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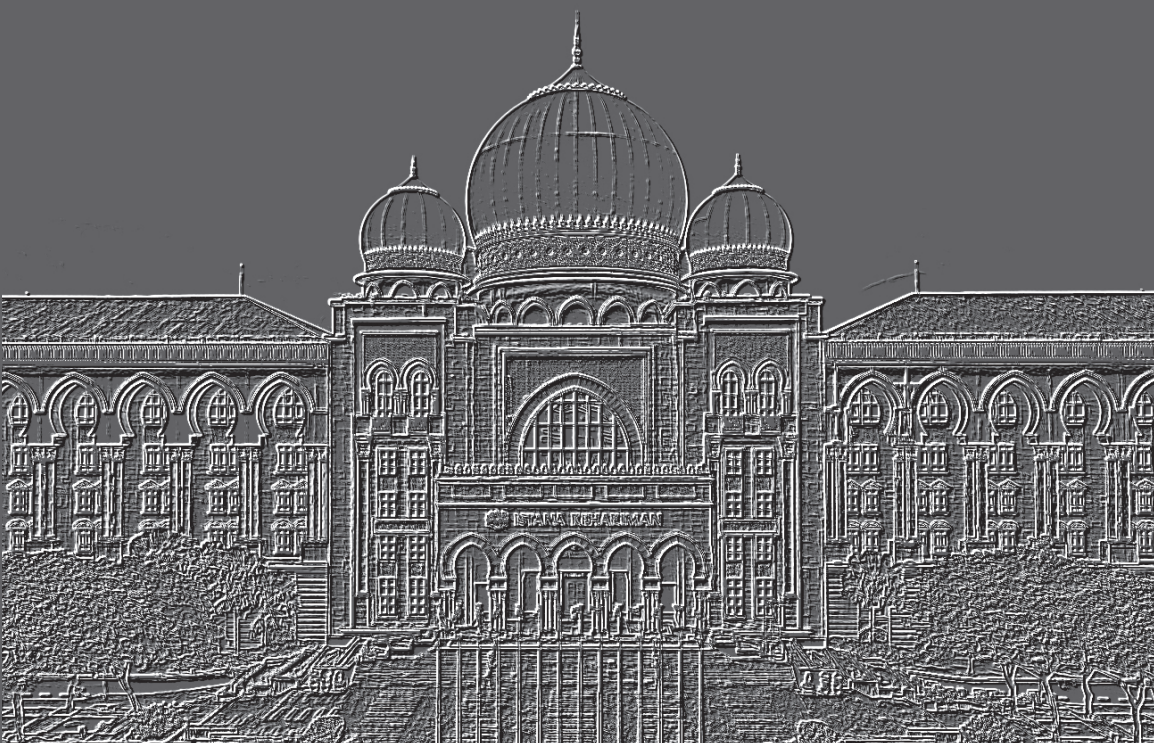

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PREFACE

It is with great pleasure that we present on behalf of the Judiciary, the ninth edition of the *Journal of the Malaysian Judiciary*. We are glad to note the continued evolution and success of the journal since its first publication in July 2016. My pleasure in writing this preface is, however, tinged with a degree of despondency by reason of the loss of our admirable editor, Tan Sri Idrus Harun, whose keen intelligence and dedication as exemplified by our last edition, will be sorely missed. However, it has to be conceded that his contribution to the nation will indubitably be greater in his current position as the Attorney-General of Malaysia.

On behalf of the dedicated Committee of the Journal, I would like to express our deep appreciation to all the contributors to the journal, who willingly devoted their time and energies to writing their stimulating and thought-provoking articles.

The subject matter of this edition commences with a distinctive essay which explores the complex relationship between Islamic financing and the philosophical underpinnings of the Shariah. Thereafter the subject matter is arranged to showcase how the Judiciary has dealt with the coronavirus pandemic and continues to evolve to ensure that access to justice is not compromised. We then turn to substantive law essays, both national and international, in the form of contributions ranging from influential impressions on the Federal Constitution to the insightful, if grim, reality of deaths in custody as well as the more conventional, but equally important, topics of mediation, corporate law, tax and shipping law, as well as evidence, specifically in relation to child witnesses. From our international contributor, we are honoured to receive an important essay on the Singapore Convention on Mediation.

This edition is the result of the contributions of eminently qualified writers who are distinguished in their field and we are delighted to have been accorded the privilege to edit these articles.

Justice Nallini Pathmanathan
Managing Editor

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An Imperfect Observation of the Perfect Shariah Through the Lens of Islamic Finance

by

*The Rt. Hon. Dato' Rohana binti Yusuf** and *Dr Syed Adam Alhabshi***

Introduction

[1] When Islamic finance started, it faced tremendous challenges. One of the main reasons was due to the fact that market players were only too familiar with conventional banking. There was no precedent to look up to. The business risk faced by banks on its acceptability by public members was yet another facet to be dealt with. Bankers and lawyers thought only familiar products would sell in the market; unfamiliar products might have taken longer to gain acceptability. In the end, the banking transactions took their form by emulating products and contracts resembling those of conventional finance. Thus, most Islamic banking products began by structuring them to mirror their conventional counterparts, with appropriate adjustments to enable compliance with Shariah.

Shariah: The immutable law

[2] The "Shariah" is an Arabic term which literally translates into "the way"/"the way of life". From this, the term Shariah is often understood as the path to a natural and innate way and order created by Allah SWT[1] for His creation, or in other words, Allah SWT's path. Hence it is the way of life to be adopted by mankind regardless of their religious affiliation. The paradigm of Shariah is Allah SWT-centric (Creator-centric); thus, the Quran plays an important role in determining the economy of the *ummah*. According to Ibn Qayyim, the general principles of Shariah are based on wisdom and achieving people's welfare in this life and the afterlife. It is about justice, mercy, wisdom and common good. Therefore, any ruling that replaces justice with injustice, mercy with cruelty, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to Shariah.

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1 SWT is *Subhanahu Wa Ta'ala* which means "Glory be to Him, the Exalted".

[3] The Shariah, when applied to Islamic finance, would necessarily take into consideration issues of social justice, equity and fairness as its backdrop as well as the practicality of commercial transactions. This means that Islamic finance transactions must comply not only in their forms and legal technicalities but more importantly, in their economic substance, premised on the objectives outlined by Shariah.

[4] Some Shariah rulings that have been clearly explained in the Quran and the Sunnah are easy to be followed. However, some rulings, especially those pertaining to the domain of everyday affairs which include Islamic finance matters, are often vague and permissive in nature. This requires further interpretation in order to derive the proper understanding of the Shariah. Such determination is recognised as the knowledge of the Islamic ruling pertaining to the conduct and *muamalat* of the *ummah,* known as *Fiqh*. In other words, "Shariah" means the eternal and immutable law of Allah SWT which paves the way to the truth, virtue, and justice in Islam. "*Fiqh*" on the other hand, is the juristic interpretation by a human in order to understand the Shariah in relation to the knowledge of the Islamic ruling on the conduct of the people. *Fiqh* is also recognised as the juristic interpretation by a human to understand the Shariah and to be "*Fiqh*-compliant" means to be in compliance with *Fiqh*.

[5] A qualified person who exercises the determination of *Fiqh* is called a Jurist (*Faqih*). In deriving *Fiqh*, a Jurist would refer to the primary and secondary sources of the Shariah. The rules of *Fiqh* are derived from the Quran and Sunnah in conformity with a body of principles and methods which are collectively known as *Usul Fiqh*. *Usul Fiqh* is the science of the sources and methodology of the law. The Quran and the Sunnah constitute the primary sources as well as the subject-matter to which the methodology of *Usul Fiqh* is applied. There are several secondary sources too, such as the consensus of legal opinion for Muslim Jurists (*Ijma'*); analogy (*Qiyas*); juristic preference (*Istihsan*); practices of Peoples of Medina (*Amal Ahl Al-Madinah*); consideration of public interest (*Istislah/Maslahah Mursalah*); general customary practices (*'Adah*); presumption of continuity (*Istishab*); blocking the lawful means to an unlawful end (*Saad Al-Dhara'i*); companion's opinion/*Fatwa* (*Qawl Al-Sahabi*); earlier scriptures (*Shar' Man Qablana*) just to name a few. In other words, *Fiqh* is the end result of *Usul Fiqh,* and yet the two are separate disciplines.

[6] Although the Shariah is considered as the immutable law of Allah SWT, *Fiqh* is subjective, partial, and open to error and change. Through *Fiqh*, we derive the interpretation of the Quran and Sunnah, but this interpretation becomes curtailed by the limitation of human agency. The flawlessness of the Shariah and the imperfect understanding of Shariah due to human imperfection make the Shariah a work in progress that would never be complete. However, this "work in progress" would be stagnant if the jurist who acts as the bearer and guardian of the *Fiqh* tradition treats it as if it is a sacred and untouchable legacy.

[7] If the Shariah is immutable and perfect, thus claiming that an Islamic banking product is "Shariah-compliant" and not a by-product of *Fiqh* effectively endorses that the product is immutable and perfect. This is definitely not the case as the Shariah-compliant endorsement may still be challenged in court. Furthermore, if there is still a Shariah non-compliance risk, it may be ruled to be Shariah non-compliant. Premised on the above in the realm of Islamic finance, would it then be fair to suggest that a product that had been approved and endorsed by the independent Shariah Committee of an Islamic financial institution is Shariah-compliant? We know, in fact, that the process of endorsing the product was only within the perspective of *Fiqh* ruling using the multifold Islamic jurisprudence as its methodology.

[8] What should be described as a *Fiqh*-compliant transaction is now being described as Shariah-compliant. Currently, this oversimplification is mainly used to distinguish that a particular product is an Islamic finance product and not a conventional finance product. Jurists (whether classical or contemporary) have always opined that their best efforts to make an opinion (*Ijtihad*) may be right or may be in error of the divine Shariah. At the time of making that view or opinion, with the amount of information available that was considered, they strive to make the best opinion (*Ijtihad*) in order to please Allah SWT. This is certainly in line with the *Hadith* by Abu Hurairah RA[2] who narrated that Prophet Muhammad SAW[3] was reported to have said, "If a judge passes judgment and strives to reach

2 RA is *Radiallahu 'Anhu* which means "May Allah SWT be pleased with him".

3 SAW is the Arabic salutation to Prophet Muhammad which means "Prayers (commonly translated as: peace and blessings) be upon him (Prophet Muhammad)".

the right conclusion and gets it right, he will have two rewards; if he strives to reach the right conclusion but gets it wrong, he will still have one reward."

[9] What would seem odd and would pose as a business risk is when an Islamic finance dispute is brought before a court for the judge to adjudicate the validity of it from the Shariah perspective. This would certainly entail a determination on the applicable *Fiqh*. We know that the courts in Malaysia are not equipped with a judge who is a *Faqih* and is able to determine the applicable *Fiqh*.

[10] This brings to mind the famous *Bai Bithaman Ajil* case which was brought to test in *Arab Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors* ("*Taman Ihsan Jaya*").[4] The High Court found in that case, the transaction based on *Bai Bithaman Ajil* to be unacceptable from the Shariah perspective. The learned trial judge had taken commendable steps researching in this area of *muamalat* by looking at various references to support that decision. It was patently clear that the High Court was looking at the objective of Islamic banking and what it should achieve. His Lordship cautioned the Islamic finance industry at paragraph [29] as follows:

> In developing a *Fiqh al-Muamalat*, caution must therefore be exercised for it is all too easy, when creating and then relying on legal fiction, to fall into the pit of complacency and inadvertently developing a *fiqh al-hiyaf*. Bearing this in mind it is not sufficient that the distinction between a sale and a loan is maintained in form, but it must also be maintained in substance. It is the reality and not the form and labels that matter.

[11] This decision, however, was overruled by the Court of Appeal of Malaysia in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and Other Appeals* ("*Lim Kok Hoe*").[5] In the judgment of the Court of Appeal, it was observed that "… the judge in civil courts should not take it upon themselves to declare whether a matter is in accordance to the religion of Islam or otherwise as it needs consideration by eminent jurists who are properly qualified in the field of Islamic Jurisprudence …". In the end the Court of Appeal upheld the *Bai Bithaman Ajil* transaction as valid, applying earlier decisions of the Court of Appeal in *Datuk Haji*

4 [2008] 5 MLJ 631.
5 [2009] 6 MLJ 839, CA.

Nik Mahmud bin Daud v Bank Islam Malaysia Berhad ("*Datuk Haji Nik Mahmud*")[6] and *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corp Sdn Bhd* ("*Emcee Corp*").[7] In *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corp Sdn Bhd*, it was observed[8] by Abdul Hamid Mohamad JCA (later CJ) that "… 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. The charge is a charge under the National Land Code ('the Code')" (see also *Azlin bin Khalid v Mohamad Najib Ishak and Other Appeals*[9]). The Court of Appeal in *Lim Kok Hoe* appeared to be trying to demarcate the jurisdiction issue of the High Court, perhaps to set a more consistent decision for Islamic banking in Malaysia.

[12] A remarkable point to also note in the case of *Taman Ihsan Jaya* is that the High Court took an equitable approach on the subject of Shariah. This, in our view, would remain as a challenge to all Islamic bankers in the application of *Fiqh* both in form and substance. Such a decision however commendable would send a chill to bankers who are faced with uncertainty as to what will be the outcome when a matter is brought to court for adjudication on a transaction involving Islamic finance. The uncertainty does not hold Islamic finance business in good stead. In any commercial transaction, elements of uncertainty should not exist.

[13] A similar dilemma had confronted the English court some time ago in deciding on a Shariah issue in an Islamic banking case in *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd & Ors*.[10] The Court of Appeal of England was asked to construe the clause in the agreement between the bank and its customer in a *Morabaha* agreement, which read as follows:

> Subject to the principle of Glorious *Sharia*, this Agreement shall be governed by and construed in accordance with the laws of England.

[14] The Court of Appeal in the United Kingdom recognised that the principles of English law are not always consistent with Shariah and

6 [1996] 4 MLJ 295.
7 [2003] 2 MLJ 408.
8 Ibid, at p 412.
9 [2017] 6 MLJ 537.
10 [2004] All ER (D) 280.

therefore the court could not apply both English law and Shariah at the same time. The court did not want to interfere with the Shariah issues but only to give effect to the terms of the contract between parties. Applying the common law, the contract was held to be valid.

[15] Efforts were taken in Malaysia to make Islamic finance a more certain business through a more systematic and scientific approach. But it requires the force of law so that it will be adhered to by all parties. This led to the birth of the Shariah Advisory Council of Bank Negara Malaysia ("SAC") in 1996, with the passing of the amendment to section 124 of the Banking and Financial Institutions Act 1989 [*Act 372*] ("BAFIA"). Later, the SAC was transferred to section 16B of the Central Bank of Malaysia Act 1958 [*Act 519*] in 2003 (w.e.f. January 1, 2004) to cover the Islamic insurance and takaful business.

Shariah Advisory Council: Role and challenges

[16] The SAC was created as a body to ascertain Islamic law for the purposes of Islamic banking. Its members are also specified in that provision. The Islamic finance institution shall consult the SAC. The ruling of the SAC shall be taken into consideration by the court. It was later enhanced by another amendment. This time, the SAC's decision was made binding on the courts, and this was provided in the new Central Bank of Malaysia Act 2009 [*Act 701*] pursuant to section 51. With this, it becomes mandatory pursuant to section 56 for the court to refer to the SAC for any dispute in relation to Shariah issues arising from Islamic financial business if there are no published rulings by the SAC available. The effect of such reference is that the ruling made on such reference binds the court.

[17] The role of the SAC was succinctly summarised by the High Court in *Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Bhd and Another Case.*[11] In that judgment, it was observed by the High Court that:

> [18] To my mind there is good reason for having this body. A ruling made by a body given legislative authority will provide certainty, which is a much needed element to ensure business efficacy in a commercial transaction. Taking cognisance that there will always be differences in views and opinions on the *Syariah*, particularly in the area of *muamalat*, there will inevitably be varied opinions on

11 [2010] 4 CLJ 388.

the same subject. This is mainly due to the permissive nature of the religion of Islam in the area of *muamalat.* Such permissive nature is evidenced in the definition of Islamic Banking Business in s 2 of the Islamic Banking Act 1983 itself. Islamic Banking Business is defined to mean, banking business whose aims and operations do not involve any element which is prohibited by the Religion of Islam. It is amply clear that this definition is premised on the doctrine of "what is not prohibited will be allowed". It must be in contemplation of the differences in these views and opinions in the area of *muamalat* that the legislature deems it fit and necessary to designate the SAC to ascertain the acceptable *Syariah* position. In fact, it is well accepted that a legitimate and responsible Government under the doctrine of *siasah as-Syariah* is allowed to choose, which amongst the conflicting views is to be adopted as a policy, so long as they do not depart from Quran and Islamic Injunction, for the benefits of the public or the *ummah.* The designation of the SAC is indeed in line with that principle in Islam.

[18] Notwithstanding the importance of the role played by the SAC in this area, the creation of the SAC was not without challenge. It became the subject of challenge in *Mohd Alias bin Ibrahim v RHB Bank Bhd*[12] when the court was tasked to decide whether the role of the SAC usurped the judicial power of the court and if the decision-making process of the SAC was made without giving the affected parties the right to be heard. The High Court held that the role of the SAC is only to ascertain the Islamic laws in Islamic banking business, takaful business and Islamic financial business and not to determine the final outcome of a dispute in a case. The ascertainment of Islamic law would then be binding upon the courts. It will be up to the courts to apply the ascertained law to the facts of the case. As such, the final decision remained with the court.

[19] Attempts were again made to challenge the validity of the SAC in *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd* at the High Court.[13] In that case, the legality of section 56 of the Central Bank of Malaysia Act 2009 which statutorily creates the SAC by way of federal law was argued to be unconstitutional as it encroaches the Shariah jurisdiction in the State List. It was found by the High Court

12 [2011] 3 MLJ 26.
13 [2012] 7 MLJ 597.

and affirmed by the Court of Appeal that, the SAC was not performing the role of a judicial or quasi-judicial function because the ultimate decision maker would still be the court. Hence, no encroachment was found.

[20] That was still not the end of the matter. The validity and constitutionality of the SAC was once again challenged in *JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Sdn Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor Interveners)*[14] ("*JRI v KFH*"). This time, the challenge on the SAC was on the binding effect of its ruling on the court. One main argument posed was that the SAC had, in a way, usurped the judicial power by having its decision binding on the court. In the majority judgment, Mohd Zawawi bin Salleh FCJ had once again recognised the role and function of the SAC and the crucial need for such a body. The Federal Court acknowledged the role and function of the SAC as quoted earlier in *Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Bhd and Another Case* (as referred to in paragraph [17] above) as well as what was stated and deposed in the affidavit by the Assistant Governor of Bank Negara Malaysia on April 23, 2018. That affidavit was affirmed by Encik Marzunisham bin Omar in the proceedings before the Federal Court. In the affidavit, it was clearly stated that there was a necessity for a single authority to ascertain Islamic law for the purpose of Islamic financial business. According to him, because of the rapid increase in the number of players in Islamic banking and finance in the country over the years, the rising complexities of Islamic finance products and the corresponding increase in disputes must be properly managed. An unsatisfactory feature of the resolution of the disputes before the civil courts previously was due to the reliance on different sources of Islamic principles. The Federal Court observed the following:

> [77] The 2009 Act (Central Bank Act of Malaysia 2009) has enhanced the role and functions of the SAC. The SAC is now the sole authority for the ascertainment of Islamic law for the purpose of Islamic financial business. Although every Islamic financial institution is responsible to form their own Shariah Committee at their institutional level, they are required to observe the advice from the SAC pertaining to Islamic financial businesses. Similarly, when a ruling given by the Shariah committee members constituted in Malaysia by an Islamic financial

14 [2019] 5 CLJ 569.

institution differs from the ruling given by the SAC, the ruling of the SAC shall prevail. This further clears the ambiguity and creates no opportunity for such conflicting ruling/advice to be rendered at all by Shariah Committees.

[78] The 2009 Act further affirms the legal *status of Shariah* pronouncements issued by the SAC as binding upon both the courts as well as arbitrators. The court or an arbitrator is required to refer to the SAC for deliberation on any Shariah issue as well as take into account its existing Shariah rulings. Undeniably, legal certainty is upheld by the 2009 Act through legal recognition of the SAC as the reference point for courts and arbitrators on any Shariah matter in relation to Islamic finance business. This is crucial to promote consistent implementation of Shariah contractual principles in Islamic financial transactions.

(See generally Tun Abdul Hamid Mohamed and Dr. Adnan Trakic, "The Shariah Advisory Council's Role in Resolving Islamic Banking Disputes in Malaysia: A Mode to Follow?" (International *Shariah* Research Academy for Islamic Finance (ISRA) Research Paper (No. 47, 2012)).

[21] From the dilemma faced by a court construing Shariah issues, the SAC is a body duty-bound to ascertain the *Fiqh muamalat* that is applicable in a particular Islamic banking transaction.

[22] The Federal Court in a nine-member bench and by a simple majority upheld the constitutionality of sections 56 and 57 of the Central Bank of Malaysia Act 2009, which make it compulsory for civil court judges to refer questions relating to Islamic financial business to the SAC if there were no published rulings by the SAC and that such rulings issued by the SAC shall be binding on the court. In essence, the majority, speaking through the judgment of Zawawi Salleh FCJ, held that the role played by the SAC was only to ascertain the Islamic law applicable to the transaction without determining the real dispute between parties. The legal liability of the parties remained in the domain and will still be decided by the presiding judge. Hence, the SAC did not exercise judicial power as its ruling is confined strictly to Shariah issues. In the supporting judgment of Azahar Mohamed FCJ (now CJM), it was held that the jurisdiction to ascertain Islamic law is well stated in item 4(k) of the Federal List of the Federal Constitution empowering the Federal Parliament to make law. The creation of the

SAC is therefore well within that jurisdiction.

[23] There were, of course, strong dissenting views by the other four members. Through the judgment of Richard Malanjum CJ, it was found that the function of the SAC is well within that of the judicial courts as it finally resolves disputes on issues of Shariah which gives an enforceable decision that a trial court could not depart. There is no system of checks and balances on the decisions of the SAC since they are final on issues of Shariah. The commendable purpose of the SAC, in his Lordship's view, cannot transgress judicial independence, and there are other ways of enforcing the function of the SAC. Meanwhile, a suggestion put to achieve this purpose is the inclusion and reliance on the "conclusive evidence clause". David Wong Dak Wah CJ (Sabah and Sarawak) in another dissenting view held, *inter alia*, that there was a direct usurpation of powers when the ruling of the SAC binds the court. It also deprived the litigant of challenging the ruling of the SAC as it binds the court.

[24] The Islamic finance industry and its stakeholders should wake up to this call. It will be useful for the SAC to also be even more transparent in its decision-making power to ensure a more stable and consistent growth of Islamic finance jurisprudence in Malaysia. Many key points can be taken from all of the judgments of *JRI v KFH*, especially the suggestion by Richard Malanjum CJ on the conclusive evidence clause. This would include the inclusion of clauses concerning the reliance of the SAC and possible amendments to the documents to the extent necessary to align the documents to be Shariah-compliant into the Islamic finance documentation. In short, banks and customers entering into a financial agreement may want to agree upfront for all the SAC rulings to be binding over them. They should be free to refer any Shariah issue to the bank before agreeing to the same instead of raising it only when they have defaulted on payment.

[25] A point to also be noted is that the Shariah challenge typically arises in the course of the defence brought upon by delinquent customers in order to avoid a liability to pay back the facilities already enjoyed by them. In the case of *JRI v KFH* itself, it began with a summary judgment that had been adjudged on JRI Resources upon default payment. On appeal, it was raised as a triable issue that, given the mandatory requirement to refer any issue of Shariah to the SAC, the failure of the trial judge to do so, in that case, was said to be fatal. The Court of Appeal allowed the appeal of JRI Resources and remitted

the matter to the trial court to make the necessary reference on the Shariah issue. The SAC's ruling did not favour JRI Resources. It was then that JRI Resources decided to challenge the constitutionality of the role of SAC.

