section 39(2) would probably mislead many a reader to say that there could be a valid application in the Malaysian courts to set aside a foreign arbitration award under section 39. As discussed and analysed in paragraphs [3]-[6] above, an application to set aside a *local* award (i.e. active remedy of attack) is to be made under section 37 of the MAA 2005 though the grounds may be similar to the grounds for opposing the enforcement of an award (i.e. passive remedy of defence) under section 39, and the High Court (or Malaysian court) has no jurisdiction to set aside a *foreign* award.

[73] In the following parts of Edgar Joseph Jr FCJ's judgment in *State Government of Sarawak v Chin Hwa Engineering Development Co*,[49] Edgar Joseph Jr J, on behalf of the Federal Court, accurately sets out the differences between "active remedy" and "passive remedy":

> By way of amplification, it was argued that the judge had misdirected himself in holding, as he did in fact hold, that the employer was

49 [1995] 3 MLJ 237.

precluded from challenging the validity of the award for the first time, at the very late stage of enforcement proceedings under s 27 of the Act, when it was open for it to have done so at a much earlier stage, under s 24(2) of the Act or under O 69 r 2(3) of the Rules of the High Court 1980. In support, our attention was directed to the following passage in *Commercial Arbitration* by Mustill and Boyd (2nd Ed) at p 546:

> "*A party avails himself of a passive remedy does not himself take the initiative to attack the award, but simply waits until his opponent seeks to enforce the award by action or summary process, and then relies upon his matter of complaint as a ground why the court should refuse enforcement …*
>
> *We agree, that in certain circumstances, a party may avail himself of a passive remedy by which is meant he does not take the initiative to attack an award, but simply waits until his opponent seeks to enforce the award by action or summary process, when he resists enforcement.* Mustill and Boyd on *Commercial Arbitration* (2nd Ed) at p 546 have instanced two situations when the passive remedy would be available; namely: (1) where the award is so defective in form or substance that it is incapable of enforcement; (2) where the whole or part of the award is ineffective, on the ground that the relief granted lies outside the jurisdiction of the arbitrator.
>
> In the circumstances, we agree with the submission of the Attorney General that it was open to the employer to have had recourse to the passive remedy of resisting the enforcement proceedings under s 27 of the Act by relying on its complaint that the arbitrator had no jurisdiction to determine the validity of the suspension order and, consequently, no jurisdiction to award damages for alleged wrongful suspension, these being matters in dispute which were outside the scope of cl 43 of the contract. …"

[74] The Federal Court's judgment in *State Government of Sarawak v Chin Hwa Engineering Development Co* was neither referred to nor discussed in the Court of Appeal's judgment in the *Alami Vegetable Oil Products* case.

[75] As the aforesaid paragraphs of the Court of Appeal's judgment in the *Alami Vegetable Oil Products* case cannot be considered a mere *obiter dictum* and jurisprudential analysis of the correct state of the

laws should not be carried out by an over-simplistic choosing of which of the conflicting decisions was decided under which applicable timing of the relevant statute, this judgment in the *Alami Vegetable Oil Products* case, and any High Court decision which followed the *Alami Vegetable Oil Products* case on this point, warrant a more thorough and analytical study and diagnosis. The *Alami Vegetable Oil Products* case was in respect of recognition and enforcement of a specie of *local* award, namely, a domestic international award where the seat of arbitration is *in* Malaysia. This is specifically stated in paragraph [10] of the learned judge's judgment.

[76] In a foreign arbitral award where the seat of arbitration is *outside* Malaysia, the courts in Malaysia have no jurisdiction to hear and decide in an application to set aside a foreign arbitral award (see paragraphs [3]-[6] above), and section 39(2) of the MAA 2005 which cross-refers to section 39(1)(a)(vii) of the same Act cannot operate *vis-à-vis* a *foreign* award. Therefore, section 39(2) of the MAA 2005 is only applicable to *local* awards. The facts in the *Alami Vegetable Oil Products* case apply to a *local* award (i.e. where the seat of arbitration is *in* Malaysia) but does not apply to a foreign award (i.e. where the seat of arbitration is *outside* Malaysia). In the case of *Envac Scandinavia Spa v Muhibbah Engineering Bhd*,[50] the High Court had the temporary reprieve of being able to distinguish the case of *Alami Vegetable Oil Products* on its facts because the *Envac* case related to a *foreign* award where the seat of arbitration was outside Malaysia, and the *dicta* in the judgment in the *Alami Vegetable Oil Products* case on local awards was, according to the doctrine of *stare decisis*, not binding on the High Court in that case, with its materially different facts. However, such latitude may not be available in another High Court case dealing with a *local* award where the seat of arbitration is *in* Malaysia, unless the appellate court intervenes in time to clarify the legal position on this point.

[77] Subsequently, in *Hafeez Iqbal Oil & Ghee Industries (PVT) Ltd v Alami Vegetable Oil Products Sdn Bhd*,[51] the High Court in a case involving *local* awards followed the Court of Appeal's decision in *Alami Vegetable Oil Products Sdn Bhd v Hafeez Iqbal Oil & Ghee Industries (PVT) Ltd*[52] and held as follows:

50 [2020] 1 MLJU 2092.
51 [2018] 3 CLJ 635.
52 [2016] 7 CLJ 19.

> [50] Coming back to the issue of contravention of public policy, *the law requires the defendant to adduce proof that the award is in conflict with the public policy of Malaysia*. …
>
> [51] The defendant here did not make any application under *s. 37(1)(a)(i) to (vi) or under (b)(ii) of the Act*.
>
> [52] This court agrees … the defendant should have moved the court under *s. 37 of the Act* to set aside the award which they failed to do.
>
> [53] *The failure in applying to set aside the award under* ***s. 37 the Act*** on the same grounds now attempted to be raised under ***s. 39 the Act***, *leads to the inescapable conclusion that the issues raised by the defendant in this application lacks bona fide* intent and obviously an afterthought.

[78] In some peculiar factual situations including a situation where there has been prolonged failure to invoke an "active remedy" challenge under section 37 and the documentary evidence before the court does not clearly establish the factual ground for "passive remedy" defence under section 39 of the MAA 2005, the court is justified in holding that the prolonged failure to invoke an "active remedy" challenge under section 37 is a material factor which tips the balance of probabilities to the eventual conclusion that the defendant's "passive remedy" defence lacks *bona fides* and is an afterthought. Nevertheless, while the learned judge may be justified on the particular facts of *Hafeez Iqbal Oil & Ghee Industries (PVT) Ltd v Alami Vegetable Oil Products Sdn Bhd* in making a factual finding or inference in paragraph [53] of the judgment in that case, the said paragraph should not be interpreted or understood out of its factual context as introducing a statement of principle of general application that the absence of an application to set aside (i.e. invoking of an attack by way of "active remedy" challenge under section 37) would *ipso facto* lead to a conclusion of afterthought and lack of *bona fides* in all such cases irrespective of the factual scenarios of the cases. Such an interpretation or understanding would be contrary to the fundamental features of the law and practice of arbitration embodied in our MAA 2005 (including the co-existence of "active remedies" and "passive remedies", also known as the "choice of remedies" policy, in sections 37 to 39 of the MAA 2005) and arguably out of alignment with the law of arbitration applied in other Model Law countries. An interpretation of the statutory provisions which goes to one extreme of accepting the full prominence of the "choice of remedies" policy

in sections 37 to 39 of the MAA 2005 to the extent of stultifying the express provisions in section 7 (waiver) and section 18 (jurisdictional challenge), and an interpretation which goes to the other extreme of stultifying the express provisions in sections 37 to 39 of the MAA 2005 (which to some extent has embodied the "choice of remedies" policy) in the absence of clear and express provisions in the MAA 2005 to such extreme effect, would both be equally unjustifiable in light of the settled principles of statutory interpretation and the fundamental features of the law and practice of arbitration under the Model Law (read with the New York Convention) which have been embodied into the MAA 2005. In light of the Federal Court's decision in *Masenang Sdn Bhd v Sabanilam Enterprise Sdn Bhd*[53] that the MAA 2005 is a complete and comprehensive code on arbitration law, it is doubtful whether the Malaysian courts can interpret the absence of resorting to an active remedy of applying to set aside an arbitral award as having created a waiver, bar or estoppel against the aggrieved party from resorting to the passive remedy of opposing the recognition and enforcement of the arbitral award – an adverse and drastic consequence which has not been expressly or impliedly stipulated in the MAA 2005.

[79] In a factual situation where a defendant neglects to provide any or adequate proof of the public policy which he contends as having been contravened and the judge is not aware of the existence of any such alleged public policy, it is justifiable for the judge to hold that in the absence of the proof of public policy, the defendant's contention should be rejected and there should be no refusal of the recognition and enforcement of the award in such case. However, this is not tantamount to saying that the defendant's provision of proof of the public policy is an absolute necessity before the judge can exercise his/her discretion to refuse to allow the recognition and enforcement of award in whatever circumstances or factual scenarios. Consistent with the principle accepted by the UNCITRAL Secretariat and the conclusion derived from the interpretation of the statutory provisions in the context and in light of the appellate court's judgments on judicial notice of public policy and the Model Law read with the New York Convention, a judge who knows about the existence of a public policy which has been contravened by the award is empowered to exercise his/her discretion to refuse the recognition and enforcement of the

53 [2021] 9 CLJ 1 at [138].

award. In the premises, the statement in paragraph [50] of the High Court's judgment in *Hafeez Iqbal Oil & Ghee Industries (PVT) Ltd v Alami Vegetable Oil Products Sdn Bhd* regarding the proof of public policy should not be interpreted as laying down an inflexible principle of general application to all factual scenarios even if the judge is aware of the contravention of the existence of the public policy despite the defendant's neglect to provide proof of the same. Of course, a defendant who elects not to provide any proof of the existence of the public policy he relies upon will also take the risk that if the court does not take judicial notice of the existence of the asserted public policy, the defendant's contention in such a case will fail. Undoubtedly, it would be desirable for our appellate court to promptly clarify and decide this question on proof of public policy after a thorough examination of the fundamental features and treatise on this topic in light of the settled principles of statutory interpretation so that clear and specific reasons can be stated as to why our law on proof of public policy is similar or dissimilar to the common understanding of the international arbitration community.

[80] The fundamental feature of arbitration law and practice, which has allowed a respondent to either resort to an active remedy of applying to set aside an arbitral award or adopt a passive remedy of waiting until the enforcement stage to oppose the enforcement, was already in existence for many decades before 1995 both internationally and in Malaysia. Under the old Arbitration Act 1952, there was no express statutory provision for opposing the enforcement application and there was no specific ground expressly recognised by the statute for opposing the enforcement application. Yet, the courts (including the Federal Court in *State Government of Sarawak v Chin Hwa Engineering Development*) have recognised the respondent's right to adopt the passive remedy of opposing the enforcement application on certain exceptional grounds. Under the old Arbitration Act 1952, the available statutory grounds for challenging the arbitral award and for applying to set aside the arbitral award were more extensive as they permitted the case stated procedure which related to the substantive merits of the arbitral award. The common law principles which permitted the setting aside of awards on procedural grounds under the old Arbitration Act 1952 were rather similar to the express statutory grounds for setting aside awards under section 37 of the MAA 2005. Yet, the Federal Court in *State Government of Sarawak v Chin Hwa Engineering Development* accepted the principle that failure or neglect

on the part of the respondent to take the active remedy of setting aside did not deny him the right to take the passive remedy of opposing the recognition and enforcement of the award.

[81] When our Legislature decided to adopt the Model Law as the model for enacting our new MAA 2005, our Legislature intended to bring our arbitration law to be more in line with the international commercial arbitration law and practice.[54] As the co-existence of the active remedy (application to set aside awards) and passive remedy (waiting until enforcement application to oppose the enforcement of awards) has been recognised internationally as well as in Malaysia at the time of the enactment of the MAA 2005 as a fundamental feature in arbitration law and practice, it is highly improbable that our Legislature, in adopting the Model Law as the model for our MAA 2005, could have intended to make a substantial departure from such fundamental feature of international arbitration law and practice in the absence of clear and express words to that effect.

[82] Jurisprudentially, by reason of the foregoing paragraphs, there seems to be stronger grounds under the express provisions of section 39 (express "passive remedy" defences in opposition to the recognition and enforcement of an award) than under the old Arbitration Act 1952 (absence of statutory provision on "passive remedy" defences) to accept the parallel remedies or co-existence of the "active remedy" and "passive remedy" except where otherwise expressly provided to the contrary in the MAA 2005.

[83] *A fortiori*, in respect of a foreign award where the Malaysian courts have no jurisdiction to entertain any application to set aside, any omission or neglect on the part of the respondent to apply to set aside the foreign award cannot be a ground to deny him of the right to oppose the enforcement of a foreign award under section 39 – the only statutory right of recourse which the respondent has against a foreign award in the Malaysian courts. In jurisprudence and common sense it is rather inconceivable how a defendant's omission to do something (i.e. applying to a Malaysian court to set aside a foreign award), which the statute disallows him from doing, can be held to deny him the only right which the same statute expressly confers upon him (i.e. opposing the enforcement of foreign award in a Malaysian court).

54 See *The Government of India v Cairns Energy India* [2014] 9 MLJ 149.

[84] Thus, it appears that an interpretation of the statutory provisions which postulated the necessity or mandatory requirement of a separate application by way of originating summons or formal written notice of application for raising a "passive remedy" defence under section 39 of the MAA 2005 would involve an interpretation of some words in the statute in isolation and out of the legislative context of the MAA 2005 and also contradictory to the fundamental features of arbitration law and practice as summarised in paragraphs [7]-[13] and [62]-[69] above. Moreover, that interpretation would probably be inconsistent with the well-recognised principles of statutory interpretation as summarised in paragraphs [26] and [27] above.

[85] Objectively reading in detail the three Federal Court judgments of the *Siemens Industry Software GMBH & Co KG (Germany)* case, *CTI Group Inc v International Bulk Carriers SPA* and *Lombard Commodities Ltd v Alami Vegetable Oil Products*, it can be argued that there is no *ratio decidendi* in any of those cases which has clearly and finally decided on the issue in this procedural point on the mode of raising the "passive remedy" defence under section 39 as to constitute a binding precedent upon the Court of Appeal and the High Court. See paragraphs [71] and [72] above regarding the analysis of the *Siemens Industry Software GMBH & Co KG (Germany)* case. In the second Federal Court decision in *CTI Group Inc v International Bulk Carriers SPA*,[55] the Federal Court was dealing with the *ex parte* procedure for the recognition of arbitral awards and the *inter partes* procedure for setting aside such *ex parte* court order of recognition under Order 69 of the ROC 2012. In the *CTI Group* case by the Federal Court, the *ratio decidendi* of the Federal Court's decision was not on the question on the procedural point of the mode of raising a "passive remedy" defence under section 39 of the MAA 2005. In the third Federal Court case of *Lombard Commodities Ltd v Alami Vegetable Oil Products*,[56] the sole question posed before the Federal Court was "Does the failure of the Yang di-Pertuan Agong to issue a *Gazette* Notification pursuant to *s. 2(2) of the 1958 New York Convention on Reciprocal Enforcement of Foreign Awards ("CREFA")* declaring the UK to be a party to the NYC render a Convention award made in the United Kingdom ("UK") unenforceable in Malaysia, notwithstanding the fact that all the conditions ordinarily

55 [2017] 9 CLJ 499.
56 [2010] 2 MLJ 23; [2010] 1 CLJ 137.

required for the enforcement of the said award under *CREFA* have been satisfied?", to which the Federal Court answered in the negative and thereafter proceeded to grant recognition of the foreign arbitral award in that case. As such, the *ratio decidendi* of the Federal Court's decision in the *Lombard Commodities* case was not on the question posed in the procedural point under discussion here.

[86] Needless to say, it is desirable that our Federal Court can pronounce and clarify as soon as possible in a written judgment the legal positions regarding these problematic aspects of the law and practice of arbitration which can bring the reported judgments in Malaysia in line with the fundamental features of arbitration read in light of the express statutory provisions in the MAA 2005 according to the settled principles of statutory interpretation in Malaysia, without arriving at a result which contravenes the treaty obligations of Malaysia under the New York Convention.

Probable source of difficulty and confusion

[87] The use of the words "request" in section 39(1) coupled with "application" in section 39(2) in the MAA 2005, which Act combines the local awards and foreign awards in the substantive sections without clearly segregating them except by general provisions in section 3(2) and (3) at the front part of the Act which are rather distanced from the substantive sections, have proved to be a source of confusion and much difficulty in interpretation unless one constantly bears in mind the fundamental features of arbitration law and practice as summarised in paragraphs [3]-[19] above.

[88] As noted above, the difficulty and controversy surrounding the interpretation of section 39(2) of the MAA 2005 arises from the fact that the words "a court referred to in paragraph (1)(a)(v) of this article" in article 36(2) of the Model Law have been changed to the words "the High Court on the grounds referred to in subparagraph (1)(a)(vii)". In the context of article 36(2) of the Model Law, "a court referred to in paragraph (1)(a)(v) of this article" means "a court of the country in which, or under the law of which, that award was made" in sub-article 36(1)(a)(v) of the Model Law, i.e. the *seat court*. When such words were changed from the seat court (i.e. "court of the country in which, or under the law of which, that award was made") to the words "the High Court" in Malaysia, a literal interpretation of section 39(2)

would lead to the following difficulties and controversies. In connection with *foreign* awards (i.e. awards where the seat of arbitration is *outside* Malaysia), it seemingly conveys a proposition that it purports to confer upon our High Court a power to set aside the foreign awards. Such proposition is contrary to a fundamental feature of the law and practice of international arbitration as embodied in the Model Law and is also in contravention of Malaysia's treaty obligations under article V(1)(e) read with Article VI of the New York Convention which provide as follows: "V(1)(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made …". The purpose of section 39(2) is to empower our High Court as the enforcement court to adjourn the enforcement proceeding and grant interim security pending the decision of the *seat court outside Malaysia* on an application to set aside the *foreign* award. In the premises, section 39(2) cannot be interpreted to confer upon our High Court a purported jurisdiction to hear and decide on an application to set aside a *foreign* award (i.e. award where the seat of arbitration is outside Malaysia: see paragraphs [3]-[6] above).

[89] It appears that there is probably a drafting oversight in the enactment of section 39(2) of the MAA 2005. While it may be arguably permissible for the Malaysian courts to give a purposive interpretation in light of the fundamental features embodied in our MAA 2005 modelled on the Model Law and the New York Convention as a way to overcome the problem, a preferable solution to this problem is to amend section 39(2) to read as such: "39(2) If an application for setting aside or suspension of an award has been made to the *court* referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security." In such amended context, "the *court* referred to in subparagraph (1) (a)(vii)" means the "court of the country in which, or under the law of which, that award was made" (i.e. the seat court), and this would bring our new section 39(2) to be identical to the corresponding provision in both the Model Law and the New York Convention, and also remove the difficulties and controversies currently faced by the Malaysian courts in the interpretation of section 39(2).

4. Closing observations

[90] A decision of a domestic court in an international arbitration matter at a Model Law country would be considered or perceived by the international arbitration community as having implications, including persuasive force, in other Model Law countries and a potential or likely impact upon their other international commercial arbitration matters. As such, there are occasions when a domestic court's judgment on a point of law or procedure of international arbitration will be open to scrutiny, dissection, diagnosis and/or criticism by international jurists and members of the international arbitration community. The Singapore Court of Appeal's judgment in *Astro v Lippo*, though regarded by some as a very well-researched and well-reasoned judgment, has also been criticised or adversely commented by others in the international arbitration community. It is but a classic example of the attention which the international arbitration community will accord to a domestic court's judgment on an international arbitration matter that they consider or perceive as having a likely or potential impact on the ongoing or future cases in international commercial arbitrations.

[91] In comparison, if a domestic court delivers a judgment on a domestic arbitration matter which affects only the local arbitration community, it is unlikely to draw as much attention or attract written criticisms from the local arbitration community because the local arbitration community is more constrained *vis-à-vis* the domestic court's judgment, and it will be very unlikely to attract any feedback or criticism from the international community because of the absence of a likely impact upon them or their clients in international commercial arbitrations.

[92] What renders it more difficult is that in Malaysia, the combination of the applicability of the MAA 2005 to both domestic arbitrations and international arbitrations has resulted in more complications in addition to the problematic aspects discussed above. One further complication is that the Malaysian courts may be lulled into thinking that their judgments on sections 37, 38 and 39 of the MAA 2005 in domestic arbitrations are merely judgments on domestic arbitration matters which are free from the risks and perils stated in paragraph [90] above. However, this temporary reprieve will expire when another Malaysian court deciding in an international arbitration matter, by

virtue of the doctrine of *stare decisis*, applies the principles laid down in the previous judgment in a domestic arbitration matter. The second-mentioned court judgment in the international arbitration matter, which followed the first-mentioned court judgment decided under the same Act of combined applicability, will be subject to scrutiny, dissection, diagnosis and/or criticism by international jurists and members of the international arbitration community as has happened to *Astro v Lippo*, albeit perhaps to a different level or extent, depending on the magnitude of the case and the importance of the issues to the international arbitration community.

[93] In light of the above, it is conceivable that Malaysian courts should always approach with much care and circumspection any case involving the law or procedure relating to any part of sections 37, 38 and 39 of the MAA 2005. These sections 37, 38 and 39 of the MAA 2005 are very closely related to each other and are intertwined to some considerable extent, so much so that a decision on one part of one of these three sections will or is likely to have an effect on the other two sections. With sections 38 and 39 of the MAA 2005 being also applicable to foreign awards, the attention of the international arbitration community who come or are likely to come to Malaysia either for arbitration proceedings or for the enforcement of an award would be upon the Malaysian court judgments.

[94] In this article, the author has referred to several examples where certain parts of the MAA 2005 may lead to probable argument of inconsistency with the New York Convention. Bearing in mind that the New York Convention is in the nature of treaty obligations whereas the Model Law is not of an obligatory nature, it is probably better to amend the relevant parts of the MAA 2005 to align with the corresponding provisions in the New York Convention where there exists a variance between the New York Convention and the Model Law. Despite the high aspirations of the UNCITRAL in formulating the Model Law, there is *no complete uniformity* in the adoption and acceptance of the Model Law in various countries, though there is *substantial uniformity* between them. The current situation in the Model Law countries is that even if Malaysia were to adopt the Model Law wholesale without any alteration whatsoever, there is still no complete uniformity of such law in the Model Law countries. Since amendments to align with the Model Law in its entirety will not bring about any complete uniformity in the adoption and acceptance of the Model Law in the Model Law countries

and bearing in mind that the New York Convention is in the nature of treaty obligations, it will be more important and meaningful for Malaysia to amend the MAA 2005 to align with all the corresponding provisions of the New York Convention in compliance with her treaty obligations. Such exercise ought to be done in consultation with the arbitration community and after getting feedback from the arbitration community on the proposed wording of the intended amendments. On matters pertaining to arbitration matters, it is often difficult, if not impossible, for a small group of persons to see or anticipate the likely implications and ramifications of the choice of words to be used in a statute which applies to international arbitrations involving complex aspects of the conflict of laws. The problematic aspects highlighted in this article are but only some examples as the author has not done a comprehensive analysis of the problematic aspects of the law and practice of arbitration.