[26] It raises the same doubt as to whether the challenge on issues of Shariah had been launched with a genuine intention of complying with Shariah or for some other reasons. In this regard it was observed in *Bank Kerjasama Rakyat Malaysia Bhd v PSC Naval Dockyard Sdn Bhd*[15] that:

> If adhering to Islamic principle is an issue of importance to the defendant over this matter then perhaps the defendant ought to be reminded that, fulfillment of a promise in Islam is a religious demand. In Chapter 5 Verse 1 the Quran declares that: O you who believe? Fulfill all your obligations. A covenant is a solemn undertaking or engagement between man and his obligations to God, between man and his soul and between the individual and his fellow men which covers the entire area of a man's moral and social responsibilities. In Chapter 17 Verse 34 again it is stressed the importance of fulfilling of one's promise when the Verse states: And fulfill (every) engagement, for every engagement will be enquired into (on the day of reckoning). These verses show that a contract in Islamic Jurisprudence is not a mere binding legal relation but it is based on certain moral and religious principles. The defendant had obtained the facility to assist its business with a promise to repay in accordance with the terms stipulated in the agreement. Since the defendant has raised concerns on the various principles of the contract which should be adhered to in a *syariah* based agreement, then fulfilling those agreed obligations as per the stipulations in the agreement should be of paramount importance that the defendant should be fulfilling without even a demand having been made.

[27] Like it or not, the implementation of Islamic banking in Malaysia sees the integration of civil law with the Shariah. As observed by his Lordship Azahar Mohammed FCJ in *JRI v KFH* at paragraph [197], the constitutional arrangement that the courts are duty-bound to refer to the SAC on the issue of Shariah is a proper constitutional mechanism to assist the court in applying the correct law to resolve Islamic banking disputes. He continued to observe that there would be some level of integration within the framework of the Federal

15 [2008] 1 CLJ 784 at para [15].

Constitution between the SAC and the courts for the functioning of Islamic finance business.

[28] In arguing on issues of Shariah and civil law, we must not lose sight of the fact that the integration between Islamic jurisprudence and common law had taken place decades before. This integration brings us to the subject of the interlink between Shariah and the common law.

Shariah and common law

[29] As we have seen thus far in Malaysia, the way that Islamic banking is implemented is by using Shariah and the common law. The method has proven to be successful. In *Lim Kok Hoe*, the Court of Appeal referred to the earlier decisions of *Datuk Haji Nik Mahmud* and *Emcee Corp* and noted that they had succinctly stated that the applicable law to *Bai Bithaman Ajil* contracts is no different from the law applicable to loans given under the conventional banking. It was held that, "The law is the law of contract and the same principle should be applied in deciding these cases." One may set to wonder how the Shariah and the common law could be so complementary in its application? How could a contract be governed by both the Shariah as well as common law principles?

[30] One underlying factor that may have contributed towards it is the origins of the common law itself. In the twelfth century, the common law was founded on established principles of Shariah. Principles of Shariah were normally consistent and similar to the common law. With time, both Shariah and the common law continued to develop its jurisprudence and principles, particularly concerning commerce.

[31] Looking back to the eleventh century, we see it as a time where the Islamic legal profession had reached the height of its development with colleges and a clear cut structure of scholastic personnel, with various grades and functions. The ancient Islamic schools of law (also known as *Mazahibs*) formalised the teaching of law and were designated geographically depending on where the *Imam* resided, and its students then continued to spread it around the world. When it was not done at private homes, shops, or outdoors it was pursued at *Masjids*. The *Masjid*-inn complex (*Madrasas*) was founded for legal studies as it took a few years for a student to complete a basic undergraduate degree. Many more years were expected from a student to be an expert in a particular subject as one is required to master a few schools of law for

a comprehensive understanding of a particular subject. This method was similar to the legal profession in medieval England which had legal schools known as the Inns of Courts.

[32] *The Islamic Origins of the Common Law*[16] mentioned numerous theories which suggested an Islamic influence on the common law amongst which can be summarised as follows:

1. In the twelfth century, the courts in England had made a precedent that the ownership of an object of sale passed upon the conclusion of the contract before delivery is verified by the legal effects of a contract. This form of the contract had no precedent in any legal system of the western world but was already an established principle under Islamic law. Professor John Makdisi stated that "the passing of ownership of the object of sale upon the conclusion of the contract created a legal imbalance by combining the physical presence of the price with the ownership of the object of sale in the hands of the buyer. This imbalance required the buyer to give up the price to the seller in order to restore balance between the parties. In this situation, Islamic law operated on a principle of equivalence. The imbalance was the source of the contractual obligation on the buyer to pay the price." In other words, the property rights in a sale transaction are exchanged at the conclusion of the contract. Islamic jurists had even required that the words of "offer" and "acceptance" (*Ijab* and *Qabul*) used to form a contract be stated in the past tense and not in the future tense. Thus it was not inconceivable that the common law owes this legal principle to Islam.

2.1. The assize of novel disseisin (recent dispossession) is a legal method to restore lands unlawfully seized through quick means of establishing rightful possession. It was created by King Henry II sometime between 1155 and 1166 to protect property holders against the usurpation of their property, and to protect ownership. It provided landowners with security under the King's law by replacing trial by battle, with trial by jury. This method shortened the period to obtain recovery and provided easier access to the courts. The assize did not appear to have

16 Professor John Makdisi, "The Islamic Origins of the Common Law" (1999) 77 *North Carolina Law Review* 1635–1739.

come from either Normandy or Anglo-Saxon law. It was also not from Roman law as the Roman interdict emphasised on the maintenance of peace and stability, whilst the common law assize emphasised on the protection of property rights.

2.2. Remarkably, the common law assize was similar to the Islamic concept of *Istihqaq*, i.e. an action for recovery of land upon usurpation (*Ghasb*). The recovery process is when an action was brought before an Islamic court judge (*Qadi*) to restore the ownership of one's property ("the original owner") because he was dispossessed by another person ("the dispossessor"). The initial presumption was that the original owner had ownership of the property and the dispossessor had taken the possession of that property from the original owner. If the action succeeded, the original owner would get back the ownership and possession of the property. However, if the action failed, the dispossessor would retain the possession and be recognised as having a better right to the property.

2.3. The similarity in characteristics between the substantive law of the assize of novel disseisin and the substantive law of *Istihqaq* is complemented by a similarity in the characteristics of the methods by which the actions were brought. Thus it was concluded that Islamic law was the only legal system to share the unique features of the common law assize, and it did so long before the assize appeared in the middle of the twelfth century in England. It was also not inconceivable that the common law borrowed the concept of the assize novel disseisin from Islamic law.

3. The institution of trial by jury in England is highly prized as the "palladium" of its liberties. This was in consideration of the more primitive methods of proof that predominated before its advent, which included ordeals by fire (such as holding heavy pieces of red hot iron in one's hand or walking over nine red hot plowshares and completing it without getting hurt), or by water (such as to put one's elbow in boiling water and escaping without getting hurt or thrown into a river and sinking to show one's innocence), or the proof by duel. The trial by jury was instituted by King Henry II as the predominant method of proof for the assize of novel disseisin, an action that revolutionised the judicial process for centuries to come. The trial by jury is also

> remarkably similar to the method of proof by the twelve *Lafif* witnesses which appeared in the practice of the Maliki school of thought in Morocco. Although there were issues concerning its validity as a method of proof, it was used in the exceptional case where proof by just ('*Adil*) witnesses were not available. The twelve *Lafif* witnesses were considered representative of the community of the locality and became the substitute for the two *'Adil* witnesses when the latter was lacking. The only characteristic of the English jury that did not exist in Islam was the judicial writ directing the jury to be summoned and directing the bailiff to hear its recognition.

[33] Based on the three key historical points above, Professor John Makdisi went on to conclude that on a more global plane, the common law could be the true offspring of Islamic law. It was natural that a more primitive system would look to the more sophisticated one and the three developments mentioned above played a major role in creating the common law.

[34] Legal systems are meant to promote economic efficiency of commercial transactions. The development of commerce in general, with particular emphasis on Islamic finance, would ensure that there will be further direct contact between Shariah and the common law. According to Tun Abdul Hamid, former Chief Justice of Malaysia, to cater for modern international Islamic finance and to compete with its conventional counterpart, Shariah can no longer look to its traditional source alone. The common law has developed to cope with the requirement of the conventional industry. At the same time, there has not been any parallel development in the Islamic finance sector. As a result, the Islamic products are developed within the common law whether in their creation, documentation, implementation or settlement of disputes.

[35] It can be said that the Shariah and the common law are examples of two parallel systems of laws that move towards the same direction, i.e. towards justice. These systems may intersect at some point, and it should be managed in a manner that does not cause any accidents, as both systems of laws can be developed to be congruent. These two systems of law must be able to harmonise their conflict in a win-win situation. Some common law courts may decline to rule on them, but the fact that Shariah issues are litigated and argued would make

the subject familiar to them. Tun Abdul Hamid at the Kuala Lumpur Islamic Finance Forum 2014 also said, "To me, and I have said it many times, any law that is not un-Islamic is Islamic. The test is whether it is Shariah-compliant. So each country may use its existing laws as the base to harmonise with Shariah".

Conclusion

[36] The capacity of the human intellect to understand the Shariah, being the immutable law of Allah SWT is limited. The *Faqih*'s imperfect attempt to comprehend the perfect Shariah shows how the Shariah remains as a work in progress that would never be complete.

[37] In the context of Islamic finance in Malaysia, the task to appreciate and ascertain the Shariah is within the responsibilities of the SAC. The SAC comprises of eminent jurists from all over Malaysia. It is the necessary mechanism to achieve one single authority to ascertain Islamic law for Islamic financial business. With the available Shariah resolutions by the SAC, the Islamic finance industry in Malaysia can have a point of reference when it comes to Shariah principles related to Islamic finance.

[38] It is hoped that we shall see Islamic finance products structured with more consideration to issues of social justice, equity, fairness, and economic substance as its backdrop as well as the practicality of commercial transactions without merely mimicking their conventional counterparts. Ultimately, Islamic finance should be a stronger unstoppable force in the finance industry leading towards a *Riba'* free, if not, a reduced *Riba'* dependence finance industry. Above all else, it must prove to benefit the *ummah* generally and the country particularly.

Only Allah SWT, The All Mighty, The Knower of All, knows best.

Justice in Times of COVID-19[1]

by

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

[1] I welcome the opportunity to share in brief with you the challenges faced and lessons learned by the Malaysian Judiciary in the times of Covid-19.

[2] Following the Malaysian Government's declaration of the Movement Control Order, which is our version of a "lockdown", and given the rapidly evolving situation, almost all Malaysian courts were closed starting from March 18, 2020. This has resulted in a far-reaching implication in the operation and administration of the justice system in Malaysia.

[3] In a situation like this, there was concern that the lockdown would hamper justice, especially in criminal cases in the context of an accused person's right to a speedy trial, some of whom were remanded in prison pending trial. From the business point of view, billions of ringgit of debt that goes through the court process will not be able to be collected. We acknowledge all these concerns.

[4] But, in these extraordinary and unprecedented times, it is unrealistic and impossible for the courts to operate in the usual way. Doing so will run the risk of jeopardising not only the health and safety of judges and court staff but also other users of the courts. Physical attendance in court would be harmful to public health and safety. The pandemic is exposing the limits of open court justice. Our usual methods of providing legal services and managing our professional relationships have to adapt to entirely new norms and expectations. Our immediate step therefore was to postpone all trials and hearings.

[5] At the same time, the Malaysian Judiciary recognises that the administration of justice cannot come to a grinding halt and come

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* Chief Judge of Malaya.

1 Paper presented on May 28, 2020 at the Webinar organised by United Nations Development Programme (UNDP) for the Judicial Integrity Network in ASEAN.

to a standstill. We remain committed to our constitutional obligation to ensure continuous access to justice to members of the public. To this end, a limited number of courts continue to operate albeit with a more limited scope.

[6] In maintaining law and order during the lockdown, the magistrates' criminal courts across the country still hear remand and bail applications as well as fresh charges, including cases related to domestic and other gender-based violence. In the middle of the raging pandemic, they have been working almost everyday with strict instruction to comply with the health and safety protocols to keep the justice system running.

[7] In respect of civil and commercial cases, fortunately for us, the two systems – e-Filing and e-Review – have been up and running by this time, so our operations did not grind to a complete halt. The e-Filing mechanism, which has been in operation for nearly a decade and enables the online filing of documents and cause papers, continues to operate as usual. Documents filed through the system are processed as usual during the lockdown. Inspection and signing of documents continue to be done electronically.

[8] 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.

[9] Urgent *ex parte* applications such as for interim injunctions are conducted by way of 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. 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.

[10] These modes of hearings were made subject to the parties' consent, as we do not have specific legislation in place to mandate the conduct of remote hearings. As a result of a combination of many factors, we have limited success in asking lawyers to have their matters heard by way of video conferencing. The existing legislation, however, do not place restrictions as to how hearings or trials are to be conducted. In this connection, in order to have a more structured regulatory regime on remote hearings, steps are underway to amend the relevant laws such as the Courts of Judicature Act 1964 [*Act 91*], Subordinate Courts Act 1948 [*Act 92*], Subordinate Courts Rules Act 1955 [*Act 55*], Rules of the Federal Court 1995 [*PU(A) 376/1995*], Rules of the Court of Appeal 1994 [*PU(A) 524/1994*] and Rules of Court 2012 [*PU(A) 205/2012*] to give effect to the conduct of online hearings. The new legislative framework will give the courts the necessary power to conduct remote hearings, as opposed to making it by consent of the parties.

[11] 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 necessity 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.

[12] For example, on March 23, 2020, we took a big step forward when for the first time, the Court of Appeal and later the Federal Court, conducted civil appeals by employing video conferencing techniques. Unexpectedly, we are turning this Covid-19 crisis into a window of opportunities. A few months ago, before Covid-19, it would have been inconceivable for both our Court of Appeal and the Federal Court to replace face-to-face hearings with hearings conducted via video conferencing. Traditionally, the court meets in one physical location. The traditional idea of an "open court" involves the judge, counsel and all parties being physically present in an open public courtroom at the same time. In the face of this crisis, we are developing a new mindset that will change our conduct of hearings and trials and the way we function as an institution. This is how life is changing after Covid-19 in the justice delivery system.

[13] Let me now say a few words about our experience and approach to reopening our courts. As the government begins to gradually ease the lockdown, we have created a methodology by which our courts reopen gradually in three phases. We are balancing open justice with public health concerns. It is a very delicate balancing act: remaining vigilant and retaining our efficacy at the same time. Our priority is to get the judges, our staff and court users back to court safely. At this moment we are not rushing back to trials and hearings in open courts. It will be a slow and cautious reopening.

[14] With this in mind, we have drafted a protocol governing the conditional reopening of courts with the following core features: crowd management measures; enhanced cleanliness and hygiene control; and emphasis on the wellbeing of court staff and the public. This protocol was drafted with a view to achieving an acceptable level of physical distancing and to minimise the physical appearances of the court users in the courts. Our aim is to keep the court users safe and secure by preventing the spread of Covid-19.

[15] The first phase of our reopening was with effect from May 4, 2020 where a number of court services began to resume operations. Among these services set to resume are the Registry of the Courts, One-stop Counter, Commissioner for Oaths Counter, Power of Attorney Counter, and e-Filing Service Bureau Counter. Our immediate aim is to maintain service to the public.

[16] The second phase is from May 13, 2020 until July 31, 2020. For this phase, we have set a timetable for a phased reopening of the courts across the country in several stages. Our decision to reopen the courts did not mean we would operate at full capacity immediately. Initially, only a limited number of courts were allowed to operate on a rotational or shift basis. The number of cases in a given courtroom in any one session was reduced. Judges were required to start their open court hearings at staggered times instead of everyone congregating at a particular time. For judges who were not sitting, we put in place a more flexible working set up: they and their supporting staff were required to work from home and continue to conduct remote hearings, where possible.

[17] The third phase is less certain. Depending on how the Covid-19 situation develops and evolves, we hope that given a sustainable

situation all the courts will be fully operational subject to strict health management practices, a condition expected to remain for a long period of time until an effective vaccine is found.

[18] The courts we left before the lockdown were somewhat different when we returned on May 13, 2020. The reopening of the courts on that day saw a returning to a new normal. In a reminder that getting back to normality would not be easy, judges and court staff were required to have their body temperature taken at the point of entry before they reported for work. Court users had to line up via a single entry point before entering the court building. They were required to complete a form for social tracing purposes before they could enter the court building. With the social distancing rule being observed in the courtrooms, sitting arrangements had been reconfigured. Lawyers were not seated right next to each other, instead there was one seat space between them which required the courts to drastically reduce seating capacity. In the courtrooms, everyone was encouraged to wear protective facemasks. These are a few aspects of the new normal that we all have to grapple with.

[19] On the bright side, the reopening of the courts amid heightened precautionary measures has been smooth so far. Early indications reveal that the court users are showing high compliance with the protocol. The feedback received from the judges and court users has been positive. The good start is the result of the meticulous planning and preparation that was undertaken by the Chief Registrar of the Federal Court and his team.

[20] We have learnt a lot from this Covid-19 crisis. In closing, I want to highlight some of the valuable lessons.

[21] The first lesson we have learnt is that we must be better prepared for future disruptions. In looking forward, the sudden and unpredictable nature of Covid-19 calls for a rethink of how we deliver justice in such a situation. Hopefully, Covid-19 will in time pass but the pandemic could be long lasting. In this context, it is important for everyone to take notice of the warning of the World Health Organization that the coronavirus may never go away and that it may become just another endemic in our communities. What this all points to is that we have to learn to live with it and continue to adopt and adapt in discharging our judicial functions.

[22] Secondly, the disruption from the Covid-19 outbreak has forced us to change the way we conduct our trials and hearings. Now more than ever, in this new environment, digital transformation has never been more important to prepare our courts for future crises. Remote hearings are here to stay. Generally there is now recognition that court litigations can be resolved fairly by remote hearings. There are broad spectrums of cases where technological solutions have proved a success and may sustainably be used to deliver justice. The reason is compelling: remote hearings do not alter any part of the substance and procedure. Remote hearings are not by their nature opposed to the notion of fair hearing. It is merely a change in venue from a physical to a virtual one. Unless a party demonstrates that real prejudice will be occasioned, there can be no objection purely on the technical or procedural basis. But, of course, remote hearings may not be suitable in all cases and some cases may be inherently unsuitable, especially in cases where the case hinges on credibility. While we acknowledge remote hearings are not suitable in all cases, for the near future and for some time to come, I think, the court will demand greater use of remote hearings.

[23] Thirdly, looking into the future, the Judiciary must continue to invest in new technology and equipment as we turn to technological advancement to conduct hearings remotely and ensure the wheels of justice continue to turn during a crisis such as the Covid-19 pandemic. We must continue to upgrade our system to address against all security threats or concerns.

[24] Fourthly, legal practitioners must sharpen their ICT skills and knowledge to conduct remote hearings and trials. They must equip their law firms to cover cloud computing, online research facilities and remote access to files and documents from home. It is necessary for lawyers to adjust to this new normal and remain steadfast in adopting the available technologies. If they pay no heed to adapt to the new realities and be ready for the long haul, they will be at a disadvantage and be left behind. This has an impact on equal access to justice for litigants.

Court-Annexed Mediation – Myths and Misconceptions

by

*Justice Datuk Vernon Ong Lam Kiat**

Introduction

[1] Although mediation plays a key role in the resolution of civil and commercial disputes in other jurisdictions, the growth and acceptance of mediation has been a relatively new phenomenon in Malaysia. Mediation was a process known to few and practised by even fewer. The process began with the launch of the Malaysian Mediation Centre ("MMC") under the auspices of the Malaysian Bar in 1999.[1] In 2005, the Malaysian Judiciary mooted the idea of mediation as an alternative to clear the backlog of cases. Practice Direction No 5 of 2010 on mediation was then issued. In 2011, a free court-annexed mediation ("CAM") programme using judges as mediators was introduced in conjunction with the launch of the Kuala Lumpur Court Mediation Centre.[2] Today, we have CAM centres in Shah Alam, Johor Bahru, Penang, Ipoh, Seremban, Kuantan, Kuching and Kota Kinabalu. However, despite a record of success in CAM in courts throughout Malaysia, mediation continues to be viewed with skepticism in some quarters.

[2] Mediation is a form of facilitated negotiation which does not necessarily take place as part of a judicial or other adjudicative process. It involves a mediator acting as a neutral third party, who assists the disputing parties in understanding their underlying concerns, and in negotiating a possible settlement of their dispute. In other jurisdictions, mediation and CAM have reached a point where there are specialist mediators and specialist mediation advocates with particular experience of those specialties in their respective fields of expertise. That we are now able to address the topic of mediation by reference to specialties underscores how far mediation has progressed. Coupled with this development, in some jurisdictions, litigants are

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1 <https://www.malaysianbar.org.my/malaysian_mediation_centre_mmc.html>.

2 Choong Yeow Choy, Tie Fatt Hee and Christina Ooi Su Siang, "Court-Annexed Mediation Practice in Malaysia: What the Future Holds" (2016) 1(2) *University of Bologna Law Review* 273–4.

subjected to mandatory pre-trial mediation protocols and in some instances, mandatory pre-action mediation protocols.

[3] There is now a considerable talent pool of qualified and accredited mediators registered with the MMC and the Asian International Arbitration Centre ("AIAC"). However, there are still many people who do not know about mediation. Most people think that it is a method of resolving disputes other than by litigation. To some, mediation is a type of negotiation and an out-of-court settlement. Others regard it as a form of arbitration.

The classics and Greek mythology

[4] The classics as we are aware is the study of classical antiquity. It includes the study of Greco-Roman philosophy, history, and archaeology. The study of classical Greece includes its language, literature, mythology and religion, and philosophy.

[5] Greek mythology is the body of myths and legends concerning the origin and nature of the world, the lives and activities of gods, heroes, and mythological creatures, and the rituals of the ancient Greeks. That the myths contained a considerable element of fiction was recognised by the more critical Greeks, such as the philosopher Plato in the fifth and fourth centuries BCE. In general, however, in the popular piety of the Greeks, the myths were viewed as true accounts.

[6] Although people of all countries, eras, and stages of civilisation have developed myths that explain the existence and workings of natural phenomena, recount the deeds of gods or heroes, or seek to justify social or political institutions, the myths of the Greeks have remained unrivaled in the Western world as sources of imaginative and appealing ideas. Greek mythology has subsequently had extensive influence on the arts and literature of Western civilisation, which fell heir to much of Greek culture.

[7] Behold the gods, goddesses and legendary figures of ancient Greece – mighty Zeus, with his fistful of thunderbolts; grayed-eyed Athena, goddess of wisdom; Helios, the Sun God. European literature and art from ancient times to the present have derived inspiration from Greek mythology and have discovered contemporary significance and relevance in classical mythological themes. Everyone knows of Heracles (*Herakles* in Greek, *Hercules* in Roman), one of the most famous Greco-Roman legendary heroes.

[8] Be that as it may, there is a divergent view expressed by none-other than Hercule Poirot the fictional little Belgian detective created by Agatha Christie and who appears in 33 novels and more than 150 short stories. In the novel *The Labours of Hercules*, Poirot opined, "Take this Hercules – this hero, indeed! What was he but a large muscular creature of low intelligence and criminal tendencies!" The whole classical pattern shocked Poirot, so much so that Poirot felt that "[t]hese gods and goddesses – they seemed to have as many different aliases as a modern criminal. Indeed they seemed to be definitely criminal types. Drink, debauchery, incest, rape, loot, homicide and chicanery – enough to keep a *juge d'Instruction* constantly busy. No decent family life. No order, no method. Even in their crimes, no order or method!" As in the Greek classics, there are myths and misconceptions surrounding mediation and CAM. It is time to shatter these myths and fallacies.

Myth No 1: Mediation is not workable

[9] First and foremost is the misconception that mediation does not work for most legal cases because the cases are primarily about money. Claimants want money, and the defendants want only to pay the least amount possible. They see no potential to uncover creative solutions.

[10] This misconception is distracting because whether a dispute is largely about money varies from case to case. There are essentially two categories of disputes which are about money: (i) personal injury claims between strangers who will never deal with each other again can be only about money. It is not open to creative resolutions other than a tailored payment scheme; and (ii) claims by banking and financial institutions for monies due and owing under loan and credit facilities.

[11] So, what cases are suitable for mediation? Our experience of the law and CAM shows that some disputes have particular features which indicate that mediation would help to resolve them effectively. Features such as when:

- personal reputations are at issue;
- the parties are averse to publicity;
- there is a need for the dispute to be resolved as early as possible;

- there is a high emotion that would benefit from a controlled outlet;
- the parties would prefer not to go through the court process;
- the parties are likely to have a continuing relationship; and
- court-ordered remedies would not be enough to resolve the dispute.