Synthesising Synthetics: Lessons Learnt from *Collins & Aikman**

by

*Justice Kannan Ramesh***

[1] This article discusses two issues that are important in the modern age of cross-border insolvency, but for one reason or another have not been getting their fair share of air time, certainly in Asia. The first pertains to the concept of synthetic secondary proceedings; the second concerns the legal treatment of business groups upon insolvency – specifically, whether it should be an unshakeable principle that companies within an integrated business group should be treated as separate legal entities in a group insolvency. These are important issues with far-reaching implications, and my purpose is to make the case for the wider acceptance and use of synthetic proceedings, and to stir debate and encourage discourse on the treatment of insolvent business groups in cross-border insolvencies. We live in a period of unprecedented change marked by disruption and globalisation. Businesses are evolving at a rapid pace to meet the immense challenges of this new paradigm, and so must the law, as it exists to serve the needs of society. I therefore believe that the time is ripe for an in-depth consideration, or in the case of the synthetic secondary proceeding, a reconsideration, of these issues.

I. Synthetic secondary proceedings

[2] The first issue I will deal with is the concept of the synthetic secondary proceeding.[1] This concept was first introduced some 12 years

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* This article is adapted from the Keynote Speech given at the 2nd Annual Global Restructuring Review Live in New York in 2018 where the writer advocated the use of synthetic secondary proceedings as well as raised the possibility of a reversal of the concept. The writer also discussed whether the doctrine of separate legal personality should be re-examined when restructuring multinational corporate groups. Bold solutions are needed in this present and post-COVID world. See https://globalrestructuringreview.com/grr-live-new-york-thought-provokingsolutions-global-group-insolvencies.

** Judge, Supreme Court of Singapore.

1 See generally, John AE Pottow, "A New Role for Secondary Proceedings in International Bankruptcies" (2011) 46(3) *Texas International Law Journal* 579.

ago in the English case of *Collins & Aikman*,[2] and to me it holds tremendous promise in revolutionising the way we manage cross-border insolvencies.

[3] Any discussion of the synthetic secondary proceeding must start with a brief journey through *Collins & Aikman.* The Collins & Aikman Group was a leading supplier of automotive components that was headquartered in Michigan, United States of America ("US"). In its prime, the group had in addition to its operations in the US, 24 companies spread over 10 countries in Europe, including six in England and one in Spain. Unfortunately, the group fell into dire financial straits and as a result, administration proceedings were commenced in England in relation to the 24 European companies. Having assessed the evidence on the organisational structure of the group, the English court concluded that England was the centre of main interests ("COMI") for these companies as their main administrative and sales functions were situated there. The English administration proceedings were therefore the main proceedings. However, as the companies had establishments in various other European jurisdictions, there was the inevitable risk of non-main or secondary proceedings being commenced by local creditors.

[4] The companies formed a closely integrated group organised on a Europe-wide basis rather than along national lines. Recognising this, the administrators developed a coordinated strategy for the continuation of the group's businesses on a worldwide basis, with a view towards maximising returns to creditors. However, there was one wrinkle in their plans. Spanish insolvency law contained equitable subordination provisions which would accord the Spanish trade creditors more favourable treatment than they would receive under English insolvency law, and these creditors therefore threatened to open secondary proceedings in Spain, the very risk I mentioned earlier.[3] The administrators believed that this would cause considerable delay and expense, and disrupt the effective realisation of the group's assets. Faced with this conundrum, the administrators and their advisers

2 *Re Collins & Aikman Europe SA and other companies* [2006] EWHC 1343 (Ch) ("*Collins & Aikman*").

3 Gabriel Moss, "Group Insolvency – Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism" (2007) 32 *Brook J Int'l L* 1005 at 1018.

thought out of the box, and devised an elegant and creative solution. The administrators assured all the foreign trade creditors that their claims would be dealt with in accordance with the relevant foreign insolvency law of their debts, thus safeguarding any favourable rights they might be able to assert but *without* the need for any *actual* secondary proceedings to be opened. This proposal received broad support from most of the creditors, who accordingly refrained from opening secondary proceedings in other jurisdictions. As a result, the administrators were able to deal with the companies' assets on a consolidated basis, and in so doing, realised US$45 million more from the liquidation of the companies' assets than was initially estimated.[4]

[5] Of course, the story in *Collins & Aikman* did not end there. After completion of the asset realisation exercise, the administrators sought provisional approval from the English High Court to distribute the assets in accordance with the assurances they had given the foreign creditors. In a striking illustration of the importance of judicial thought leadership, Justice Lindsay took the view that the court not only had the jurisdiction to, but also ought to, direct the administrators to honour their assurances to apply local insolvency laws to the claims of those creditors in the English administration proceedings. In so ruling, Justice Lindsay endorsed the view of Justice Norris in the earlier case of *Re MG Rover Belux SA/NV (in administration)*[5] that English law was sufficiently flexible to allow the application of foreign law to aspects of an English administration if warranted by the particular circumstances of the case.

[6] It is important to pause here to fully appreciate the significance of *Collins & Aikman.* This was not just about *not* opening secondary proceedings. It was about far more. When the English court sanctioned the arrangement, it was in effect endorsing the parties' autonomy to determine the jurisdiction that the insolvency proceedings ought to be carried out in. For example, as a result of the Spanish trade creditors accepting the administrators' assurance, there was a jurisdictional shift in the resolution of their priorities from Spain to England. The English courts assumed jurisdiction over an issue which would have otherwise fallen to be determined by the Spanish courts. Obviously, this was done to facilitate an efficient restructuring process and an effective

4 *Collins & Aikman*, supra, n 2 at [8].
5 [2006] EWHC 1296 (Ch).

outcome. However, it is perhaps more pertinent that the administrators and the Spanish trade creditors made a deliberate choice to relocate the resolution of the latter's priorities to the main proceedings in England. It is an excellent illustration of party autonomy in forum selection, which is an expression I much prefer to "forum shopping", which carries, unfairly, pejorative connotations. The parties were motivated by the desire to achieve an effective restructuring outcome when they decided to centralise in the administration proceeding in England the resolution of key issues, and I would argue that they were legitimately entitled to make this choice. Indeed, this is no more than what parties embroiled in cross-border disputes do on a regular basis, when they elect the *fora* or arbitral seats for the resolution of their commercial disputes.

[7] Why is the synthetic secondary proceeding important? In my view, it achieves two important objectives. First, it allows all primary issues to be centralised and resolved in the main proceedings, thereby greatly reducing the unsatisfactory prospect of inconsistent outcomes. Centralising control over and determination of the key issues facilitates the development of a cohesive restructuring plan as the court in the main proceedings ("the main court") is able to holistically assess the entire restructuring process, and make decisions in a coordinated, focused and cohesive manner. Indeed, in my view, this was the unarticulated consideration behind the strategy in *Collins & Aikman.* Taking this course increases predictability for all parties, and promotes the effective realisation of assets. The benefits are plain to see. The additional US$45 million that was realised in *Collins & Aikman* represented a staggering one-third of the total pool of assets available for distribution. The gains were so substantial that even creditors who stood to receive *less* under their local laws than they would have if English law was applied uniformly to the distribution of all assets, also supported the proposal, because such loss was "more than off-set" by the additional gains from the enlarged pool.[6] Second, it ensures that the interests and expectations[7] of local creditors are safeguarded by the application of local insolvency laws. The tension between local creditors' interests and the overall interests of the restructuring is therefore balanced and efficiently managed.

6 *Collins & Aikman*, supra, n 2 at [49].

7 See, e.g. *In re HIH Casualty and General Insurance* [2008] 1 WLR 852 at [33].

[8] There must be a familiar ring to the two objectives that I just described. I have in fact described the cornerstone of modified universalism – balancing the tension between, on the one hand, universalism and its centrifugal exertion towards centralisation, and on the other hand, territorialism and its centripetal push away from the centre. As Lord Hoffmann noted in *In re HIH Casualty and General Insurance* ("*HIH*"),[8] modified universalism implicitly recognises the interests of creditors in secondary proceedings by encouraging the ancillary court of the secondary proceeding to cooperate with the main court in "so far as is consistent with justice and [local] public policy".[9] It seems to me that the synthetic secondary proceeding does exactly that, representing a finely-balanced compromise between the universalist vision of a single forum applying *erga omnes* one substantive insolvency law to the debtor's assets and liabilities on a worldwide basis, and the territorialist vision of the primacy of local interests.

[9] So the arguments in favour of the synthetic secondary proceeding are clear and seemingly obvious. But admittedly, there are obstacles. Let me mention three. First, courts may be unwilling to relinquish control of secondary proceedings if, for example, their legislative regimes actively protect creditor interests through direct judicial supervision over the insolvency process. Professor John Pottow gives the example of systems which require judicial assent to lay-offs.[10] In such cases, the courts may be disinclined, or even statutorily enjoined, from relinquishing jurisdiction to the main court. Second, the main court itself may lack jurisdiction to apply foreign law or, even if it has such jurisdiction, may be reluctant to exercise it. This may be particularly true of civilian jurisdictions in which such powers must be expressly conferred by statute.[11]

[10] Third, synthetic secondary proceedings, like *actual* secondary proceedings, are vulnerable to the criticism of arbitrariness. As Professor Jay Westbrook argues, the fact that certain assets are located in a particular jurisdiction may simply be an "accident of the timing of the insolvency filing and the vagaries of the business",[12] and the

8 [2018] 1 WLR 852.
9 Ibid, at [30].
10 John AE Pottow, supra, n 1 at 587–588.
11 Ibid, at 590.
12 Jay Westbrook, "A Comment on Universal Proceduralism" (2010) 48 *Columbia Journal of Transnational Law* 503 at 510.

presence of an asset within a jurisdiction does not necessarily entail the presence of a legitimate connection to the interests of local creditors. This is acutely demonstrated by assets which are mobile – for example, the proceeds of realisation of assets such as airplanes or ships may be distributed to local creditors simply because the asset happened to be in a particular airport or port at the time of the insolvency filing. Not only would this create unpredictable and sometimes counter-intuitive results, it could also give rise to excessive litigation over the legal location of assets. Professor Westbrook cautions that this could also lead to "forum stashing", where distressed businesses are pressured by creditors to transfer assets to jurisdictions with more favourable priority rules immediately before an insolvency filing.

[11] These are fair observations, but they are arguments against secondary proceedings in general, and not against *synthetic* proceedings in particular. I think it is important to emphasise that a synthetic proceeding is merely a tool to relocate the *forum of adjudication*. Accordingly, unless, in the words of Lord Hoffmann in *HIH*, "justice and [local] public policy" speak against the use of synthetic secondary proceedings on the particular facts of any given case, which I would venture to suggest will be rare, there is really no conceptual objection to allowing parties the autonomy to make this choice. As noted earlier, this is not very different to the way that parties choose the *fora* or seat in which they resolve their disputes. I will explain later how court-to-court communication and cooperation may help to overcome some of the resistance to synthetic secondary proceedings.

[12] That the case for synthetic secondary proceedings is compelling is clear from two recent developments. First, Article 36 of the recast European Union Insolvency Regulation (EU 2015/848) (the "Regulation") enables insolvency practitioners in the main proceedings to give an undertaking to local creditors that they will be treated in the same manner as if secondary proceedings had been opened, provided the undertaking meets a number of conditions, including approval by a qualified majority of local creditors. Article 38(2) of the Regulation also stipulates that where such an undertaking has been given, a court may refuse a request to open secondary proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors. This represents legislative endorsement of the approach in *Collins & Aikman*, and should be applauded as a bold and necessary step forward.

[13] Second, the synthetic secondary proceeding is encapsulated in Article 21 of the UNCITRAL Working Group V's draft legislative provisions on facilitating the cross-border insolvency of multinational group enterprises.[13] It is significant that the draft provision endorses the use of synthetic secondary proceedings in the context of a multinational group of companies. This demonstrates the inherent adaptability and versatility of the synthetic secondary proceeding. If deployed with proper safeguards – the Regulation being a good example – it is a powerful tool in the restructuring toolkit for facilitating the centralisation of key issues in a single forum.

[14] I suggest that cross-court communication and cooperation could facilitate the wider acceptance and use of synthetic secondary proceedings, and introduce a degree of flexibility into the process. For example, where secondary proceedings have already been commenced, several possible permutations can be considered. First, the ancillary court may be willing to stay the secondary proceedings in favour of the main court deciding the issues, on terms that the main court keep the ancillary court apprised of developments. It is important to stress that this is not an all-or-nothing proposition. In complex restructurings, issues that are unique to the secondary proceedings may be carved out either for determination by both courts in a joint hearing, or by the ancillary court solely. Alternatively, the main court may take the lead in managing the issues in the synthetic proceeding with assistance from the ancillary court on particular issues of foreign law. In this regard, I would mention that Annex A of the Judicial Insolvency Network ("JIN") Guidelines establishes guiding principles on how such joint hearings may be conducted.

[15] The discussion thus far has been on the synthetic secondary proceeding. But I ask: is the concept circumscribed by the term "secondary"? I offer for consideration a fascinating twist to the

13 Article 21(1) states: "To facilitate the treatment of claims that could otherwise be brought by creditors in a non-main proceeding in another State, a foreign representative or group representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a non-main proceeding in that other State." Article 21(2) states: "A court in this State may stay or decline to open a non-main proceeding if a foreign representative or group representative from another State in which a main proceeding is pending has made a commitment under paragraph 1."

paradigm. Let us imagine for a moment the possibility of a "reverse" *Collins & Aikman* situation: a synthetic *main* proceeding if you wish. In this paradigm, in appropriate circumstances and with sufficient safeguards, the ancillary court would, subject to the consent of the creditors in the main proceedings or the main court, take on the responsibility of resolving key issues in the main proceedings. This might perhaps appear somewhat counter-intuitive at first, controversial even. Some may even argue that it is doctrinally objectionable as a concept. But is it really so? I am not convinced that it is. If the synthetic secondary proceeding is doctrinally acceptable, is there any reason why a synthetic main proceeding ought to be any different? There is much commercial sense behind enlarging the concept of the synthetic proceeding to include main proceedings.

[16] Let me sketch the paradigm with reference to multinational group enterprises. Such enterprises today are organised in a disparate manner across multiple jurisdictions for tax, regulatory, fiscal or other reasons. This means that there is a reasonable prospect that the COMIs of members of the group enterprise will not coincide. In fact, that is the premise that undergirds the draft Model Law on multinational group enterprises. Quite often, the operating entities of the group enterprise would have their principal place of business and possibly their COMI in emerging markets where the primary growth opportunities are. At the same time, the capital or debt for the investments in these entities might have been raised by holding entities which have their COMI in jurisdictions with a robust and thriving financial, legal and restructuring ecosystem. In the event of a group insolvency, main proceedings are likely to be commenced in the COMI of the holding entity to take advantage of the very ecosystem that I have just described, and to develop the group enterprise plan. The group enterprise plan, however, is about both the holding entity and the operating entities. The latter would be integral to the plan as much of the economic value of the group resides there. If each entity in the group commences its own main proceedings, how do we then ensure that an effective group restructuring solution is achieved? It is here that the synthetic main proceeding, if properly calibrated, can play a vital role. It will help to centralise, in the main proceedings of the holding entity, the resolution of key issues in the insolvency of the operating entities, thereby facilitating the development of a group restructuring plan. This would be much like *Collins & Aikman* in the reverse. The main court of the *holding* entity would be in the

position of an ancillary court in relation to the *operating* entities, and would resolve issues concerning the operating entities. Of course a considerable level of trust and cooperation, and comity between the relevant courts, as well as a preparedness to recognise orders that are made by the main court of the holding entity, would be required for this to work. This can be achieved if two ingredients are present. First, if there is court-to-court communication and cooperation through carefully drafted protocols endorsed by the relevant courts. Second, with appropriate creditor support which is in fact the predicate of synthetic proceedings. I should add that institutions such as the JIN can play a vital role in building a broad consensus amongst judges and courts for such an approach. To my knowledge, synthetic main proceedings have not been attempted, but as *Collins & Aikman* so vividly demonstrates, new approaches should never be discounted. I would suggest that the idea deserves further consideration.

[17] This brings me to my last point about synthetic secondary proceedings. Synthetic secondary proceedings can be an alternative to actual secondary proceedings in some cases, but they cannot completely replace them, at least given the current state of affairs. Sometimes they are necessary, particularly where the laws of the ancillary jurisdiction require direct oversight over the insolvency process. It follows that greater harmonisation of insolvency regimes and priority rules would greatly reduce the concerns created by secondary proceedings in the first place. Such efforts have already begun with the Asian Principles of Business Restructuring project jointly undertaken by the Asian Business Law Institute and the International Insolvency Institute to formulate restructuring principles for Asia distilled from an assessment of the regimes in ASEAN and key Asian economies. However, until such principles are embraced widely, the synthetic proceeding, when allied with effective court-to-court communication and cooperation, offers an innovative and perhaps even indispensable solution for regions with vastly diverse legal traditions such as Asia to deal effectively with cross-border insolvencies. With Asia attracting vast investments – some US$26 trillion in the next 15 years – such a solution needs to be given serious consideration.

II. Legal separate personality in group restructurings

[18] Moving now to the second part of my article, I would like to focus on the issue of the treatment and legal status of entities within a

business group in an insolvency. *Salomon v Salomon*,[14] and the doctrine of separate legal personality which it articulates, is probably the first case that any student of the common law would encounter in the study of company law, and its importance cannot be understated. Multinational corporations rely on the separate legal personality of their constituent entities to allocate risk, and they deliberately structure their businesses in such a way as to insulate each entity from the debts and liabilities of the others. This allows corporations to control their risks even as they expand. An example would be the shipping industry, where one-ship companies proliferate. But when a business group enters insolvency, should this *status quo* remain? To what extent is it permissible to disregard the traditionally inviolable separate legal personality of each entity within the group in order to attain an effective restructuring solution for the group as a whole?

[19] The idea of treating business groups as a single entity upon insolvency is bound to create significant discomfort for practitioners accustomed to the doctrine of separate legal personality. The question is whether such discomfort rests on grounds of principle and policy, or whether it is more attributable to legal conservatism. By their very nature, insolvency proceedings are communitarian and as a result contemplate the recalibration of legal rights and liabilities in the light of the debtor's inability to meet all its obligations. The overarching philosophy is that the greater good must prevail over minority interests. Thus, contractual transactions may be avoided for unfair preference or undervalue; payments may be made to some categories of creditors in priority to others; secured rights may be subjugated to the interests of new creditors to encourage rescue financing; and cram down provisions may allow the court to approve an arrangement even if it lacks the support of the requisite quorum of creditors.[15] In jurisdictions such as Australia and the United States and soon Singapore, the scope of contractual *ipso facto* clauses is also considerably curtailed by legislative provisions. If an individual creditor's contractual entitlements and the doctrine of *pacta sunt servanda* may be subordinated to the imperative of restructuring, should the doctrine of separate legal personality be

14 *Salomon v Salomon & Co Ltd* [1897] AC 22.

15 See, e.g. Singapore Companies Act (Cap 50, 2006 Rev Ed), ss 211E and 211H. See also Sandeep Gopalan and Michael Guihot, "Cross-Border Insolvency Law and Multinational Enterprise Groups: Judicial Innovation as an International Solution" (2016) 48(3) *The George Washington International Law Review* 549 at 551.

treated differently and as a result serve as a roadblock? Treating each entity strictly as a separate legal personality may prevent the attainment of an effective restructuring solution, be it the rehabilitation of the business group or the maximisation of net returns to creditors. This calls for a careful inquiry into the rationale underpinning the doctrine of separate legal personality and its interaction with the competing objectives that arise in the insolvency context.

[20] One common argument against treating business groups as one single entity upon insolvency is the purported expectations of creditors who extend credit to a single entity, and not to the business group as a whole. On this argument, creditors often lend to one entity within a group without assessing the creditworthiness of other entities within the same group, on the understanding that the assets of the different entities are partitioned.[16] As the argument goes, disregarding the separate legal personalities of the individual entities in an insolvency would therefore be unfair, and undermines commercial certainty.

[21] Yet, we should not accept this critique unthinkingly. Let me suggest three counterarguments. First, is the expectation justified by commercial reality? In the context of a highly integrated business group where the assets of separate entities are often pooled and treated interchangeably when the business was a going concern, creditors arguably extend credit on the implicit understanding that they were lending to the entire business group rather than one particular entity. The prevalence of cross-collateralisation of debt, cross-guarantees and cross-default provisions speaks to this. As another example, in a scheme of arrangement, quite often the discharge extends to contingent debtors, such as guarantors, which are frequently related entities. Clearly the credit assessment at the point of lending was not just of the debtor but also of the related guarantor. Under such circumstances, there might be an impetus to pool the assets of the group for distribution in an insolvency. Secondly, the expectations argument is, in a sense, self-reinforcing. The creditors' expectation that their investment will be undisturbed in a group insolvency is to some extent a mere reflection of the orthodoxy of separate legal personality. That should not preclude us from reconsidering the

16 See generally, Henry Hansmann and Reinier Kraakman, "The Essential Role of Organizational Law" (2000) 110 *Yale LJ* 387.

normative justifications for that orthodoxy. In fact, if incursions into the separate legal personality doctrine become more common in group insolvencies, creditors' expectations for their investment to be ring-fenced upon insolvency would be less justified. Thirdly, it is clear that creditors' expectations should not be a decisive factor in any case, and should in the appropriate case give way to considerations of policy. This is precisely why creditors' contractual rights are subordinated in an insolvency. One example where policy penetrates the separate legal personality doctrine is in the case of the group structure being used for dishonest or fraudulent purposes. This would certainly justify treating the group of companies as a single entity notwithstanding the expectations of some creditors that they would be treated as legally separate. While I acknowledge that this might be an extreme example, it illustrates that the lifting of the veil is undergirded, at least in part, by a policy imperative to prevent abuse. Similarly, the question must be asked whether there are other compelling policy considerations that warrant embracing consolidation in an insolvency.

[22] In this regard, the practice of disregarding separate legal personalities upon insolvency is not without precedent. One example is the doctrine of substantive consolidation, which calls for the treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate.[17] I accept that the contours of the doctrine are uncertain even in jurisdictions where it has been expressly recognised,[18] but this may improve over time as the doctrine matures.