[12] There are, indubitably, some disputes which are unlikely to be resolved by mediation as where:

- one of the parties refuses to consider any compromise;
- one of the parties gives little or no weight to an opponent's rational arguments;
- one of the parties is not willing, under any circumstances, to discuss the issue in front of anyone but a judge – this includes a vexatious litigant;
- one of the parties seeks a court decision for its precedential significance to current or prospective disputes with other parties or requires establishing a point of law such as the enforceability of a restrictive clause in a series of contracts;
- the claimant wishes to make a public example of the defendant; and
- a court order is necessary, such as an injunction.[3]

Myth No 2: You mediate only when you have a weak case

[13] It is commonly misconceived that a party who takes the initiative to mediate has a weak case; as such, parties are reluctant to initiate a reference to mediation to resolve their dispute. However, this misconception is easily addressed in the case of CAM under which the court directs both parties to refer to mediation before a judge or judicial officer. The fact that the mediation is at the initiative of the court neutralises the misconception that either party's case is weak.

3 David Semple, "Why mediation is a bad idea, and other myths" (January 16, 2006) *Law Society of Scotland Journal*.

Myth No 3: Mediation deprives parties of their day in court

[14] Most parties are convinced that they have a strong case and want to have their day in court. Even so, the fact is that most civil cases, sooner or later, will settle, even if no mediation occurs. Even if the matter proceeds to full trial, the trial process often does not permit a party to tell their story in the fullest sense. The facts relevant to the legal points at issue may be far less than the total history of the dispute. And the cross-examination process may only focus on credibility issues and other unpleasant distractions from a party's central story.

[15] Further, most cases tried in court are determined on the basis of legal rights and obligations. However, only a handful of cases involve difficult or novel questions of law. As such, there are other considerations which really matter to the parties, such as: (i) getting the matter out of the way; (ii) costs; (iii) delays; (iv) loss of control; (v) time taken up which could have been better used; and (vi) overall effect on their business.

[16] By contrast, mediation is flexible. Most mediators encourage the parties themselves to speak (not just their counsel) and encourage them to give a full picture of the dispute, in their own words. Therefore, the parties will have the chance to say what they wish – in the way they wish to say it and in an unthreatening atmosphere. They feel they have been truly listened to.

[17] In the course of a mediation, the parties usually have the earliest opportunity to state the relative strength of their case at law. Although this is a factor in the mediation process, it may not be the most significant issue. Mediation allows the parties the opportunity to prioritise between their life/business needs and their legal rights and obligations. Indeed, parties often find the mediation process cathartic, reporting satisfaction with a mediator's active listening process.

Myth No 4: Mediation is a "fishing expedition"

[18] It is also perceived that mediation is a fishing expedition for lawyers to elicit more information against the other party's case; and which information can be used against them later in court. This is a common fallacy that mediation provides the adversary "free discovery" and makes the trial process more difficult.

[19] It must be appreciated that mediation proceedings are private and confidential and are also a "without prejudice" process. Therefore, any communications during mediation cannot be used against the other party in court and will not affect a party's rights in court if the dispute is not settled during mediation. Even if there is no settlement at all, mediation has often enabled the parties to narrow the issues for trial and understand each other's position better.

Myth No 5: Mediation sessions often become shouting matches

[20] On the contrary, the opportunity for parties to express emotions directly to their adversary is one of the strengths of mediation. The expression of emotions and pent-up feelings in a controlled environment often provides the space for a breakthrough in negotiations. Mediation sessions enable the parties blowing off steam to get their yesterdays behind them, enabling them to think straight about what is to happen next. Family mediation has a good track of successful outcomes, yet disputes involving more emotional exchanges are hard to imagine. A well-run mediation involving a trained, neutral, emphatic mediator with no interest in the outcome of the dispute, who creates an atmosphere in which emotions become constructive not destructive, often provides the key ingredient to successful negotiation.

Myth No 6: Mediation is not legally binding

[21] When the parties come to a settlement in private mediation, the lawyers will draw up a settlement agreement which is then signed by the parties. The settlement agreement is enforceable like any other contract.

[22] In CAM, once a settlement is reached the lawyers draw up a draft consent order or judgment setting out the terms and conditions of the settlement. After the draft consent order is approved and co-signed by the parties and their respective lawyers, the matter is brought before a judge for the draft consent order to be recorded as a court order. Once that process is completed, the consent order is binding and enforceable like any other court order. More significantly, the consent order may include remedies which would not be available at a trial.

Mediation in other jurisdictions

[23] Mediation has become increasingly used as an adjunct to civil proceedings and as many different permutations of mediation

programmes have emerged in different countries. To gain an insight into the process, principles and practice of mediation in other jurisdictions, we will start with the United Kingdom.

United Kingdom ("UK")

[24] In 1974, the Finer Report of the Committee on One Parent Families[4] recommended mediation for the resolution of family disputes. This was followed by the development of independent family mediation services in Bristol and Bromley in 1979 and the National Family Conciliation Council in 1981 together with parallel developments in court-annexed family mediation, conducted by district judges or welfare officers. By 1993, there had been approximately 6,500 independent family mediations and 19,000 court-annexed family mediations.[5]

[25] However, mediation was still in its infancy until the mid 1990s and confined to family courts. The crunch moment came with the introduction of the new Civil Procedure Rules in April 1999.

[26] The report that led to the radical reform of the civil justice system and provided a catalyst for the spurt in mediation growth was Lord Woolf's 1996 report, "Access to Justice". Perhaps no statement better summed up the heart of the proposed reforms than the words in the resulting December 1998 Lord Chancellor's Department report, "Modernising Justice": [6]

> … in civil matters. For most people, most of the time, going to court is, and should be, the last resort.

The reforms resulted in a huge increase in both the level and complexity of commercial cases being mediated. Under the new rules, the courts were encouraged to facilitate the use of mediation, and penalise in costs those recalcitrant parties who failed, without good reason, to engage in it.[7]

4 Cmnd 5629, HMSO, London, 1974.
5 Laurence Boulle and Miryana Nesic, *Mediation: Principles Process Practice* (Tottel Publishing 2001), pp 225, 226.
6 Christopher Newmark and Anthony Monaghan, *Mediators on Mediation, Leading Mediator Perspectives on the Practice of Commercial Mediation* (Tottel Publishing, 2005), p ix.
7 Ibid.

[27] A series of cases highlighted the dangers of parties failing to use mediation when appropriate. In one of the early decisions, *Cowl v Plymouth City Council*,[8] Lord Woolf himself said:

> The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation wherever this is possible. … The courts should … make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts.

[28] Subsequent cases such as *Railtrack v Dunnett*,[9] *Cable & Wireless v IBM*,[10] *Halsey v Milton Keynes NHS Trust*[11] and *Steel v Joy and Halliday*[12] reinforced the central role of mediation in resolving commercial disputes.

[29] The UK Government's commitment to developing the field of mediation has been demonstrated not only in implementing the recommendations of the "Access to Justice" report, but also in the concrete form of the March 2001 ADR Pledge that government departments and agencies will use alternative dispute resolution (usually mediation) in all suitable cases where the other party accepts it. The UK Government has also been instrumental in supporting the introduction of mediation pilot programmes in a number of courts, including the pioneering work in the Central London County Court.[13]

[30] As a result of the reforms and the court decisions that implemented them, even the most hardened litigators are forced to advise their clients of what mediation can offer. In a number of cases, the English courts have imposed cost sanctions because a party unreasonably refused to consent to participate in mediation.[14] The number of mediations rose dramatically. The Centre for Effective Dispute Resolution ("CEDR")

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8 [2002] 1 WLR 803.
9 [2002] 2 All ER 850.
10 [2002] 2 All ER (Comm) 1041.
11 [2004] EWCA (Civ) 576.
12 [2004] 1 WLR 3002.
13 Supra, n 6.
14 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576 (Eng); *Hurst v Leeming* [2002] EWHC (Ch) 1051 (Eng); *Dunnett v Railtrack* [2002] EWCA (Civ) 303 (Eng); *Hickman v Blake Lapthorn* [2006] EWHC 12 (QB) (Eng).

which administered just under 100 cases in 1996, administered almost 700 by 2004.

[31] The growth in the size and sophistication of the field has also led to fragmentation in the marketplace. A field once dominated by one or two mediation providers has seen a proliferation of new mediation providers and an increase in demand for independent mediators. Sector-specific mediation schemes have also emerged. The expansion of the field has brought into sharp focus the need to maintain standards and ensure appropriate regulation is implemented so as to meet and exceed the expectations of commercial users. Notwithstanding all of these changes, the percentage of mediations that result in concluded settlements remain not only steady, but staggeringly high.

Judicial mediation in employment tribunals[15]

[32] As can be seen, whilst mediation is actively encouraged by the courts in the UK, there is no CAM in the sense that judges act as mediators in cases pending in the courts of law. There is, however, a judicial mediation scheme unique to employment tribunals which started as a pilot in 2006. Over 65% of cases mediated reach a successful settlement on the day of mediation. Most cases that do not succeed on the day of the mediation are settled before the hearing as a result of the impetus created by the judicial mediation.

[33] This scheme involves bringing the parties together for a mediation at a private preliminary hearing before a trained employment judge who remains neutral and tries to assist the parties in resolving their disputes.

[34] Suitable cases are identified, as part of the normal tribunal process, by an employment judge at a preliminary hearing at which the employment judge advises the parties of the possibility of an offer of judicial mediation. If both parties agree, the regional employment judge considers the file and decides whether to make an offer of judicial mediation, depending on resource constraints and the suitability of the issues for mediation. Nothing said or taken place at the judicial mediation may be referred to at any subsequent hearing and the employment judge mediating is precluded from any further involvement in the case.

15 Judicial Mediation – Employment Tribunals (England and Wales), HM Courts & Tribunals Service, July 1, 2014.

Pre-action protocols

[35] Pre-action protocols were one of the key features introduced to save parties from costly court battles and to reduce the administrative burden on courts. Parties were required to enter into a formal exchange of correspondence setting out their respective positions and providing where appropriate for disclosure of documents and witness evidence; whereby parties could then properly evaluate their cases at an early stage and settle their differences without having to file proceedings in court.

[36] In the UK, compulsory pre-action protocols apply to personal injury claims, clinical disputes, construction and engineering disputes, defamation, professional negligence, judicial review, disease and illness, housing disrepair, possession claims by social landlords, possession claims for mortgage arrears, dilapidation of commercial property, low value personal injury road traffic accident claims and low value personal injury employer's and public liability claims.[16] The procedural rules are set out in the Pre-action Protocol Practice Directions. The court can take failure to adhere into account by imposing sanctions such as an order to pay costs, possibly on an indemnity basis and if the party at fault is the claimant, an order depriving that party of interest or a lower rate of interest regardless of whether it is successful on the main claim, or if the party at fault is the defendant, an order awarding interest on the judgment sum at a higher rate than the rate which would otherwise have been awarded.[17]

Australia

[37] Historically, Australia has been among the most litigious societies in the world. The burden, financial and otherwise, on litigants was severe. The public purse was severely strained by the necessity of allocating huge resources in terms of infrastructure and personnel (judges, juries, facilities and support staff) to the hearing of all these cases. In the late 1980s and early 1990s, the courts decided that the days of litigation being conducted at whatever leisurely pace the protagonists chose were over. Case management became the weapon

16 <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct>.
17 Ibid.

of choice of the Judiciary in its quest to confine cases to real and relevant issues and compel litigants to conduct litigation quickly and efficiently. Compelling parties to settle those cases that should be settled as early as possible and to seriously address issues in resolving the disputes of the more recalcitrant disputants were both philosophies at the centre of the case management drive. The rise of mediation in Australia coincided with the rise of case management and its underlying philosophy. Now the courts and the parties are very much focused on alternative dispute resolution, with mediation in the forefront of that push.[18]

[38] The early development of mediation in Australia has been described as a unique practice and distinct discipline in its separation from and development as an alternative to litigation. However, courts in Australia were quick to see the potential financial and workload benefits of mediation and to embrace them to court processes.[19] As observed by John North:[20]

> Most courts in Australia have legislation and rules which empower judges, or an officer of the Court, to refer matters to mediators. In some courts, that power may be exercised with or without the consent of the parties. The power is often used before matters are listed for trial. It is not uncommon, however, for matters to be referred to mediators during trial.
>
> …
>
> Court annexed mediation began in Australia in 1983, when the Victorian County Court Building Cases List made provisions for matters to be referred to mediators for the resolution of cases. The

18 Campbell Bridge, "Comparative ADR in the Asia-Pacific – Developments in Mediation in Australia", paper presented at the 5Cs of ADR Alternative Dispute Resolution Conference, Singapore, October 4–5, 2012.

19 Judge Joe Harman of the Federal Circuit Court of Australia, "From Alternate to Primary Dispute Resolution: The pivotal role of mediation in (and in avoiding) litigation", paper presented to the National Mediation Conference Melbourne 2014.

20 Paper entitled "Court Annexed Mediation in Australia – an Overview" delivered at the 13th Malaysian Law Conference by the Law Council President, John North on November 17, 2005, <https://www.malaysianbar.org.my/adr_arbitration_mediation/court_annexed_mediation_in_australia_an_overview_by_john_north.html>.

> Federal Court of Australia has had a mediation program for alternative dispute resolution since 1987. … In June 1991 the Federal Court of Australia Act 1976 was amended to allow the court, with the consent of the parties, to refer the proceeding or any part to a mediator …
>
> What started as a ripple on the mediation front in the early-to-mid 1980s, became a wave in the 1990s. Practitioners realised that unless they learned to surf this "new wave" of mediation and alternative dispute resolution, they would be left floundering at sea without the proverbial paddle. The mediation movement in Australia gained particular impetus and credibility in the early 1990s. In 1992, the then Chief Justice of the Supreme Court of Victoria, Justice Phillips, concluded that delays in the Supreme Court could only be resolved by a "massive and mighty effort using mediation as a vehicle for getting cases resolved."
>
> This led to the so-called "Spring Offensive" in Victoria in 1992, in which 762 cases waiting for trial were reviewed by a panel of judges. Two-hundred-and eighty of these cases were sent for mediation and 104 were settled at mediation … By 1993 mediation was on the rise and was described by the editor of the Australian Law Journal as "the flavour of the year".
>
> In 1995, the Federal Attorney-General announced the establishment of the National Alternative Dispute Resolution Advisory Council (NADRAC) to foster the expansion of alternatives to court action in civil matters. In announcing the establishment of NADRAC, the Attorney-General said "the Government was encouraging the expansion of Alternative Dispute Resolution as part of its strategy to lower legal costs and improve access to justice".

[39] According to Laurence Boulle, at least one reason for the rapid growth of mediation in Australia has been "economic rationalism" whereby:[21]

> Mediation [has] develop[ed] in a context in which the value of social activities is located within the structure of the market-place.

[40] Another interesting development of ADR in Australia is the changes of "attitudes and practices in the courts which the Federal

21 Laurence Boulle, "Minding the gaps: reflecting on the story of Australian mediation" (2000) 3(1) ADR Bulletin 1 at 2.

Court of Australia moved from voluntary mediation to mandatory mediation". In 1997, the Council of Chief Justices of Australia and New Zealand stated that "it is a function of the State to provide the necessary mechanisms for the resolution of disputes and the Court-annexed mediation was part of that process". In 2000, amendments were made to the Supreme Court Act 1970 (NSW) which made mediation and neutral evaluation mandatory if the court considered the circumstances appropriate.

Court-annexed mediation

[41] Similar to other jurisdictions, CAM refers to mediations conducted by the registrars of the court who are also qualified as mediators. Since 1987, the Federal Court of Australia already had a mediation programme for ADR. In June 1991, the Federal Court of Australia Act 1976 was amended so that the court was empowered to refer proceedings or any part to a mediator.

Australian Disputes Centre ("ADC")

[42] In 1986, the ADC, a non-profit organisation, was established to "advance the practice and quality of ADR services such as mediation, conciliation and arbitration in Australia and internationally". It is one of the first ADR providers in Australia.[22] Its purpose is to introduce non-adversarial dispute resolution processes into Australia – these procedures have been rapidly accepted and adopted as part of the overall business and government approach to dispute resolution. Since its formation, the ADC has assisted in the resolution of thousands of disputes and is nominated to facilitate dispute resolution in business and government contracts.[23]

Australian Mediation Association ("AMA")

[43] The AMA is also worthy to note in that they are "a group of mediators and conflict resolution practitioners who provide private mediation consultation services, and education in mediation, communication and negotiation, to help businesses and individuals avoid disputes through planning and to resolve disputes through mediation".[24] The AMA is driven on "facilitating highly professional,

22 <https://www.disputescentre.com.au/history/>.
23 Ibid.
24 <https://ama.asn.au/>.

diplomatic and responsive interventions that achieve successful outcome for all parties involved".[25]

Pre-action protocols

[44] In Australia, mandatory pre-action protocols require a party to take or consider undertaking certain actions that can promote the resolution or management of a dispute before court proceedings are commenced. The pre-action requirements include: (i) document disclosure; (ii) pre-action meetings or correspondence; (iii) ADR, e.g. mediation; and (iv) genuine and reasonable negotiations. Instances of mandatory pre-action mediation include: (a) family disputes under the Family Law Act 1975 (Cth) and the Family Law Rules 2004 (Cth) for parenting disputes prior to lodging an application with the court; (b) retail lease disputes in NSW and Victoria pursuant to the Retail Leases Act 2003 (Vic) under which the Victoria Small Business Commissioner mediates matters for retail tenancy disputes before issuing proceedings at the Victorian Civil and Administrative Tribunal; (c) the Farm Development Mediation Act 1994 (NSW) where mediation must occur before a creditor can take possession of property or other action under a farm mortgage.[26] In Western Australia, if a case goes to court, the court will look at whether the pre-action requirements have been complied with, and will consider the consequences of either party failing to comply. The court may, where a party has been unreasonable and failed to follow the pre-action procedures, order that the party pays all or part of the other party's costs, or change the way the case progresses through the court.[27]

Singapore

[45] The development of mediation in Singapore began in the 1990s. Mediation has since developed into three main forms: (i) court-based mediation – Court Mediation Centre; (ii) private-commercial mediation – Singapore Mediation Centre; and (iii) community-based mediation – Community Mediation Centre.

[46] Court-based mediation was introduced through the court dispute resolution process in the Subordinate Courts (now known as State

25 Ibid.
26 <http://nmc2019.com.au/wp-content/uploads/2019/05/1.1-Tania-Sourdin.pdf>.
27 <https://www.familycourt.wa.gov.au/P/pre_action_procedures.aspx>.

Courts since 2014) in 1994, when the Judiciary incorporated the pre-trial conference into civil cases. In 1996, pre-trial conferences were coded in the Rules of Court of Singapore.[28]

[47] The Primary Dispute Resolution Centre ("PDRC") was established in 1994 for ADR services within the courts for civil suits, where judges are specifically trained in ADR. The mediation process would include joint sessions with the judge, who will usually play an active role in guiding the parties to achieve a mutual understanding. If such an agreement cannot be achieved, the judge would then inform the parties of the implications of going to trial.[29]

[48] In 2002, non-injury motor accident cases were automatically referred to court dispute resolution[30] unless the parties themselves chose to opt out. In 2006, it was extended to cases of medical negligence and in 2011, personal injury cases.[31]

[49] Pro-ADR schemes were introduced subsequently. In 2010, the ADR Form[32] was introduced at the summons for direction stage in civil disputes before the State Courts. The ADR Form required parties/lawyers to acknowledge and certify that ADR options have been discussed, and they have decided on what decision to follow through.[33]

Singapore Mediation Centre ("SMC"), Singapore International Mediation Centre ("SIMC") and Singapore International Mediation Institute ("SIMI")

[50] Formed under the Singapore Academy of Law to promote mediation services for civil disputes in the High Court, the SMC was

28 Order 34A empowers the court to order the parties' attendance at confidential pre-trial conferences, or to make other orders/directions appropriate for the just, expeditious and economical disposal of the dispute at any point once proceedings had commenced.

29 Teh Hwee Hwee, *Mediation Practices in ASEAN*. See also Subordinate Courts Practice Directions, para 25, <http://app.subcourts.gov.sg/Data/Files/File/PracticeDirections/MasterPD_31082011.pdf>.

30 State Courts Practice Directions, paras 37 and 38.

31 James Leong and David Lim, "An Overview of Court Mediation in the State Courts of Singapore" in Danny McFadden and George Lim SC (gen eds), *Mediation in Singapore: A Practical Guide*, 2nd edn (Sweet & Maxwell, 2017), pp 232–233, Ch 9.

32 The former Subordinate Courts Practice Directions No 2 of 2010.

33 Emmanuel Chua, "ADR In Singapore Developments and Trends", Herbert Smith Freehills, Conventus Law (February 2016), retrieved from <http://www.conventuslaw.com/report/adr-in-singaporedevelopments-and-trends/>.

established in August 1997, followed by a network of community mediation centres from 1998 onwards.

[51] In 2014, the SIMC and the SIMI were established. The SIMC offered mediation of cross-border commercial disputes, hosting a panel of internationally respected mediators drawn from around the world. One of the distinguishing features of the SIMC is its hybrid Arb-Med-Arb Protocol.[34] The SIMI on the other hand, is a professional standards body for the "training, assessment and accreditation of mediators". It is also tasked to increase public awareness on mediation.

Pre-action protocols

[52] Pre-action protocols are prescribed for non-injury motor accident cases ("NIMA"), personal injury claims and defamation actions. For NIMA cases and personal injury claims, the protocols provide a framework for pre-writ negotiations and exchange of information.[35] Before commencing proceedings, a claimant must comply with the pre-action protocols in the State Courts Practice Directions, the first of which is to send a comprehensive letter of claim (using prescribed Form 1) enclosing all relevant supporting documents to every potential defendant and his insurer. After all the relevant information and documents have been exchanged between the parties, the parties shall negotiate with a view to settling the matter at the earliest opportunity on both liability and quantum. Parties are encouraged to resolve the claims through the SMC or the Law Society of Singapore Arbitration Scheme. Non-compliance without good reasons may result in "cost sanctions" against the breaching party, i.e. the court may reduce or increase the overall party-and-party costs payable by the defendant to the claimant (if any at all) as "penalty" for non-compliance.[36] For defamation actions, a comprehensive letter of claim (in Form 1) by the claimant must be issued to the potential defendant. If no response is received by the claimant within the timeframe, the claimant may commence legal proceedings. However, if there is a response from the potential defendant, then the parties are required to consider

34 Supra, n 29.

35 <https://www.statecourts.gov.sg/cws/CivilCase/Documents/PD07032014-AppFA-AnnexB-PreActionProtocolforNIMA.pdf>; <https://www.statecourts.gov.sg/cws/CivilCase/Documents/PD07032014-AppFB-PreActionProtocolforPIClaims.pdf>.

36 Ibid.

mediation at the SMC, the SIMC or the Law Society Mediation Scheme prior to commencing an action. Non-compliance without good cause may subject the party in default with sanctions in costs.[37]

Other developments

[53] Many independent ADR services were eventually introduced, some specific to certain industries such as family mediation and counselling (Eagles Mediation and Counselling Centre), consumers (Consumer Association of Singapore Mediation Centre) and finance (Financial Industry Dispute Resolution Centre). Even the Intellectual Property Office of Singapore ("IPOS") entered into an arrangement with the World Intellectual Property Organisation Arbitration and Mediation Center in January 2012, so that any party with trademark proceedings that are pending before the IPOS may submit its dispute to mediation using the WIPO Mediation Rules.[38]

[54] Mediations are also conducted in the family court. Parties are referred to mediation to help "heal their broken relationships, or at least prevent future recurrences of similar events".[39] Mediation has now been accepted as the "first step in divorce matters",[40] as often times parties are able to resolve their differences amicably.

[55] There are two main types of family mediation: court-based and private mediation.[41] Court-based family mediation takes place at the Family Justice Courts and the Syariah Courts, offering a forum for negotiation and settlement via counselling and mediation. Private mediation on the other hand takes place in the SMC.

The Philippines

[56] ADR started in 1992 when the Philippine Bar Association came to the "realization that court dockets were congested, and the cost of justice had become unaffordable for the greater number of our people".[42]

37 <https://www.statecourts.gov.sg/cws/CivilCase/Documents/Pre-Action%20Protocol%20for%20Defamation%20Actions.pdf>.
38 Supra, n 29.
39 Ibid.
40 Kevin Ng, *"Family Mediation – The Perspective of the Family Court" in Mediation in Singapore: A Practical Guide* (Sweet & Maxwell, 2017), [13.010].
41 Ibid.
42 Dean Eduardo de los Angeles, "The Philippine Mediation Center: Past, Present and Future" in *The Mediation Project*, *The PHILJA Judicial Journal*, 2002, Vol 4(II) at 89.

In December 1999, a pilot testing for mediation began with the trial courts.[43] The result of the pilot testing showed a moderate success rate of 41%.[44] In Mandaluyong City, 48 cases were referred for mediation, 15 of those resulted in compromise settlements. In Valenzuela City, 52 cases were referred for mediation, 12 cases were successful.[45] As a result of this pilot testing, the Judicial Reforms Committee decided to recommend the adoption of Court-Referred Mediation ("CRM") in both of those cities, and in other areas.

[57] The second pilot testing was for the CRM in the regional trial courts and the family courts in selected cities in Metro Manila. The success rate soared to 77%.[46]

[58] In 1999, the court issued amended guidelines for the implementation of mediation/conciliation proceedings. Under these guidelines, the following cases are referred for mediation:

- Civil cases involving members of the same family within the sixth civil degree of consanguinity or affinity, except those which by law cannot be subject to compromise, and civil disputes between residents of the same municipality or city cognisable by the *Lupon Tagapamayapa* in accordance with section 408 of the Local Government Code of 1991(Republic Act 7160);
- Collection cases based on a creditor and debtor relationship;
- Claims for civil damages; and
- Disputes arising out of a lessor-lessee tenant relationship.

Philippine Mediation Center ("PMC")

[59] In 2001, after intense workshops identifying the pros and cons and recommendations for mediation, the Supreme Court declared Administrative Order No 21-2001 which designated the Philippine Judiciary Academic to be a component unit for court-referred, court-related mediation cases and other ADR mechanisms. This led to the establishment of the PMC.

43 Ibid, at p 90.
44 Ibid.
45 *The Mediation Project, The PHILJA Judicial Journal*, Jan-March 2002, Vol 4(II) at 11.
46 Supra, n 42, at p 89.

[60] The introduction of the PMC is said to be historic because "for the first time in our country, a centre rises with the sole aim of continuing a program which has been successfully begun. It will now institutionalize a program … as the Supreme Court's educational arm that will provide an alternative mode to litigants, addressing their problems swifter, and in a non-adversarial and less costly manner".[47]

Court-annexed mediation

[61] CAM was then institutionalised under the PMC. CAM refers to "any mediation process conducted under the auspices of the court, after such court has acquired jurisdiction of the dispute".[48] Through CAM, if the trial court determines the possibility of an amicable settlement via ADR, the Second Revised Guidelines on Mediation in 2001 mandates the court to issue an order referring the case to the PMC for mediation.

[62] By 2011, the Supreme Court has expanded the cases covered by CAM to cover the following:[49]

(i) all civil cases and the civil liability of criminal cases covered by the Rules on Summary Procedure, including the civil liability for violation of the Bouncing Checks Law;

(ii) special proceedings for the settlement of estates;

(iii) all civil and criminal cases requiring a certificate to file action under the Revised Katarungang Pambarangay Law;

(iv) the civil aspect of quasi-offences under the Revised Penal Code;

(v) the civil aspect of less grave felonies not exceeding six years of imprisonment where the offended party is a private person;

(vi) the civil aspect of *estafa* (swindling), theft and libel;

(vii) all civil cases and probate proceedings brought on appeal from the first level courts;

47 Supra, n 42, at p 87.
48 Republic Act No 9825, s 3(l).
49 <http://www.conventuslaw.com/report/the-philippines-dispute-resolution-guide-2016/>.

(viii) all cases of forcible entry and unlawful detainer brought on appeal from the first level courts;

(ix) all civil cases involving title or possession of real property or interest therein brought on appeal from first level courts; and

(x) *habeas corpus* cases brought on appeal from the first level courts.

Judicial dispute resolution ("JDR")

[63] More recently, the Philippine Supreme Court put in place the JDR programme, which effectively serves as a secondary tier of "mediation" conducted not by a mediator accredited by the PMC, but by an active judge of the first instance courts. JDR is resorted to only where CAM fails to result in a mediated settlement agreement.[50] Judicial proceedings covered by JDR is divided into two stages: (i) from the filing of the complaint to the conduct of court-annexed mediation and JDR; and (ii) pre-trial proper to trial and judgment.[51]

[64] Cases usually referred to JDR include:[52]

(a) All cases which were not successfully settled in CAM; and

(b) All appealed cases from the exclusive and original jurisdiction of the first level courts:

(i) over civil cases and probate proceedings, testate and intestate, under section 33, paragraph (1) of the Judiciary Reorganization Act of 1980;

(ii) over cases of forcible entry and unlawful detainer under section 33, paragraph (2) of the Judiciary Reorganization Act of 1980;

(iii) over civil cases involving title to or possession of real property or an interest therein under section 33, paragraph (3) of the Judiciary Reorganization Act of 1980; and

(iv) over a *habeas corpus* case decided by the judge of the first level courts, in the absence of all the regional trial court judges

50 Patricia-Ann T Prodigalidad, *Building an ASEAN Mediation Model: The Philippine Perspective*, p 4.

51 <http://www.conventuslaw.com/report/the-philippines-dispute-resolution-guide-2016/>.

52 <http://philja.judiciary.gov.ph/pfaq.html>.

in the province or city, that are brought on appeal from the special jurisdiction granted to the first level courts under section 35 of the Judiciary Reorganization Act of 1980.

Appellate court mediation ("ACM")

[65] Meanwhile, the ACM is a mediation programme in the Court of Appeals, a corollary to CAM in the lower courts. It provides a "conciliatory approach in conflict resolution. Through ACM, the Court of Appeals promotes a paradigm shift in the resolution of disputes from rights based (judicial) to an interest based (mediation) process to amicably settle appeals".[53]

Specialisation

[66] One of the specialisations of the mediation process in the Philippines is on intellectual property. In 2019, the Intellectual Property Office of the Philippines ("IPOPHL") issued Memorandum Circular No 2019-006 on the Rules of Procedure for IPOPHL Mediation Outside of Litigation, which extends its mediation service outside of litigation.[54]

Thailand

[67] In Thailand, mediation has already been prescribed in the Civil Procedure Code as early as 1934. Mediation did not take root as "in some period in the past, the court extensively promoted mediation to parties in litigated cases, and tried to encourage them to use mediation. However, once there were changes of court executives, the policy toward mediation would also be affected".[55]

[68] What sparked the mediation movement was the economic crisis in 1997. Due to money supply being tied up, the banking and financial institutions as well as the court and administration of justice were vastly impacted. The main concern was to expedite the process for pending loan defaults – the courts in particular had to think of how to settle all the cases more speedily as they had many other cases to deal with. Mediation was seriously adopted. Cases were selected and

53 Resolution of the Court En Banc (2008), s 7(e), retrieved from <http://philja.judiciary.gov.ph/assets/files/pdf/pmc/FunctionsofPMCO.pdf>.

54 <https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_10/wipo_ace_10_5_ppt.pdf>.

55 Sorawit Limparangsri, "Alternative Dispute Resolution In ASEAN: A Contemporary Thai Perspective" (2010) 13(1) *Thailand Law Journal*.

sent to the mediation centres in the hope that they would be settled without having to go on trial.[56]

Thai Mediation Center ("TMC")

[69] It is said that the most notable organisation providing mediation service is the ADR Office of the Court of Justice.[57] Moreover, the TMC, established by the Act of Arbitration Center BE 2550 (2007), played a vital role in setting up the mediation system of the Court of Justice. The TMC also offered training programmes for court mediators. As time went by, it was proven that mediation was the key to reducing backlog of cases, and that it had improved the efficiency in the administration of civil justice.[58]

Court-annexed mediation

[70] The CAM programme is said to be "the most successful mediation scheme in Thailand",[59] so much so that mediation had been incorporated in the Strategic Plan of the Court of Justice to sustain mediation schemes as well as facilitate the budget for expansion and promotion of mediation.

[71] From early 2000s onwards, mediation has been practised in conjunction with court proceedings and arbitration, though it cannot be considered a primary dispute settlement mechanism yet, as many contracts do not include a mediation clause – even if the parties agree on an alternative dispute resolution method, they would usually opt for arbitration.[60]

Specialisation

[72] Mediation for financial disputes is now common. Courts have the option to refer a dispute relating to non-performing loans to the mediation process.[61]

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56 Sorawit Limparangsri, Montri Sillapamahabundit, *Mediation Practice: Thailand's Experience*.

57 Sorawit Limparangsri, Prachya Yuprasert, *Arbitration and Mediation in ASEAN: Law and Practices from a Thai Perspective* (2005), p 201.

58 Supra, n 56.

59 Ibid.

60 Supra, n 57, p 202.

61 Court of Justice Regulation Pertaining to Mediation on Financial Dispute BE 2544 (2001). See Regulation for the Mediation Process, Ch 2.

[73] For family cases, social workers who work in family cases are given the power to mediate the disputes. Judges sitting in a particular family case are required to discuss about mediation and provide it as an option for the parties regardless of the stage of proceedings.[62]

[74] Labour cases are also commonly associated with mediation. It is said that mediation in this context "can alleviate the adversary tension between the parties, and may help the parties to develop further relationships once the disputes have been settled".[63] Mediation in labour cases has been proven to be a success as many cases have been settled in the mediation process.[64]

United States of America ("US")

[75] In 1913 mediation was institutionalised in the labour field when the US Department of Labour created a panel to handle labour-management conflicts. In 1947, the panel evolved into the Federal Mediation and Conciliation Service, which is charged with maintaining stability in industries through mediation.[65]

[76] In the 1960s, neighbourhood justice centres (also called community dispute resolution centres) have been funded by state and federal budgets. In addition, the Civil Rights Act of 1964 created the Community Relations Service of the US Department to help resolve discrimination disputes through negotiation and mediation.[66]

[77] The "litigation boom" in the late 1970s and 1980s prompted the instituting of mediation to relieve court congestion.[67] Judges were encouraged to reduce the caseloads and delay, and convened bench-bar committees to recommend alternative methods to resolve disputes. Hence, a rich array of court-connected alternative dispute resolution processes developed.[68]

[78] Traditional settlement conferences conducted by judges were augmented and sometimes replaced by more innovative dispute

62 Supra, n 57, p 201.
63 Ibid.
64 Ibid.
65 Menkel-Meadow, CJ and Porter-Love, L, *Mediation: Practice, policy, and ethics* (Wolters Kluwer Law & Business, 2014), p 97.
66 Ibid, at pp 98–99.
67 Ibid.
68 Folberg, J, *Development of Mediation Practice in the United States*, p 37.

resolution options. Informal "settlement weeks" and case evaluation panels, both using volunteer lawyers, led to institutionalised programmes, often imposed by statutes and court rules that required litigants to engage in ADR.[69]

[79] Two significant laws were passed cementing mediation as a national enterprise, and not a fad or a tool for only local disputes.[70] In 1990, Congress passed the Civil Justice Reform Act ("CJRA"), affirming its dedication to "just, speedy and inexpensive resolutions" in civil cases, which included the use of mediation.[71] In conjunction to that, the CJRA required all 94 federal districts to create and implement plans that would achieve such goals.[72] The Federal Courts Advisory Committee recommended that mediation be utilised in civil cases in the federal district courts.[73] While the CJRA treated all ADR equally, mediation became the dominant form.[74] In 1996, more than half of all the federal courts had some form of mediation programme.[75]

[80] In 1998, Congress put its "stamp of approval" on ADR methods in the courts when it adopted the ADR Act ("ADRA").[76] The ADRA went one step further, requiring that every federal court consider mediation specifically.[77] As such, CAM has been widely practised in the US federal courts since 1998.

[81] In conjunction with the CJRA, states began enacting statutes regarding mediation.[78] With all the conflicting and policy objectives in 2001, the American Bar Association ("ABA") Section on Dispute Resolution and the National Commission on Uniform State Laws began drafting the Uniform Mediation Act ("UMA").[79]

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69 Ibid.
70 Birke, *US Mediation in 2001: The Path that Brought America to Uniform Laws and Mediation in Cyberspace*, p 193.
71 Cole, SR, Rogers, NH, and McEwen, CA, *Mediation: Law, Policy, Practice*, Vol 1 (Thomson Reuters West Publishing, 2013), p 78.
72 Supra, n 70, p 193.
73 Supra, n 71.
74 Supra, n 70.
75 Ibid.
76 Supra, n 71, p 79.
77 Supra, n 70.
78 Supra, n 71 66, p 82. See also, Appendix A at pp 863–941.
79 Ibid.

[82] The drafters sought to make the provisions understandable by a wide audience, thereby keeping some provisions shorter and leaving discretion to the courts in interpretation, consistent with the general policies espoused in the Act.[80] The UMA was amended in 2003 to facilitate state adoption of the 2002 UNCITRAL Model Law on International Commercial Conciliation.[81] However, to date, only 12 jurisdictions have adopted the UMA.[82]

[83] It is important to note that there is no governing or regulatory body for mediation in the US. Associations such as the ABA provide standards that are well respected in the practice of mediation. In addition, most states have individual laws governing mediation, although there have been several attempts to develop uniform domestic mediation laws in the US such as the ADRA and the UMA.[83]

[84] In summary, mediation has matured into a new profession in the past couple of decades and has become an important part of the dispute resolution landscape in the US. Existing private organisations providing ADR had a growth spurt. Among others, the largest private ADR provider organisation – the Judicial Arbitration and Mediation Services founded in 1999 – has grown to 25 centres nationwide and has international affiliates in 2015.[84]

Mandated mediation in the US

[85] Also known as CAM, the main objective of having CAM is the hope of achieving settlement short of trial.[85] According to the ABA, in at least 28 states, CAM is automatic for many cases, for example,

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80 Francis E MgGovern, *Civil Practice and Litigation Techniques in Federal and States Courts Sponsored with the cooperation of the Federal Center*, SN009 ALI-ABA 2219 (2007). The general policies of the UMA include fostering prompt, economical, and amicable resolution, integrity in the process, self-determination by parties, candor in negotiations, societal needs for information, and uniformity of the law.

81 Uniform Law Commission, The National Conference of Commissioners on Uniform State Laws, as viewed on November 17, 2014. See <www.uniformlaws.org>.

82 <https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/on-professional-practice/>.

83 "Mediation in the USA", September 9, 2019, *Lexology*.

84 Supra, n 68, p 38.

85 Sherman EF, "Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?" (1993) SMU L Rev 2079 at 2081, 2090–91.

those under a certain dollar amount.[86] However, the courts have uniformly held that such settlement procedures must not have the effect of coercing the parties into settling.[87]

[86] Where CAM is available in the jurisdiction, the judge may refer certain kind of disputes, such as child custody agreements, to that programme during the pre-trial conference. During mediation, a neutral third-party mediator will assist the parties to reach a negotiated settlement.

[87] States in the US have different laws pertaining to CAM. Among other statutes that empowers the judge to order for mediation is Fed. R Civ P 16. A similar rule was enacted by the District of Oregon.[88] The issue is then, does the court have power to order mediation when no statute or court rule expressly provides for such power? In *Re KAR*,[89] the court agreed that the inherent judicial power of a trial judge includes the power to order mediation. In *Fuchs v Martin*,[90] the Indiana Supreme Court held that although there were no statutes or court rules that authorised the court to order the parties to mediate, however, the court reasoned that mediation is an "appropriate procedural step consistent with the efficient judicial administration of the party's case",[91] affirming the trial judge's order that required the parties in a paternity dispute to attend mediation.

[88] Courts generally recognise the power of Congress, state legislatures, or judges to set up mandatory ADR processes that would include mediation. In the absence of a statute or court rule, the trial judge has broad inherent authority to order litigation parties to mediate a dispute. At the same time, that authority is subject to weighing in individual cases whether the benefits of doing so justify the burden in terms of expense, delay, or litigation strategy.[92]

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86 <https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pretrial_conference/>.

87 Supra, n 81, pp 2085–2086.

88 See LR 16-2 at <https://ord.uscourts.gov/index.php/rules-orders-and-notices/local-rules/civil-procedure/1202-2014-lr-16/1850-lr-16-pretrial-conferences-scheduling-and-case-management>.

89 171 SW 3d 705, 715 (Tex App Houston 14th Dist 2005).

90 845 NE 2d 1038 (Ind 2006).

91 Ibid, at p 1041.

92 Supra, n 71, p 462.

Pre-action and pre-trial protocol in the US

[89] Unlike the UK, the US does not have any specific pre-action and pre-trial protocols. For the UK, the pre-action conduct is provided under the Practice Directions – Pre-Action Conduct and Protocols.[93] In contrast, in the US the parties to mediation are expected to participate in good faith and failure to participate in good faith will lead to sanction imposed by the courts.[94]

[90] The US does not have a one-fits-all pre-trial or pre-action protocol due to the fact that the US does not have a uniform mediation Act that governs the whole of the US. Notwithstanding the passage of the UMA, the UMA is not wholly adopted by all the states in the US as yet. Therefore, there is no one-statute-fits-all statute in the US pertaining to mediation, CAM as well as pre-trial or pre-action protocols. However, despite the differences in law, the cases illustrate that under the rubric of good faith mediation, the US does have pre-mediation requirements that must be fulfilled by the parties.[95]

Moving forward

[91] As we have seen, the development of mediation in the UK, Australia, Singapore, Thailand, the Philippines and the US has been phenomenal. Mediation has progressed to include pre-action protocols and the growth of mediation as a discipline in its own right coupled with the advent of training and accreditation of mediators and mediation advocates. Mediation has further evolved into various specialist mediation sectors including employment disputes, injury-related claims, family disputes, intellectual property disputes, multi-party disputes, construction claims, commercial disputes, transportation disputes, to name a few. To cap this phenomenon, there is now an abundance of scholarship, literature, books, and articles on mediation.

[92] Apart from Australia where the early development of mediation occurred away from, and largely uninfluenced by, courts and litigation,

93 <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#3.1>.

94 Good faith participation is discussed in detail in Ch 9, specifically 9:4-9:7. See supra, n 71, p 464–479.

95 *Kothe v Smith* 771 F 2d 667 (2d Cir 1985); *Re KAR* 171 SW 3d 705 (Tex App Houston 14th Dist 2005*); Fuchs v Martin* 845 NE 2d 1038 (Ind 2006); *Re Atlantic Pipe Corp*, 304 F 3d at 142; *Arpaio v Baca* 217 Ariz 570, 177 P 3d 312 (Ct App Div 1 2008).

in the other jurisdictions it was the Judiciary which provided the catalyst for the spurt in mediation growth.

[93] In Malaysia, the introduction of CAM in 2011 has provided the catalyst for the cultural shift on the public perception of mediation and of judges and judicial officers as mediators. Under the new Rules of Court 2012, the courts are encouraged to facilitate the use of mediation although recalcitrant parties who fail without good reason to engage in it cannot be penalised in costs. Whilst there is no pre-action protocol, there is a pre-trial protocol which empowers the court to direct parties to mediation to secure the just, expeditious and economical disposal of the action.[96] Clearly, the initial way forward to promoting mediation is through CAM, under which litigants and lawyers are introduced to and participate in the mediation process.

[94] While the parties' reticence towards mediation is due to unfamiliarity with or ignorance of the mediation process, CAM will be instrumental in helping them overcome their prejudices or lack of understanding. Studies have shown that parties who have entered mediation reluctantly still benefited from the process even though their initial participation was not voluntary.[97] The need to increase awareness and the usage of mediation services is probably the most compelling reason for pushing forward with CAM. As such, CAM is needed as an expedient because parties do not use mediation voluntarily and therefore should be given the opportunity to experience the benefits of mediation. Whether CAM should only be a short-term measure where mediation is relatively less well developed, and as an expedient that should be lifted as soon as the society's awareness of mediation has reached a satisfactory level, remains to be seen.

[95] As lawyers often play a critical and constructive role in the mediation process, the time has come for the legal profession to ride on the growing movement of mediation and CAM. Litigators must take the initiative to advise their clients of what mediation and CAM can offer. As a corollary, mediation should also be made a core discipline

96 Rules of Court 2012, O 34 r 2(2).

97 Jessica Pearson and Nancy Thoennes, "Divorce Mediation: An Overiew of Research Results" (1985) 19 COLUM J L & Soc PROBS 451; James A Wall and Lawrence F Schiller, "Judicial Involvement in Pre-Trial Settlement: A Judge is Not a Bump on a Log" (1982) 6 AM J TRIAL ADVOC 27; Craig McEwen and Thomas Milburn, "Explaining a Paradox of Mediation" (1993) 9 NEGOT J 23.

in law schools. Even though some law schools now offer mediation courses, most mediation classes and seminars train mediators rather than mediation advocates. Mediation advocacy is and should be a teachable discipline. Academically-oriented law faculties can isolate and analyse various aspects of mediation advocacy and develop an effective course design. The Malaysian Bar can also play its part by making mediation advocacy a core subject in its ethics course for chambering pupils and conduct mediation advocacy training for its members as part of its continuing legal education programmes.

[96] Mediation advocacy is vital in the mediation process because there are significant differences between mediation and other dispute resolution processes. As pointed out by Harold I Abramson:[98]

- The mediation process is indisputably different from other dispute resolution processes like arbitration and court trials where the third party makes decisions. The familiar adversarial strategy of presenting your strongest partisan arguments and attacking the other side's case may be effective when each side is trying to convince a neutral third party to make a favourable decision.
- But in mediation, there is no neutral third-party decision-maker, only a third-party facilitator. The third party may not even be your primary audience. The primary audience may be the other side, who surely is not neutral, can often be quite hostile, and ultimately must approve any settlement. In this different representational setting, the adversarial approach can be less effective if not self-defeating.
- Most sophisticated and experienced litigators realise that mediation calls for a different approach, but they still muddle through the mediation sessions, guided by familiar approaches that have worked well in other forums like arbitration and in court. Even though many lawyers prefer a problem-solving type of approach to negotiations, lawyers can be unsure how that approach translates into advocacy.
- Most senior lawyers have never taken a course on dispute resolution. They either went to law school in a country where

98 Harold I Abramson, *Mediation Presentation*, 2nd edn (Oxford University Press, 2011), pp 2–4.

such courses are rarely offered or before such courses were offered or popular. And whatever courses are offered tends to be limited to teaching students to be mediators, not as mediation advocates.

- Regardless of what opportunities might be available, lawyers do not seem convinced of the need for training until they participate in a programme and see firsthand what they do not know and what could be helpful to learn.

- The advocacy practices of many lawyers do not seem to reflect a nuanced understanding of how to select a suitable mediator, how to take full advantage of pre-mediation contacts with the mediator or other side, how to present effective opening statements, and how to optimally utilise the choice between joint sessions and caucuses to advance their client's interests and overcome impediments.

[97] Harold I Abramson also provided some pointers on the role of a mediation advocate:[99]

- As a problem-solving advocate, you should do more than try to merely settle the dispute. You should search for solutions that go beyond the traditional ones based on rights, obligations, and precedent. Rather than settling for win-lose outcomes, you should search for solutions that might benefit both sides. You should develop a collaborative relationship with the other side and the mediator, and participate throughout the process in a way that may produce solutions that are inventive as well as enduring. Inventive solutions may be uncovered because you advocate your client's interests instead of legal positions, use sophisticated techniques for overcoming impediments, search expansively for multiple options, and evaluate and package options to meet the various interests of all parties, including any possible interest in money. Enduring solutions, whether inventive or not, are likely because both sides would have worked together to fashion tailored solutions that each side would fully understand, could live with, and would know how to implement.

99 Ibid, at pp 4–6.

- You should avoid the hybrid approach of shifting between hard positional tactics and creative problem-solving ones during the course of mediation as it can undercut the problem-solving approach.
- You should be persistent. It is relatively easy to engage in simple problem-solving moves such as responding to a demand with the question "why?" in order to bring to the surface the other party's interests. But it is much more difficult to stick to this approach throughout the mediation process, especially when faced with an adversarial positional opponent. When the other side engages in adversarial tactics, you should react with problem-solving responses, responses that might even convert the other side into a problem solver.
- You should even strive to create a problem-solving process when your mediator does not. Your mediator may fail to follow a problem-solving approach.