[23] In the US, where the doctrine of substantive consolidation is traditionally regarded as one arising out of equity, the courts have in rare cases allowed the pooling of assets upon insolvency in primarily two alternative scenarios: first, where the business group as a going concern disregarded the separate legal personalities of its constituent entities and led creditors to deal with the group as a single economic unit; and second, where the assets and liabilities of the business group upon insolvency are so entangled that attempts

17 United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency* (July 2012), Glossary, para 4(e).

18 See, e.g. *Re Nortel Networks Corp* [2015] OJ No 2440 at [213] and [215]–[216].

at separation would be prohibitively costly.[19] The second of these two categories has been recognised in Part Three of the UNCITRAL Legislative Guide on Insolvency Law, which proposes two grounds for substantive consolidation: first, where the court is satisfied that the assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay, and second, where the court is satisfied that the enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose.[20]

[24] It is interesting that many jurisdictions have in recent years taken steps to adapt their insolvency laws to accommodate business groups. In Australia, the Corporations Act 2001 was amended in 2007 to allow for pooling of assets of a group of companies upon liquidation, both voluntarily and by court order.[21] Last year, Singapore introduced amendments to its Companies Act which provide for, *inter alia*, enhanced moratorium relief for companies seeking to restructure their businesses. Of particular note is the newly introduced section 211C which permits subsidiaries and holding companies of the entity being restructured to apply for moratorium relief if those related entities are necessary and integral to the restructuring plan. Such relief may have *in personam* worldwide effect, i.e. it can apply to any act of any person within the jurisdiction of the court, whether the act takes place in Singapore or elsewhere.[22] For Singapore, this provision is an important first step in taking a consolidated approach to group enterprise restructuring.

[25] To be sure, I should not be understood as advocating the sacrifice of the doctrine of separate legal personality at the altar of group restructuring. This may not always lead to increased recovery for each creditor; it could simply increase the amount distributed to

19 See, e.g. *In re Owens Corning* 419 F 3d 195 208 ((3rd Cir), 2005); *In re Augie/Restivo Co Ltd* 860 F 2d 515 ((2nd Cir), 1988); *In re Republic Airways Holdings Inc* 565 BR 710 (Bankr SDNY, 2017).

20 Supra, n 17, Section II (Addressing the insolvency of enterprise groups: domestic issues), para 113.

21 Australian Corporations Act 2001 (Cth), ss 571 and 579E.

22 Singapore Companies Act (Cap 50, 2006 Rev Ed), s 211C(1), 211C(2) and 211C(4)(*b*).

some at the expense of others.[23] Given the tremendous disruptive potential of a doctrine such as substantive consolidation, its use must be carefully circumscribed and calibrated with adequate safeguards.[24] A balanced solution can only be arrived at following detailed study, and comprehensive discourse and dialogue. The purpose of my raising the issue is to call for an examination as to whether that process should be initiated. That is after all one of the privileges of a keynote address. The complexity of business structures in global commerce today compels us to find effective solutions to address the challenges in preserving enterprise value in the event of an insolvency. These are the commercial realities we confront and we are compelled to find compelling answers to them.

III. Conclusion

[26] I hope that a theme that emerges is the need for the law and its practitioners to find innovative solutions to meet the demands of the new global economic paradigm. There is a need to push boundaries and take bold new steps in that process. But isn't that truly the lesson from *Collins & Aikman*? After all, if you change nothing, nothing will change.

23 Supra, n 17, Section II (Addressing the insolvency of enterprise groups: domestic issues), para 110. For example, in *Re ZYX Learning Centres Limited (formerly ABC Learning Centres Limited) (Receivers and Managers Appointed) (in liq)* [2015] FCA 146, the Australian court observed that if the assets of a parent company and its subsidiary were pooled, the subsidiary's employees would be paid in full but the parent company's unsecured creditors would receive no return; whereas if they were not pooled, the employees would receive 19 cents on the dollar and the unsecured creditors 0.23 cents on the dollar.

24 See further, Irit Mevorach, "Is the future bright for enterprise groups in insolvency? – analysis of the UNCITRAL's new recommendations on the domestic aspects" in Paul Omar (ed) *International Insolvency Law: Reforms and Challenges* (2013), ch 12.

Islamic Banking and Alternative Dispute Resolution

by

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[1] Islamic banking, also referred to as Islamic finance or Shariah-compliant finance, refers to finance or banking activities that adhere to Shariah law. This financial system was first established in Malaysia in the late 1980s following the passing of the Islamic Banking Act 1983[1] and has since grown rapidly. Presently, 38.9% of Malaysia's total banking sector deposits are placed with Islamic banks, amounting to approximately RM790.9 billion worth of Islamic banking assets.[2]

[2] Without doubt, disputes would arise out of such a thriving industry. In the past, Malaysia has largely been inclined towards litigating such disputes in court, but as this article will illustrate, this comes with its own sets of disadvantages. The Asian International Arbitration Centre ("AIAC"), formerly the Kuala Lumpur Regional Centre for Arbitration, believes that the future of Islamic banking dispute resolution lies in arbitration and is ready to spearhead the movement, as this industry continues to evolve.

[3] This article will briefly delve into the principles of Islamic banking, the development of Malaysia's Islamic banking legal framework and where arbitration fits in, in the current legal landscape.

Islamic banking – Principles and legislation

[4] Islamic banking has been defined by various scholars and banking institutions. Banking institutions, such as Bank Negara Malaysia ("BNM"), have established a set of guidelines[3] that govern the conduct

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1 Bank Negara Malaysia's Annual Report 2020, available online at <https://www.bnm.gov.my/documents/20124/3026128/ar2020_en_ch1d_islamicfinsys.pdf>.

2 Ibid.

3 Bank Negara Malaysia's Banking and Islamic Banking Regulations, Standards and Guidelines, available online at <https://www.bnm.gov.my/banking-islamic-banking>.

of Islamic banking. The High Court in the decision of *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd*[4] explained:

> Islamic financing in Malaysia is governed by the Islamic Banking Act 1983 and the Banking and Financial Institutions Act 1989 for banks licensed under the respective legislation. The fundamental requirement under these Acts is contained in the provision that in respect of Islamic banking and financing, the aims and operations of the bank do not involve any element not approved by the religion of Islam.[5]

[5] As explained in the preceding remarks, the abovementioned legislation state that the aim and operation of banks providing Islamic banking services should not involve any element not approved by Islam. However, there is no explicit legislative provision on what elements are approved by Islam.

[6] Scholars have explained that a key principle in Islamic banking services is the prohibition of *riba* or interest in all transactions. To fall safely under the ambit of Islamic banking, Islamic banking providers have utilised the principle of mutual risk and profit sharing and does not charge any interest in its banking services. [6]

[7] Shariah principles naturally prohibit involvement in the sale of prohibited (*haram*) goods such as alcohol and pork meat.[7] No Islamic banking institution would be allowed to provide loans for companies or anyone dealing in prohibited goods.

[8] Additionally, Shariah principles disapprove of uncertainty (*gharar*) and gambling (*maisir*) in the conduct of business.[8] This is explicitly stated in verse 5:90-91 of the Quran. The verse is translated as follows:

> O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone alters [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid *it that you may be successful.*

4 [2008] 5 MLJ 631.
5 Ibid, at [12].
6 M Kabir Hassan and Mervyn K Lewis, *Handbook of Islamic Banking* (Edward Elgar Publishing, 2007), p 7.
7 Ibid, at p 39.
8 Ibid.

> Satan only wants to cause between you animosity and hatred through intoxicants and gambling and to avert you from the remembrance of Allah and from prayer. So will you not desist?

[9] *Gharar* and *maisir* can further be illustrated by, say, the sale of fish that have yet to be caught, the sale of animals that have yet to be birthed or other such forward contracts, lacking in certainty.

[10] In practice, the Islamic finance sector is regulated by BNM as provided for under the Central Bank of Malaysia Act 2009 ("CBMA"). Islamic financial services are additionally regulated by the Islamic Finance Services Act 2013 ("IFSA").[9] These legislations provide for the supervision of Islamic financial institutes, and oversee the standard of Shariah compliance.[10]

[11] As disputes involving Islamic financial services arose, questions of the court's jurisdiction cropped up along with it. Since Malaysia has both a civil court as well as a Shariah court, each with its own jurisdiction, this brought up its own set of complications. In particular, issues have arisen as to whether Islamic banking matters would fall under the jurisdiction of the civil court or the Shariah court.

[12] In the Court of Appeal's decision of *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corp Sdn Bhd*,[11] the court stated as follows:

> As was mentioned at the beginning of this judgment, the facility is an Islamic banking facility. But that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under conventional banking.

[13] Following that, it became trite law that the civil courts have jurisdiction over Islamic banking matters. List 1 under the Ninth Schedule to the Federal Constitution provides Parliament with power to legislate on matters of external affairs, internal security and finance, amongst other things. Paragraph 1 of List II under the Ninth Schedule

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9 With the enactment of the Islamic Finance Services Act 2013, the Islamic Banking Act 1983, the Takaful Act 1984, the Payment System Act 2003 and the Exchange Control Act 1953 were then repealed.

10 Intisaar Kaamilah, Mariam Abdulaziz, Alliya Jaffar and Mor Talla Lo, "Impacts of the Islamic Financial Services Act 2013 on Investment Account Products Offered by Islamic Banks in Malaysia" (2019) 6(4) *International Journal of Management and Applied Research* 317–327, available online at <http://ijmar.org/v6n4/19-024.html>.

11 [2003] 2 MLJ 408 at 411.

states that the Syariah courts shall have jurisdiction in respect only to matters under that paragraph but makes no mention of matters pertaining to Islamic banking and finance.

[14] Consequently, Islamic banking is deemed as falling under the scope of the Federal List as it pertains to banking, which is stipulated under paragraph 7(j) of the Federal List.[12]

[15] However, criticism then arose regarding the civil court's lack of expertise and consistency when it came to deciding on matters involving Shariah principles. In an effort to address the above criticism, the Muamalat Court was established under a special division of the civil court, for purposes of handling Islamic banking and financial matters. This action was undertaken based on Practice Direction No. 1 of 2003.[13] Following that, in 2013, Practice Directions No. 4, 6 and 7 of 2013 were issued to further clarify the classification of cases and use of specific reference codes with regards to matters under the Muamalat Court. This court is part of the Commercial Division of the Kuala Lumpur High Court comprising a single judge, two registrars and supported by three clerks.[14]

[16] Even with these efforts in place, there were still doubts regarding whether or not civil court judges were the appropriate authority and experts when it came to deciding on Shariah matters. In the decision of *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd*,[15] the learned High Court judge observed as follows:

> In the event any litigation is commenced, it must be appreciated that not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with matters, which *ulamaks* take years to comprehend.

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12 Zulkifly Hasan and Mehmet Asutay, "An Analysis of the Courts' Decisions on Islamic Finance Disputes" (2011) *ISRA International Journal of Islamic Finance* 41–71, available online at <https://www.researchgate.net/publication/256022326_An_Analysis_of_the_Courts'_Decisions_on_Islamic_Finance_Disputes>.

13 Dr Rusni Hassan and Mohammad Azam Hussain, "The Establishment of Muamalah Court in Malaysia: An Overview of Issues and Challenges" (2011) *IIUMLJ* SEd 119.

14 Hizri Hasshan, "Islamic Finance Litigation: Problems with the Malaysian Civil Courts Structure" (2016) 29 *JUUM* 33–42 at 40, available online at <http://journalarticle.ukm.my/12982/1/26336-79273-1-SM.pdf>.

15 [2005] 5 MLJ 210.

[17] The above case of *Arab-Malaysian Merchant Bank* is a clear indicator of the civil court's lack of expertise when it comes to presiding over *Shariah*-related matters. To further contextualise this issue, this article will first explain why the civil courts cannot simply call for a Shariah law expert as an expert witness before the court.

[18] In 1982, the Court of Appeal in *Ramah binti Taat v Laton binti Malim Sutan*[16] by a majority decision concluded that Islamic law was considered to be part of the law of the land and not considered as foreign law. The decision unwittingly brought into play the relevancy of section 45 of the Evidence Act 1950 ("Evidence Act") pertaining to Islamic banking. This section reads:

> 45. *Opinions of experts*
>
> (1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.
>
> (2) Such persons are called experts.

[19] The implication of the above case, read together with section 45, is that with Shariah law experts not falling under section 45 of the Evidence Act, Malaysian civil courts therefore could not call upon experts on Shariah law should they require assistance. Judges thus must be persuaded by other means or must be required to be well equipped on matters of Shariah law; but as mentioned in the case of *Arab-Malaysian Merchant Bank*, it takes years even for eminent jurists to fully master such Shariah law knowledge. More on this later. Whether there is a total prohibition for High Court judges to call on experts is debateable as courts are not shackled by such inhibitions prior to arriving at a just decision. But this is not the issue here.

[20] Section 2 of the Evidence Act states that the Evidence Act applies to all judicial proceedings but not to proceedings before an arbitrator. This suggests that in the case of an Islamic banking arbitration, parties are not prevented from calling an expert witness in the area of Shariah law to assist the tribunal on Shariah matters.

16 [1982] 1 MLJ (B) 1.

[21] In line with these criticisms and limitations, sections 56 and 57 of the CBMA establish the Shariah Advisory Council ("SAC") whose functions have been amended over the years to its present form.[17] The provisions of these sections are as follows.

> 56. *Reference to Shariah Advisory Council for ruling from court or arbitrator*
>
> (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall –
>
> (a) take into consideration any published rulings of the Shariah Advisory Council; or
>
> (b) refer such question to the Shariah Advisory Council for its ruling.
>
> (2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat.
>
> 57. *Effect of Shariah rulings*
>
> Any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under section 55 and the court or arbitrator making a reference under section 56.

[22] Currently, part of the SAC's function is to ascertain the relevant Shariah principles in Islamic banking disputes. This is intended to encourage judgments that are Shariah compliant and consistent across the judicial Bench. This additionally alleviates the burden of judges needing to be experts in the area of Shariah law and Islamic banking.

[23] However, the authority of the SAC came into question in several cases. Most notably was the case of *JRI Resources Sdn Bhd v Kuwait Finance House Bhd*,[18] where the Federal Court had presided over the question of whether or not sections 56 and 57 of the CBMA were

17 Abdullah Abdul Rahman, "Islamic Finance Arbitration: Enforceability Under the New York Convention 1958 of Arbitration Awards Made Following a Reference to the Shariah Advisory Council Under the Central Bank of Malaysia Act 2009" (2019) 35(2) *Arbitration International* 245–261.

18 [2019] 3 MLJ 561.

constitutional. It was presided by a nine-judge Bench and the majority ruled that sections 56 and 57 were indeed constitutional.

[24] Mohd Zawawi Salleh FCJ explained the role of the SAC in the following manner:

> We agree with the submission of learned counsel for the second intervener that the ruling under s 57 of the 2009 Act does not conclude or settle the dispute between the parties arising from the Islamic financing facility at hand. It does not "determine" the liability of the borrower under the Islamic facility. The determination of a borrower's liability under any banking facility is decided by the presiding judge and not the SAC.
>
> … In short, an "ascertainment" exercise which results in a "ruling" must not be confused with an act of "determination" which results in a final decision.[19]

[25] The Federal Court in the course of its judgment took great pains to highlight the decisions of *Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor*[20] and *Tan Sri Abdul Khalid Ibrahim v Bank Islam (M) Bhd*[21] to emphasise the importance of distinguishing the SAC's authority to "ascertain" Shariah principles and the court's jurisdiction to make a "determination".

[26] It clearly showed that the SAC does not have the characteristics of judicial power.

[27] It is apparent that Malaysia's Legislature and Judiciary have worked hard to ensure that Islamic banking matters may be brought to court and presided over within the appropriate jurisdiction and advised by experts on the matter. And in the course of doing so has ensured the effectiveness of the SAC when rendering assistance.

[28] As previously noted, with so much to be gained from arbitration as a method of dispute resolution for Islamic banking and finance matters over that of the civil courts, Mr Hasshan in his paper on this subject pointed out that the Rules of Court 2012 are silent on the procedural mechanisms for courts to make reference to the SAC. He

19 Ibid, at [274]–[275].
20 [2011] 3 MLJ 26.
21 [2013] 3 MLJ 39.

went on further to suggest that the Rules Committee may take a leaf from rule 11 of the AIAC i-Arbitration Rules 2018 ("2018 i-Rules") when making future amendments to the Rules of Court 2012.[22]

Development of arbitration in Islam and Malaysia

[29] Arbitration as a method of dispute resolution has a long and established history in Islam. Known as *tahkim*, it is a dispute resolution mechanism that allows parties to seek the assistance of arbitrators when matters cannot be resolved between themselves. Similar to modern day commercial arbitration, *tahkim* in Islam provides the arbitrators with limited jurisdictional power.[23]

[30] The Quran and *hadith* have played a large part in encouraging arbitration for resolving disputes in Islam. Verse 4:35 of the Quran is translated and reads as follows:

> And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Aware.

[31] The verse states that married couples who fear dissent should seek out an arbitrator to act as a neutral third party, consequently encouraging arbitration as a form of dispute resolution. Islamic history additionally illustrates instances where the Prophet (PBUH) and his companions had applied the use of arbitration in resolving disputes. A well-known example of this is the instance when the Prophet himself (PBUH) acted as an arbitrator when resolving the conflict between several Arab tribes regarding the placement of the Black Stone on the Ka'abah.[24]

[32] According to Ibn' Ishaq's biography of the Prophet Muhammad (PBUH),[25] when the Prophet was 35 years of age, the people of Quraysh had decided to tear down and rebuild the Ka'abah due to its failing

22 Hizri Hasshan, "Islamic Finance Litigation: Problems with the Malaysian Civil Courts Structure" (2016) 29 *JUUM* 33–42 at 40, available online at <http://journalarticle.ukm.my/12982/1/26336-79273-1-SM.pdf>.

23 Aishath Muneeza and Harun M Hashim, "Is Conventional Alternative Dispute Resolution to Islamic Law?" [2010] 4 MLJ xcvii.

24 Ibid.

25 A Guillaume, *The Life of Muhammad: A Translation of Ishaq's Sirat Rasul Allah* (Oxford University Press, 1955), pp 84–85.

infrastructure, leaving only the foundations intact as built by Prophet Ibrahim (PBUH). In the beginning, each tribe contributed to building the Ka'abah. However, as construction progressed, the tribes reached the point where they needed to place the Black Stone in its place. A dispute arose as to who should be allowed to place the Black Stone back in its place. It was alleged that the oldest man of the Quraysh tribe suggested to the tribes that the first man to enter the gates of the mosque should arbitrate the matter, to which they agreed. As it were, Prophet Muhammad happened to be that person. Consequently, he was chosen to arbitrate the matter.

[33] The Prophet resolved this by placing the Black Stone on a cloak and asking the leader from each tribe to raise each corner of the fabric together. They then brought the Black Stone to the Ka'abah where the Prophet then placed it himself. This is a clear example of arbitration in practice in the early days of Islam.

[34] In a nutshell, arbitration has always been compatible with Islamic Shariah law and encouraged within Islam. With that in mind, it is not a leap or something new to encourage the move towards commercial Islamic arbitration, or i-Arbitration, where arbitrators are required to consider Shariah principles when making an arbitral award.

[35] In Malaysia, the area of arbitration has evolved tremendously over the past couple of centuries to where it is today. Arbitration was first legislated in Malaya during the British colonial reign in the form of the Arbitration Ordinance XIII 1809. This was subsequently replaced by the Arbitration Ordinance 1890, specifically in Malacca and Penang. In 1950 the Arbitration Ordinance 1950 was introduced, modelled after the English Arbitration Act 1889,[26] with the Ordinance subsequently being adopted by all the states in the Federation of Malaya.[27]

[36] Malaysia's first introduction of the modern arbitration framework was in the form of the Arbitration Act 1952. This was later repealed in 2005, and thereafter Malaysia enacted the Arbitration Act 2005 (the "Act") which adopted the United Nations Commission on International Trade ("UNCITRAL") Model Law 1985.

26 52 & 53 Vict, c 49.

27 Dato' Syed Ahmad Idid and Umar A Oseni, "The Arbitration (Amendment) Act 2011: Limiting Court Intervention in Arbitral Proceedings in Malaysia" [2014] 2 MLJ cxxxii.

[37] Further amendments were made to the Act in 2011 and 2018 to bring the Act in line with the 2006 revisions of the UNCITRAL Model Law 1985 and to ensure that Malaysia's arbitral framework was reflective of modern international standards and stood toe to toe with other seats of international arbitration.

Introduction to the AIAC

[38] In 1978, Malaysia signed a host country agreement with the Asian African Legal Consultative Organisation ("AALCO"), which enabled the establishment of the Kuala Lumpur Regional Centre for Arbitration, the precursor of the AIAC. The name change was pursuant to the Arbitration (Amendment Act) 2018.

[39] The AIAC was established as part of the AALCO's integrated dispute settlement system in the field of international economics and commerce. The agreement further provided provisions for the AIAC to act as an international organisation with independence and immunity, while being provided premises and an annual grant by the Malaysian Government to carry out its functions.[28]

[40] As stated earlier, apart from adopting the UNCITRAL Arbitration Rules, the AIAC was integrated into the Malaysian arbitration system through the Arbitration Act 2005. Under section 13 of the Act, the Director of the AIAC is referred to as an administrative appointing authority, meaning that parties may refer matters to the Director of the AIAC should they require assistance in appointing an arbitrator for their proceedings in an ad hoc arbitration proceeding.

[41] Section 48 of the Act additionally provides for the immunity enjoyed by the Director of the AIAC in the course of his function as Director.

> 48. *Immunity of Arbitral Institutions*
>
> The Director of the Kuala Lumpur Regional Centre for Arbitration or any other person or institution designated or requested by the parties to appoint or nominate an arbitrator, shall not be liable for

28 AIAC, "Malaysia and AALCO Signs Host Country Agreement" (March 27, 2013), available online at <https://www.aiac.world/news/31/Malaysia-and-AALCO-Signs-Host-Country-Agreement>.

> anything done or omitted in the discharge of the function unless the act or omission is shown to have been in bad faith.

[42] The provisions in the Act as well as the International Organizations (Privileges and Immunities) Act 1992 accords the Director of the AIAC immunity in respect to things done in his official capacity and allows the AIAC to carry out its functions to its fullest capacity, within reason.

[43] In the recent Court of Appeal decision of *Menteri Hal Ehwal Luar Negeri, Malaysia & Ors v Sundra Rajoo a/l Nadarajah*,[29] the court presided over the question of, *inter alia*, whether the Director of the AIAC is afforded immunity from criminal proceedings.