[98] Leading the mediation movement internationally is the International Mediation Institute ("IMI"), a non-profit public initiative with the vision of professional mediation worldwide. The IMI has designed a "criteria" for certifying programmes qualifying competent mediation advocates/advisers in order to establish a professional and technical basis for enabling disputing parties to identify professionals experienced in advising and representing clients in resolution of disputes through mediation.[100] There is also a programme where the IMI certifies "Qualifying Assessment Programs", which in turn certifies mediators and mediation advocates against these established standards, enhancing the practice of mediation and thereby improving consensus and access to justice.

[99] The IMI has also drawn up a Competency Criteria for Mediation Advocates and Advisors for IMI Mediation Advocacy Certification.[101] The criteria is premised on lawyers needing a different set of knowledge and skills because mediation presents unique problem-solving opportunities in which representatives can assist their clients to reach

100 <https://www.imimediation.org/orgs/competency-criteria-mediation-advocates-advisors/>.
101 Ibid.

faster, cheaper and/or better outcomes with the assistance of a mediator; and the representatives can help their clients achieve outcomes that may be unattainable in a courtroom or arbitration tribunal.[102]

[100] Speaking at the third edition of an international conference on Arbitration in the Era of Globalisation, the Chief Justice of India SA Bodbe is reported to have remarked that the time is ripe for legislation containing compulsory pre-litigation mediation and a remedy for the unenforceability of an agreement arrived at a mediation.[103] Is the time ripe for the introduction of compulsory pre-action mediation protocol in Malaysia?

102 Ibid. See the extensive list of general knowledge requirements and on the areas of practical skills required for effective mediation advocacy in Annexes 1 and 2 respectively.

103 <https://m.economictimes.com/news/politics-and-nation/time-is-ripe-for-legislation-containing-pre-litigation-mediation-cji/articleshow/74026498.cms>.

Basic Structure of the Constitution

by

*Justice Dato' Abdul Rahman bin Sebli**

[1] Writing as a judge of the Federal Court, I must start with a caveat that this article is not meant to be an authoritative text on the subject, based as it were on judicial pronouncements from both within and outside the country which may yet be the subject of challenge in court. An unnamed writer defines a "Federal Constitution" in the following terms: A Federal Constitution is a document that is drafted and ratified for the purpose of stating as precisely as possible the relationship between the Federal Government and the governed – in effect the people – and the relationship between the Federal Government and the individual political entities (the States) that collectively comprise the nation.

[2] Thus, a Federal Constitution is a document that by definition enjoys the legitimacy of the governed, and which spells out the rights of the governed relative to the government the document is establishing. It may or may not specify divisions of responsibility, or establish a "separation of powers" between branches of the government, but it does set the framework for the structure of the central government while specifying, to the extent possible, the relationship between the government and the governed. Perhaps the Constitution can be likened to a house, with the pillars forming its basic structure. Undermine the pillars, and the whole structural integrity of the house will collapse.

[3] The context in which the doctrine of "basic structure" is discussed in this short article is the constituent power of Parliament to amend the Constitution, which is the process of making changes to the supreme law by way of addition, variation or repeal in accordance with the procedure prescribed by the Constitution itself, which is different from the procedure for making changes to ordinary legislation passed by Parliament. The special procedure is to ensure the sanctity of the Constitution and keeps a check on the arbitrary power of Parliament, in particular to amend the basic features of the Constitution.

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* Judge of the Federal Court of Malaysia.

[4] The adjective "basic" is defined by the *Concise Oxford English Dictionary*[1] to mean "1. Forming an essential foundation; fundamental." The noun "structure" on the other hand is defined as "1. the arrangement of and relations between the parts of something complex." Thus the expression "basic structure" can be defined to mean "basic element" or "fundamental feature". There can be no doubt that the concept of basic structure was developed to protect the basic rights of the people and the ideals and philosophy of the Constitution.

[5] The underlying philosophy behind the basic structure doctrine is that Parliament can amend the Constitution but cannot destroy its "basic structure". The doctrine implies that although Parliament has the prerogative to amend the entire Constitution, the prerogative is subject to the condition that it cannot in any manner interfere with features so fundamental to the Constitution that without them it would be spiritless. The doctrine therefore targets any amendment to the Constitution that destroys any fundamental feature of the Constitution.

[6] The power of the Malaysian Parliament to pass Acts to amend the Federal Constitution is provided by Article 159, which reads:

159. (1) Subject to the following provisions of this Article and to Article 161E, the provisions of this Constitution may be amended by federal law.

(2) (*Repealed*)

(3) A Bill for making any amendment to the Constitution (other than an amendment excepted from the provisions of this Clause) and a Bill for making any amendment to a law passed under Clause (4) of Article 10 shall not be passed in either House of Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of that House.

(4) The following amendments are excepted from the provisions of Clause (3), that is to say:

(a) Any amendment to Part III of the Second or to the Sixth or Seventh Schedule;

1 11th edn, Revised.

(b) Any amendment incidental to or consequential on the exercise of any power to make law conferred on Parliament by any provision of this Constitution other than Articles 74 and 76;

(bb) subject to Article 161E any amendment made for or in connection with the admission of any State to the Federation or its association to the States thereof, or any modification made as to the application of this Constitution to a State previously so admitted or associated;

(c) Any amendment consequential on an amendment made under paragraph (a).

(5) A law making an amendment to Clause (4) of Article 10, any law passed thereunder, the provisions of Part III, Article 38, Clause (4) of Article 63, Article 70, Clause (1) of Article 71, Clause (4) of Article 72, Article 152, or 153 or to this Clause shall not be passed without the consent of the Conference of Rulers.

(6) In this Article "amendment" includes addition and repeal; and in this Article and in paragraph (a) of Article 2, "State" includes any territory.

[7] As can be seen, some amendments require a two-thirds majority, which means the relevant constitutional amendment Bill must be passed in each House of Parliament "by the votes of not less than two-thirds of the total number of members of" that House (Article 159(3)). Thus, for the Dewan Rakyat, the minimum number of votes required is 148, being two-thirds of its 222 members.

[8] Some provisions may be amended only by a two-thirds absolute majority in each House of Parliament but only if the Conference of Rulers consents. These include:

(i) amendments pertaining to the powers of the Sultans and their respective States;

(ii) the status of Islam in the Federation;

(iii) the special position of the Malays and the natives of Sabah and Sarawak; and

(iv) the status of the Malay language as the official language.

[9] Some provisions of special interest to East Malaysia may be amended by a two-thirds absolute majority in each House of Parliament but only if the Yang di-Pertua Negeri of each of the East Malaysian States concurs. These include:

(i) citizenship of persons born before Malaysia Day;

(ii) the constitution and jurisdiction of the High Court of Sabah and Sarawak;

(iii) the matters with respect to which the Legislature of the States may or may not make laws, the executive authority of the States in those matters and financial arrangement between the Federal Government and the States; and

(iv) special treatment of natives of the States.

[10] The types of constitutional amendments which may be made by a simple majority are set out in Article 159(4), which includes amendments to Part III of the Second Schedule (relating to citizenship), the Sixth Schedule (oaths and affirmations) and the Seventh Schedule (election and retirement of Senators).

[11] Other than these, all other provisions may be amended by a two-thirds majority in each House of Parliament, and these amendments do not require the consent of anybody outside Parliament. Of significance to note is that on the face of it and in theory at least, clause (6) of Article 159 empowers Parliament to repeal altogether any provision of the Federal Constitution by way of amendment.

[12] Although recognised and accepted as an Indian judicial principle, the basic structure doctrine has its genesis in Germany in the writings of German jurist Professor Dietrich Conrad, formerly Head of the Law Department, South Asia Institute of the University of Heidelberg, Germany. In a lecture delivered in February 1965 while on a visit to India this is what he said:

> Perhaps the position of the Supreme Court is influenced by the fact that it has not so far been confronted with any extreme type constitutional amendments. It is the duty of the jurist, though, to anticipate extreme cases of conflict, and sometimes only tests reveal the true nature of a legal concept. So, if for the purpose of legal discussion, I may propose some fictive amendment laws to you, could it still be considered a valid exercise of the amendment power conferred by Article 368 if

> a two-thirds majority changed Article 1 by dividing India into two States of Tamilnad and Hindustan proper?
>
> Could a constitutional amendment abolish Article 21, to the effect that forthwith a person could be deprived of his life or personal liberty without authorisation by law? Could the ruling party, if it sees its majority shrinking, amend Article 368 to the effect that the amending power rests with the President acting on the advice of the Prime Minister? Could the amending power be used to abolish the Constitution and reintroduce, let us say, the rule of a moghul emperor or of the Crown of England? I do not want, by posing such questions, to provoke easy answers. But I should like to acquaint you with the discussion which took place on such questions among constitutional lawyers in Germany in the Weimar period – discussion, seeming academic at first, but suddenly illustrated by history in a drastic and terrible manner.

[13] The doctrine was formally introduced in India with rigorous legal reasoning by Justice Hans Raj Khanna in the case of *Kesavananda Bharati v State of Kerala* ("*Kesavananda*"),[2] a bench that comprised 13 judges of the Supreme Court of India. The facts of *Kesavananda* are these. One Sripad Galvaru Kesavananda Bharati was a chief of a religious sect in Kerala. The sect had certain lands acquired under its name. Some of these lands by virtue of the Kerala Reforms Act 1963 which was further amended by the Kerala Land Reforms (Amendment) Act 1969 were to be acquired by the State Government to fulfil their socio economic obligations. On March 21, 1970, the petitioner moved the Supreme Court for enforcement of rights under Article 25 (right to practice and propagate religion), Article 26 (right to manage religious affairs), Article 14 (right of equality), Article 19(1)(f) (freedom to acquire property) and Article 31 (compulsory acquisition of property). Meanwhile, when the petition was under consideration by the court, the State Government of Kerala passed the Kerala Land Reforms (Amendment) Act 1971.

[14] Previously the same court had, in *Golak Nath & Ors v State of Punjab & Ors* ("*Golak Nath*"),[3] held that the power of Parliament to amend the Constitution was unfettered. However, in the landmark ruling in *Kesavananda*, it was held that while Parliament has "wide" powers, it did not have the power to destroy or emasculate the basic

2 AIR 1973 SC 1461; (1973) 4 SCC 225.
3 AIR 1967 SC 1643; (1967) 2 SCJ 486.

elements or fundamental features of the Constitution. Justice Hans Raj Khanna approved as substantially correct the following observations by Professor Dietrich Conrad: "Any amending body organised within the statutory scheme, however verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority."

[15] The challenge in *Golak Nath* was over the 17th Amendment, which impinged on the fundamental rights guaranteed by Article 13(2) of the Indian Constitution, which stipulates:

> The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of such contravention, be void.

[16] The court did not accept the doctrine of implied limitations on Parliament's power to amend the Constitution. The majority felt that "there is considerable force in this argument" but thought it unnecessary to pronounce it by stating "This question may arise for consideration only if Parliament seeks to destroy the structure of the Constitution embodied in provisions other than Part III of the Constitution."

[17] Undoubtedly, the basic structure doctrine was formulated to check an all-powerful Indian Parliament from amending the Indian Constitution at its whim and fancy. The majority held that the word "amend" in the Indian Constitution implied that the identity of the original Indian Constitution formed by its basic structure must remain, as the framers of the Constitution could not have intended the word "amend" to mean "destroy". Setu Gupta, a scholar at the Indian Law Institute in his article titled "Vicissitudes and Limitations of the Doctrine of Basic Structure"[4] remarked:

> The doctrine of "basic structure" is considered the most potent tool in the hands of the Indian judiciary to maintain the balance of power, the checks and balances that are required for a smooth functioning of a democracy. This doctrine has altered the course of Indian Constitutional law jurisprudence.

[18] In a direct reference to *Kesavananda*, the learned authors of *Shorter Constitution of India*[5] wrote:

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4 Setu Gupta (LL.M. scholar at the Indian Law Institute): "Vicissitudes and Limitations of the Doctrine of Basic Structure", Ili Law Review Winter Issue 2016.

5 14th edn (LexisNexis, 2009).

> The theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity. The Supreme Court has observed that "one cannot use the Constitution to destroy itself". It is further observed that "the personality of the Constitution must remain unchanged". Therefore, the Supreme Court while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity. The word "amendment" postulates that the old constitution survives without loss of identity despite the change and it continues even though it has been subjected to alteration. To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle of constitutional sovereignty. The main object behind the theory of the constitutional identity is continuity and within the continuity of identity, changes are admissible depending upon the situation and the circumstances of the day. The theory of basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not of form … the theory of basic structure is the only theory by which the validity of impugned amendments to the Constitution is to be judged.

[19] The decision in *Kesavananda* was not a unanimous decision though. It was decided by a narrow margin of 7:6, almost splitting down the middle and this reflects how contentious and divisive the issue was. Seven judges held that the power of amendment is plenary and can be used to amend all articles of the Constitution (including the fundamental rights), seven judges held (six judges dissenting on this point) that "the power to amend does not include the power to alter the basic structure of the Constitution so as to change its identity" and an equal number of judges held (two judges dissenting, one leaving this point open) that "there are no inherent or implied limitations on the power of amendment under Article 368".

[20] To provide context and to appreciate *Kesavananda* in its proper perspective, Article 368 of the Indian Constitution is reproduced below:

> 368. *Power of Parliament to amend the Constitution and procedure therefor*
>
> (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.
>
> (2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of

Parliament, and when the Bill is passed in each House by a majority of the total membership of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in –

(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) Any of the Lists in the Seventh Schedule, or

(d) The representation of States in Parliament, or

(e) The provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in Article 13 shall apply to any amendment made under this article.

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article PART XXI TEMPORARY, TRANSITIONAL AND SPECIAL PROVISIONS.

[21] The power of the Indian Parliament to amend the Indian Constitution under Article 368 therefore extends to "addition, variation or repeal any provision of this Constitution". The Article mentions two important things:

(1) Procedure for amendment – The amendment can be initiated only by the introduction of a Bill for the purpose in either House of Parliament and the assent of the President is compulsory for every such Bill.

(2) Method for amendment – The amendment to those provisions which are vital can only be amended with the majority which is not less than two-thirds of the members of that House present and voting, i.e. special majority.

[22] New clauses 368(1) and 368(3) were added by the 24th Amendment in 1971, which also added a new clause (4) in Article 13 which reads, "Nothing in this article shall apply to any amendment of this Constitution made under Article 368." The provisions were inserted by the 42nd Amendment, but were later declared unconstitutional in 1980 by the Supreme Court in *Minerva Mills Ltd & Ors v Union of India & Ors* ("*Minerva Mills Ltd*")[6] where it was, *inter alia*, held:

> What I wish to emphasise is that judicial review is vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the legislature shall not be liable to be called into question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of sub-version of the Constitution, for it would make a mockery of the distribution of legislative powers between the union and the States and render the fundamental rights meaningless and futile.

[23] After the 24th Amendment, Article 4(2) of the Indian Constitution was superseded by Article 368(1) which is the only procedure for amending the Constitution however marginal may be the nature of the amendment. The Supreme Court ruled that the constituent power under Article 368 must be exercised by Parliament in the prescribed manner and cannot be exercised under the legislative powers of Parliament.

[24] As a follow up to the decision in *Kesavananda*, nine judges (including two dissentients) signed a statement of summary for the judgment which reads:

6 AIR 1980 SC 1789.

1. *Golak Nath's* case is over-ruled.

2. Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.

3. The Constitution (Twenty-fourth Amendment) Act, 1971 is valid.

4. Section 2(a) and 2(b) of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid.

5. The first part of section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid. The second part namely "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" is invalid.

6. The Constitution (Twenty-ninth Amendment) Act, 1971 is valid.

[25] The ruling thus established the principle, by a majority of just one, that the basic structure of the Constitution cannot be amended for the reason that a power to amend is not a power to destroy.

[26] It is interesting to note that even among the majority, the judges had differing opinions on what the "basic structure" of the Indian Constitution comprised. Chief Justice Sarv Mittra Sikri indicated that the basic structure consists of the following:

(1) the supremacy of the Constitution.

(2) a republican and democratic form of government.

(3) the secular character of the Constitution.

(4) maintenance of the separation of powers.

(5) the federal character of the Constitution.

[27] Justices Shelat and Grover, in their opinion, added three features to the Chief Justice's list, namely:

(1) the mandate to build a welfare state contained in the Directive Principles of State Policy.

(2) maintenance of the unity and integrity of India.

(3) the sovereignty of the country.

[28] Justices Hedge and Mukherjea, in their opinion, provided a separate and shorter list:

(1) the sovereignty of India.

(2) the democratic character of the polity.

(3) the unity of the country.

(4) essential features of individual freedoms.

(5) the mandate to build a welfare state.

[29] Justice Jaganmohan Reddy preferred to look at the preamble, stating that the basic features of the Constitution were laid out by that part of the document, and thus could be represented by:

(1) a sovereign democratic republic.

(2) the provision of social, economic and political justice.

(3) liberty of thought, expression, belief, faith and worship.

(4) equality of status and opportunity.

[30] In a different case, Chief Justice Ray had a different view. He opined that the constituted power of Parliament was above the Constitution itself and therefore not bound by the principle of separation of powers. Parliament could therefore exclude laws relating to election disputes from judicial review. He further opined, rather strangely, that democracy was a basic feature but not free and fair elections.

[31] The basic structure doctrine was clarified in *Minerva Mills Ltd*. In that case, the 42nd Amendment had been enacted by the Government of Indira Gandhi in response to the *Kesavananda* case in an effort to reduce the power of judicial review of constitutional amendments by the Supreme Court.

[32] What happened was that the constitutionality of sections 4 and 55 of the 42nd Amendment were challenged when Charan Singh was the caretaker Prime Minister. Section 4 of the 42nd Amendment had amended Article 31C of the Indian Constitution to accord precedence to the Directive Principles of State Policy articulated in Part IV of the Constitution over the fundamental rights of individuals articulated in Part III.

[33] Section 55 on the other hand prevented any constitutional amendment from being "called in question in any Court on any ground". It also declared that there would be no limitation whatever on the constituent power of Parliament to amend by way of definition, variation or repeal the provisions of the Constitution. In January 1980, when Indira Gandhi was back in power, the Supreme Court declared sections 4 and 55 of the 42nd Amendment as unconstitutional. It further endorsed and evolved the basic structure doctrine of the Constitution.

[34] The court ruled that Parliament could not by amending the Constitution convert limited power into an unlimited power, as it had purported to do by the 42nd Amendment. In his judgment Chief Justice Yeshwant Vishnu Chandrachud wrote:

> Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.

[35] In *M Nagraj v Union of India*,[7] it was held that in order to apply the principle of basic structure, the twin tests have to be satisfied, namely the "width test" and the "test of identity". Reference was made to *Kesavananda* for the proposition that what is not permissible is not the amendment of a particular Article but an amendment that adversely affects or destroys the wider principles of the Constitution such as democracy, secularism, equality or republicanism or one that changes the identity of the Constitution.

[36] Unfortunately, the doctrine of basic structure is vague. There is no explicit exposition of what constitutes "basic structure". In *Constitutional Law of India*,[8] the learned authors lamented that a precise formulation of the basic features would be a task of greatest difficulty and would add to the uncertainty of interpreting the scope

7 AIR 2007 SC 71.
8 Delhi: Universal Law Publishing.

of Article 368 of the Indian Constitution (in our context, Article 159 of the Federal Constitution).

[37] What is clear however is that it is the Judiciary that decides what the basic features of the Constitution are. In *Indira Nehru Gandhi v Raj Narain*[9] and in *Minerva Mills Ltd*, it was observed that the claim of any particular feature of the Constitution to be "basic" would be determined by the court in each case that comes before it.

[38] In the later case of *Maneka Gandhi v Union of India*,[10] the Supreme Court extended the doctrine's importance as superior to any parliamentary legislation. It held that no Act of Parliament can be considered a law if it violated the basic structure of the Constitution. But is this not stretching the basic structure doctrine beyond what was propounded in *Kesavananda*, in that the proposition purports to include within its embrace amendments to ordinary legislation instead of confining it to amendments to the supreme law, i.e. the Constitution? I shall leave the question open, on the assumption that it is a valid question to ask.

[39] To recapitulate, some of the features of the Indian Constitution termed as "basic" are:

1. Supremacy of the Constitution.
2. Rule of law.
3. The principle of separation of powers.
4. The objectives specified in the preamble to the Constitution.
5. Judicial review.
6. Articles 32 and 226.
7. Federalism (including financial liberty of States under Articles 282 and 293).
8. Secularism.
9. The sovereign, democratic, republican structure.

9 AIR 1975 SC 2299.
10 1978 AIR 597.

10. Freedom and dignity of the individual.
11. Unity and integrity of the nation.
12. The principle of equality, not every feature of equality, but the quintessence of equal justice.
13. The "essence" of other fundamental rights in Part III.
14. The concept of social and economic justice – to build a Welfare State: Part IV *in toto*.
15. The balance between fundamental rights and the directive principles.
16. The parliamentary system of government.
17. The principle of free and fair elections.
18. Limitations upon the amending power conferred by Article 368.
19. Independence of the Judiciary.
20. Effective access to justice.
21. Powers of the Supreme Court under Articles 32, 136, 141, 142.
22. Legislation seeking to nullify the awards made in exercise of the judicial power of the State by Arbitration Tribunals constituted under an Act.
23. Welfare state.

[40] Has the basic structure doctrine been accepted in Malaysia? Put in another way, is the doctrine part of our law? The starting point perhaps is the decision of the former Federal Court in *Loh Kooi Choon v The Government of Malaysia* ("*Loh Kooi Choon*").[11] The case concerned the rights and freedom guaranteed by the Federal Constitution and also the extent to which Parliament can amend the Federal Constitution. The facts are as follows. Loh Kooi Choon had been detained by the police under a warrant issued under the Restricted Residence Enactment. He was not produced before a magistrate within 24 hours of his arrest. He claimed damages but it was held that no action could be brought

11 [1975] 1 LNS 90; [1977] 2 MLJ 187.

against the police officer as he was acting in compliance with a warrant issued by a competent authority.

[41] He appealed but before his appeal was heard, the Federal Constitution was amended by Act A354/76 which provided in effect that Article 5(4) of the Federal Constitution shall not apply to the arrest or detention of any person under the existing law relating to restricted residence and that the amendment shall have effect from Merdeka Day. It was contended that the amendment was unconstitutional.

[42] Loh Kooi Choon's counsel argued that it was not permissible for the Federal Constitution to be amended in such a way that its "basic structure" was destroyed. He referred to Article 4(1) which specifies that the Federal Constitution is "the supreme law of the Federation" and to the basic structure doctrine of Indian case law to argue that the amendment had contravened the spirit and basic structure of the Federal Constitution by invalidating the right of *habeas corpus*. The court disagreed and held as follows:

(1) Parliament can alter the entrenched provisions of Article 5(4) to remove the provision relating to the production before a magistrate of any arrested person under the Restricted Residence Enactment as long as the process of constitutional amendment as laid down in Article 159(3) is complied with. When that is done, it becomes an integral part of the Federal Constitution; it is the supreme law, and accordingly it cannot be said to be at variance with itself.

(2) If Parliament retrospectively affects vested rights or pending proceedings, then it would be the duty of an appellate court to apply the law prevailing on the date of appeal before it. Subject to the constitutional limitation of Article 7 of the Federal Constitution, to wit, protection against retrospective criminal laws and repeated trials, Parliament would be within the ambit of its competence if it deems fit to legislate retrospectively.

[43] Raja Azlan Shah FJ delivering the judgment of the court said:

> The question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause

as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107, 118:

> "Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature."

It is the province of the courts to expound the law and "the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction" – per Roskill LJ in *Henry v Greopresco International Ltd* [1975] 2 All ER 702, 718. Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature, and not the courts; they have their remedy at the ballot box.

[44] His Lordship rejected the attempt to make our courts accept the basic structure doctrine propounded in *Kesavananda*, in the following terms:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording "can never be overidden by the extraneous principles of other Constitutions" – see *Adegbenro v Akintola & Anor* [1963] 3 All ER 544, 551. Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law …
>
> It is therefore plain that the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution, and they, accordingly, armed Parliament with "power of formal amendment". They must be taken to have intended that, while the Constitution must be as solid and permanent

> as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in which it was drafted but also centuries later …
>
> There have also been strong arguments in support of a doctrine of implied restrictions on the power of constitutional amendment. A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power.