[44] The court confirmed that the Director of the AIAC enjoys immunity while acting in his official capacity. The Court of Appeal explained in this manner:

> It follows that Act 485[30] and the 1966 Regulations had embodied the whole law on the issue, they would no doubt have had the effect that as a Malaysian citizen, the respondent enjoys privileges and immunities from both civil and criminal proceedings. As a former High Officer, he enjoys immunity from both civil and criminal proceedings because the immunity applies to suit and any other legal process.
>
> However, it is obvious that the immunity he enjoyed in respect of civil and criminal offences is limited to acts and thing done in his capacity as a High Officer.[31] The court then went on to emphasise that:
>
> > "… it is implausible to suggest that the legislation intended to accord complete immunity from criminal proceeding to a former High Officer who is a Malaysian citizen like the respondent in this case. That would in our view amount to altering the scope of Act 485."[32]

[45] This case was later brought to the Federal Court and presided over by a seven-judge Bench led by Chief Justice Tun Tengku Maimun. Her Ladyship, on behalf of the Federal Court, considered the question

29 [2021] 2 MLJ 787.
30 International Organizations (Privileges and Immunities) Act 1992.
31 *Menteri Hal Ehwal Luar Negeri, Malaysia & Ors v Sundra Rajoo a/l Nadarajah* [2021] 2 MLJ 787 at [75]–[76].
32 Ibid, at [93].

of whether Part II of the Second Schedule to the International Organizations (Privileges and Immunities) Act 1992, as provided for below, would apply to criminal proceedings.[33]

> Second Schedule
>
> Part II
>
> Immunities of Former High Officer of International Organization
>
> Immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer.

[46] The Federal Court affirmed that the phrase "suit and … other legal process" would include criminal proceedings, meaning that the immunity of the Director of the AIAC would not be limited to suits of a civil nature.

Introduction to the AIAC i-Arbitration Rules 2021

[47] In carrying out its functions, the AIAC has additionally published individual sets of rules for arbitration, adjudication and mediation matters administered under the AIAC. Included in these rules are the i-Arbitration Rules which was most recently updated in 2021 with the AIAC i-Arbitration Rules 2021 ("2021 i-Rules").

[48] The 2021 i-Rules are a reflection of the provisions responding to the trends in the market. As Islamic banking grew and litigious disputes on Islamic banking issues were being filed in court, the AIAC saw it fit to provide a well-regulated avenue for alternative dispute resolution.

[49] The 2021 i-Rules, similar to its predecessors, do not include any provision that limits the applicability of the Rules to certain areas of law. Instead, it behaves much the same way as the regular AIAC Arbitration Rules 2021 ("2021 Rules"), with the addition of specific rules that allow for arbitrators to consider Shariah principles when making their arbitral awards. The following section will look into these distinct rules and their specific functions for the purposes of i-Arbitration.

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33 Timothy Achariam, "The Federal Court Rules Ex-AIAC Director has Immunity from Criminal Charges", *The Edge Markets* (April 30, 2021), available online at <https://www.theedgemarkets.com/article/federal-court-rules-exaiac-director-has-immunity-criminal-charges>.

[50] We start with the following:

> Rule 13 – *Conduct of Proceedings and Powers of Arbitral Tribunal*
>
> 13.5. In conducting the arbitral proceedings, the powers that may be exercised by the Arbitral Tribunal include but are not limited to:
>
> …
>
> (e) making necessary enquiries on the existence of third-party funding arrangements, including any guidance on the application of Shariah principles in respect thereof, the third-party funder's economic interest in the outcome of the arbitral proceedings, and directing the Parties to disclose the existence of such arrangements, as well as any change in circumstances throughout the course of the arbitral proceedings;
>
> (f) referring any point or matter as a question or issue to a relevant Shariah Council pursuant to Rule 29.1;
>
> (g) appointing a Shariah Expert pursuant to Rule 30.11;
>
> …
>
> (o) unless otherwise agreed to by the Parties, award a late payment charge in accordance with the principles of Ta'widh and Gharamah or such similar charges that the Arbitral Tribunal considers appropriate, for any period ending no later than the date of payment on the whole or any part of:
>
> (i) any sum which is awarded by the Arbitral Tribunal in the arbitral proceedings;
>
> (ii) any sum which is in issue in the arbitral proceedings but is paid before the date of the Award; or
>
> (iii) costs awarded or ordered by the Arbitral Tribunal in the arbitral proceedings.

[51] The AIAC has, while drafting the most recent update to its arbitration rules, taken into account the recent global trend of parties entering into funding agreements with third party funders. As part of that, rule 13.5(e) allows the arbitrator to make the necessary enquiries on the existence of any third-party funding ("TPF") arrangements. The arbitral tribunal may also, as part of its powers under rule 13.5(e), enquire regarding the consideration of Shariah principles with regard to any such funding agreement.

[52] In a report providing insight on TPF in the Middle East, Woodsford Litigation Funding, a litigation and arbitration financing company, forwarded the argument that TPF is in fact Shariah compliant. As previously mentioned, Islamic banking prioritises the Shariah principle of mutual risk, profit sharing and prohibition of *riba*,[34] all of which are characteristics present in TPF. In a run of the mill TPF agreement, third-party funders expect to receive and share profit from a successful litigation, and conversely the party will bear no loss and are usually not required to pay the sum in return should the litigation fail.

[53] Rule 13.5(f) and rule13.5(g) are also new additions to the 2021 i-Rules which explicitly provide the arbitral tribunal with the jurisdiction to make reference to a Shariah Council pursuant to rule 29 or appoint a Shariah expert pursuant to rule 30. In the previous 2018 i-Rules, the same jurisdiction was afforded only by way of rule 11 of the 2018 i-Rules – Procedure for Reference to Shariah Advisory Council or Shariah Expert. The amendment to include rule 13.5(f) and rule 13.5(g) sits in line with the AIAC's aspirations to provide a clear and comprehensive set of arbitration rules.

[54] Similar to rule 6(g) found under the 2018 i-Rules, the newly amended 2021 i-Rules includes rule 13.5(o). This provision empowers the arbitral tribunal to award late payment charges in accordance with the principles of *ta'widh*, meaning compensation, and *gharamah*, meaning fine or penalty, which are forms of late payment charges that may be claimed as relief by the parties in the course of the arbitral proceedings.[35] The SAC in its previous resolutions[36] has distinguished the two and clarified that *ta'widh* may be considered as income for Islamic banking institutions while *gharamah* may not. The SAC further provided that the customer's financial capacity should be considered

34 Woodsford Litigation Funding, "Litigation and Arbitration Funding in the Middle East", available online at <https://woodsfordlitigationfunding.com/asia/wp-content/uploads/sites/4/2018/01/Litigation-and-Arbitration-Funding-in-the-Middle-East.pdf>.

35 Hizri Hasshan, "Issues and Challenges in the Enforcement of Islamic Finance Judgment Within the Malaysian Bankruptcy Framework" [2016] 2 MLJ xxi.

36 Bank Negara Malaysia, *Kompilasi Keputusan Syariah Dalam Kewangan Islam*, Edisi Ketiga (2017), pp 131-132, available online at <http://www.sacbnm.org/wp-content/uploads/2020/02/Kompilasi-Keputusan-Syariah-Dalam-Kewangan-Islam_Edisi-Ketiga-2011-2017.pdf>.

when determining the imposition of late payment charges, the maximum rate of which is determined by BNM.[37]

[55] Where rule 13.5(f) has provided the arbitral tribunal with the jurisdiction to make reference to a Shariah Council, rule 29 of the 2021 i-Rules provides the procedural guidelines for such reference. Rule 29 is reproduced below for ease of reference.

> Rule 29 – *Reference to Shariah Council*
>
> 29.1. Where the Arbitral Tribunal has to decide on a point related to Shariah principles or a matter on the Shariah aspect of a dispute arising from the contract, the Arbitral Tribunal may, at any time during the course of the arbitral proceedings, refer such points or matter as a question or issue to a relevant Shariah Council to be ascertained, as a ruling.
>
> 29.2. For the purposes of Rule 29.1, a relevant Shariah Council shall be the Shariah Council under whose purview a specific Shariah point or matter to be ascertained falls under, as determined by the Arbitral Tribunal.
>
> 29.3. Where the Arbitral Tribunal determines that the Shariah point or matter to be ascertained does not fall under the purview of a relevant Shariah Council, whether by a finding of its own initiative or following an unsuccessful reference to a Shariah Council, then the Arbitral Tribunal shall refer the Shariah point or matter:
>
> (a) to a Shariah Council jointly agreed upon by the Parties; or
>
> (b) in the event the Parties fail to jointly agree within 30 days of the Arbitral Tribunal's determination pursuant to Rule 29.3(a), then, to a Shariah Expert pursuant to Rule 30.11.
>
> 29.4. A reference to the Shariah Council pursuant to Rule 29.1 or Rule 29.3(a), shall:
>
> (a) be submitted by the Arbitral Tribunal to the Shariah Council, with a copy delivered to the Parties and the AIAC as soon as reasonably practicable; and

37 Bank Negara Malaysia, "Resolutions of Shariah Advisory Council Bank Negara Malaysia" (June, 2010), available online at <https://www.bnm.gov.my/-/resolutions-of-shariah-advisory-council-bank-negara-malaysia>.

(b) in addition to any requirements stipulated by the Shariah Council in accordance with such reference, include:

(i) a description of the facts and issues forming the subject of the reference to the Shariah Council;

(ii) any other information as the Shariah Council may require to form its ruling; and

(iii) a list of the questions to be answered by the Shariah Council.

29.5. The Arbitral Tribunal shall, after consulting the Parties, decide whether and to what extent the arbitral proceedings are to continue, pending any ruling by the Shariah Council on a reference pursuant to Rule 29.1 or Rule 29.3(a).

29.6. Upon receipt of the Shariah Council's ruling, the Arbitral Tribunal shall, without affecting its liberty to decide on the application of the ruling, proceed to determine the dispute and make an Award.

29.7. The Arbitral Tribunal may invite submissions from the Parties to assist towards deciding on the application of the Shariah Council's ruling.

29.8. Where the Shariah Council fails to deliver its ruling within 90 days from the date the reference is made pursuant to Rule 29.4 or such other period as mandated under a relevant law, then the Arbitral Tribunal may, after consulting the Parties, proceed to determine the dispute and deliver the Award in absence of the ruling.

29.9. Any ruling of the Shariah Council shall be limited to the question or issue that forms the subject of the reference, and shall not extend to any finding of fact, determination of the application of the ruling or the making of a decision on any matter which would otherwise be a matter for the Arbitral Tribunal to determine.

29.10. An Award delivered by the Arbitral Tribunal following a reference to the Shariah Council under Rule 29 shall state the reasons upon which the Arbitral Tribunal's decision on the points or matter referred to the Shariah Council is based, and shall not be affected by:

(a) the Arbitral Tribunal's determination of the non-application of any ruling of the Shariah Council in the case of a ruling delivered by the Shariah Council; or

(b) the absence of a ruling by the Shariah Council, in the case of a failure by the Shariah Council to deliver its ruling.

[56] Where the tribunal has failed to make reference to a relevant Shariah Council, likely due to a lack of Shariah Councils with the appropriate jurisdiction or due to any other prevailing factors, the arbitral tribunal then has the jurisdiction, pursuant to rule 13.5(g), to appoint a Shariah expert. The procedure for the appointment of a Shariah expert by the arbitral tribunal is similar to the procedure for the appointment or an ordinary quantum or technical expert, which is provided for under rule 30. The provisions under rule 30 that are unique to the 2021 i-Rules are rule 30.11 to rule 30.13, which reads as follows:

> Rule 30 – *Appointment of an expert by the Arbitral Tribunal*
>
> …
>
> 30.11. Where Rule 30 applies, an independent expert includes a Shariah Expert whom the Arbitral Tribunal may appoint pursuant to Rule 29.3(b) or on its own initiative, after consulting the Parties, to provide an opinion to the Arbitral Tribunal, in writing, on a point related to Shariah principles or a matter on the Shariah aspect of a dispute arising from the contract.
>
> 30.12. Where the Arbitral Tribunal appoints a Shariah Expert, the Arbitral Tribunal in its own discretion may appoint any qualified person empanelled by the AIAC as a Shariah Expert, including a person of any religion, gender and ethnic background, unless otherwise agreed by the Parties.
>
> 30.13. In lieu of Rules 30.8 - 30.10, upon receipt of the Shariah Expert's opinion, the Arbitral Tribunal shall deliver a copy of the opinion to the Parties and the AIAC where the following shall apply:
>
> (a) the Parties shall be given the opportunity to provide submissions to the Arbitral Tribunal on the Shariah Expert's opinion, and shall be entitled to examine any document which the Shariah Expert has relied upon in its opinion; and
>
> (b) at the request of any Party, the Shariah Expert, after delivery of the opinion, may be called at a hearing where the Parties shall have the opportunity to examine the Shariah Expert and call any Shariah Expert of their own to testify on the points or matter in question or issue.

[57] Other distinct features of the 2021 i-Rules include the use of Islamic bank accounts for deposit collection as provided for under rule 41.7, the use of AED as a recognized currency for deposit collection

as well as the requirement for any claim for out-of-pocket expenses to be guided by Shariah principles.

Opting for arbitration over litigation

[58] As with any other arbitral proceedings, i-Arbitration proceedings bear the same attractive characteristics of a conventional arbitration. It means that parties are not required to disclose the details of their arbitral awards.[38] i-Arbitration additionally upholds the principle of party autonomy and maintains the parties' authority to appoint a fair and neutral i-Arbitral tribunal.[39]

[59] Arbitration disputes administered by the AIAC have the benefit of being managed by an AIAC case counsel, whose job includes ensuring that arbitration timelines are met and that the arbitration is conducted in a timely and efficient manner. In addition to that, where the AIAC is acting as the administrative authority, parties are required to pay a deposit of the arbitrator's fee with the AIAC before the start of arbitration proceedings. This acts as a safeguard against arbitrators being left unpaid once the dispute has run its course. The AIAC additionally conducts technical reviews of the arbitral awards before they are released to the parties. These reviews ensure a consistent technical quality of arbitral awards and do not interfere in the actual merit of the arbitral award.

[60] Presently, one of the key concerns of i-Arbitration proceedings is the question of whether or not the arbitral awards can be brought to courts of foreign jurisdictions for enforcement. Of the 167 Member States that are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[40] more commonly known as the New York Convention, more than 30 of those countries practice some degree of Shariah law within their legal jurisdiction. This is to say that Shariah principles as applied within i-Arbitration Rules in Malaysia are not limited only to this jurisdiction.

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38 Datuk Professor Sundra Rajoo, "The Relevance of Arbitration in Resolving Disputes" [2021] 1 MLJ ccxiv.

39 Term coined by the AIAC when making reference to the arbitral tribunal presiding over i-Arbitration matters.

40 See the New York Convention's website for the Contracting States, available online at <https://www.newyorkconvention.org/countries>.

[61] This article would go so far as to say that the enforcement of i-Arbitration awards is not limited to countries practicing some degree of Shariah law within its legal jurisdiction. The English courts have over the years presided over a number of Islamic banking matters. In the decision of *Halpern v Halpern*[41] specifically, the English Court of Appeal recognised that parties can resort to a non-national system of law in arbitration. Consequently, this means that parties may apply, amongst others, Shariah law in their arbitral proceedings.

[62] In *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd & Ors*,[42] the English Court of Appeal laid out that English law would only apply to the underlying transaction in an Islamic banking dispute. However, the courts may additionally consider Shariah principles given that the courts are provided with precise reference as to Shariah principles.[43] Although this presents an immediate barrier to the applicability of Shariah principles, it is not one that cannot be overcome through expert evidence or advisory bodies similar to BNM's SAC.

[63] The above examples and cases illustrate why the enforcement of i-Arbitration awards can and should extend into foreign jurisdictions, including jurisdictions without an explicit Shariah law jurisdiction.

i-Arbitration moving forward

[64] With the recent launch of the amended 2021 i-Rules, the AIAC has plans to carry out capacity building and competency enhancement initiatives as means of solidifying its foothold in the intersection of Islamic banking and arbitration. As part of this, the AIAC has released a circular on the empanelment of i-arbitrators and Shariah experts on October 27, 2021. The circular includes the standards and requirements for a person to qualify to be empanelled as an i-arbitrator or Shariah expert with the AIAC.

[65] The purpose of empanelling Shariah experts lies in the AIAC's desire to provide a point of reference for arbitrators when appointing

41 [2007] EWCA Civ 291.

42 [2004] EWCA Civ 19.

43 Dr Gordon Blanke, "Islamic Banking and Finance Disputes: the Case for Semi-Secular Arbitration", Thomson Reuters (April 4, 2019), available online at <http://arbitrationblog.practicallaw.com/islamic-banking-and-finance-disputes-the-case-for-semi-secular-arbitration-part-1/>.

a Shariah expert. This initiative seeks to set a benchmark within the industry and to ease the process of finding an expert in the area of Islamic banking, and more broadly, Shariah law.

[66] In addition to its empanelment efforts, the AIAC continues to carry out competency enhancement efforts. For the year 2022, the AIAC has developed the i-Arbitration Learning Series which are a series of workshops open to the general public. This series will cover, in depth, issues of *ta'widh* and *gharamah*, the powers of the arbitral tribunal under the 2021 i-Rules, the reference mechanism and jurisdiction of a Shariah Council as well as delve into new areas such as Islamic financial technology.

[67] Beyond the Malaysian perspective, the AIAC also looks forward to other centralised Shariah Councils being established globally for the purposes of providing Shariah rulings in areas of Islamic banking. It is without a doubt that a centralised Shariah Council would simplify the reference mechanism in instances where the national courts or arbitral tribunal require its assistance. As part of the initiative towards a more comprehensive i-Arbitration framework, the AIAC has and will continue to develop its competency enhancement initiatives and expand its services as an arbitral institution.

Conclusion

[68] The Islamic banking industry in Malaysia continues to grow exponentially. This is thanks in part to the equitable nature of Shariah principles as well as continuous efforts on the part of Malaysia's Islamic banking institutions. However as previously illustrated, a growing industry is not without its flaws. The Malaysian courts have over the years presided over a growing number of Islamic banking disputes. The AIAC believes that Islamic arbitration administered under the i-Arbitration Rules provides an alternative course for dispute resolution.

[69] In contrast to the judicial framework, the i-Arbitration Rules readily provide much needed procedural rules for the tribunal to refer to the SAC. The AIAC additionally believes that matters conducted using the i-Arbitration Rules bear the same benefits of ordinary arbitration proceedings, including global enforceability of the arbitral award.

[70] It is without a doubt that the AIAC will continue to develop and provide sophisticated innovations in its Rules to best benefit the market and the growing Islamic banking industry. Thus, it is only a matter of time before i-Arbitration sits side by side with other more commonly used forms of alternative dispute resolution towards resolution of Islamic banking disputes.

Good Faith in Contractual Performance: Chasing a Mirage?

by

*Dr Nurhidayah Abdullah**

Abstract

The doctrine of good faith is rooted in civil law countries but received wide attention in common law countries. Good faith propounds the notion that all parties owe a duty to each other beyond those expressly provided by the terms of the contract. Good faith is treated as an implicit expectation of the parties to achieve cooperation and fairness in the absence of an express term of the contract. One of the main problems with the concept of good faith is its definition which leads to uncertainty. The objective of this article is to discuss the concept, position and perspective of the doctrine of good faith in contract law. This research used both doctrinal and empirical approaches. Findings of the research reveal a form of endorsement of its general application in a selected jurisdiction.

1. Overview

[1] In the 18th and 19th centuries, the landscape of contract law has changed due to the development of politics, economics and society in parallel with the *laissez faire* period.[1] The law of contract underwent a radical transformation from the classical theory of contract to modern contract.[2] The classical theory of contract propounds the idea of freedom of contract and the sanctity of contract that depends on the bargaining power of the contracting parties and ties the court's hands from interfering. In contrast, modern contract law expects contract law to uphold fairness and justice due to many issues of inequality

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1 Sir Anthony Mason and Stephen Gageler, "The Contract" in PD Finn (ed), *Essays on Contract* (1987), p 1.

2 Tyrone M Carlin, "The Rise (And Fall) of Implied Duties of Good Faith in Contractual Performance in Australia" (2002) 25 *UNSW Law Journal* 99–123.

of bargaining power, the widespread use of standard-form contracts and the emergence of many forms of economic activities which had dampened the freedom of contract. Recently, courts are more willing to interfere to override the express terms agreed by the parties, they "developed new doctrines, used existing doctrines in new situations or used covert means by implying suitable terms or construing the contract in a benevolent manner".[3] The doctrine of good faith has received wide attention as it is considered as "modern armour" in contract law to promote fairness and justice which differs from the classical contract law's expectation.

[2] Good faith is a ubiquitous but a poorly understood concept in contract law. It has many meanings in which most of them are confusing and contradict each other. Good faith encompasses the idea that all parties to a contract owe a duty to each other beyond those expressly provided by the terms of the contract. In this context, it is expected that the contracting parties take into account other parties' interests when exercising their contractual rights.[4] The concept of good faith is pivotal to the contracting parties in two ways: (1) cooperation and fairness are achievable through the concept of good faith; and (2) in the absence of express terms in the contract to prevent unfairness, good faith is treated as an implicit expectation of the parties. Burrows further explained the function of good faith, stating that:

> The concept of good faith is regularly invoked not only to condemn deception and lack of candour at the time a bargain is concluded, but also to require a forthcoming attitude, to condemn chicanery and sharp practice in the carrying out of contractual obligations.[5]

[3] The general recognition of good faith as described by Lord Bingham is that it is "the most important contractual issue of our

3 Cheong May Foong, "The Malaysian Contracts Act 1950: Some Legislative and Judicial Developments Towards a Modern Law of Contract" (2009) 36 *JMCL* 53–80.

4 See John Gava and Peter Kincaid, "Contract and Conventionalism: Professional Attitudes to Changes in Contract Law in Australia" (1996) 10 *Journal of Contract Law* 141 at 150.

5 See JF Burrows, "Contractual Cooperation and Implied Terms" (1968) 31 *Modern Law Review* 390 for an interesting discussion of a somewhat broader notion of good faith, an implied duty of cooperation, and for a discussion of the extent to which each party has a duty to cooperate in the contractual undertaking, see 395–405.

time".[6] It can be found in the landmark case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, where Lord Bingham implied the concept of good faith where he held that:

> In many civil law systems and perhaps most legal systems in the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts, parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean", or "putting one's card face upwards on the table" … English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith by treating as irrecoverable what purport to be agreed estimates of damage but are in truth disguised as penalty for breach, and in many other ways.[7]

[4] The concept of good faith is widely employed at international levels, where many international trade instruments incorporate it.[8] In *Nuclear Tests* (*Australia v France*),[9] the International Court of Justice claimed that "one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the

6 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.

7 Ibid, at p 439.

8 See also the Principles of International Commercial Contracts (UNIDROIT Principles 2004), art 1.7, which clearly supports the duty of good faith. It states that:

> In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade and prohibits the parties from limiting or excluding the duty in their contracts.

The Vienna Convention on the Law of Treaties, art 31(1) provides that:

> A treaty shall be interpreted in good faith in accordance with the ordinarily meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The Principles of European Contract Law, art 1.201 provides that:

> In exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing.

9 [1975] ICJ Rep 253.

principle of good faith".[10] An example of the adoption of good faith in an international trade instrument can be found in article 7.1 of the United Nations Convention on Contracts for International Sale of Goods, known as the Vienna Sales Convention ("CISG"), which provides that:

> … in the interpretation of the Convention, regard is to be had to its international character and the need to promote uniformity in its application and the observation of good faith in international trade.

[5] In many instances, the duty of good faith is conceived as an implied term.[11] There are two types of implication: term "implied in law" and term "implied in fact". The term "implied in law" is based on the legal incident of a particular type of contract. The term "implied in fact" is based on the test of necessity. The term "implied in law" sets precedent for all future contracts of that particular type while the term "implied in fact" is more concerned with a "just" and "fair" result. There has been some debate and some confusion as to whether the implied duty of good faith, if it exists, is an "implied term in law" or an "implied term in fact".

[6] On the contrary, Peden argues that the method of incorporating good faith that is usually relied upon, namely the implication of a term, is a "hindrance rather than a positive force in the introduction of an obligation of good faith".[12] Peden argues that construction is the best approach for incorporating good faith in a contract. The rule of construction consists of the processes of interpretation and construction. Interpretation is the process whereby courts determine the meaning of words. Construction is the process of determining the legal effect. The main purpose is to give effect to the parties' intention to construe the contract as a whole and to avoid any unreasonable construction where possible.

The problem of defining good faith

[7] As mentioned earlier, one of the main problems with the concept of good faith is in its definitions. The main reason for the lack of a

10 [1974] ICJ Rep 253 at 268.

11 Summers, R, "Good Faith in General Contract Law and the Sales Provision of the Uniform Commercial Code" (1968) 54 *Virginia Law Review* 195 at 196.

12 Elisabeth Peden, "Incorporating Terms of Good Faith in Contract Law in Australia" (2001) 23 *Sydney Law Review* 222.

commonly agreed upon or specific definition of good faith in contract law is that good faith has many meanings. Most identified meanings of good faith are complex, contradictory and unclear. In his attempt to define good faith, Davis claimed that "The more that I have sought to give some meaning to the phrase, the more I have realised that any possible meaning would need to be so qualified, or so general, as to be of no real assistance at all".[13] There are many meanings of good faith such as honesty,[14] cooperation,[15] reasonableness,[16] fairness,[17] parties' reasonable expectations,[18] an excluder,[19] and having regards

13 Davis, JLR, "Good Faith in Building Contracts and Construction", paper presented at the Construction Law Committee's Construction Law Seminar in 1993.

14 In the case of *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [1999] 16 WASCA 1046, for which Templeman J held that:

> In addition, I think that the obligation of good faith requires the parties to deal honestly with each other.

15 The duty of cooperation has been accepted as part of the law since 1881. In *Mackay v Dick* (1881) 6 App Cas 251 at 263, the duty to cooperate was found to be part of the obligation of good faith. Lord Blackburn stated:

> Where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances.

16 Priestley J in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 268 discussed the commonality of meanings between the terms "fairness" and "reasonableness". His Honour commented:

> In ordinary English usage, there has been constant association between the words fair and reasonable. Similarity, there is a close association of ideas between the terms unreasonableness, lack of good faith, and unconscionably …

17 In the case of *Commonwealth Bank of Australia v Spira* [2002] NSWSC 905 at [176], where Gzell J held:

> The obligation of good faith requires a party to exercise rights and obligations under the contract fairly and, it would seem, reasonably. It does not require anything else.

18 Paterson, J, Robertson, A and Heffey, P, *Principles of Contract Law*, 2nd edn (Law Book Co, 2005), p 304.

19 Summers, R, "Good Faith in General Contract Law and the Sales Provision of the Uniform Commercial Code" (1968) 54 *Virginia Law Review* 195 at 196. Summers proposed the idea of good faith as an "excluder" of bad faith behaviour and claimed:

> It is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith.

to others' interest.[20] The most common expression of good faith is a moral concept such as honesty. The inclusion of such moral values as part of the meaning of the concept gives it a definite orientation, yet leaves unavoidable room for flexibility.

[8] Another approach has been used to frame good faith based on the interpretation of the intention of the contracting parties. Both approaches, namely a moral framing in terms of honesty and the expected intent of the parties, involve both concrete and malleable aspects. For example, although the general meaning of honesty is easily understood, its specific meaning within a specific religious or cultural framework is by no means uniform. Similarly, intention can be rather difficult to determine.

[9] Secondly, in the attempt to define good faith, Paterson explained that many commentators divided the problem of interpreting the context of good faith into two groups: the contractual approach to good faith and the generalised moral standard of the conduct approach.[21] The first group, the contractual approach of good faith, attempts to give good faith a meaning that is consistent with existing contractual doctrines by treating it as an implied term based on the parties' probable intention or expectation. This is consistent with the traditional contractual approach to the implication of terms to give business efficacy to the contract. The second approach grounds the duty of good faith in generalised moral standards of conduct. This measure of good faith is based on desirable behaviour in a contractual relationship and is not determined by reference to the parties. This is demonstrated in section 2-103(b) of the Uniform Commercial Code, which states that "Good faith" in the case of a merchant means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade". In this context, good faith is based on the moral standard of honesty. In commercial practice, good faith is the expected commercial practice. This "moral standards" approach gained support in the case of *Renard Constructions (ME) Pty Ltd v Minister for Public Works*[22] where Priestley J suggested that certain standards of

20 In the case of *Automasters Australia Pty Ltd v Bruness Pty Ltd & Anor* [2002] WASC 286 at [388], in which his Honour claimed:

> The term "good faith" imports a duty to have due regard to the legitimate interests of both parties in the enjoyment of the fruits of the contract.

21 Paterson, JM, "Duty of Good Faith Does it Have a Place in Contract Law?" (2000) *Law Institute Journal* 48.

22 (1992) 26 NSWLR 234.

"fairness" in contract performance may be demanded by prevailing community expectations. From the above, it can be seen that there are two approaches to interpret good faith, namely by means of intention, or moral standard. Given the complexities of both approaches, the interpretation can vary significantly and leads to uncertainty.

[10] Thirdly, the meaning of good faith cannot be expressed in a vacuum. Holmes argued that "there is a problem in describing the content of good faith where the language and even philosophy are vague".[23] In contrast with the duty of cooperation whereby the content of the duty is clearly established, it is argued that good faith can only be determined in the context of an agreement.[24] The proper construction of the agreement requires to be determined in the light of the context provided by the agreement as a whole and the circumstances in which the agreement was made. For example, if good faith is based in the context of an agreement during the negotiation process, surrounding factors not related to the negotiation process in the agreement should be ignored. This is to ensure the expected benefit of the contract is achievable without the interruption of other factors that will hinder the success of the contract.

[11] The fourth reason pertains to the United States of America ("US") where it is the only common law country that has legislated a general obligation of good faith, in the Uniform Commercial Code[25] and the Restatement (Second) of Contracts.[26] A special definition of good

23 See Holmes, EM, "A Contextual Study of Commercial Good Faith: Good Faith Disclosure in Contract Formation" (1977) *University of Pittsburgh Law Review* 39 at 381–408.

24 In *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [1999] WASC 1046, Templeman J held:

> In reaching my conclusion as to the proper construction of the term "good faith" in this contract, I have had regard to a number of authorities and articles which I have been referred to. In particular, I have considered the decision of Gummow Judge in S*ervice Stations Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84 which contains a helpful analysis of many of these materials. But in the end, the term must be construed in the context of the agreement in which it appears.

25 The Uniform Commercial Code, s 1-203 provides that "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement". Section 1-201(19) (General Definitions and Principles of Interpretation) defines "good faith" as "honesty in fact in the conduct or transaction concerned".

26 The Restatement (Second) of Contracts, s 205 provides that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement".

faith concerning merchants is provided in Article 2 (Sales), section 2-103(1)(b) of the Uniform Commercial Code, which provides that "… good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade". In the Uniform Commercial Code, good faith has two different meanings depending on the status of the contracting parties: merchant or non-merchant. A merchant is one who regularly trades in goods as illustrated in Article 2 (Sales) of the Uniform Commercial Code. Article 1 (General Provisions) of the Uniform Commercial Code refers to non-merchants. Under the "honesty in fact" definition, good faith is determined based on the intent or state of mind of the party.

[12] Although it is clearly legislated, there are comments from legal scholars in the US who have expressed their disagreement with the definition of good faith as stated in the Uniform Commercial Code and the Restatement (Second) of Contracts. Farnsworth commented that the definition of good faith in Article 1 (General Provisions) of the Uniform Commercial Code as "too restrictive" because the conduct of the contracting parties is based solely on honesty. In contrast to Article 2 (Sales) of the Uniform Commercial Code, in the case of merchants, the requirement of good faith includes honesty and reasonableness. Farnsworth commented that it is the "rationale for a court to imply contract terms [good faith] is necessary to secure the expected benefits of the contract to a party or to protect reasonable expectations".[27] Summers, one of the early legal commentators on good faith, agreed with the critique by Farnsworth. Summers commented that "if an obligation of good faith is to do its job, it must be open-ended rather than sealed off in a definition". He claimed that good faith should be conceptualised as an "excluder". In this context, good faith as an "excluder" is defined as a "phrase without general meaning (or meanings) of its own and serves to exclude a wide range of heterogeneous forms of bad faith". Summers' analysis of the term "excluder" had an influence on Robert Braucher, the section's principal drafter, who did not attempt to define good faith, opting instead to use the "excluder" approach. In Comment (a) to section 205 of the Restatement (Second) of Contracts, Robert Braucher acknowledged that:

27 Summers, R, "Good Faith in General Contract Law and the Sales Provision of the Uniform Commercial Code" (1968) 54 *Virginia Law Review* 195 at 196.

> [T]he phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract … excludes a variety of types of conduct characterised as involving "bad faith" because they violate community standards of decency, fairness and reasonableness.

Comment (d) to section 205 of the Restatement (Second) of Contracts proceeded to define good faith by providing an example of bad faith which includes an "evasion of the spirit of the bargain, lack of diligence and slacking off, wilful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance". Although good faith is clearly mentioned in the Uniform Commercial Code, there is no specific or precise definition of good faith. One of the main problems is the difficulty of a specific or precise definition of good faith due to the uncertainty of the concept.

[13] Despite its never-ending controversy of its definition, judges and scholars are still interested in the concept. The unresolved issues are a key motivation for this article. This article begins with a discussion of good faith in contract law by examining the civil law and common law approaches to good faith in Part 2. Part 3 focuses on good faith under Australian law and the empirical landscape to supplement doctrinal studies. Part 4 reviews the position of good faith in selected common law countries: Canada, Singapore and Malaysia. Part 5 concludes the discussion.

2. Good faith in contract law

[14] In civil law, good faith is recognised as a general and pervasive principle.[28] In most European civil codes, there is a general good faith provision. However, in common law systems, there is no such general principle of good faith, but this does not mean that the rules of contract law do not generally conform to the requirements of good faith. Instead, the invocation of the concept of good faith can be reached in other ways in common law.[29] While the underlying principles are

28 See Rick Bigwood, "Symposium Introduction: Confessions of a Good Faith Agnostic" (2005) 11 *New Zealand Business Law Quarterly* 371.

29 The legal concepts such as unconscionability, fiduciary obligation, non-derogation of grant and the common law duty to cooperate to deal with the problems of unfairness, contractual injustice and unequal bargaining power.

found in the common law, the concept is not specifically referred to.[30] For example, the equitable doctrine of unconscionability is used by the courts to review unconscionable conducts and a more liberal statutory doctrine of unconscionability is laid down in the Australian Consumer Law.[31]

Civil law and common law approaches to good faith

[15] Civil law has its origins in Roman law, which has influenced the continental system of law. The civil law legal system has been widely adopted in Europe, as well as in Latin America, Asia, Africa and the Middle East. Common law originates in the English legal system and has been adopted in the United Kingdom ("UK"), the US (excluding Louisiana), Canada (excluding Quebec), Australia, Malaysia and Singapore.

[16] There is a fundamental difference between civil law and common law legal systems. Civil law is based on codification, where its legal rules are predominantly written. In the context of civil law, the role of the judge is limited to the interpretation and application of the law based on the civil law code. In contrast to civil law, common law is developed by judges through decisions of the court or based on the doctrine of binding precedent. Both common law and civil law adopted two different legal systems. However, it is interesting to note that in the law of contract, there is a tendency for common law lawyers to refer to the civil law. According to Nicholas, "it is in the law of contract also that Common lawyers have most often looked to Roman or civil law".[32] In civil law, the influence of Roman law can be traced back to the law of obligation, particularly in the law of contract. Therefore, in the context of good faith, there is a higher chance that good faith, which is rooted in civil law, will have a big influence on common law lawyers.

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30 See Ole Lando and Hugh Beale (eds), *The Principles of European Contract Law, Part1: Performance, Non-Performance and Remedies* (Martinus Nijhoff Publishers, 1995), p xvii.

31 The Australian Consumer Law 2010, s 20 prohibits unconscionable conduct within the meaning of the unwritten law, from time to time; s 21 prohibits unconscionable conduct in connection with the supply of goods or services to a person; s 22 prohibits unconscionable conduct in connection with the supply of goods or services, or the acquisition of goods or services, in business transactions.

32 Nicholas, B, "Rules and Terms – Civil Law and Common Law" (1974) *Tulane Law Review* 946.

Bona fides in civil law

[17] Amongst the features of Roman law characteristic of the civil law system is *bona fides*. The concept of *bona fides* requires that "one's word must be kept" and "one's conduct should be in exact conformity with it [promise]".[33] Therefore, it is a kind of social and moral concept that regulates the relationship. The underlying theme of *bona fides* is to ensure that justice and fairness are upheld regardless of the express intention of the parties to the contract.

[18] Prior to *bona fides*, the concept of *stricti juris* (formal contract) had already existed in Roman contract law. *Stricti juris* is a concept whereby a judge is required to decide a contractual dispute according to the strict rules of the civil law.[34] A right in the contract could only be applied when the right is expressly granted. Therefore, it is difficult to fulfil the requirement of *stricti juris* when the right needs to be implied. However, the requirement of *stricti juris* seems of little value regarding the rights and duties concerning everyday dealings such as sale, letting and hiring, and especially those rights and duties which are not explicitly expressed but implied.

[19] This concept causes a problem when the plaintiff pleads breach of contract but he is unable to assert a definite and express right in the contract. Moreover, there were problems with the use of *stricti juris*. Firstly, upon breach of contract, according to *stricti juris*, the issue must be defined in precise Latin words, sometimes invoking the Roman gods.[35] This situation was problematic to non-Roman citizens who were not well versed in Latin and who did not believe in the Roman gods. This made it difficult for non-Roman citizens to comply with the requirement that was set by *stricti juris*. Secondly, as early as the third century, with the expansion of business between Rome and other countries, there was a need for the court to provide adequate remedies for breach of contract. Therefore, in order to accommodate these two limitations, Roman law introduced the concept of *bona fides*.

33 See CC Turpin, "*Bonae Fidei Judicia*" (1965) *The Cambridge Law Journal* 260 at 262.
34 See Dale Hutchison, "Good Faith in the South African Law of Contract" in Rogers Brownsword, Norma J Hird and Geraint Howells (eds), *Good Faith in Contract, Concept and Context* (Ashgate, 1999), p 215.
35 Ibid.

[20] There were procedural differences between the two concepts. In applying *bona fides*, the court has to consider other elements. For example, the circumstances of the case and the parties' intention, compared to when applying *stricti juris* which relies on the right given. The praetor (Roman magistrate) would always reject a remedy if the person seeking it was not in good faith, without having to show any element of bad faith in the contract. The ultimate effect which *bona fides* had on Roman law is described by Martin Schermaier:

> The expansion of the judicial discretion in assessing the merits of a case lay at heart of the brilliant development of Roman contract law from time of the late Republic until the end of the classical period. Before the introduction of the *bonae fidei iudicia* the judge was confined to determining whether the claim asserted under the procedural formula did or did not exist. The *bona fide* clause enabled him to consider the parties' relationship in its origin and all its effects, within the framework of all surrounding circumstances and the conduct of the parties.[36]

[21] The historical origin of *bona fides* within the Roman law has played a vital part in the acceptance of good faith within contemporary contract law in European civil codes. Most European civil codes contain a general good faith provision. In addition, some codes contain specific rules in which reference is also made to the concept of good faith. The inclusion of good faith both in specific code provisions and as a blanket concept of importance for entire fields of law has given good faith an "institutional" or formal role in codified civil law systems unlike in common law. Moreover, many specific rules in the codes are said to be special applications of good faith.

[22] In Germany, a general good faith provision is enshrined in section 157 of the German Civil Code, which provides that contracts must be interpreted in accordance with good faith, having regard to common usage. Section 242 of the German Civil Code provides that the debtor is bound to perform the contract in accordance with good faith having regard to common usage. In France, Article 1134(3) of the French Civil Code pronounces that contracts must be performed in good faith. The French Civil Code does not define good faith or

36 Martin Schermaier, "Bona Fides in Roman Contract Law" in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press, 2000), pp 81–82.

the standards by which it is to be judged. Article 1134(3) seems to impose a minimum obligation of honest conduct where duties are not prescribed by the contract or by the law. In Italian law, by virtue of Article 1375 of the Italian Civil Code, contracts are to be performed to an objective standard of good faith. In the Swiss Civil Code, Article 2 provides that every person is bound to exercise their rights and fulfil their duties as well as to act in accordance with good faith. In addition to that, the Greek Civil Code and Article 6:248 of the Dutch Civil Code make reference to the concept of good faith.

Common law approaches to good faith

[23] Unlike civil law, there is no overriding general positive duty of good faith imposed on the parties to a contract either in negotiation or performance in common law. Lord Ackner commented that:

> … [T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making representations. A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating parties.[37]

[24] In the context of performance, common law confers rights to the contracting parties as stipulated in the contract. In *James Spencer & Co Ltd v Tame Valley Padding Co Ltd*, Potter LJ commented that:

> [T]here is no general doctrine of good faith in the English law of contract. The Plaintiffs are free to act as they wish provided that they do not act in breach of a term of the contract.[38]

[25] This parallels the features of the common law which is based on precedent. The development of good faith in common law stems from the English law through the Court of Chancery. In the Court of Chancery, the first Chancellors were ecclesiastics well versed in canon law. The principle of good faith is inherent in canon law (the law of the Church of England). Therefore, canon law has a significant influence in the development of common law. Canon law emphasised

37 See *Walford v Miles* [1992] 2 AC 128 at 138.

38 See *James Spencer & Co Ltd v Tame Valley Padding Co Ltd* (unreported, April 8, 1998), CA.

that every promise was binding on the conscience of the person who made it and that failure or refusal to keep it was a breach of that person's duty to God.[39]

[26] The jurisdiction of common law courts over contracts was limited during the Middle Ages, and there was no remedy for the breach of a simple contract. However, the ecclesiastical courts were willing to enforce such contracts. For this reason, common law courts issued writs of prohibition to prevent recourse to the Court of Chancery as a means to avoid conflict.

[27] Due to the rapid development of international trade in the 13th century, a general remedy for breach of contract was needed even though there were many available statutes and petitions that were addressed to the King that called for contracts to be honoured. The available statutes and petitions were insufficient to provide a remedy for breach of contract. In the 16th century, the Court of Chancery progressed and developed from a Court of Conscience to a Court of Equity. This event led to the development of the concept of good faith. It also implies that the concept of good faith is separated from the concept of conscience.[40] Thus, it would appear that the basic obligation of good faith arising from a promise or an agreement (*pacta sunt servanda*), which was enforced on grounds of conscience in the Court of Chancery became the basis of the general remedy for breach of contract in common law. In view of this, it is beyond dispute that the Court of Chancery was mainly responsible for the development of good faith in common law.

[28] By the 18th century, under the influence of Lord Mansfield, it seemed that good faith might have emerged as a broad principle of significance in English contract law.[41] Lord Mansfield emphasised basic fairness and the intentions of the parties as governing principles. In his famous decision in *Carter v Boehm*,[42] Lord Mansfield, relying on the idea of good faith bargaining in contract formation, held that:

39 See Raphael Powell, "Good Faith in Contracts" (1956) 9 *Current Legal Problems* 16 at 22.

40 See JF O'Connor, *Good Faith in English Law* (Darmouth Publishing Company Limited, 1990), p 8.

41 PS Atiyah, "Implied terms (A Duty to act in Good Faith?)" in *Atiyah's Introduction to the Law of Contract* (Oxford University Press, 2005), pp 1 and 168.

42 [1766] 3 Burr 1905 at 1910.

> The governing principle is applicable to all contracts and dealings. Good faith forbids either party from concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.[43]

[29] Despite the strong advocacy of Lord Mansfield, the concept of good faith is still in its infant stages. English contract lawyers are familiar with the concept of subjective good faith in the sense of honesty in fact or a clear conscience. However, until very recently, the idea of a general doctrine of good faith, in the sense of an overriding and objective requirement of fair dealing has not been part of the established norms of English contract law.[44] There has been relatively little support for the concept of good faith in common law. For example, Lord Steyn observed that there is no need for English law to introduce a general duty of good faith as it is unnecessary as long as the courts respect the reasonable expectations of the parties "in accordance with [English law's] own pragmatic tradition".[45]

[30] In the US, good faith is clearly adopted in the Uniform Commercial Code and the Restatement (Second) of Contracts and both are compelling authoritative sources of the duty of good faith in commercial contracts. Despite the pervasiveness of the concept of good faith throughout the statutory provisions and the attempt by some of the American scholars to define good faith, there is still no firm definition and guidelines for the concept of good faith.

[31] From the above discussion, it can be concluded that the perception of good faith as an important legal principle appears to be much clearer in civil law systems compared to common law. The application of good faith in common law is still ambiguous.

3. Good faith under Australian contract law

[32] One of the earliest discussions of good faith in Australia was in the opening speech at the Second Annual Journal of Contract Law Conference in 1991. Lord Goff of Chieveley commented that English

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43 [1766] 3 Burr 1905 at 1910.

44 See generally, Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1995).

45 John Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 *Law Quarterly Review* 442.

and Australian lawyers have a lot in common and that the principle of good faith is an issue for both jurisdictions.[46] His Lordship commented:

> We know that there is such a principle [good faith] in one of the most famous provisions of the German BGB. I think that I am right saying that there is also such a principle [good faith] in the United States Uniform Commercial Code. Do we need such a principle [good faith] as this in our commercial law?[47]

[33] His Lordship further commented that he was unsure of the position taken by Australian judges and practitioners but believed that there were some academic lawyers who were sympathetically inclined towards the idea of good faith. Lord Goff was of the opinion that because of the conservative attitude of English judges, good faith could only exist if introduced by a commercial code akin to that introduced by the US. His Lordship commented on the position of good faith in Australia, saying:

> In this country [Australia], we are more likely to see a gradual refinement and development of a recognised concept such as estoppel, which perhaps has yet to achieve its full potential.[48]

[34] In his opening address at the Fourth Journal of Contract Law Conference two years later, Lord Staughton noted the uncertain position of good faith in Australia.[49] His Lordship affirmed that good faith is of importance in some commercial contexts, such as insurance contracts, but noted that the common law does not proceed too readily from a series of examples to the adoption of a general principle of good faith.