[45] Having analysed the differences in the making of the Indian Constitution and the Malaysian Federal Constitution, Raja Azlan Shah FJ concluded:

> Considering the differences in the making of the Indian and our Constitutions, in our judgment it cannot be said that our Parliament's power to amend our Constitution is limited in the same way as the Indian Parliament's power to amend the Indian Constitution.

[46] The decision of the former Federal Court in *Loh Kooi Choon* to reject the basic structure doctrine was reaffirmed in *Phang Chin Hock v PP* ("*Phang Chin Hock*").[12] The Federal Court comprising Mohd Suffian LP, Wan Sulaiman FJ and Syed Othman FJ unanimously agreed, in the words of Mohd Suffian LP:

> For the purpose of this appeal it is enough for us merely to say that Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself.

[47] The learned LP in the course of his judgment said this:

> If it is correct that amendments made to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words Art. 159 is superfluous, for the Constitution cannot be changed or altered in any way, as if it has been carved in granite. If our Constitution

12 [1979] 1 LNS 67; [1980] 1 MLJ 70.

> makers had intended that their successors should not in any way alter their handiwork, it would have been perfectly easy for them to so provide; but nowhere in the Constitution does it appear that that was their intention, even if they had been so unrealistic as to harbour such intention. On the contrary apart from Art. 159, there are many provisions showing that they realised that the Constitution should be a living document intended to be workable between the partners that constitute the Malayan (later Malaysian) policy, a document that is reviewable from time to time in the light of experience and, if need be, amended.

[48] In coming to its decision, the court considered the Indian cases on the basic structure doctrine including *Kesavananda*, *Golak Nath*, *Shankari Prasad Singh Deo & Ors v The Union of India & Ors*,[13] and *Sajan Singh v State of Rajasthan*.[14]

[49] Like *Loh Kooi Choon*, *Assa Singh v Menteri Besar of Johore*[15] was also a case that concerned the applicability of the Restricted Residence Enactment after independence in 1957. Assa Singh had been arrested under the provisions of the Restricted Residence Enactment by the police with a view to forcibly relocate him to another district to preserve security and public order. He filed a suit claiming that this was a violation of his rights under Article 5 (personal liberty) and Article 9 (freedom of movement) of the Federal Constitution. The trial judge referred the case to the Federal Court to determine the constitutionality of the Restricted Residence Enactment.

[50] The case was heard in the Federal Court by Mohamed Azmi Mohamed LP, Ong Hock Thye CJ (Malaya), Mohd Suffian FJ, PS Gill FJ and Raja Azlan Shah J. The five judges unanimously held that although the Restricted Residence Enactment did violate Assa Singh's rights, this did not void it as unconstitutional law. They held that the Enactment could still be applied by "reading these rights into the Enactment".

[51] The Solicitor General had submitted that under the Federal Constitution, only Acts of law inconsistent with the Federal Constitution passed after independence would be void, while Article 162 excepted

13 AIR 1951 SC 458.
14 AIR 1965 SC 845.
15 [1969] 2 MLJ 30.

legislation passed prior to independence. This submission was accepted by Mohd Suffian FJ who wrote:

> To sum up, in my judgment, the Restricted Residence Enactment is silent as regards the four rights guaranteed by article 5 to a person arrested under the Enactment, namely, the right to be informed as soon as may be of the grounds of his arrest, to be allowed to consult and be defended by a legal practitioner of his choice, and, if not sooner released, to be produced without unreasonable delay and in any case within 24 hours (excluding the time of any necessary journey), before a magistrate and not to be further detained without the magistrate's order. Such further detention must be in accordance with law, which law need not give him a right to an enquiry. Silence of the Enactment regarding the four rights does not make it contrary to the Constitution. Even if the Enactment is contrary to the Constitution, the Enactment is not void. The four rights should be read into the Enactment.

[52] In the result, the breach of Assa Singh's rights was held to be constitutional and he was not released. It was, it will be noted, a case on the constitutionality of a pre-existing ordinary law and not on the constitutionality of an Act amending the supreme law, i.e. the Federal Constitution in accordance with the procedure prescribed by Article 159.

[53] *Mark Koding v PP*[16] was a case on amendment to the Federal Constitution. The amendment to Article 63 was challenged as a violation of the basic structure doctrine because, in a departure from all other democratic Legislatures, freedom of speech in Parliament was subjected to the law of sedition. Mark Koding, who was a member of Parliament, had been charged with an offence specified in the following charge:

> That you on October 11, 1978, in the Dewan Rakyat, in the city of Kuala Lumpur, Federal Territory, in the course of your speech before the said Dewan did utter seditious words to wit, as per attached Appendix "A", and thereby committed an offence punishable under section 4(1)(b) of the Sedition Act 1948 (Revised 1969).

[54] The challenge failed. Mohd Suffian LP delivering the judgment of the court said:

16 [1982] 1 LNS 15.

> As regards the argument that the amendment complained of affected the basic structure of the constitution and are therefore unconstitutional, with great respect to Mr Heald, we have no difficulty in holding that they do not; and it was therefore unnecessary for us to consider the question whether or not Parliament has power to amend the constitution as to alter its basic structure whatever that may be.

[55] Before concluding, the learned LP made two observations, only the first of which is reproduced below for its relevance to the issue under discussion:

> Before departing from this case, we would make two observations. First, Malaysians take pride in the fact that our country is a parliamentary democracy and we have since independence held free general elections every five years as enjoined in the Constitution. Malaysians with short memories and people living in mature and homogeneous democracies may wonder why in a democracy discussion of any issue and in Parliament of all places, should be suppressed. Surely it might be said that it is better that grievances and problems about language, etc. should be openly debated, rather than that they be swept under the carpet and allowed to fester. But Malaysians who remember what happened during May 13, 1969, and subsequent days are sadly aware that racial feelings are only too easily stirred up by constant harping on sensitive issues like language; and it is to minimise racial explosions that the amendments were made.

[56] Thirty years after *Loh Kooi Choon* was decided, the Federal Court comprising Ahmad Fairuz CJ, Abdul Hamid PCA, Alaudin Sherif CJ (Malaya), Richard Malanjum CJ (Sabah and Sarawak) and Zaki Azmi FCJ heard *PP v Kok Wah Kuan* ("*Kok Wah Kuan*").[17] Again, it was a case on the constitutionality of an ordinary Act of Parliament. The issue was whether section 97(2) of the Child Act 2001 [*Act 611*] was constitutional. The Court of Appeal had held that it was unconstitutional as it contravened the doctrine of separation of powers embodied in the Federal Constitution by consigning to the Executive the judicial power that is vested in the courts. The decision was reversed by the Federal Court. In holding that the section is constitutional, the court found support in *Loh Kooi Choon* and *Phang Chin Hock*.

17 [2008] 1 MLJ 1.

[57] Thus, by the time *Kok Wah Kuan* was decided, the rejection of the basic structure doctrine by the Malaysian courts beginning with *Loh Kooi Choon* had stood the test of time for 30 odd years. The judgment written by Raja Azlan Shah FJ continued to be cited with approval in at least two more judgments of the Federal Court, namely *Dato' Seri Ir Haji Mohammad Nizar Jamaluddin v Dato' Seri Dr Zamry Abdul Kader, Attorney General (Intervener)*[18] and *Said Mir Birhami v Pengarah Penjara Sungai Buloh, Selangor*.[19]

[58] Singapore's position is similar to the position taken by the Federal Court in *Loh Kooi Choon* and *Phang Chin Hock*. The Republic's Court of Appeal in *Teo Soh Lung v Minister for Home Affairs & Ors*[20] affirmed the decision of the High Court where Chua J had held, *inter alia*, as follows:

(1) The amendments to the Internal Security Act (Cap 143) ("ISA") were within the scope of Article 149 of the Constitution as they were designed to stop or prevent subversion, and further, this was a non-justiciable issue as national security was the responsibility of the Executive.

(2) The amendments to the Constitution (read with the amendments to the ISA) were a legislative and not a judicial act as they did not direct a particular judgment to be entered in a particular case; they did not usurp judicial power but reaffirmed principles of law laid down by the courts.

(3) The basic structure doctrine as propounded by the Supreme Court of India in *Kesavananda* and *Minerva Mills Ltd* had no application to the Constitution and any provision therein could be validly amended in compliance with the amending procedure provided in the Constitution; accordingly, the 1989 constitutional amendments were valid.

[59] Chua J held the view that the doctrine was not applicable to the Singapore Constitution due to the differences in the making of the Indian and the Singapore Constitutions and for that reason it cannot be said that Parliament's power to amend the Constitution is limited

18 [2010] 2 CLJ 925.
19 [2013] 5 CLJ 447.
20 [1990] 1 LNS 15.

in the same way as the Indian Parliament's power to amend the Indian Constitution. Chua J explained his position thus:

(a) If the framers of the Singapore Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations but Article 5 has no such limitation.

(b) If the courts have the power to impose limitations on the Legislature's power of constitutional amendments, they would be usurping Parliament's legislative function contrary to Article 58 of the Singapore Constitution.

(c) The *Kesavananda* doctrine (that there were basic features of the Constitution that Parliament could not amend) is not applicable to the local Constitution, considering the differences in the making of the Indian and the Singapore Constitutions.

[60] In his essay titled "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises",[21] Andrew J Harding argued that for the doctrine to be applicable, there must exist what he called a "constitutional moment", and that because Singapore did not have such a moment, the doctrine is not applicable in Singapore. However, Kevin YL Tan[22] in his chapter in *Constitutional Interpretation in Singapore: Theory and Practice* argued for a doctrine limited to the Westminster model constitution:

> Who determines whether Singapore's Constitution is based on the Westminster model? The short answer would be – the courts. In many ways, it is a claim to identity, a self proclamation of sorts. So long as the courts continue to hold Singapore's Constitution to be based on the Westminster model, the matrix holds true and limits Parliament's amendment powers only in so far as it destroys the structure of the Constitution. Thus, if the Parliament decides to abolish the judiciary completely, the court can strike it down as destroying the Constitution's basic structure. Likewise, it can be argued that Parliament has not the power to obliterate the fundamental liberties provisions under Part IV of the Constitution as all constitutions based on the Westminster model have a bill of rights.

21 Andrew J Harding, "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises" in Jaclyn Neo (ed), *Constitutional Interpretation in Singapore: Theory and Practice* (Routledge, January 12, 2018).

22 Kevin YL Tan, "Into the Matrix: Interpreting the Westminster Model Constitution" in Jaclyn Neo (ed), *Constitutional Interpretation in Singapore: Theory and Practice* (Routledge, January 12, 2018).

[61] A brief mention should perhaps be made to the position of the Republic of Uganda, which like Singapore and Malaysia circa *Loh Kooi Choon*, rejected the basic structure doctrine. In December 2017, the Ugandan Parliament passed a constitutional amendment which removed the age limit of 75 years for the President and Chairpersons of the Local Council. The President, Yoweri Museveni, who had been president of Uganda since 1986, signed the amendment into law in January 2018 when he was 74 years of age, one year short of compulsory retirement. Several opposition leaders and the Ugandan Law Society challenged the constitutionality of the amendment before the Constitutional Court which by majority upheld the validity of the amendment. Taking note of the judgments in *Kesavananda*, the Supreme Court of Uganda in *Mabirizi Kiwanuka & Ors v Attorney General*[23] unanimously upheld the Constitutional Court's majority decision.

[62] Bangladesh on the other hand embraced the doctrine wholeheartedly. In its ruling in *Anwar Hossain Chowdhary v Bangladesh*,[24] the Supreme Court expressly relied on the reasoning in *Kesavananda*.

[63] Back to the Malaysian scene, *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* ("*Sivarasa Rasiah*")[25] came to be decided by the Federal Court in 2010. It marked the beginning of a sharp turn away from the position taken by the former Federal Court in *Loh Kooi Choon.* Yet again, the issue was on the constitutionality of an ordinary legislation and not on the effect of any amendment to the Federal Constitution.

[64] The issue was whether section 46A(1) of the Legal Profession Act 1976 [*Act 166*] was unconstitutional. Sivarasa Rasiah, a lawyer by profession, had challenged the constitutionality of the provision on three broad grounds. First, that the section violated his rights of equality and equal protection guaranteed by Article 8(1) of the Federal Constitution. Second, that it violated his right of association guaranteed by Article 10(1)(c). Third, that it violated his right to personal liberty guaranteed by Article 5(1). He argued that in the event that any of these rights was found to be violated, the section must be declared void as being inconsistent with the supreme law. The Federal Court did not accept the argument and unanimously held the provision to be constitutional.

23 [2019] UGSC 6.
24 41 DLR 1989 App Div 165; 1989 BLD (Spl) 1.
25 [2010] 2 MLJ 333.

[65] Gopal Sri Ram FCJ in the course of delivering the judgment of the court alluded to *Loh Kooi Choon*, which his Lordship rejected in the following terms:

> It was submitted during argument that reliance on the *Vacher* case was misplaced because the remarks were there made in the context of a country whose Parliament is supreme. The argument has merit. As Suffian LP said in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112:
>
> > "The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and the State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please."

[66] Inspired by *Sivarasa Rasiah*, the basic structure doctrine was ultimately applied by the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and Another Case* ("*Semenyih Jaya*")[26] and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & 2 Ors and 2 Other Cases* ("*Indira Gandhi*").[27] In those two cases, the Federal Court held that the vesting of the judicial power of the Federation in the civil courts formed part of the basic structure of the Federal Constitution, and could not be removed even by constitutional amendment.

[67] Datuk Seri Gopal Sri Ram, since retired as a Federal Court judge after a long and distinguished career in the Judiciary, described the decision in *Indira Gandhi* as "probably the most important judgment" in independent Malaysia's constitutional history. The decision in *Semenyih Jaya* was no less monumental. In that case, the judicial power of the Judiciary was recognised as inherent, sacrosanct and a critical feature of the Federal Constitution. It was a reaffirmation of an old principle that the judicial power of the court resides in the Judiciary and in no other. *Indira Gandhi* added other features as forming the basic structure of the Federal Constitution, namely the rule of law, fundamental liberties and protection of the minority. There may be more added to the list. The gates are now wide open.

[68] Thus the basic structure doctrine has ostensibly been accepted as part of our law since its soft landing in *Sivarasa Rasiah* in 2010 before being finally adopted by *Semenyih Jaya* and *Indira Gandhi* in 2017 and 2018 respectively. The reversal from the position taken by the former

26 [2017] 3 MLJ 561.
27 [2018] 3 CLJ 145.

Federal Court in *Loh Kooi Choon* and *Phang Chin Hock* was thus complete. What we need to reflect on however is that *Sivarasa Rasiah*, *Semenyih Jaya* and *Indira Gandhi* were not cases on amendments to the Federal Constitution, which formed the factual basis for the formulation of the basic structure doctrine in *Kesavananda*. Rather, they were cases on the constitutionality of ordinary laws passed by Parliament.

[69] The issue that was common to all three cases was whether the laws in question were inconsistent with the Federal Constitution, not whether they destroyed the basic structure of the Federal Constitution. There was nothing to be destroyed because there was no amendment to the Federal Constitution. Its basic structure remained intact. A law may be inconsistent with the Federal Constitution but that does not destroy its basic structure. The only way the basic structure of the Federal Constitution can be destroyed is by Parliament amending the Federal Constitution through the special procedure prescribed by Article 159. The basic structure of the Federal Constitution does not get destroyed by the enactment of ordinary laws such as those that the Federal Court was dealing with in *Sivarasa Rasiah*, *Semenyih Jaya* and *Indira Gandhi*.

[70] The three cases were therefore not cases on the destruction of the basic structure of the Constitution resulting from amendments to the Federal Constitution, unlike *Loh Kooi Choon* where by an Act of Parliament [*Act A354/76*], the Federal Constitution was amended to deprive Loh Kooi Choon of his right to *habeas corpus*. Likewise in *Kesavananda*, the case that gave birth to the basic structure doctrine. That case dealt specifically with amendments to the Indian Constitution that destroyed its basic structure and not on ordinary legislation.

[71] Indeed, the basic structure doctrine works on the premise that the Constitution has been amended by Parliament and the amendment destroys its basic structure. The word "destroy" in its ordinary and popular sense refers to something that has come to an end or to no longer exist. If no amendment is made to the Constitution, the question of destroying its basic structure simply does not arise. The argument cannot be stretched too far by suggesting that the basic structure of the Constitution can be destroyed by Parliament passing ordinary laws without amending the Constitution itself. The basic structure concept, like any other legal concept, does not operate in a vacuum. There must first of all be actual physical destruction of the Constitution before one talks of destroying its basic structure.

[72] One must also not forget that the mischief that the doctrine of basic structure aims to strike down is the abuse by Parliament of its power to amend the Constitution by destroying its basic features. The only way that Parliament can achieve that object is to amend the Constitution. In all humility and with the greatest of respect, it is debateable whether the basic structure doctrine had correctly been applied in *Sivarasa Rasiah*, *Semenyih Jaya* and *Indira Gandhi*. If it had not, will it mean that *Loh Kooi Choon* and *Phang Chin Hock* must remain as good law?

[73] In any case, it is neither possible nor desirable to give an exhaustive list of the basic or fundamental features of the constitution. Ultimately, what constitutes "basic structure" must be decided on a case by case basis. In *Phang Chin Hock*, counsel for Phang Chin Hock suggested that the basic structures of the Federal Constitution would consist of:

(a) Supremacy of the Federal Constitution;

(b) Constitutional monarchy;

(c) That the religion of the Federation shall be Islam and that other religions may be practised in harmony;

(d) Separation of powers of the three branches of Government; and

(e) The federal character of the Federal Constitution.

[74] The Federal Court however highlighted the distinction between the Malaysian Federal Constitution and the Indian Constitution, noting that unlike the latter, the former does not have a preamble, directive principles and was not made by a constituent assembly. The court declined to make a conclusion as to whether there is an implied limitation on the power of Parliament in not destroying the basic structure of the Federal Constitution.

[75] There are 16 Parts to the Federal Constitution of Malaysia which may fall to be determined as its basic structures:

Part I – The States, Religion and Law of the Federation.

Part II – Fundamental Liberties.

Part III – Citizenship.

Part IV – The Federation.

Part V – The States.

Part VI – Relations between the Federation and the States.

Part VII – Financial Provisions.

Part VIII – Elections.

Part IX – The Judiciary.

Part X – Public Services.

Part XI – Special powers against subversion, organised violence, and acts and crimes prejudicial to the public and emergency powers.

Part XII – General and miscellaneous.

Part XIIA – Additional protection for the states of Sabah and Sarawak.

Part XIII – Temporary and transitional provisions.

Part XIV – Saving for Rulers' sovereignty, etc.

Part XV – Proceedings against the Yang di-Pertuan Agong and the Rulers.

[76] The question then arises, which of the above Parts constitute the Federal Constitution's basic structures? If basic elements or fundamental features are to be used as the yardstick to determine "basic structure", then clearly the following Articles are fundamental structures of the Federal Constitution, thus prohibiting Parliament from ever making changes to any of them by way of addition, variation or repeal in accordance with the procedure prescribed by the Federal Constitution itself:

Article 3 – Islam as the religion of the Federation.

Articles 5 to 13 – Fundamental liberties and right to property.

Articles 39 and 40 – The Executive.

Article 71 – Federal and State relationship, State sovereignty and State Constitutions.

Articles 73 to 79	– Legislative powers.
Article 121	– The Judiciary.
Article 152	– National language and other languages.
Article 153	– Special position of the Bumiputras and the legitimate interests of other communities.
Article 160	– Sovereignty of the Malay Rulers.
Article 161E	– Safeguards for the constitutional position of the States of Sabah and Sarawak.

[77] At the risk of being repetitive, the question whether Article 159 allows any amendment to the Federal Constitution was raised in *Loh Kooi Choon* and *Phang Chin Hock* where the former Federal Court held that Parliament may completely remove the whole of Part II of the Federal Constitution (the fundamental rights guarantees) provided it meets the procedural requirements set out in Article 159. *Loh Kooi Choon*, it will be noted, was decided on the premise that the Federal Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself.

[78] In their joint article titled "The Doctrine of Basic Structure of the Malaysian Constitution: A Study of Framework"[28] the learned writers have this conclusion to make on the applicability of the basic structure doctrine in Malaysia:

> The applicability of the basic structure doctrine is contentious both in terms of its adaptability and enforcement in jurisdictions outside India. This doctrine due to its undefined nature continues to be unclear in its perception and application. Factors such as differences in political and constitutional history pose a hindrance towards the doctrine becoming a universal watchdog of the legislature. The Indian basic structure doctrine was presented in Malaysia in several cases, and at an early stage the Malaysian Federal Court rejected the Indian basic structure doctrine, granting Parliament an unlimited power to amend the Constitution. In *Loh Kooi Choon v Government of Malaysia*

28 Hamid. N.A., Ismail Nawang, N., Salleh, K. & Makhtar, M., paper presented during Proceedings of the 5th International Conference on Law and Society 2016 (ICLAS V) Fatoni University, Pattani Thailand (April 18-19, 2016).

> (1977), Justice Raja Azlan Shah contended, with direct reference to *Kesavananda Bharati v State of Kerala* (1973), that, in contrast with Indian jurisprudence, any provisions of the Malaysian Constitution could be amended.
>
> In *Phang Chin Hock v PP* (1980), again with direct reference to *Kesavananda Bharati v State of Kerala* (1973), the Federal Court held that the basic structure doctrine does not apply in Malaysia due to differences between the Indian and Malaysian Constitutions – mainly historical differences and the fact that in contrast with the Indian Constitution, the Malaysian Constitution of 1957 has no preamble. However, based on *Sivarasa Rasiah v Badan Peguam Malaysia* (2010) it was concluded that the doctrine of basic structure of the constitution is no longer rejected and treated as an unfamiliar concept in our constitutional law.

[79] Closely related to the doctrine of basic structure is the question whether the court recognises separation of powers, the rule of law and independence of the Judiciary as part and parcel of the Constitution? In *Kok Wah Kuan* (supra) the Federal Court through Gopal Sri Ram FCJ said that Malaysia does not have the features of separation of powers, and went on to point out:

> A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. At the same time, no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, although it may be inconsistent with the doctrine. The doctrine of the separation of powers is not a provision of the Malaysian Constitution, even; it had influenced the framers of the Malaysian Constitution, just like democracy. The Constitution provides for elections, which is a democratic process. It does not make democracy a provision of the Constitution in that where any law is undemocratic it is inconsistent with the Constitution and therefore null.

[80] Given the nature of the basic structure doctrine, it is not entirely clear what his Lordship meant when he said "At the same time, no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, *although it may be inconsistent with the doctrine*". Is not the doctrine all about striking down any law that destroys the basic structure of the Constitution? There can be no argument that judicial immunity is part and parcel of judicial independence, the purpose of which is to enable judges, counsel and

witnesses to speak and act fearlessly in the interest of justice without fear of being sued or prosecuted. Every judge of the superior and inferior courts is entitled to protection from liability for anything said or done while acting judicially. Abusing or insulting a judge may amount to contempt. Thus, any law that seeks to remove judicial immunity will be struck down by the court, not because it destroys the basic structure of the Constitution, but because such law will be *ultra vires* the doctrine of separation of powers.

[81] The same goes with equality before the law guaranteed by Article 8 of the Federal Constitution, which requires that there must be fairness of State action of any sort, legislative, executive or judicial. It demands a minimum standard of substantive and procedural fairness: *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*.[29] So long as the law passed by Parliament that touched on fundamental rights is not *ultra vires* the Federal Constitution, it will stand as valid law.

[82] So, the prevailing law on the power of Parliament to amend the Federal Constitution appears to be settled by *Sivarasa Rasiah*, *Semenyih Jaya* and *Indira Gandhi*, which is to the effect that any law that destroys its basic structure will be struck down as being unconstitutional even where no amendment is made to the Federal Constitution itself that destroys its basic structure. As to which Articles of the Federal Constitution would constitute its "basic structure", that question must ultimately be left to the court to decide. *Loh Kooi Choon* was the prevailing law then, but for better or for worse, was discarded by *Sivarasa Rasiah*, *Semenyih Jaya* and *Indira Gandhi*. Although its acceptance of the basic structure doctrine may arguably be *obiter*, the Federal Court had made it clear that the doctrine is here to stay.