[35] The concept of good faith was first judicially considered in 1992 by Priestley J in the New South Wales ("NSW") Court of Appeal in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* ("*Renard*").[50] Priestley J was clearly of the opinion that the appropriate course was towards the development of a general principle of good faith and fairness. His Honour stated:

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46 See Goff, RLA, "Opening Address (Second Annual Journal of Contract Law Conference in London in September 1991)" (1992) 5 *Journal of Contract Law* 4.

47 Ibid.

48 Ibid.

49 See Staughton, C, "Good Faith and Fairness in Commercial Contract Law" (1994) 7 *Journal of Contract Law* 193.

50 (1992) 26 NSWLR 234.

> … people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view, this is in these days the expected standard, and anything less is contrary to prevailing community expectations.[51]

[36] His Honour reviewed the influence of the Uniform Commercial Code and the Restatement (Second) of Contracts on US case law, and considered that there were strong arguments "for recognition in Australia of [such] a duty".[52] Despite Priestley J's strong belief in the position of good faith in Australia, its application remains uncertain. There remains no High Court decision regarding the position of good faith in Australia.[53]

[37] There are at least 154 Federal Acts in Australia that mention the words "good faith".[54] These Acts apply good faith in different ways; in some, good faith is expressly spelt out in the legislation while in others, the reference is more oblique. One of the well-known examples of legislation of good faith is found in the Insurance Contracts Act 1984 (Cth) by virtue of section 13.[55] It is clear that there is an expectation that parties to the insurance contract have a duty to disclose the required information to each other in order to ensure the sanctity of the contract. The concept of utmost good faith in the insurance contract is a longstanding one. In other legislation, the reference to the obligation of good faith is oblique. An example of oblique good faith is found in section 22(1) of the Australian Consumer Law as prescribed in Schedule 2 to the Competition and Consumer Act 2010 (Cth). This section provides a list of factors which the court may have to consider for the purpose of determining unconscionable conduct.

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51 Ibid, at p 268.

52 Ibid.

53 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289; *Yousif v Commonwealth Bank of Australia (No 2)* [2009] FCA 656. Both cases evince an unwillingness to discuss further on the status of the definition of good faith.

54 *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at [84].

55 Section 13 stated that a contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

One factor that needs to be taken into account is the good faith factor which states, "To the extent to which the supplier and the customer acted in good faith". The existence of such a wide range of legislative references to good faith suggests that there is a strong indication from the Legislature that the good faith obligation is a commonly expected norm.

The Watershed decision: Renard Constructions (ME) Pty Ltd v Minister for Public Works

[38] The judgment of Priestley J in *Renard* has paved the way for the emergence of the concept of good faith in Australian contract law. The *Renard* case did not establish the doctrine of good faith because Priestley J's comments were *obiter*, but it has no doubt influenced many cases.[56] *Renard* has been a catalyst for debate about the doctrine of good faith.

[39] *Renard* concerned a dispute that arose between Renard Constructions ("the contractor") and Minister for Public Works ("the principal") over the construction of sewerage works. Clause 44.1 of the NPWC3-1981 General Conditions of Contract provided that if the contractor defaulted, the principal was entitled to call upon the contractor by notice in writing to "show cause within a period specified in the notice" as to why the powers set out in the clause "should not be exercised". The clause also conferred on the principal the power to take over the whole, or any part, of the work and to exclude the contractor from the site.

[40] When the contractor did not complete the work on time, the principal served a notice under clause 44.1. One of the reasons for the contractor not completing the work on time was due to the failure of the principal to supply the required material at the agreed time of the

56 Some of the cases which refer to *Renard* (not exhaustive): *Service Station Association Ltd v Berg Bennet & Associates Pty Ltd* (1993) 45 FCR 84; *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32; *Vodafone Pacific Ltd v Mobile Innovations Ltd* (2004) NSWCA 15 (unreported, February 20, 2004), *per* Sheller, Giles and Ipp JJA; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Gary Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) FCA 903; *Burger King Corp v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558; *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* (2005) VSCA 228 (unreported, September 15, 2005), *per* Warren CJ, Buchanan JA and Osborn AJA.

contract. The information about the failure of the principal to supply the required material at the agreed time of the contract was unknown to the officer, who had the power to make final decisions to terminate the contracts and sign the appropriate notices. At the same time, the contractor had also enlarged its workforce, worked longer hours, and engaged an experienced foreman in response to the show-cause notice. For these reasons, the contractor regarded the principal's conduct as repudiatory. The arbitrator found that the principal was unreasonable in exercising the power under clause 44.1. By virtue of section 38 of the Commercial Arbitration Act 1984 (NSW), the principal appealed the award of the arbitrator.

[41] Cole J held that the decision of the arbitrator should be reversed on the basis that clause 44.1 did not carry an implied obligation upon the principal to the effect that the power to take over the work and exclude the contractor from the site must be exercised reasonably. The contractor then appealed against Cole J's order. In the Court of Appeal, the issue that needed to be considered was whether the principal was under a duty to act reasonably, which permitted the principal to take over the builder's work.

Priestley J's judgment

[42] In Priestley J's view, a requirement of reasonableness is implied in clause 44.1. His Honour suggested the requirement could either be implied in fact[57] or implied in law.[58] His Honour further held:

57 Implication by fact, known as implication ad hoc, is an implication by a judge based on the judge's view of the actual intention of the parties drawn from the surrounding circumstances of the particular contract, its language and its purpose as that emerges from the language and in the circumstances. See *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266, which discusses the rules governing implication in fact. A number of Australian cases have treated a duty of good faith as a term "implied by fact", see for example: *GSA Group Pty Ltd v Siebe Plc* (1993) 30 NSWLR 573; *News Ltd v Australian Rugby Football League Ltd* (1996) 58 FCR 447 at 541; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151; *Advance Fitness Corp Pty Ltd v Bondi Diggers Memorial & Sporting Club Ltd* [1999] NSWSC 264; *Saxby Bridge Mortgages Pty Ltd v Saxby Bridge Pty Ltd* [2000] NSWSC 433 at [61]–[62].

58 Implication by law is based on imputed intention as opposed to actual intention and implies a term as a legal incident of a particular class of contract. A number of Australian cases have treated a duty of good faith as a term "implied by law", see for example: *Alcatel Australia v Scarcella* (1998) 44 NSWLR 349 at 369; *Garry*

> For myself, I cannot see why a term should not be implied at both stages; that is, it seems to me relatively obvious that an objective and reasonable outsider to this contract upon reading clause 44.1 would assume without serious question that the principal would have to give reasonable consideration to the question whether the contractor had failed to show cause and then, if the principal had reasonably concluded that the contractor had failed, that reason consideration must be given to whether any power and if any which power should be exercised.[59]

[43] His Honour held that all the accepted criteria for term "implied in fact" were clearly satisfied. Priestley J agreed with the findings by the arbitrator that the principal was not entitled to exercise any power under clause 44.1 when the contractor had served the notice to show cause. Therefore, the principal's announcement to the contractor that the contractor was to be excluded from the site, and that the remaining work was to be taken over by the principal was undoubtedly repudiatory. In this event, the contractor could bring the contract to an end.

[44] In reaching this conclusion, an analogy was drawn between the incidents where good faith was judicially attached to various classes of contract and those attached by statute. There are many instances in which Acts of Parliament impose a similar effect in the form of attaching implied conditions to contracts as an incident of law. In both instances, it arrived at the same outcome with the aim of making the contract fairer between the parties. In addition to statutory analogy, his Honour drew support from the concept of good faith:

> Good Faith. The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith which

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Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd (1999) ¶ ATPR 41-703,43,014; *Far Horizons Pty Ltd v McDonald's Australia Ltd* [2000] VSC 310 (unreported, August 18, 2000) at [120], *per* Byrne J; *Burger King Corp v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558; *Apple Communications Ltd v Optus Mobile Pty Ltd* [2001] NSWSC 635 at [15]; *Bamco Villa Pty Ltd v Montedeen Pty Ltd* [2001] VSC 192 (unreported, June 20, 2001) at [162], *per* Mandie J; *Commonwealth Bank of Australia v Renstel Nominees Pty Ltd* [2001] VSC 167 at [47]; *Overlook v Foxtel* (2002) Aust Contract Reports 90-143 at 91-972; *Commonwealth Bank of Australia Ltd v Spira* (2002) 174 FLR 274 at [140]; *Commonwealth Development Bank of Australia v Cassagrain* [2002] NSWSC 965 at [210].

59 (1992) 26 NSWLR 234 at 257.

> are regarded in many civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract. Although this implication is not yet been accepted to the same extent in Australia as part of judge-made Australian contract law, there are many indications that the time may be fast approaching when the idea, long recognised as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States.[60]

[45] Priestley J further commented that "in ordinary English usage there has been a constant association between the word fair and reasonable. Similarly, there is a close association of ideas between the terms unreasonableness and lack of good faith. Although they may not be always co-extensive in their connotations, partly as a result of the varying senses in which each expression is used in different contexts, there can be no doubt that in many of their uses there is a great deal of overlap in their content".[61]

[46] His Honour also considered that the increased legislative interference with freedom of contract resulted in the following:

> [P]eople generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contracts which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing. In my view, this is in these days the expected standard, and anything less is contrary to prevailing community expectations.[62]

[47] The *Renard* case is significant in Australia because this case recognised that a duty of good faith could, in some circumstances, be implied into contracts. It is considered as "refreshing approaches to support of modern contract law"[63] as compared to English law approaches. Although consideration was given to good faith by only one out of three members of the NSW Court of Appeal, and only as *obiter* comments, the case has a significant influence in subsequent

60 Ibid, at p 264.
61 Ibid, at p 265.
62 Ibid, at p 268.
63 Cheong May Fong, "Good faith in contract law: A comparative survey", UM-UI Law Seminar: Core Trends in Malaysian and Indonesian Laws, Jakarta, Indonesia, December 16, 2006.

cases that refers the judgment in *Renard*, including cases in jurisdictions other than NSW.[64]

Empirical analysis: A case study of Renard Constructions (ME) Pty v Minister of Public Works

[48] An empirical overview of good faith gives a more detailed review of the "landscape" of decided cases on the issue of good faith in contractual performance during the period of review. This study is based on cases between 1992 and 2009 which cited the *Renard* case that focused on good faith in contractual performance. The study employed a longitudinal approach, where the years were divided into three phases – the introduction phase from 1992 to 1998, the development phase from 1999 to 2003, and the consolidation phase from 2004 to 2009 – in order to trace the evolution and development of good faith in Australian contract law.

Cases raising good faith as an issue (per year)

[49] One means of analysing the good faith phenomenon in Australia is to measure the number of instances in which the issue of good faith was raised as a material issue. Figure 3.1 shows, by year, that there were 104 identified good faith cases in Australia during the 1992–2009 period.

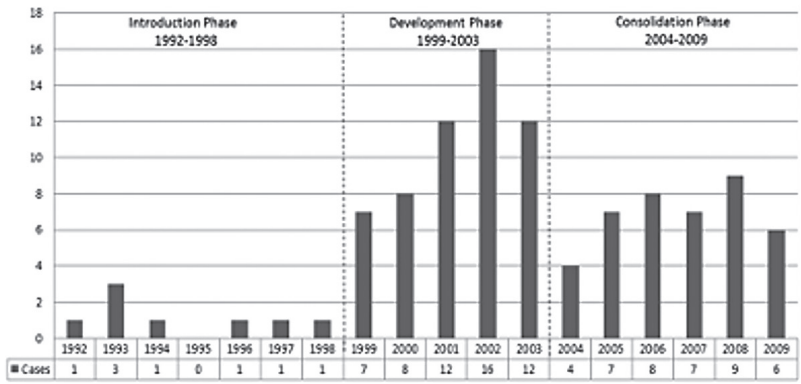

Figure 3.1: Cases that raised good faith as an issue (per year)

64 Some of the examples: *Service Station Association Ltd v Berg Bennet & Associates Pty Ltd* (1993) 45 FCR 84; *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32; *Vodafone Pacific Ltd v Mobile Innovations Ltd* (2004) NSWCA 15 (unreported, February 20, 2004), *per* Sheller, Giles and Ipp JJA; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Gary Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) FCA 903; *Burger King Corp v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558; *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* (2005) VSCA 228 (unreported, September 15, 2005), *per* Warren CJ, Buchanan JA and Osborn AJA.

Introduction phase

[50] During the introduction phase from 1992 to 1998, only eight cases were identified. In 1992, 1994, 1995, 1996 and 1998, one case was identified for each year. However, in 1993, three cases were identified. During this phase, there appears to be some degree of confusion about the issue of good faith, with only eight cases being identified. One interpretation of this may be that plaintiffs and judges were not well versed in the concept and as such lacked confidence to discuss the issue of good faith in their cases. The discussion of the concept of good faith in *Renard* was only *obiter* comments and as such did not constitute a binding precedent for other courts. The acceptance and recognition of the concept of good faith may take time because good faith was still a new concept without a clear meaning. A good example is the duty of cooperation which has long been accepted and recognised in contract law. In *Mackay v Dick*,[65] the duty of cooperation is recognised as part of the underlying concept of contract law as early as 1881. Since then, the duty of cooperation has developed to the extent that it becomes the expected standard that the parties in the contract are required to secure the expected benefit of the contract. The longer period of time has provided an ample opportunity for the duty of cooperation to be well established in contract law.

Development phase

[51] During the development phase between 1999 and 2003, there is an increasing number of identified reported good faith cases compared to the introduction phase. The number of identified good faith cases by year are as follows: 1999 (7), 2000 (8), 2001 (12), 2002 (16), and 2003 (12). This shows a dramatic increase in identified good faith cases. Of the 104 cases in the entire study period, 55 occurred during the development phase (1999 to 2003). The figure also shows that the majority of good faith cases were raised in 2002 (16), and the least in 1999 (7). One conclusion that can be drawn from this is that the issue of good faith was slowly being embraced in the legal landscape in this phase.

Consolidation phase

[52] The period between 2004 and 2009 constitutes the consolidation phase in which there is greater acceptance of the issue of good faith.

65 (1881) 6 App Cas 251.

The number of identified good faith cases by year are as follows: 2004 (4), 2005 (7), 2006 (8), 2007 (7), 2008 (9), and 2009 (6). Forty one cases were identified from a total sample of 104 cases. This phase suggests that the judges were ready to hear pleadings put forward by plaintiffs on the basis of the concept of good faith. One conclusion that could be drawn from this phase is that the issue of good faith has become more recognised.

[53] Overall, the data suggests that the development of good faith in Australian case law from 1992 to 2009 is inconsistent due to the inconsistent distribution of cases that raised good faith as an issue as illustrated in Figure 3.1. The development of good faith as a new concept has undergone a development similar to the experience of any new principle of law. A good example is section 52 (misleading or deceptive conduct) of the Trade Practices Act 1974 (Cth),[66] which received little attention before becoming an accepted provision. French J's observation of the Trade Practices Act 1974 (Cth) is that "judicial exploration of the scope of s 52 (misleading or deceptive conduct) has, in the 14 years since its enactment, generated a considerable body of case law".[67] His Honour's statement is supported by the increasing number of decisions involving the section reported in the Australian Trade Practices Reports:

> In the first years to 1979 there were 19. In the next five years to 1984, there were 131. In the three years and eight months to August 1988, there have been a further 236 cases reported or digested in that service. In the two years since August 1988 there has been a further 166 cases reported or digested.[68]

[54] At present, section 52 (as it then was), now known as section 18 of the Australian Consumer Law, is commonly used, but only after the concepts of the section underwent a lengthy development process. Similarly, it is also expected that the concept of good faith must also undergo a similar process before it receives a greater acceptance.

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66 See the Trade Practices Act 1974 (Cth), which was enacted as Sch 2 to the Competition and Consumer Act 2010 (Cth) which came into effect on January 1, 2011.

67 RS French, "A Lawyer's Guide to Misleading or Deceptive Conduct" (1989) 63 *Australian Law Journal* 250.

68 See Deborah Healey and Andrew Terry, *Misleading or Deceptive Conduct* (CCH Australia Limited, 1995), pp 19–20.

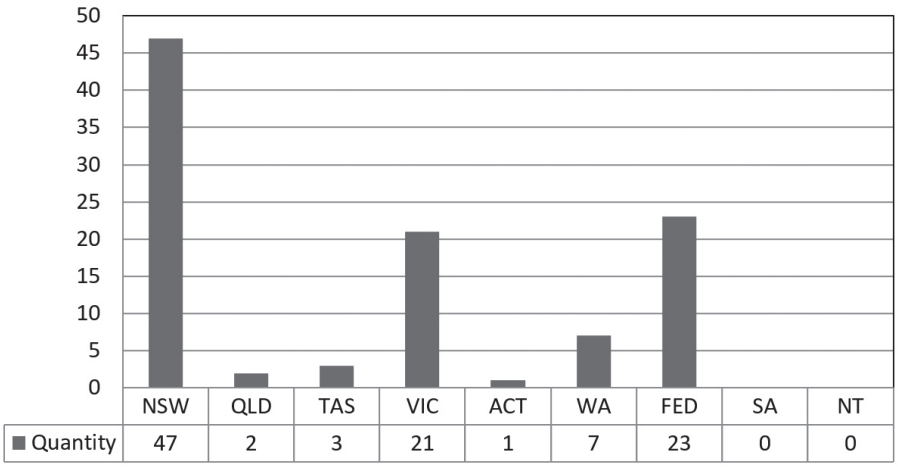


Figure 3.2: Cases that raised good faith as an issue (by jurisdiction)

	NSW	QLD	TAS	VIC	ACT	WA	FED	SA	NT
Cases	47	2	3	21	1	7	23	0	0
%	45%	2%	3%	20%	1%	7%	22%	0	0

Table 1: Percentage of cases that raised good faith as an issue (by jurisdiction)

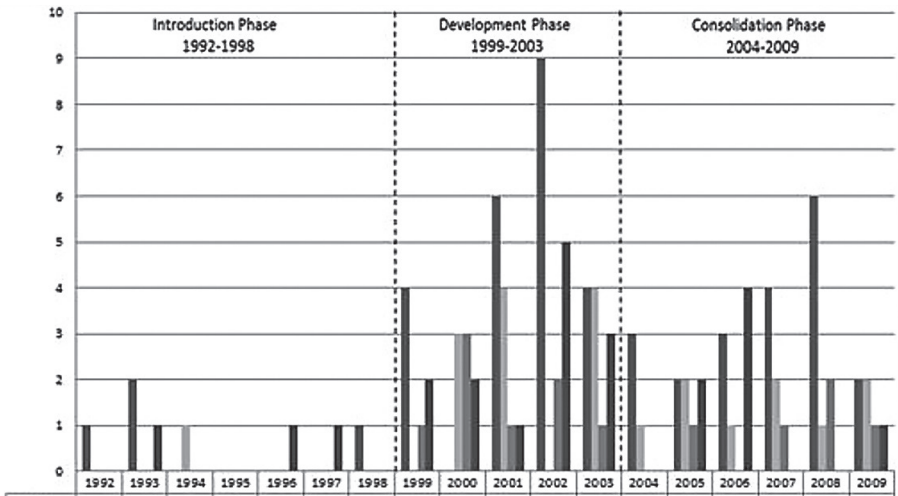
[55] Figure 3.2 provides an overview of the identified good faith cases raised in Australia by jurisdiction. Table 1 illustrates the quantity and percentage of identified cases by jurisdiction.

[56] Figure 3.2 suggests an unbalanced distribution in the raising of the issue of good faith in Australia. The number of identified good faith cases by jurisdiction are as follows: NSW (47), Queensland (2), Tasmania (3), Victoria (21), ACT (1), Western Australia (7), and Federal (23). No cases were identified in South Australia and Northern Territory. A small number of cases of good faith were identified in Queensland, Tasmania, ACT and Western Australia. These states are grouped together and classified as "Other States". The figures have to be interpreted cautiously because they are influenced by an uneven population distribution. For example, NSW has the highest population, with approximately 7,247,700 people, followed by Victoria, with approximately 5,574,500 people while the Northern Territory has the least, which constitutes approximately 232,400 people.[69]

69 Australian Bureau of Statistics, December 2011, available online at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0/>.

[57] It is apparent from Table 1 that the majority (47) of identified cases are decisions of NSW courts, which is not surprising as it has the largest population. The number of reported cases amounts to 45% of all identified cases. Victoria has the second most number of reported cases with 21%, again, most likely because it is the second most populated area. This percentage amounts to 20% of total cases. The Federal courts reported 23 cases, amounting to 22% of the total. Other states reported 13 cases out of the total of 104 identified cases (Western Australia (7), Queensland (2), ACT (1), and Tasmania (3)), amounting to 13% of the total percentage.

[58] One conclusion that can be drawn from this is that the issue of good faith is influenced by jurisdiction. The fact that the *Renard* case was first decided in NSW undoubtedly influenced many cases in NSW to follow suit. The data also reveals that good faith is a well-known issue in NSW and that there is strong judicial support for the term compared to the other states.



	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
NSW	1	2	0	0	0	0	1	4	0	6	9	4	3	2	3	4	6	2
VIC	0	0	1	0	0	0	0	0	3	4	0	4	1	2	1	2	1	2
OTHERS	0	0	0	0	0	0	0	1	3	1	2	1	0	1	0	1	2	1
FED.	0	1	0	0	1	1	0	2	2	1	5	3	0	2	4	0	0	1

Note: "Others" comprises the jurisdictions of Western Australia, Queensland, Tasmania and ACT

Figure 3.3: Cases that raised good faith as an issue (by year and jurisdiction)

[59] The analysis of the influence of good faith in each Australian jurisdiction provides a more comprehensive view of the growing

awareness of the good faith issue. Figure 3.3 identifies cases in which good faith is raised as an issue by year and jurisdiction.

Introduction phase

[60] During the introduction phase from 1992 to 1998, four cases relying on an argument of good faith were identified in NSW, three in the Federal courts, and one in Victoria with no identified cases in other states. During this stage, it is undeniable that the issue of good faith was still in its infancy

Development phase

[61] During the development phase from 1999 to 2003, there was a growing number of identified cases relying on good faith as an issue when compared to the introduction phase. The number of identified good faith cases by jurisdiction are as follows: NSW (23), Victoria (11), Federal courts (13), and others states (8). The highest number of identified cases is in NSW (23), followed by Federal courts (13), Victoria (11), and other states (8). This suggests a growing awareness of, and interest in, the issue of good faith. It may be considered that the opinion of Priestley J had convinced litigants in NSW to plead the issue of good faith.

Consolidation phase

[62] In the consolidation phase from 2004 to 2009, the distribution of identified cases arguing good faith as an issue across jurisdictions was stable. The number of identified good faith cases by jurisdiction are as follows: NSW (20), Victoria (9), Federal courts (5) and other states (7). The number of reported cases during the period of review showed a consistent distribution of cases compared to the development phase. One interpretation that can be inferred here is that good faith is beginning to receive a warm welcome in NSW. This may be because the concept has become more widely recognised and the judges are more willing to consider the concept as a result of it having been introduced in NSW.

Good faith identified as an implied term in Australian contract cases

[63] Paragraphs [49]-[52] address the total sample of cases which raised good faith as a substantial issue. This section examines the sample to determine the cases in which the courts have upheld an argument that an obligation of good faith was implied in the contract.

The issue of the implication of a good faith term has yet to be decided upon by the High Court.[70]

[64] Good faith can be implied as a term of the contract in two ways: term "implied in law" and term "implied in fact". A term "implied in law" is based on the legal incident of a particular class of contract. A term "implied in fact" is based on the intention of the parties. This section examines the data pertaining to the number of instances in which a term requiring good faith performance was implied compared to the total number of cases in which good faith was raised by year (from 1992 to 2009).

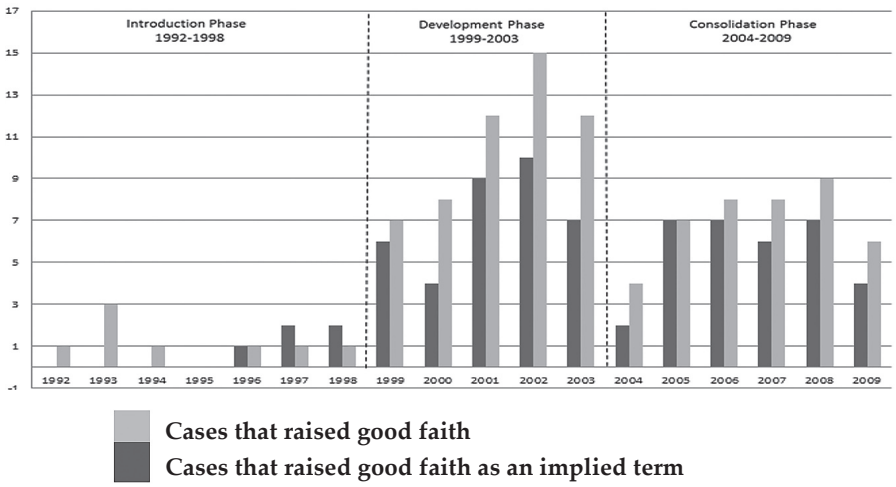


Figure 3.4: Recognition of implied term (by year)

	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Implied	0	0	0	0	1	2	2	6	4	9	10	7	2	7	7	6	7	4
Cases	1	3	1	0	1	1	1	7	8	12	16	12	4	7	8	7	9	6
%Implied	0%	0%	0%	0%	100%	200%	200%	86%	50%	75%	63%	58%	50%	100%	88%	86%	78%	67%

Table 2: Total number of cases, the quantity and percentage of implied cases (by year)

70 In *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289, the court refused to decide the issue of good faith because the judges deemed it unnecessary at that point. However, Kirby J in his dissenting judgment expressed a very important point, highlighting that an implied term in a commercial contract "appears to be inconsistent with the law as it has developed in Australia in respect of the introduction of implied terms into written contracts which the parties have omitted to include".

[65] Figure 3.4 illustrates the cases by year in which the court recognised implication of a term requiring good faith in contractual performance. Table 2 depicts the total number of cases, the quantity and percentage of implied cases during the period of review.

Introduction phase

[66] In the introduction phase from 1992 to 1998, only five cases were found to have been implied from the eight identified cases. The number of identified cases of implied term recognised by year are as follows: 1996 (1), 1997 (2), and 1998 (2). This shows that the implication rate and the identified cases are almost equal with an exception in 1993, where there is no implied term recognised from three identified cases. This indicates that the courts had yet to establish a direction to take in deciding whether to imply a term of good faith in contract.

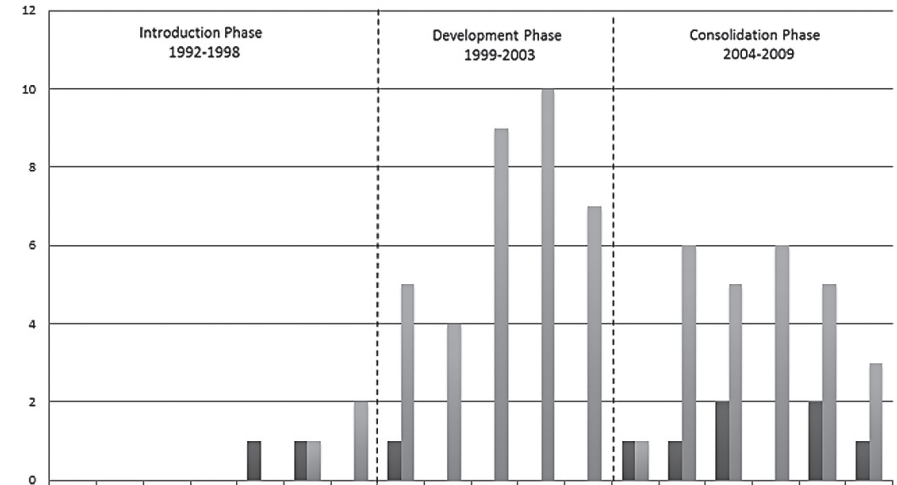
Development phase

[67] In the development phase from 1999 to 2003, the implication rate is higher. Thirty six cases were found to have recognised an implied term of good faith from the 55 identified cases. The number of identified cases of implied term recognised by year are as follows: 1999 (6), 2000 (4), 2001 (9), 2002 (10), and 2003 (7). The average implication rate is more than 50%, with the year 1999 having the highest implication rate wherein six cases were found to imply a term from seven identified cases, or 86%. At this stage, it can be said there is an emerging trend in implying a term of good faith.

Consolidation phase

[68] In the consolidation phase from 2004 to 2009, 33 cases were found to have recognised an implied term of good faith from 41 identified cases. The number of identified cases of implied term recognised by year are as follows: 2004 (2), 2005 (7), 2006 (7), 2007 (6), 2008 (7), and 2009 (4). The implication rate is greater than 50%, showing a growing recognition for the concept. In 2005, all the seven identified cases were also found to be implied terms. This indicates that in 2005, the courts were willing to accept an implication of good faith term in seven identified cases.

[69] One conclusion that could be drawn from this is that the implication of a term is increasingly accepted over the study period.



	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Fact	0	0	0	0	1	1	0	1	0	0	0	0	1	1	2	0	2	1
Law	0	0	0	0	0	1	2	5	4	9	10	7	1	6	5	6	5	3

Figure 3.5: Term implied in fact vs term implied in law (by year)

[70] As discussed in earlier, there are two types of implications recognised by the court. The court has approached good faith as a term which may be either term: "implied in fact" or "implied in law". Figure 3.5 illustrates the instances of the term "implied in fact" and the term "implied in law" by year in Australia.

Introduction phase

[71] In the introduction phase from 1992 to 1998, there were two identified cases in which the term "implied in fact" was found, namely in 1996 (1) and 1997 (1), and three cases which the term "implied in law" was found, namely in 1997 (1) and 1998 (2). During this stage, there was no binding authority to decide which concept was preferable.

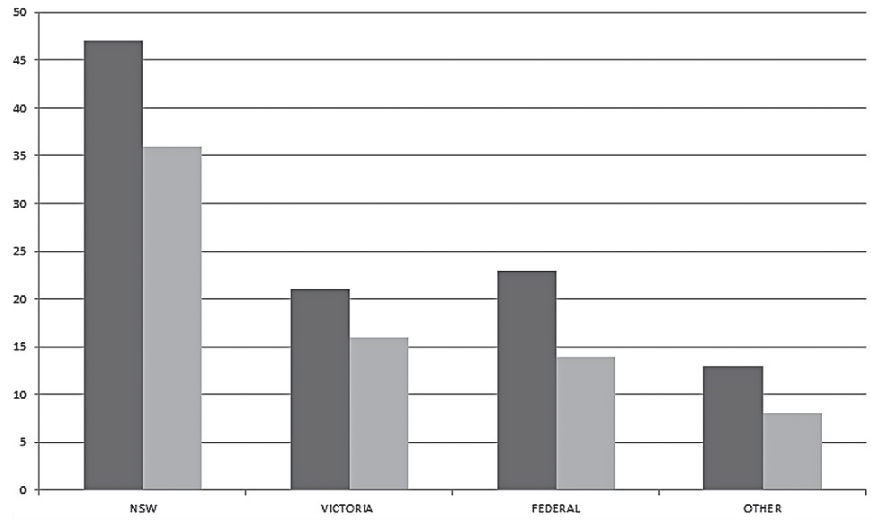
Development phase

[72] Interestingly, in the development phase from 1999 to 2004, there was only one case in which the term "implied in fact" was found, namely in 1999, and 35 cases in which the term "implied in law" was found, namely in 1999 (5), 2000 (4), 2001 (9), 2002 (10), and 2003 (7). This empirical data clearly suggests that there is an increasing acceptance of good faith as a term "implied in law".[71]

71 See *Burger King Corp v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558 at 569.

Consolidation phase

[73] There were seven cases where the court decided to imply a term "implied in fact" as found in 2004 (1), 2005 (1), 2006 (2), 2008 (2), and 2009 (1). No such case was found in 2007. There were 26 cases where the court decided to imply a term "implied in law" as found in 2004 (1), 2005 (6), 2006 (5), 2007 (6), 2008 (5), and 2009 (3). Overall, more cases were identified using the term "implied in law". This finding clearly supports the comments of the NSW Court of Appeal that this term ("implied in law") is preferred to imply a good faith obligation.[72]



Note: "Other" comprises the jurisdictions of Western Australia, Queensland, Tasmania and ACT

Figure 3.6: Cases of implied terms (by jurisdiction)

	NSW	VICTORIA	FEDERAL	OTHER
No.of cases	47	21	23	13
Term Implied	36	16	14	8
%of Term Implied	77%	76%	61%	62%

Table 3: Quantity and percentage of implied term cases (by jurisdiction)

72 See *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84.

[74] Figure 3.6 depicts the cases by jurisdiction during the period of review. Table 3 explains the quantity and percentage of the term implied based on the number of cases from each of the jurisdictions. These rates contrast significantly with the observed implication for cases by year as illustrated in Figure 3.6.

New South Wales

[75] NSW has the most cases identified, 36 out of 47 cases, where the term was implied. This amounts to 77% from the total percentage of the term implied. There has been strong judicial support for the implication of the term of good faith in NSW.[73]

Victoria

[76] In Victoria, the frequency of cases where the term implied is also significant, with 16 out of 21 cases identified where the term was implied. This amounts to 76% from the total percentage of the term implied.

Other states

[77] It is reported that in other states, there is a small number of cases reported where the term was implied, that is eight cases where the court decided to imply the term from 13 identified cases. This amounts to 62% of the total percentage of the term implied.

Federal courts

[78] In the Federal courts, the number of cases where the term implied by jurisdiction is 14 out of 23. This amounts to 61% of the total percentage of the term implied.

[79] Overall, the implication of good faith demonstrated that NSW has an acceptance rate of 79% and Victoria 76%. This data indicates that Victoria and NSW show most interest in the implication of the concept. The rates of the Federal courts (61%) and other states (62%) show that these jurisdictions take an equal interest in recognising an implication of good faith despite a smaller quantity of reported cases during the period of review.

73 See *Overlook v Foxtel* (2002) Aust Contract Reports 90-143 at 91-972.

Breaches of implied term of good faith in Australian contract cases

[80] The previous discussion in paragraphs [63]-[79] address the number of cases in the total sample in which the courts have found an implied term of good faith. Paragraphs [81]-[83] examine cases in which the court recognised implication cases and breach cases of the implied term of good faith were found.

Recognised implication cases and breach cases

[81] Figure 3.7 depicts the number of cases where the courts have recognised breach and implied a term of good faith. Table 4 shows the number of the total cases, number and percentage of implication cases and the number of implication and breach cases during the period of review.

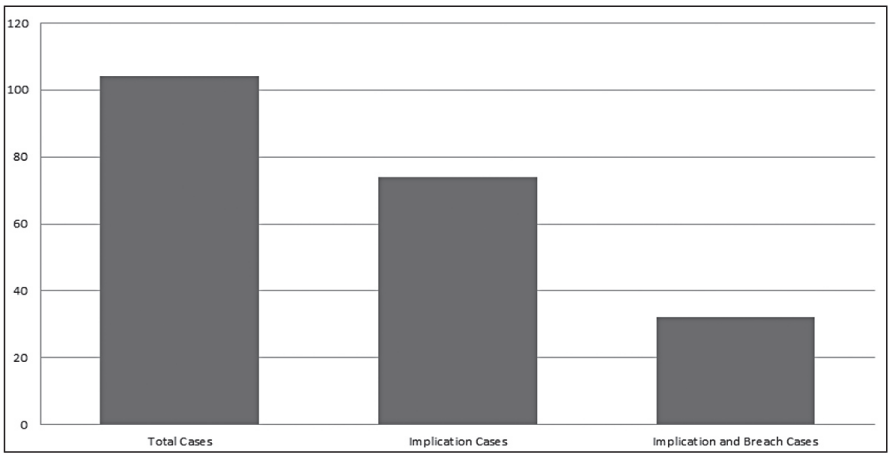


Figure 3.7: Recognition of breach and implied term of good faith

	Total Cases	Implication Cases	Implication and Breach Cases
Quantity	104	74	32
%	0	71%	43%
% Total Sample	0	0	31%

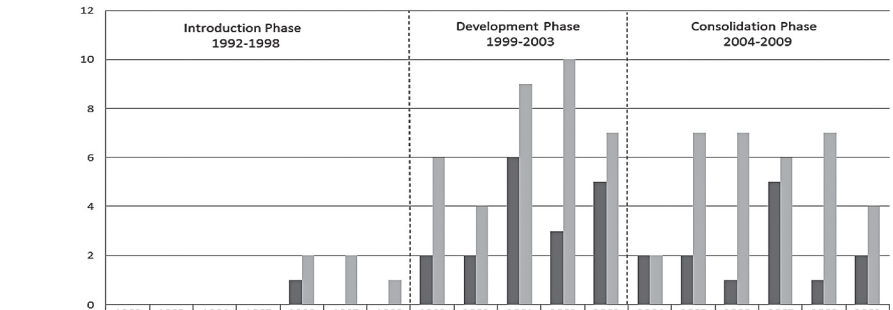
Table 4: Percentage of recognition of breach and implied term of good faith

[82] Seventy four out of 104 cases are implication cases, amounting to 71%. Thirty two out of 74 cases are implication and breach cases, amounting to 43%. Thirty two out of 104 cases are the total number of implication and breach cases from the total sample of cases, amounting to 31% of total cases.

[83] Figure 3.7 and Table 4 illustrate two important figures for the study. They show, firstly, the total implication cases in which 74 cases are identified from the total identified cases, and secondly, the total implication and breach cases, that is, 32 of 74 total implication cases. The data suggests that at least 70% of the total cases recognised implication rates compared to the smaller number of cases recognising implication and at the same time recognising breach of implication, that is, 43%. From the total cases, only 31% are implication and breach cases. This data suggests a gap between the capacity to convince a court of the existence of an implied term and the capacity to demonstrate that such a term had in fact been breached.

Cases where the courts have found breach of implied term of good faith from implied term cases

[84] The tendency of the courts to find a breach of implied term of good faith from implication cases also varied by year. Figure 3.8 depicts the number of cases where breach of the implied term of good faith from implication cases are recognised during the period of review.



	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Term Breached	0	0	0	0	1	0	0	2	2	6	3	5	2	2	1	5	1	2
Term Implied	0	0	0	0	2	2	1	6	4	9	10	7	2	7	7	6	7	4

Figure 3.8: Cases of breach of implied term from implied term

Introduction phase

[85] During the introduction phase from 1992 to 1998, a small number of cases were found to be in breach of the implied term of good faith. In 1996, two cases were found to be implied term cases. One out of the two cases found a breach of implied term of good faith from an implication case. In 1997, two cases were found to be implication cases but no cases were found to be in breach of an implied term of good faith. In 1998, one case was found to be an implication case but no case

was found to be in breach of an implied term of good faith. The data suggests that when there is an implication issue, it is not necessarily a breach of an implied term of good faith issue. This indicates that the court is still unclear on dealing with the issue of breach of an implied term of good faith.

Development phase

[86] In the development phase from 1999 to 2003, there was an upsurge of interest in the number of cases that were found to be in breach of the implied term of good faith, in which 18 cases were reported to have breached an implied term of good faith out of 36 implication cases. In 1999, there were six implication cases. In two of the six cases, there was found to be a breach of an implied term of good faith. In 2000, there were four implication cases of which two were found to have breached an implied term of good faith. In 2001, there were nine implication cases. Six out of nine cases were found to be a breach of an implied term of good faith. In 2002, there were 10 implication cases. Three out of the 10 cases were found to have breached an implied term of good faith. In 2003, there were seven implication cases. Five out of seven were found to have breached an implied term of good faith. The data suggests that both instances reflect the increasing recognition of the plaintiffs and judges of the issue as compared to the introduction phase.

Consolidation phase

[87] During the consolidation phase from 2004 to 2009, the distribution of breach of an implied term of good faith and implication cases were not stable. In this phase, there were 13 cases where the courts had found a breach of an implied term of good faith from 33 cases of implication. In 2004, there were two implication cases. The two cases were found to have breached an implied term of good faith. In 2005, there were seven implication cases of which two were found to have breached an implied term of good faith. In 2006, there were seven implication cases of which one was found to have breached an implied term of good faith. In 2007, there were six implication cases of which five were found to have breached an implied term of good faith. In 2009, there were four implication cases of which two were found to have breached an implied term of good faith. This shows that the court had not accepted an implication issue where there is a small possibility that there is a breach of an implied term of good

faith. Nevertheless, in 2007, the court found five cases of breach of an implied term of good faith from six implication cases. The data in 2007 indicates that there is a higher chance than in any other year that when there is an implication, the case is likely to be found as a breach of an implied term of good faith.

[88] Overall, the data suggests that when the parties plead breach of an implied term of good faith in implication cases, there is a low chance of the court to accept its plea. One conclusion that can be drawn from this is that pleading for a breach of an implied term of good faith is a fairly new course of action.

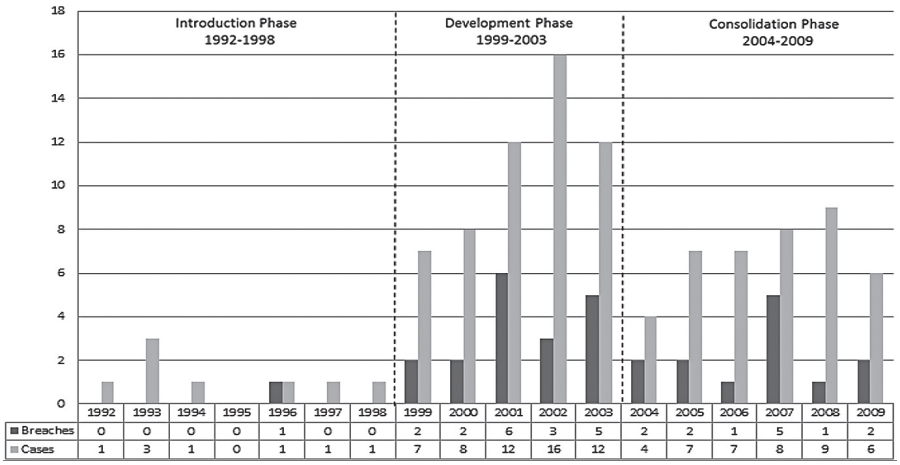


Figure 3.9: Breaches of implied term of good faith

	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Breaches	0	0	0	0	1	0	0	2	2	6	3	5	2	2	1	5	1	2
Cases	1	3	1	0	1	1	1	7	8	12	16	12	4	7	7	8	9	6
%Breaches	0%	0%	0%	0%	100%	0%	0%	29%	25%	50%	19%	42%	50%	29%	14%	63%	11%	33%

Table 5: Breaches of implied term of good faith

[89] Figure 3.9 illustrates the trend pertaining to breach of the implied term of good faith by year. Table 5 shows the number of breaches and percentage of the breaches based on the number of cases during the period of review in Australia.

Introduction phase

[90] The first phase is the introduction phase from 1992 to 1998, in which there was only one identified case in 1996 that recognised a breach of

an implied term of good faith. In this phase, the issue of a breach of an implied term of good faith was newly pleaded and considered to be in the "embryonic" stage after *Renard* in 1992. This is also the case for Figure 3.5 where the implication rate in the introduction phase was also in its infancy.

Development phase

[91] During the development phase from 1999 to 2003, there was an upsurge of interest in the issue compared to the introduction phase. In 1999, two out of seven cases recognised a breach of an implied term of good faith, which equates to 29% of the total cases. In 2000, two out of eight cases recognised a breach of an implied term of good faith, which equates to 25%. In 2001, six out of 12 cases recognised a breach of an implied term of good faith, which equates to 50%. In 2002, three out of 16 cases recognised a breach of implied term of good faith, which equates to 19%. In 2003, five out of 12 cases recognised a breach of an implied term of good faith, which equates to 42%.

[92] The data shows that the level of recognition is increasing, for example, six out of 12 cases or 50% were identified in 2001 to have breached an implied term of good faith in contractual performance. However, the data shows that the percentage of breaches is less than 50%, which indicates that the level of recognition of the breach of an implied term of good faith remains low.

Consolidation phase

[93] In the consolidation phase from 2004 to 2009, the acceptance of a breach of an implied term of good faith in contractual performance is steadier when compared to the development phase. In 2004, two out of four cases recognised a breach of an implied term of good faith, which equates to 50%. In 2005, two out of seven cases recognised a breach of an implied term of good faith, which equates to 29%. In 2006, one of seven cases recognised a breach of an implied term of good faith, which equates to 14%. In 2007, five out of eight cases recognised a breach of an implied term of good faith, which equates to 63%. In 2008, one out of eight cases recognised a breach of an implied term of good faith, which equates to 11%. In 2009, two out of six cases recognised a breach of an implied term of good faith, which equates to 33%.

[94] There are two instances where there were evidently higher rates of acceptance of breach, in 2004 and 2007, where two out of the four

identified cases were breach cases, which equates to 50%. In 2007, five out of eight cases were breach cases, equating to 63%. The remaining years are reported to be less than 50%. The data demonstrates that the recognition to breach an implied term of good faith is still low.