[83] On that note I will conclude by quoting Datuk Emeritus Prof Dr Shad Saleem Faruqi, a prominent Professor of Law at the University of Malaya and a member of the Judicial Appointments Commission, Malaysia: "We will have to wait and see whether this admirable constitutional development will survive the test of time. As in life, nothing is settled in law."

29 [2004] 1 CLJ 701

Death in Custody

by

*Dato' Mah Weng Kwai**

This article seeks to give the reader an insight into the many cases of death of detainees while in the custody of the police, immigration and prison authorities. The issues pertaining to deaths in custody are many-fold, ranging from the constitutional rights of the detainees, inquests, reported custodial death cases to the protection of detainees in custody. Custodial deaths have left distressed families searching for answers as to the actual or real causes of the deaths. Fingers are often pointed at government officers for their failure to ensure the safety of the detainees. This diminishes public confidence in the delinquent officials and enforcement agencies as a whole. There is an urgent need for the Government to take swift action to remedy the situation by eliminating at the very least or reducing the number of deaths in custody. At the end of this article, recommendations will be made to the relevant authorities to improve the current situation.

Introduction

[1] For the purpose of this article, it will be useful to explain the meaning of deaths in custody. It can be defined as follows:[1]

(i) any death occurring upon an arrest by the police;

(ii) death while in custody of an enforcement agency; and

(iii) death occurring during the period of seeking medical treatment while still in the custody of an enforcement agency.

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1 F Stefan and F Patrick, "Death behind bars", <Cmaj.ca> (accessed February 25, 2015).

[2] Whenever an individual dies while under the custody of any government agency, his or her death would be considered as a death in custody.[2] In Malaysia, the Polis Diraja Malaysia ("PDRM"), the Prison Department and the Immigration Department play a pivotal role in ensuring the safety of their detainees.

[3] Insofar as death in custody is concerned, this has been defined by the Human Rights Commission of Malaysia (SUHAKAM) to encompass the following:[3]

(i) death that occurs during arrest by police;

(ii) death that occurs when an individual is in police detention; and

(iii) death that occurs when an individual under police custody is on his way to the hospital or any health or treatment centre to receive treatment.

Statistical analysis

[4] According to the report made available by the PDRM, the Prison Department and the Immigration Department in October 2019, there was a total of 1,452 cases of death in custody from 2015 to October 2019.[4] While there was a decline in the number of custodial deaths in immigration detention centres from 87 in 2015 to 37 as of October 2019,[5] there was a steady increase in cases of custodial death in prisons, where the figure of 252 in 2015 rose to 341 in 2018. Overall, the number of custodial deaths in prisons is indeed alarming with a total of 1,181 over the past four years.[6]

[5] Prior to this, an article in *The Star* dated March 27, 2016 reported that the number of police custodial deaths in the past 16 years from 2000 to April 2016 totalled a number of 269.[7] To place this into perspective,

2 Suara Rakyat Malaysia (SUARAM), <https://www.suaram.net/death-in-custody/>.
3 Ibid.
4 K Kumar, "Over 1,600 deaths in custody since 2010, DPM reveals", <https://www.malaymail.com/news/malaysia/2017/03/13/over-1600-deaths-in-custody-since-2010-dpm-reveals/ 1333815> (accessed March 13, 2017).
5 SUHAKAM Annual Report 2017, <https://drive.google.com/file/d/1fTHb17EOl10UZedlB38v2t0W-VeS9q34/view>.
6 Ibid.
7 SUHAKAM Annual Report 2016, <https://drive.google.com/file/d/0B6FQ7SONa3PRLVFYOHoyODc0eDg/view>.

this means an average of 16 detainees died while in the custody of the police each year. The 2017 Parliamentary Report revealed that the total of police custodial deaths was on the rise. It is very disturbing to note that the number of published cases is still high. This indicates a presence of systemic problems in managing and handling detainees in lockups. As Justice S Nantha Balan in *Selvi a/p Narayan & Anor (Pentadbir bersama Estet dan tanggungan Chandran a/l Perumal, simati) v Koperal Zainal bin Mohd Ali & Ors*[8] observed:

> In a modern, mature and evolved constitutional democracy such as Malaysia, it is axiomatic and imperative there should be zero deaths of detainees in police custody.

[6] Even one case of custodial death is one case too many. Regarding police custodial deaths from 2000 to April 2016, it was reported in *The Star* that 220 deaths were related to illnesses that had damaged organs – 158 deaths related to intestines, lungs and throat, yellow fever and ulcers. Also, 36 died of HIV or AIDS, 20 of heart attacks, and six of asthma attacks.[9] From 2011 to 2018, where there was a total of 104 deaths in custody, it was found that 56 died of "medical" issues, eight of "suicides", two of "accidents", four from "blunt force trauma", and 34 of "unknown reasons".[10] In other words, most of these deaths were attributed to diseases and health complications.

[7] However, there appears to be a sizeable underreporting of deaths in police custody. While the official statistics provided by the Home Ministry in a Parliamentary reply on March 28, 2017 showed there were 257 deaths in police custody between 2002 and 2016, based on SUARAM's data, only 62 of these cases were reported to the media.[11] This signifies that only about one in four cases of deaths in police custody are made known to the public, whereas the rest are "swept under the carpet."[12]

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8 [2017] MLJU 11.

9 Human Rights Commission of Malaysia, "Deaths in Police Custody: A Thematic Study on Lock-up Conditions and Factors Contributing to the Death", p 60.

10 KS Kua, "IPCMC must prioritise deaths in custody", <https://www.thestar.com.my/news/nation/2019/07/21/ipcmc-must-prioritise-deaths-in-custody> (accessed July 21, 2019).

11 JL Koh and AQ Koh, "Reporting deaths in police custody: Behind the numbers", <https://pages.malaysiakini.com/deathincustody/> (accessed March 5, 2018).

12 Ibid.

[8] One of the reasons for under reporting is due to the deceased's next of kin who lack the knowledge as to what needs to be done and how to lodge a report.[13] There are a number of deceased's families who are unaware of even the existence of SUHAKAM or SUARAM or NGOs, or the now dissolved EAIC (the Enforcement Agency Integrity Commission).[14] As a result, these cases end up as mere numbers without any recourse to any form of justice.

Constitutional rights of the detainees

[9] The cases of custodial deaths place pressure on human rights principles and rightly so. Families of victims should not be placed in a climate of fear of losing their loved ones upon their detention. Human life is intrinsically valuable and sacrosanct. As a member of the United Nations, Malaysia has agreed to uphold the principles of the Universal Declaration of Human Rights ("UDHR"), which are considered reflective of customary international law.[15] Article 3 of the UDHR protects the right to life and security of the person. It provides that everyone has the right to an effective remedy for violation of fundamental rights.

[10] The right to life is the cornerstone of all other human rights. In Malaysia, a person's right to life is enshrined in Article 5(1) of the Federal Constitution, which provides that no person shall be deprived of his life or personal liberty save in accordance with law. The duty to respect and ensure the right to life implies that no one may be arbitrarily deprived of his or her life.

[11] Hence, it is clear that the Federal Constitution values human life and advocates for its protection. The Court of Appeal in the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan*[16] adopted a

13 Ibid.
14 Ibid.
15 "Basic Principles for the Treatment of Prisoners", GA res 45/111, annex, 45 UN GAOR Supp (No 49A), p 200, UN Doc A/45/49 (1990); "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment", GA res 43/173, annex, 43 UN GAOR Supp (No 49) at 298, UN Doc A/43/49 (1988); "UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions" ("Principles on Extrajudicial Executions"), ESC res 1989/65, annex, 1989 UN ESCOR Supp (No 1), UN Doc E/1989/89 (1989), p 52.
16 [1996] 1 MLJ 261.

broad approach to the definition of "life" in Article 5(1) of the Federal Constitution. Justice Gopal Sri Ram JCA (as he then was) stated that "… the expression life does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the rights to seek and be engaged in lawful and gainful employment."

[12] In India, Article 21 of the Indian Constitution is *in pari materia* with Article 5 of our Federal Constitution.[17] In the case of *Kharak Singh v The State of UP & Ors*,[18] the Supreme Court stated that the term "right to life" should be given a broad and liberal interpretation as follows:

> [L]ife is something more than mere animal existence. The inhabitation against its deprivation extends to those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, of the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world …

[13] Following rule 1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (known as the "Nelson Mandela Rules"), all prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification.[19] The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.[20]

[14] The sharp increase in the number of custodial deaths has caused SUHAKAM to take a serious view of the matter. While there is no simple formula to ensure the safety of the detainees, SUHAKAM emphasises that it is important for all stakeholders to work together in deterring custodial deaths.

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17 R Jain, "Article 21 of the Constitution of India – Right to Life and Personal Liberty", <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/>.

18 1964 SCR (1) 332.

19 The United Nations Standard Minimum Rules for the Treatment of Prisoners ("Nelson Mandela Rules"), p 4.

20 Ibid.

[15] The lofty purpose of Article 5(1) of the Federal Constitution would be defeated if a person's right to life is not upheld. It should be an avowed duty of the State to ensure that detainees are not deprived of their fundamental right to life.

SUHAKAM's role: Upholding the right to life

[16] In accordance with section 4(1)(d) of the Human Rights Commission of Malaysia Act 1999, SUHAKAM has the power to inquire into complaints regarding any infringement of human rights referred to in section 12.[21] Furthermore, section 4(2)(d) of the Act empowers SUHAKAM to visit places of detention in accordance with procedures as prescribed by the laws relating to places of detention and to make necessary recommendations.[22]

[17] In an attempt to combat the underlying issue, SUHAKAM has taken action to examine the circumstances which lead to or cause deaths in custody, particularly trends and common factors encapsulating the deaths and the lessons that can be learnt from the findings to curb future custodial deaths. Such action involves conducting visits (announced or unannounced) at places of detention like police lockups, prisons, and immigration detention centres.[23]

[18] Generally, there are three types of visits, namely case-based visits, periodic or preventive visits, and full-audit visits. A case-based visit entails an investigation into an allegation of human rights violation. For a periodic or preventive visit, this requires at least a half-day visit to monitor the condition and treatment at detention centres. Lastly, with regard to a full-audit visit, there will be a comprehensive inspection of the detention centre for more than two days. The purpose of the visit is to ensure the conditions of the detention and treatment provided to the detainees are on par with international human rights standards as stipulated under the Nelson Mandela Rules as well as under domestic laws. It is also to ensure the rights of personnel working at the detention centres are protected and this includes the doctors or medical officers.

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21 Human Rights Commission of Malaysia Act 1999 [*Act 587*], <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20597%20-%20Human%20Right s%20Commission%20of%20Malaysia%20Act%201999.pdf>.

22 Ibid.

23 SUHAKAM Annual Report 2016, <https://drive.google.com/file/d/0B6FQ7SONa3PRLVFYOHoyODc0eDg/view>.

[19] SUHAKAM also inquires into complaints made by those who have been detained by the police. In particular, the major complaints received by SUHAKAM are of physical assault, mental torture, poor physical condition of the detention centres, and deaths in custody.[24] It has been constantly alleged that physical assaults are committed during the interrogation or investigation by the authorities. The tools used in assaulting the victims include using a rubber hose to beat them so as to extract confessions or to obtain valuable information from them. As a result, victims also suffer from mental torture.

[20] With regard to the condition of the detention centres, it has been widely criticised that the conditions are deplorable due to poor lighting, poor ventilation, poor hygiene, and limited drinking water.[25] SUHAKAM conducted a thematic study on the right to healthcare in prisons and released "The Right to Health in Prison: Results of a Nationwide Survey and Report" in 2014. The study revealed that the prisoners suffer a disproportionate burden of health problems due to various reasons. The prisoners are also confronted with other challenges like overcrowding, bad sanitation facilities, low quality food, limited clothing, uncomfortable bedding and unhygienic cell conditions.[26] These lead to common health problems such as scabies. According to SUHAKAM, 30% of the lockups are overcrowded.[27] Such overcrowding results in fights among inmates and the spread of diseases. There is also insufficient space for the prisoners to sleep. Admittedly, the prison officers find it difficult to safeguard the prisoners' human rights.

[21] In terms of healthcare services and facilities in police lockups, the findings reveal that there is no medical examination or screening, no treatment rooms, inadequate storage of detainee's medicine, non-labelling of medicine, no records on detainee's health, inadequate first-aid kits, as well as lack of transportation to hospitals.[28] As a detainee in a police lockup is a mere suspect who is temporarily held

24 Human Rights Commission of Malaysia, "Deaths in Police Custody: A Thematic Study on Lock-up Conditions and Factors Contributing to the Death", p 15.

25 SUHAKAM Annual Report 2015, <https://drive.google.com/file/d/0B6FQ7SONa3PRLVFYOHoyODc0eDg/view>.

26 Ibid.

27 Human Rights Commission of Malaysia, "Deaths in Police Custody: A Thematic Study on Lock-up Conditions and Factors Contributing to the Death", p 18.

28 Ibid, at p 85.

for investigations, often his or her basic health needs are overlooked. Health screening is not conducted to detect acute medical problems. Also, injuries that are not visible can go untreated. Even if the detainees are sick, the police officers tend to create a false perception that those detainees like to feign their sickness.[29] The lack of resources and facilities in terms of qualified medical professionals and less than minimum standard of healthcare within the system generate more problems should a person succumb to healthcare issues while being detained, leading to the rise in custodial deaths.[30]

[22] Such inadequate and rudimentary facilities afforded to the police as well as lack of necessary resources to provide for basic amenities and medical needs are also being suggested to have contributed to the ill treatment of the victims by the police. The police are understaffed and undertrained to provide adequate or appropriate detention conditions.[31] Nevertheless, despite these, they do not justify the police's actions in assaulting or torturing the detainees. Torture is an affront to the victim's human dignity and an abridgment of human rights. Under Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the term "torture" means "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions. However, it is difficult to provide the appropriate medical evidence to prove torture has been inflicted because detainees are often locked away until their next court appearance and are subjected to threats of further violence by investigating officers if they reveal what has been inflicted upon them. Also, since the quality of the CCTV facilities is often unsatisfactory, it is difficult to capture the tortuous acts of the

29 SUHAKAM Annual Report 2015, <https://drive.google.com/file/d/0B6FQ7SONa3PRLVFYOHoyODc0eDg/view>.
30 SUHAKAM, "Laporan Kematian dalam tahanan polis", p 77.
31 Ibid, at p 98.

police committed against the victims on camera.[32] Furthermore, not all lockups are equipped with CCTVs. Even if CCTVs are installed, half of them are found to be "broken" and there are insufficient funds to repair them.[33]

[23] When the complaints made by the victims are proven to be true, this suggests that custodial deaths may also be attributable to the conduct of police officers. Hence, it would be instructive to conduct inquiries of deaths, rather than to have mere speculation over the matter.

Inquiries of death (inquests)

[24] In Malaysia, due to widespread public concern over the increase in custodial deaths, an inquiry of death or inquest may be carried out by a magistrate in a place open to the public to inquire into the suspicious circumstances under which a person died or where there is reason to suspect that a person has died in the following manner:[34]

(i) Sudden;

(ii) Unnatural;

(iii) By violence; or

(iv) Cause of death unknown and in situations where the law requires an inquiry.

[25] Essentially, an inquest is a proceeding under the Criminal Procedure Code [*Act 593*] ("CPC"). It means an inquiry by a magistrate with a view to ascertain the cause of death and to any of the circumstances connected therewith.[35] The language used under the relevant provision in the CPC clearly reveals that an inquest is not, by any stretch of interpretation, a criminal trial.[36] An inquest into death is only an expression of non-binding opinion of a proceeding where

32 Human Rights Watch, "No Answers, No Apology: Police Abuses and Accountability in Malaysia" (2014), <ISBN: 978-1-62313-117 https://www.refworld.org/docid/533e8f2e4.html> (accessed March 4, 2020).

33 SUHAKAM, "Laporan Kematian dalam tahanan polis", p 179.

34 Ibid, at p 112.

35 Attorney General's Chambers, "Death Inquiries", p 1.

36 AR Kamarudin, "Inquiry of Deaths Under the Malaysian Criminal Procedure Code" [2009] 5 *Malayan Law Journal* lxviii–lxxxii.

there is no accusation against any party.[37] There is no complainant or an accused to be prosecuted. The inquiry is to determine when, where, how and after what manner the deceased came by his death and also whether any person is criminally concerned in the cause of the death.[38] This means that the circumstances in which the death occurred play an important part in weighing the evidence before the inquest.[39]

[26] In other words, the parameters and purpose of the inquest are confined to arriving at a verdict consistent with the physical cause of death. Section 328 of the CPC provides that the "cause of death" includes not only the obvious cause of death as ascertainable by a post-mortem examination of the body of the deceased, but also all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his death and as to whether his death resulted in any way from or accelerated by any unlawful act on the part of any other person. The other objectives of the inquest are to allay rumours or suspicion; to draw attention to the existence of circumstances which, if unremedied, might lead to further deaths; to examine the deficiencies which affect the credibility of the proceedings; and to preserve the legal interests of the deceased person's family, heirs or other interested parties.

[27] Generally, public interest demands that inquiries of death should be held as soon as possible after the death is reported so as to avoid any unnecessary delay in obtaining evidence regarding the cause of death of a detainee. Inquest proceedings in Malaysia are bound by Part VIII, Chapter XXXII of the CPC and Practice Direction No 1 of 2007: Guidelines on Inquest.[40] Upon receiving any report of death, the police shall investigate the death. Under section 330 of the CPC, a police officer making an investigation shall, if it appears to him any reason to suspect that a person came by his death in a sudden or unnatural manner; by violence; or that the person's death resulted in any way from or was accelerated by any criminal act or a "slip" on

37 Attorney General's Chambers, "Death Inquiries", p 5.
38 *Re Rumie Mahlie, Deceased* [2007] 10 CLJ 697, *per* David Wong Dak Wah J.
39 Attorney General's Chambers, "Death Inquiries", p 1; P Scraton and K Chadwick, "Speaking ill of the dead: institutionalised responses to deaths in custody" (1986) 13(1) *Journal of Law and Society* 93–115.
40 Attorney General's Chambers, "Death Inquiries", p 1.

the part of any other person, at once inform the nearest government medical officer.

[28] Where it appears to the police officer that the dead body should be viewed by a magistrate at the place where the dead body was found, the police officer shall, in the course of investigation, take or send the dead body to the nearest government hospital to arrange for a post-mortem examination with the government medical officer.[41] The report of the government medical officer conducting the post mortem may then be forwarded to the magistrate in whose jurisdiction the body was found.[42] Such report is crucial to determine the medical cause of death, which may be due to a natural disease, poisoning, accident or even a cleverly executed murder without any visible signs. The said report is the key which may enable the magistrate to unravel the victim's legal cause of death.

[29] A magistrate is also empowered to direct for a post mortem to be conducted, regardless whether the post mortem had been conducted or not during the police investigation.[43] The magistrate will further report to the Public Prosecutor on issues pertaining to the cause of death.[44] Section 339 of the CPC states that a Public Prosecutor may at anytime direct a magistrate to hold an inquiry into the cause of, and the circumstances connected with, any death as referred to in sections 329 and 334 of the CPC. Section 334 of CPC specifies that when any person dies while in the custody of the police or in prison, the officer who had the custody of that person or was in charge of that psychiatric hospital or prison, shall immediately give intimation of such death to the nearest magistrate, and the magistrate in the case of a death in custody of the police, and in other case may, if he thinks expedient, hold an inquiry into the cause of death.

[30] When a custodial death takes place, an inquest into the cause of death in a police station, remand prison, prison, rehabilitation centre, detention camp, mental institution, and asylum is mandatory as in accordance with the obligation under Article 2 of European Convention of Human Rights ("ECHR") for the preservation of the right to life.[45]

41 CPC, ss 330 and 329(2).
42 Ibid, s 329(5).
43 Ibid, s 335(2).
44 Ibid, s 333(1).
45 Report of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police (2005), section 2.3.5 (g), p 43.

In practice, however, very few inquests are conducted. This raises the concerns of the Royal Commission of Inquiry ("RCI") about police failure to conduct inquests when required by law. According to the report by the RCI, between 2000 and 2004, inquests were carried out in only six out of the 80 deaths in police custody.[46]

[31] The failure to conduct timely independent inquests into such deaths often creates suspicion in the minds of the public that the authorities have something to hide. This would then result in a consequent increase in negative perceptions of the enforcement authorities.

[32] The magistrate shall take cognizance, scrutinise and admit any evidence which he thinks fit, including hearsay evidence.[47] He is not required to follow the usual procedure of the courts, such as rules of procedure and rules of evidence which are applicable in a criminal trial.[48] At the conclusion of the inquiry, the magistrate may deliver an open verdict, where the cause or the circumstances of the death remains unknown or unclear, due to insufficiency of evidence.[49] The standard of proof is on balance of probabilities and not beyond reasonable doubt. This was established by the Court of Appeal in the case of *Re Teoh Beng Hock*[50] in 2014.

Case analysis of *Re Teoh Beng Hock*

[33] In the case of *Re Teoh Beng Hock*,[51] the deceased ("TBH") was detained by officers of the Malaysian Anti-Corruption Commission ("MACC") in Shah Alam due to an allegation of corruption against his employer, Mr Ean Yong Hian Wah, a member of the Selangor State Legislative Assembly and State Executive Council. TBH was found dead on the roof of the podium (fifth floor) of a building adjacent to the MACC office having fallen out of the MACC interrogation office on the 14th floor. There were two possible theories: suicide or homicide. The discovery of a "suicide note" at the end stage of the inquest proceedings was very surprising and unbelievable. Nevertheless, the coroner arrived at an open verdict due to the lack of evidence.

46 Ibid, section 2.3.9, p 44.
47 *Re Inquest into the Death of Sujatha Krishnan, Deceased* [2009] 5 CLJ 783.
48 Ibid.
49 Attorney General's Chambers, "Death Inquiries", p 7.
50 [2010] 1 MLJ 715.
51 Ibid.

[34] Subsequently, this case was heard by the RCI. The RCI found that TBH had been "driven to commit suicide by aggressive, relentless, oppressive and unscrupulous interrogation by three MACC officers."[52] The three MACC officers displayed poor interview skills, poor reporting, and arrogance with regard to TBH's case. In fact, there were assaults during the interviews.

[35] An appeal was filed against the open verdict decision of the coroner to the High Court, which dismissed the appeal and confirmed the order of open verdict. On further appeal by the brother of TBH to the Court of Appeal, the Court of Appeal allowed the appeal and set aside the open verdict of the coroner. The Court of Appeal held that the death of TBH was a homicide and "a person or persons were responsible for his death." The Court of Appeal also held that the coroner and the High Court judge had erred in law in applying the wrong standard of proof. In an inquest, the standard of proof should be on a balance of probabilities and not beyond reasonable doubt.

[36] The decision of the Court of Appeal received positive comments from the public. The Court of Appeal in its findings recommended that further police investigations be carried out to identify and prosecute the persons responsible for the death of TBH. The civil action filed by the family of TBH seeking for damages was eventually settled by the Government following the decision of the Court of Appeal.

[37] Hence, it is pertinent to consider the five reported cases of police custodial deaths at this juncture, namely the cases of A Kugan, C Sugumar, P Karuna Nithi, N Dharmendran and S Balamurugan.

Reported custodial death cases

1. A Kugan (2009)[53]

[38] A Kugan who was arrested on January 14, 2009 on suspicion of car theft died in police custody after being severely beaten at Taipan Police Station in Subang Jaya. Prior to his death, his family was unaware of his whereabouts as they were not informed by the police of his arrest. His family was only informed when Kugan died on January 20, 2009. A Kugan's body showed some "22 categories of

52 "MACC suspends 3 officers who drove Teoh Beng Hock to suicide", *The Star Online*, <https://www.thestar.com.my/news/nation/2011/07/23/macc-suspends-3-officers-who-drove-teoh-beng-hock-to- suicide/> (accessed July 23, 2011).