[95] Overall, the data demonstrates that the courts were not convinced by the argument of a breach of an implied term of good faith. One conclusion that can be drawn from this data is that the claim of breach of an implied term of good faith is a new course of action. There is also the possibility that the claim of breach was misguided given that there were no clear guidelines for interpreting the concept of good faith.

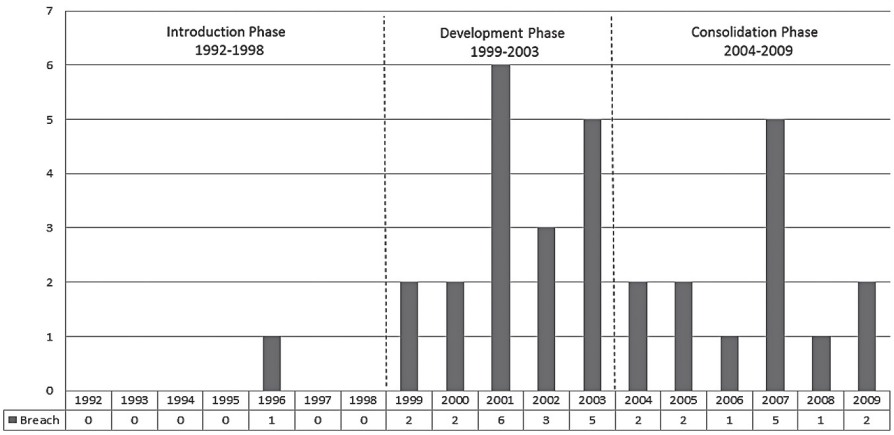


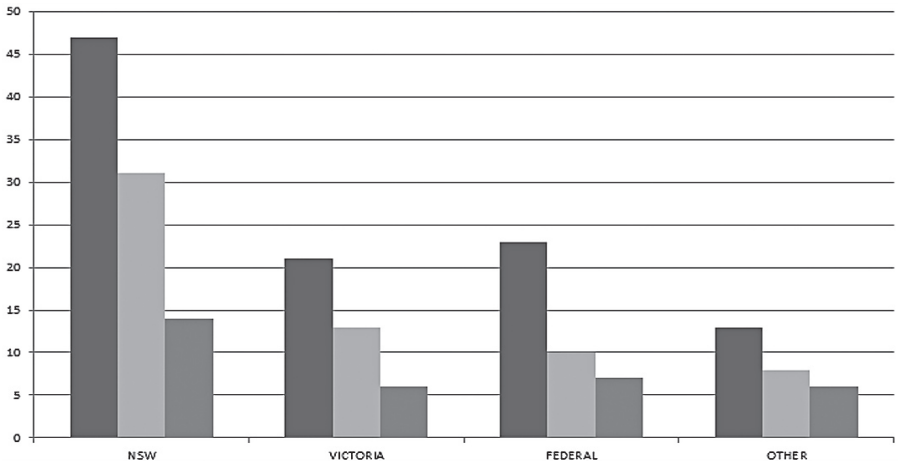
Figure 3.10: Rate of breach of implied term (by year)

	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Breach	0	0	0	0	1	0	0	2	2	6	3	5	2	2	1	5	1	2
%	0%	0%	0%	0%	3%	0%	0%	6%	6%	18%	9%	15%	6%	6%	3%	15%	3%	6%

Table 6: Rate of breach of implied term (by year)

[96] Figure 3.10 illustrates the quantity of breach rates as a proportion of the total sample and the sub-sample of cases in which a good faith obligation term was implied respectively. Table 6 shows the number of cases and percentage of breach rates by year. It shows that throughout the period of review, the breach rate where term implied by year is less than 20% compared to the breach of implied term of good faith

cases as illustrated in Figure 3.9. Both Figure 3.9 and Figure 3.10 demonstrate a high degree of inconsistency between breaches of implied term of good faith and breaches rate where term implied by year. One interpretation of this inconsistency is that the nature of good faith is still not clear in Australian contract law.



Note: "Other" comprises the jurisdictions of Western Australia, Queensland, Tasmania and ACT

Figure 3.11: Cases of breach of implied term of good faith (by jurisdiction)

	NSW	VICTORIA	FEDERAL	OTHER
Total	47	21	23	13
%Total	45%	20%	22%	13%
Implied	36	16	14	8
%Implied	77%	76%	61%	62%
Breach	13	6	7	6
%Breach	28%	29%	30%	46%

Note: "Other" comprises the jurisdictions of ACT, Western Australia, Queensland and Tasmania

Table 7: Cases of breach of implied term of good faith (by jurisdiction)

[97] The data is now analysed by jurisdiction in order to evaluate the overall legal construct opinion. Figure 3.11 illustrates the cases where the courts have found breach of an implied term of good faith by jurisdiction. Table 7 depicts the quantity and percentage of breach rate, and the quantity and percentage of implied term of good faith based on the total number of cases from each jurisdiction.

New South Wales

[98] Forty seven cases of good faith are identified, which equates to 45% of good faith cases. The number of implication cases are 36, which equates to 77% of implication cases. The breach cases are 13, which equates to 28% of breach cases.

Victoria

[99] There are 21 identified good faith cases, which equates to 20% of good faith cases. The implication cases are 16, which equates to 76% of implication cases. The breach cases are six, which equates to 29% of breach cases.

Federal courts

[100] There are 23 identified good faith cases, which equates to 22% of good faith cases. The implication cases are 14, which equates to 61% of implication cases. The breach cases are seven, which equates to 30% of breach cases.

Other states

[101] There are 13 identified good faith cases, which equates to 13% of good faith cases. The implication cases are eight, which equates to 62% of implication cases. The breach cases are six, which equates to 46% of breach cases.

[102] Overall, the empirical evidence suggests that NSW has the highest number of cases from the total case sample: 47 of 104 cases, which equates to 45% of the total case sample. The implication rate is higher. Out of 36 of 47 cases, which equates to 77% of the total cases, a good faith term was implied. The breach rate is also higher across samples, 13 of 36 of implication cases or 28% came from NSW. This empirical data is significant to prove that the issue of good faith is

receiving more attention in NSW compared to Victoria, Federal and other states.

Good faith families

[103] The definitions or meanings of good faith examined in this study were collected from a variety of books and articles supported by a review of the database comprising 104 cases. Out of 104 cases, 19 defined good faith as illustrated in Figure 3.12 below:

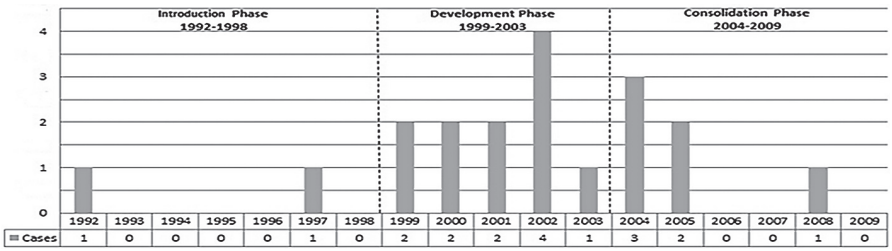


Figure 3.12: Overall cases which define good faith

Introduction phase

[104] During the introduction phase from 1992 to 1998, there were two instances in which good faith was defined as illustrated in 1992 and 1997. From 1993 to 1996 and in 1998, there were no cases in which good faith was defined. This means that two out of the eight identified cases in which good faith was mentioned sought to define good faith. One interpretation that can be drawn from this is that Australian judges lacked confidence in regards to defining the meaning of good faith as it was a fairly new concept in Australia.

Development phase

[105] In the development phase from 1999 to 2003, it is surprising to note that there is a sudden interest in the concept of good faith as shown by the number of cases that attempted to define its meaning. Eleven out of the 55 identified cases that raised good faith attempted its definition. The distribution of the cases by year include two cases in 1999, two cases in 2000, two cases in 2001, four cases in 2002 and one case in 2003 in which these cases attempted to define its meaning. The highest number of identified cases determining the meaning of good faith is in 2002, wherein four cases were identified. This situation

resonates with the highest number of cases reported in the same year, wherein 16 cases raised the issue of good faith. This suggests that the level of confidence in applying the concept of good faith increased. It seems that with the turn of the 21st century, Australian judges have become more open to the concept of good faith as indicated in 2002. This is a positive indication of the development of the meaning of good faith during this period.

Consolidation phase

[106] It was expected that in the consolidation phase from 2004 to 2009, there would be an increase in the acceptance and recognition of the term "good faith" and its meaning. However, the empirical data shows a different pattern. During this period, there were fewer attempts to define the concept with only six out of 41 identified cases attempting a definition of its meaning. The distribution of the cases by year that attempted to define its meaning are as follows: three cases in 2004, two cases in 2005 and one case in 2008. No attempts were made to define the term in 2006, 2007 and 2009. One presumption that could be drawn from this is that in 2006, 2007 and 2009, the judges showed no interest in attempting its definition. Although there were active attempts at its definition between 2004 and 2005, whereby five cases were identified, with one case identified in 2008, the significant gap between 2006 and 2009 shows that the judges were becoming less certain of the definition of good faith.

Findings

[107] The data described above reveals material variation in the incidence of good faith cases raised, the issue of implication of good faith, and the instances of breach of an implied term of good faith, both by year and jurisdictions in Australia.

[108] It is noteworthy to discover that there are 104 cases from 1992 to 2009 which discussed an implied term of good faith in Australia since it was first put onto the judicial agenda in 1992 in the case of *Renard*. The number of issues concerning good faith are growing over the period of review as illustrated by the three phases: the introduction phase (1992–1998), the development phase (1999–2003) and the consolidation phase (2004–2009). NSW had the most identified cases pleading an implied term of good faith both by year and jurisdiction, with 47 cases which, equates to 45%. Victoria followed with 21 cases,

which equates to 20%, Federal Courts cases numbered 23, which equates to 22%, and other states reported 13 cases, which equates to 13%, as illustrated in Figure 3.2 and Table 1 above.

[109] The empirical data shows that the implication rate is higher. There are 74 cases of implication from the 104 identified cases which equates to 77% as illustrated by Figure 3.7. The empirical data demonstrates that when the courts imply a term they prefer to imply a term "implied in law" as a necessary of legal incident of particular cases law. The empirical data demonstrates that there are 64 cases identified to imply a term "implied in law" and 10 cases identified to imply a term "implied in fact". The empirical data also reported that NSW had the most implication cases, 36 cases of implication from 47 identified cases which is equivalent to 79%. It was followed by Victoria, 16 cases of implication from 21 identified cases which is equivalent to 76%. Federal courts and other states had 14 cases of implication from 23 identified cases which is equivalent to 61%, and eight cases of implication from 13 identified cases which is equivalent to 62% respectively, as illustrated in Figure 3.6 and Table 3 above.

[110] The courts recognised breach of an implied term of good faith based on implication either in the form of term "implied in law" or term "implied in fact". Forty three percent are cases found to be a breach of an implied term of good faith. This data suggests that less than half of all cases accepted pleadings for a breach of an implied term of good faith as illustrated in Figure 3.7 and Table 4 above. The number of cases argued for a breach of an implied term of good faith is low. There is also a possibility that the claim of breach was misguided in the absence of a specific and precise meaning of good faith. This indicates that the argument of breach of an implied term of good faith was not able to convince the court as illustrated in Figure 3.9. Therefore, when the party pleads a breach of an implied term of good faith based on implication, the rate is low as the court is not convinced.

[111] The NSW data suggests that litigants in NSW were able to convince the court that a breach of an implied good faith term had transpired during the period of review. Figure 3.11 suggests that there is a popular reception of good faith in NSW, in terms of total number of cases, implied cases and breach cases compared to other jurisdictions. In NSW, the implication cases is 36, which equates to 77%, and the breach of an implied good faith term is 13 cases, which

equates to 28%, as illustrated in Table 7. The empirical evidence also shows that in the development phase from 1999 to 2003, there is a consistent approach in defining good faith as illustrated in Figure 3.12. However, its translation into real practice highlighted the difficulties of defining the concept of good faith.

4. Selected jurisdictions: Canada, Singapore and Malaysia

[112] The doctrine of good faith has its proponents as well as opponents from the academia and Judiciary. A survey of major common law jurisdictions reveals conflicting views, apart from the US where the doctrine of good faith is well established in the legislation,[74] where there is yet a form endorsement of its general application in the selected jurisdictions as discussed in the following paragraphs.

Canada

[113] In Canada, the courts are generally reluctant to apply the concept of good faith when asked to override express contractual provisions and the reasonable expectation of the parties. The issue of the meaning of good faith is controversial in Canada. O'Bryne[75] argues that attempts to define it continually prove to be futile because "… good faith can have no absolute meaning: it simply assumes its contents from the facts of each particular case". It is self-evident that defining good faith is a frustrating task as "it is impossible to take into account all the situations, types of behaviour, tactics or conducts that may in a given situation constitute a departure from 'good faith'.

[114] However, there is statutory recognition of the concept of good faith in Quebec, where the influence of civil law stems from its distinct French inheritance. The acceptance of the concept of good faith is clearly stated in the Quebec Civil Code. Article 6 states that "Every person is bound to exercise his civil rights in good faith"; Article 7 states that "[n]o right may be exercised with the intent of

74 However, the approach of the US is different whereby the concept of good faith is entrenched in the Uniform Commercial Code, s 1-203 (General Provisions – good faith as requirement for all Code transactions), s 1-201(9) (Good faith is defined as honesty in the conduct and transaction), s 2-103 (an exclusive definition of good faith concerning merchants) and s 2-311(1) (mentioned good faith in sale contract), and the Restatement (Second) of Contracts, s 205.

75 Shannon Kathleen O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995) 74 *Canadian Bar Review* 70 at 73.

injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith" and Article 1375 states that "[t]he parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished". Even though good faith seems to play a central role in the Quebec Civil Code as mentioned by the three general provisions above, a clear definition of good faith is still not given. The position of good faith has changed in the case of *Bhasin v Hrynew*,[76] despite the lukewarm response from the common law jurisdictions. The Supreme Court of Canada acknowledged good faith as a "general organizing principle" of the common law of contract and articulated a new duty of honesty in contractual performance from the principle of good faith where its intention is to foster legal certainty and protect reasonable commercial expectations.

Singapore

[115] The position of good faith in Singapore is similar to that of the UK, where the current position is that an obligation of good faith performance is not part of Singapore contract law. In the Court of Appeal case of *Ng Giap Hon v Westcomb Securities Pte Ltd*,[77] where Andrew Phang Boon Leong JA (delivering the judgment of the court) dealt with the issue of implied term. His Lordship distinguished between "term implied by law" and "term implied in fact". The "term implied by law" sets a precedent for all future contracts of that particular type, whereas the "term implied in fact" does not create any precedent as the court is only concerned with arriving at a just and fair result in the particular context of that case. For this reason, Phang JA advised that the court should be more careful in implying terms as a matter of law than in implying terms in fact. The test for implied term in fact is based on the "officious bystander" test as being firmly established in Singapore contract law. Although the relationship between the two tests is not as clear in Singapore as in English law, the court preferred to view them as complementary rather than as alternative tests, with the "officious bystander" test being the practical mode by which the "business efficacy" test is implemented. The court thus concluded, having regard to the relevant historical and judicial background and the general logic involved.

76 2014 SCC 71.
77 [2009] 3 SLR(R) 518; [2009] SGCA 19.

[116] In this case, the court held that good faith could not be implied as a matter of law into the agency agreement for the following reasons: (a) it would undermine the concept of sanctity of contract, unless required in exceptional circumstances and in accordance with legal principles; (b) it tends to generate some uncertainty with the use of broader policy considerations as the criteria; (c) it sets a precedent for implying the same term in all future contracts of the same type; (d) it involves the doctrine of good faith which is "a fledgling doctrine" in contract law in England and other common law jurisdictions, and definitely in Singapore; (e) the doctrine needs clarification as to its meaning and application in view of the differing academic opinions; (f) the doctrine is far from settled in view of the vigorous arguments against it; (g) the case law is apparently in a "state of flux", notably in the US, Australia and Canada; and (h) on the basis of leading academic opinion that good faith is inherent in all aspects of contract law, there is no reason for the court to imply good faith into a contract. The court concluded that because much clarification is required on the structure of the doctrine, it would be inadvisable to apply it in the practical realm. The reason given was the strongest reason for the Court of Appeal's reluctance to imply an obligation of good faith in contractual performance under Singapore law.

Malaysia

[117] The position of good faith in Malaysia is similar to the UK and Singapore.[78] There is no general duty of good faith between contractual parties, however, if the parties wish to impose such a duty they must do so expressly.[79]

[118] In *Pasuma Pharmacal Corp v McAlister & Co Ltd*,[80] the issue involved the breach of a contract where there was an express term in the contract whereby there was an agreement to undertake to replace any defective stock by McAlister. A dispute arose when the McAlister allowed stocks of inferior quality to remain in the market without being replaced by new stocks. The trial judge took the view that there was no express

78 Malaysia takes a similar position as English law whereby "keeping with the principles of freedom of contract and the binding force of contract" is the paramount consideration.

79 *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)* [2013] EWCA Civ 200.

80 [1965] 1 *Malayan Law Journal* 221.

term in the contract which made fraud a breach of contract. The court has the option to decide whether to imply good faith as "term implied at law" or "term implied in fact". At the Federal Court, Thomson LP held that good faith should be implied as a "term in fact" to give business efficacy. His Lordship stated that "it is difficult to resist the conclusion that there was an implied condition that in relation to their business as covered by the contract the parties should be reasonably honest and truthful with each other".[81] The judicial caution practised has not prevented the court on embarking on a more creative course.

[119] The doctrine of good faith in Malaysia was also discussed in the latest Court of Appeal case of *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor*[82] but the opportunity was not utilised. The Court of Appeal at paragraph [325] held that "on the state of the current law, there is no general duty of good faith and fair dealing at common law". The case involved the appellants who were participant banks to a syndicated loan for recovery of the loan from the respondent borrower and developer who had, despite restructuring, refinancing, deferments and extensions of time, persistently defaulted in its repayment obligations resulting in the loan facility being terminated. What was so unusual about the case was that the respondent's sole pleaded cause of action against the appellants in its counterclaim was that by terminating the loan facility, the appellants had breached "a duty to act in good faith and honesty" in granting and administering the syndicated loan. The court allowed the appeal but did not recognise the implied duty of good faith and fair dealing in contract law. However, the court opted to adopt the more conservative English common law principle. Counsel for the defendant cited *Tai Hing Cotton Mill Ltd v Lim Chong Hing Bank Ltd & Ors*[83] where the Privy Council held that in a banker and customer relationship, the parties' mutual obligations in tort cannot be any greater than those to be found expressly or by necessary implication in their contract.

[120] The development of good faith in Malaysia is still in its infancy stage[84] as compared to the civil law jurisdictions of its neighbours

81 Ibid.
82 [2014] 2 CLJ 773.
83 [1985] 2 All ER 947.
84 Shaik Mohd Noor Alam bin Shaik Mohd Hussain, "Implying Good Faith in Contracts: Some Recent Developments" (1993) 3 *Current Law Journal* xii.

where good faith is included in the civil law codes of Philippine, Thailand and Indonesia.[85] Sections 3[86] and 5[87] of the Civil Law Act 1956 together with Article 160 of the Federal Constitution[88] allow the importation of foreign doctrine which gives a wider scope of good faith application in commercial matters. Thus, it gives a better chance for the doctrine of good faith to be accepted in our legal system. Since Malaysia is a trading nation, therefore it is high time to apply good faith in contractual performance where it is recognised widely.

5. Conclusion

[121] Although good faith has its roots in civil law countries, it has now extended beyond its geographical borders to common law countries. In civil law countries, good faith is regarded as a general and pervasive principle in contract law. As a general and pervasive principle, it has found its expression in civil law codes and is recognised in all phases of the contract: negotiation, performance and enforcement. This means good faith serves as a standard of behaviour which is expected from the parties in a contract. This is well illustrated in

85 The Philippines' Civil Code, Art 1159 states that "Obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith". In addition to section 5, which is situated in Book I of Thailand's Civil and Commercial Code on "General Principles" designed to govern the entire Code, states: Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith. Indonesia's Civil Code, Art 1338, para 3 states that "All agreements must be executed in good faith (*te goeder trouw*)".

86 Section 3(1) provides that the courts in Malaysia shall apply the common law as well as rules of equity existing in England in the absence of written law on April 7, 1956 in West Malaysia, December 1, 1951 in Sabah and December 12, 1949 in Sarawak, provided that the circumstances of the states and their inhabitants permit and if the local circumstances deem necessary.

87 Section 5(2): in all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

88 The Federal Constitution, Art 160 states the definition of law which includes "the common law in so far as it is in operation in the Federation or any part thereof" that concerns the extent to which English law is applicable in Malaysia.

Germany, France and Italy's civil caw codes which clearly mention good faith. In common law, there is no overarching duty of good faith but good faith is recognised in certain specific contexts, for example, insurance. In the insurance context, the duty of utmost good faith has been long recognised in which there is an expectation of behaviour to effectuate the insurance contract. Common law countries, however, tend to be suspicious of the idea that parties must act in good faith. Unlike other common law countries, good faith has a different status in the US legal system as illustrated by the recognition of good faith in the Uniform Commercial Code and the Restatement (Second) of Contracts. It is observed that the perception of good faith as an important principle in civil law appears to be much clearer compared to common law countries.

[122] The empirical evidence in Australia has proved that there is a greater chance to plead good faith in Australian courts despite an *obiter* comment from Priestley J, even if the High Court of Australia has not pronounced on the matter as yet. Three key propositions may be derived from this exercise. First, the instability in the incidence of good faith from the three phases (i.e. the introduction phase from 1992 to 1998, the development phase from 1999 to 2003, and the consolidation phase from 2004 to 2009) suggests that the law relating to the concept of good faith is still fractured along jurisdictional lines. NSW is still the dominant state in dealing with the issue of good faith. Secondly, volatility remains in the incidence of good faith litigation, implication rates and breach, suggesting considerable tension and inconsistency in the Judiciary. Finally, while there was growth of recognition from when it was first introduced in 1992, the empirical data indicates that the growth of the recognition is inconsistent across the three phases.

[123] Malaysia and Singapore share a similar view with English law that there is no general duty of good faith between contractual parties. Despite lukewarm support from courts in Malaysia and Singapore, the Supreme Court of Canada took a radical step in recognising the doctrine of good faith to comply with commercial expectation and legal certainty. This has fundamentally changed from the traditional doctrine of precedent by introducing a new law-making process by way of "law making through good faith" and expanded the power of the courts to introduce a new contractual doctrine of good faith.

[124] One of the reasons for the inconsistent perspective towards the doctrine of good faith is because it has many meanings and has caused uncertainty. It is suggested that defining the doctrine of good faith will give new breath to its application in assisting judicial interpretation in the law of contract.

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