53 *N Indra a/p P Nallathamby v PP* [2009] MLJU 764.

extensive injuries" from beatings he sustained during his detention. Despite this, the first post mortem concluded that Kugan had died of "acute pulmonary oedema" (fluid accumulation in the lungs).[54]

[39] This conclusion was disputed in a second post mortem, which found that Kugan's death was caused by acute renal failure due to rhabdomyolysis as a result of blunt trauma to his skeletal muscles. This meant that he died from kidney failure as a result of being beaten. There was a stark difference between the two findings. The first post-mortem report raised many questions, most importantly why the findings were in favour of the police, despite clear signs of abuse on Kugan's body. Although the pathologist who issued the first post-mortem report was found guilty of neglect and professional misconduct, he was only reprimanded whereas the proper punishment should have been to strike him off from medical practice.

[40] To pursue the course of justice, Kugan's family filed a civil case at the Kuala Lumpur High Court seeking damages. They succeeded and were awarded damages of RM801,700.[55] The High Court judge found evidence of a cover up within the police department, citing falsified station diary records that had reported Kugan was in good health. No internal disciplinary action was ever taken against the dishonest officers who fabricated the station diary entries.

[41] While 12 police officers were suspended for beating Kugan to death while in police custody in January 2009, only one officer Navindran Vivekandan was tried and convicted. The other defendants insisted that Navindran was acting "on a frolic of his own" and was single-handedly responsible for torturing Kugan to death.[56] Navindran was eventually the only one who was sentenced to three years of imprisonment.[57] This fuelled the grief and anger of the Kugan family as the other defendants were absolved of their wrongdoings.

[42] The amount of damages was however later reduced to RM401,700 due to subsequent judgments of the Court of Appeal and the Federal

54 "Deciphering Kugan's Post-Mortem", *MalaysiaKini*, 2009, < http://www.malaysiakini.com/news/103504> (accessed November 25, 2012).

55 Lawyers for Liberty, "5 Faces: A story of police custodial deaths in Malaysia", 2018, p 6.

56 Ibid.

57 Human Rights Watch, "No Answers, No Apology: Police Abuses and Accountability in Malaysia" (2014), <ISBN: 978-1-62313-117 https://www.refworld.org/docid/533e8f2e4.html> (accessed March 4, 2020).

Court.[58] The Federal Court held that the families of persons who died in custody are not entitled to exemplary damages for a breach of a constitutional right to life.

2. C Sugumar (2013)[59]

[43] On January 14, 2013, Sugumar Chelladuray, who was mentally ill, died shortly after apprehension while still in handcuffs. During the inquest at the Coroner's Court Shah Alam, it was revealed that four policemen had run after Sugumar for damaging public property, and had subsequently contributed to his death. While struggling to subdue Sugumar, a policeman kicked his legs, causing him to fall face down. As he lied down on the ground wincing in pain, one policeman sat on his buttocks and pressed him down to handcuff him; another policeman stepped on his neck and handcuffed him again with a second pair of handcuffs. The policeman continued to step on Sugumar's neck until he stopped struggling. Sugumar then died shortly during or after his arrest. Before Sugumar took his last breath while lying on the ground, no attempt was ever made to check on his condition or transport him to a hospital for medical attention, under the excuse that the policemen present were not medically trained. He was only taken to a hospital mortuary, four hours after his death.

[44] The police denied beating him and this was supported by a post mortem which found that Sugumar died of heart failure. The post-mortem report wholly disregarded the series of events up to the point of his death and the way he was forced into submission by the police. Sugumar's family refused to accept the finding of the first post mortem, and attempted to obtain a second independent post mortem to reveal the truth but was stalled by the authorities. However, as attempts to secure a second post mortem failed, eventually the matter was dropped.

[45] The case attracted public attention due to the harsh and improper manner of the arrest of Sugumar. This sparked public outrage when Sugumar's death was shrugged off. Regarding the first post-mortem report that Sugumar died because of heart failure, the public castigated the report to be preposterous and absurd. During the inquest, it was revealed that the police chose not to check on him or to send him

58 Lawyers for Liberty, "5 Faces: A story of police custodial deaths in Malaysia", 2018, p 10.
59 Ibid, at p 11.

to a hospital in a patrol car simply because the deceased was "large and heavy". The police also handcuffed the deceased with two pairs of handcuffs, thus breaching the standard operating procedure. Furthermore, the pathologist failed to take into account that the position in which Sugumar was forced into would have made it extremely difficult for him to breathe. Instead, the pathologist (wrongly) classified the cause of death as heart failure.

[46] While the inquest ruled that police negligence had directly precipitated Sugumar's death due to the failure to either attend to his medical needs or send him to a hospital, no action had been taken to pinpoint and punish those offenders.

3. P Karuna Nithi (2013)[60]

[47] P Karuna Nithi died in police custody at the Tampin Police District Headquarters in Negeri Sembilan on June 1, 2013. He went to the police station to report a domestic incident on May 31, 2013 but was instead arrested for causing hurt. He died in police custody the next day. A post mortem was carried out by a pathologist, who concluded that the cause of death was "fatty change of the liver" despite visible signs of abuse on the deceased's body, including a jaw fracture and multiple haematoma (swelling of clotted blood) on the deceased's chest.

[48] During the inquest proceedings at the Seremban Coroner's Court, CCTV footage tendered as evidence showed that during Karuna's detention period, he was beaten by other inmates and police officers and displayed mentally abnormal behaviour. Although he was unfit for detention, he was not sent to a hospital contrary to the Lock-Up Rules 1953. The police claimed that they did not know that the deceased was ill and suggested that his injuries were self-inflicted. They denied any "foul play". Nevertheless, the coroner rejected the first post-mortem report and instead concluded that the cause of death was "blunt force trauma leading to rhabdomyolysis or commotion cordis", and that the policemen and other inmates were directly and indirectly responsible for Karuna's death. The Ministry of Health Committee then provided a follow-up report to exonerate the pathologist and to overturn the coroner's established findings. However, since they failed to offer any

60 Ibid, at p 16.

new evidence so as to reopen the inquest, the coroner dismissed the Committee's report and his verdict remained the same.

[49] Although one of the deceased's family members had lodged a complaint against the pathologist's misconduct at the Malaysian Medical Council ("MMC"), no disciplinary hearing was taken against her. While the inquest found the policemen at the lockup and other detainees to be responsible for Karuna's death, no action was in fact taken to identify and punish those responsible.

4. N Dharmendran (2013)[61]

[50] N Dharmendran died in police custody in Kuala Lumpur on May 21, 2013 after allegedly suffering an asthma attack. According to the post-mortem report, he died due to "a blunt force trauma" 10 days after the arrest, with his body bearing possible signs of torture. This refuted the police's version of events that Dharmendran had died of "breathing difficulties". In truth, however, Dharmendran had 52 injury marks and overlapping bruises, including both his ears sustaining wounds from stapler clips, which were two to three days old at the time of the post mortem.

[51] While an inspector and three police officers were charged for murder of the deceased at the High Court, all of them were acquitted. This decision was upheld by the Court of Appeal. An Enforcement Agency Integrity Commission ("EAIC") inquiry was conducted to uncover the truth behind Dharmendran's death. It was discovered that the entries in the lockup diary had been falsified by specifying that Dharmendran had been released after his remand ended, rearrested, and had been complaining of chest pains and asthma before collapsing and dying. The time in the entries had also been tampered to propagate the false narrative. Despite these, none of the police officers involved were ever prosecuted for conspiring to cover up the murder or falsifying evidence.

5. S Balamurugan (2017)[62]

[52] S Balamurugan died in police custody at the North Klang police headquarters on February 7, 2017. He was arrested on February 6, 2017

61 Ibid, at p 22.
62 Ibid, at p 28.

for alleged robbery and taken to the Magistrates' Court the day after. He had vomited blood during the remand proceedings. Following the incident, the court rejected the remand application and ordered the police to take Balamurugan to a hospital but he was instead taken to the police headquarters to be continuously detained, where he died later that day due to the recalcitrant attitude of the police.

[53] A post mortem was conducted on the deceased, which then concluded that the cause of death was "heart problems". Dissatisfied with the findings, the deceased's family applied for a second post mortem to be carried out, in which the second pathologist found that the cause of death was "coronary artery disease with multiple blunt force injuries". The second pathologist further discovered 22 different injuries on the deceased's body. This confirmed that the deceased had suffered "multiple beatings" while in custody. The deceased was allegedly slapped, punched, kicked, and forcefully smeared chilli on his bruised body to extort a confession from him. In order to be let off, the senior police officers even conspired on Whatsapp to fabricate investigations against him.

[54] Nevertheless, justice was served when both the inspectors responsible for Balamurugam's death were charged under section 342 (wrongfully confining a person) and section 330 (voluntarily causing hurt to extort a confession) of the Penal Code respectively at the Klang Magistrates' Court.

[55] The first post-mortem report was criticised for erring on the side of the police when there was clear evidence of torture, abuse and neglect. Pitifully, without pressure from SUHAKAM, lawyers, activists, and the family of the deceased, this would have been yet another case which would have been buried following the conclusion of the first post-mortem report.

Public concerns and complaints

[56] Regardless of the passage of time, the unfortunate victims of these five custodial death cases should not be forgotten. Their cases send a chilling message to the public that the problem of custodial deaths is attributable to the culture of impunity which is deeply entrenched in the police force that trumps a human's right to life. They display the extraordinary lengths to which the police, hospital pathologists, and the Attorney General's Chambers will go to vindicate the detention

authorities and conceal their crimes and wrongdoings.[63] Indeed, the laws of Malaysia are fuelled with abiding concerns for human rights and fundamental freedom. The cruel deaths of the victims have left an acute impact on their families and friends, causing them to suffer from distress and loss.

[57] To the public's dismay, investigations into reports of police abuses are rare and only occur when there is considerable pressure from the media and human rights organisations.[64] Undoubtedly without such pressure, the victims' deaths would have been covered up. This alludes to the fact that the police are not taking custodial deaths seriously, by downplaying any wrongdoing on their part or turning a blind eye to the deceased's signs of injuries, neglects and other suspicious circumstances in the medico-legal death investigation. They also tend to expedite their investigations, thereby providing a quick closure to custodial death cases without careful and thorough examination.[65]

[58] As investigations into police abuses are conducted primarily by the police themselves and therefore lack transparency, the independence of police investigations in custodial death cases have been questioned by the RCI and human rights organisations. In July 2012, a High Court judge in Kuala Lumpur raised serious concerns regarding the impartiality and transparency of an investigation conducted by police officers, noting that such investigation was affiliated with an officer from the same police station where the death of a detainee occurred.[66] This marks an inherently flawed process of police investigation.

[59] The police have largely remained silent in the face of the problem of deaths in custody. In the case of V Mugilarasu (2020), the victim was found dead while being detained in Sungai Buloh Prison. While the police did inform the deceased's family of the victim's death, they failed to notify the coroner as is required under section 329(5) of the Criminal Procedure Code. The immediate reporting of a death in custody by the police to the coroner is mandatory.[67]

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63 Ibid, at p 41.
64 Ibid, at p 37.
65 Ibid.
66 Supra, n 45, p 43.
67 EDICT Malaysia, "The Selangor police must report and investigate the death of V Mugilarasu", <https://www.edictmalaysia.com/post/polis-selangor-mesti-lapor-dan-siasat-kematian-v-mugilarasu> (accessed July 10, 2020).

[60] In addition, criminal prosecutions of detaining authorities are rare despite there being evidence to prove they are the real culprits. There are only a few criminal prosecutions which have been conducted, with one or two lower ranking police officers convicted, leaving the higher echelons untouched.[68] This presents how the subordinates conspire with their superiors to try to whitewash the latter's misdeeds. Since policemen responsible for custodial deaths hardly ever get punished, they feel emboldened to continue using torture as one of the means in their investigations.

[61] To make matters worse, the police officers even go through immeasurable lengths to obliterate the truth, such as falsifying the entries and collaborating with pathologists to concur with their own findings that the victim's cause of death was due to natural health complications despite pervasive signs of torture, neglect, and abuse.[69] With regard to improper record keeping, the RCI established that the police sometimes classify deaths in police custody as "Accidental Death", which is written in the Sudden Death report, thereby bypassing post mortems and inquests for those deaths.[70] This is clearly a rouse to frustrate attempts to uncover the truth at every juncture and allow them to avoid liability. By relying on the police's information, the pathologists help to reach at inexplicable conclusions that ignore the victims' injuries and warning signs of custodial death. Such unsupported findings based on their own erroneous reasoning have been roundly criticised by the public. This signifies that the impartiality of pathologists in Malaysia is of grave concern, which serves as a wake up call for the need to reform the post-mortem system.

[62] A more disconcerting question is whether future potential victims must risk themselves in facing death simply because the police take "advantage" of the laws? This leaves the public to live in fear as their loved ones who are detained are in danger of dying in custody while those who are responsible for causing the victim's death are not brought to book. Plainly, this amounts to a flagrant breach of justice.

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68 Lawyers for Liberty, "5 Faces: A story of police custodial deaths in Malaysia", 2018, p 3.

69 Ibid.

70 Human Rights Watch, "No Answers, No Apology: Police Abuses and Accountability in Malaysia" (2014), <ISBN: 978-1-62313-117 https://www.refworld.org/docid/533e8f2e4.html> (accessed March 4, 2020).

[63] There are families of the deceased who continue to fight for justice by filing a civil suit in court to seek for damages. This is the only avenue open to them to seek some form of justice. However, no words can articulate the pain, loss and suffering that families have to endure. And to exacerbate the matter, the recent Federal Court ruling in the case of A Kugan reduced the amount of damages that can be claimed.[71] Also, the ability to seek redress through civil suits has been made difficult by a Federal Court decision in *Kerajaan Malaysia v Lay Kee Tee*,[72] which held that plaintiffs are required to name the specific government officer(s) who is/are allegedly responsible for the abuse. This is often difficult because many victims have told the Human Rights Watch that the police officer(s) often do not wear identification name tags while on duty.[73] For instance, in July 2012, the civil suit of Shahril Azlan who survived gunshots by plainclothes police at a roadblock in 2009, was dismissed by the Kuala Lumpur High Court simply because Azlan could not name the individual police officers involved.[74] This means offending police officers can rarely be sued.

[64] The five cases discussed above point out the flaws in the statistical data which asserts that custodial deaths are mostly attributable to health issues. The truth, in fact, is far more sinister. They are also largely caused by the misfeasance and lacklustre performance by the police. Such grave dereliction of duty by the officers leads to discontentment of the public.

[65] Overall, the lack of transparency and impartiality in police investigations into deaths in custody, the inconsistent application of law that mandates inquests, and questionable competency as well as integrity of government pathologists conducting post mortems have all heightened public distrust of the police in the handling of such cases.[75] The image of the police has been tarnished.

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71 *N Indra a/p P Nallathamby v PP* [2009] MLJU 764.

72 [2009] 1 MLJ 1.

73 Human Rights Watch, "No Answers, No Apology: Police Abuses and Accountability in Malaysia" (2014), <ISBN: 978-1-62313-117 https://www.refworld.org/docid/533e8f2e4.html> (accessed March 4, 2020).

74 Human Rights Watch interview with Shahril Azlan, Kuala Lumpur, April 22, 2012.

75 Human Rights Watch, "No Answers, No Apology: Police Abuses and Accountability in Malaysia" (2014), <ISBN: 978-1-62313-117 https://www.refworld.org/docid/533e8f2e4.html> (accessed March 4, 2020).

[66] Ideally, pathologists should assist in uncovering the depth of police cover up. They have an indispensable role not to forsake their sworn and high duty to do no harm and to start taking custodial deaths more seriously.[76] Yet, they will typically produce a post-mortem report which dismisses a victim's death as due to natural sickness, thus causing the effect of exonerating the custodial authorities when the medical evidence and other circumstances showed otherwise. With the increase in requests for a second post-mortem report, this casts doubts on the veracity of the post-death forensic investigative findings. Not only is this a big waste of time and resources on all fronts, it also needlessly torments the feelings of the family and intensifies their sense of injustice.

[67] Following the Guidelines for Investigating Deaths in Custody, the International Committee of the Red Cross ("ICRC") states that the personnel carrying out post-mortem examinations must be granted complete independence throughout the investigation and when presenting its results. Where their independence is compromised, they may decline to draw conclusions. The investigation and findings must be impartial and objective.[77] The cause of death must be stated accurately. This is because in most cases, the fate of custodial death victims depends entirely on the observations recorded and the opinions expressed by the pathologist in post-mortem reports. Where the reports are manipulated, this amounts to a grave miscarriage of justice. As such, for those pathologists who had created biased post-mortem reports in favour of the police, they should be severely punished, such as being struck off from medical practice.

Protection of detainees in police custody

[68] In general, all police in Malaysia owe a duty of care to those who are detained in their custody. In the UK, case laws interpret the police's duty of care as "… a duty on the person having custody of another to take all reasonable steps to avoid acts or omissions which he could reasonably foresee would be likely to harm the person for whom he

76 Lawyers for Liberty, "5 Faces: A story of police custodial deaths in Malaysia", 2018, p 35.

77 ICRC Guidelines for Investigating Deaths in Custody.

is responsible."[78] In *Orange v Chief Constable of West Yorkshire Police*,[79] a duty of care was construed as "a duty to any person in [Police] custody to take reasonable care for that person's health and safety".

[69] Police officers are obliged to comply with the stringent procedures of law in Malaysia. For instance, for lockups, they are subjected to the Lock-Up Rules 1953.[80] This provision applies to all detainees who are being detained in gazetted lockups, which cover, *inter alia*, the process of admission and release as well as the minimum standard of treatment towards detainees. The relevant parts of the Lock-Up Rules 1953 which relate to the process of admission and release as well as the minimum standard of treatment towards detainees are reproduced as follows:

> ADMISSION AND DISCHARGE
>
> 10. The Medical Officer shall so far as possible examine every prisoner as soon as possible after admission to a lockup and shall certify whether the prisoner is fit for imprisonment and, if convicted the class of labour which he can perform.
>
> …
>
> TREATMENT OF PRISONERS
>
> 13. Every prisoner shall be supplied with bedding which shall be changed and washed as often as may be necessary but never less than once a month.
>
> 14. Notices in English, Romanised Malay, Chinese and Tamil setting forth the facilities to which prisoners are entitled as regards communication with friends or legal advisers, the granting of bail and the provision of medical assistance shall be displayed at the entrance to each lockup. In all cases where it is necessary the contents of the notice shall be communicated to all prisoners in a language they understand.

78 *Brooks v Metropolitan Police Commissioner & Ors* [2005] 2 All ER 489; *Gibson v Chief Constable, Strathclyde Police Defender* [1999] SC 420; *Calveley v Chief Constable of the Merseyside Police* [1989] 1 All ER 1025; *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4.

79 [2001] EWCA Civ 611.

80 CK Gan, "An Overview of Police Custodial Death Cases in Malaysia" (2018) 3(4) Humanities Soc Sci at 544.

…

STAFF

35. (1) The Officer-in-Charge or the Deputy-Officer-in-Charge shall frequently and never less than once a day inspect all parts of each lockup and shall see every prisoner confined there in at least once in every twenty-four hour and shall visit each lock-up at uncertain hour of the night at least once in every seven days.

(2) A police officer shall be detailed daily by the Officer-in-Charge to visit cells at least once each night to see that they are secure and to check the number of prisoners.

36. The Officer-in-Charge or the Deputy-Officer-in-Charge shall without delay report to the Medical Officer any case of apparent mental disorder or of injury to or illness of any prisoner.

37. The Officer-in-Charge or the Deputy-Officer-in-Charge shall upon the dangerous illness or death of any prisoner give immediate notice thereof to the most accessible known relative of such prisoner.

38. The Medical Officer shall visit each lockup whenever requested to do so by the Officer-in-Charge, and he shall enter in the Journal his comments on the state of the lockup and the prisoner confined therein.

39. The Medical Officer shall notify the Officer-in-Charge of any prisoner who appears to him to be mentally disordered or of unsound mind.

40. Whenever the Medical Officer is of the opinion that the life of any prisoner will be in danger by his continued confinement in a lockup or that any prisoner is totally and permanently unfit for confinement, he shall immediately state his opinion and the grounds thereof in writing to the Officer-in-Charge, who shall forthwith forward the same to the President of a Sessions Court or to a First Class Magistrate for transmission to the Menteri Besar of the State or to the Resident Commissioner of the Settlement as the case may be.

41. The Medical Officer shall whenever he visits a lockup to examine the food supplied to prisoners and shall enter in the Journal his comments thereon.

SUBORDINATE POLICE OFFICERS AND CONSTABLES

42. Subordinate police officers and constables shall at all times be responsible for the safe custody of prisoners under their charge and shall count the prisoners frequently and always –

On receiving charge;

On handing over charge; and

On leaving any building or work, and shall enter the muster in the Journal and shall sign the same.

[70] The relevant parts of the Lock-Up Rules 1953 highlighted above are to safeguard and secure the rights of detainees whose liberties are being deprived in accordance with law as detainees are exceptionally vulnerable towards the risk of human rights violations during police custody.[81] They also ensure accountability for the deaths of the victims who were healthy before they were apprehended but lost their lives under the watch of the police force.[82] Although the police officers have the authority to detain any individual for investigation as stated in the Criminal Procedure Code, it does not mean that a suspect deserves to be treated in a cruel, inhuman or degrading manner. As ill treatment by the police tend to happen behind closed doors, other police officers uninvolved in such conduct must investigate the matter carefully and thoroughly, and the burden is on the detaining authorities to account for the treatment of the deceased.

[71] However, due to the absence of meaningful accountability of the police force, deaths in custody cases continue to occur. Such procedural failings by the police aggravate the abuse of rights and at times deadly police practices. The lack of a robust and independent oversight system also sabotages the relations between the police and the general public. Effective law enforcement depends on cooperation with and information from the community. Where the public faith in the police has eroded, the public will be reluctant to cooperate, which in turn leads to less efficient law enforcement.

[72] In view of countering deaths in custodial cases, the Government should act urgently to reform the present system, so as to take every

81 Ibid, at pp 540–545.
82 Ibid.

death in custody seriously, prevent gross abuse of police power, and uphold the administration of justice. The steps taken to alleviate the matter must not be cosmetic for obvious reasons. Hence, effective measures must be instigated to dispel the danger of unfortunate reoccurrence of custodial deaths, where detainees will no longer die as a result of abuse or due to the denial of adequate medical treatment.

[73] The Lock-Up Rules 1953 ought to be reviewed and amended given that some of the provisions are archaic and not in keeping with present times.

Recommendations

Healthcare in detention centres

[74] Currently, there are 42 prisons, 19 immigration or temporary detention centres, 28 National Anti-Drug Agency ("AADK") lockups and police lockups in Malaysia which include accommodating vulnerable groups.[83] These institutions encounter problems such as poor ventilation, poor lighting, and overcrowding, which inevitably lead to the rapid spread of infections and diseases that can cost victims' lives. This urges the Government to revamp the healthcare facilities in detention centres, especially those still reliant on the bucket system.[84] Ideally, the Government should provide a conducive detention environment in compliance with international instruments where proper and adequate healthcare facilities are afforded to detainees who are coping with disabilities or other health issues.

[75] Noting the need for healthcare in detention facilities, the government authorities have adopted appropriate measures to tackle the healthcare issues at hand. For instance, officers from the District Health Office and Food Safety Health Inspector ("JKN") have conducted visits to monitor the food preparation in detention facilities by checking on the cleanliness, lighting and ventilation.[85] Notwithstanding, the police are to be commended as they have, following the recommendations of SUHAKAM, established the Custodial Medical Services in five centralised lockups, namely in

83 EAIC Annual Report 2017, p 14.

84 R Bedi, "Suhakam urges govt to abolish bucket system in prisons, rehab centre", *The Star*, <https://www.thestar.com.my/news/nation/2019/04/25/suhakam-urges-govt-to-abolish-bucket-system-in-prisons-rehab-centre> (accessed April 25 2019).

85 SUHAKAM, "Laporan Kematian dalam tahanan polis", p 67.

Jinjang, Sentul; Bayan Lepas, Pulau Pinang; Indera Mahkota, Pahang; Shah Alam, Selangor and Kepayan in Kota Kinabalu. Upon the set-up of the Custodial Medical Services, a medical doctor will be stationed at the centralised lockups from 8.00 a.m. to 6.00 p.m. and will be on call after 6.00 p.m. The Deputy Health Director Dr S Jeyaindran has proposed that the Custodial Medical Services be extended to smaller lockups throughout the country. In order to improve a serious situation, SUHAKAM has further recommended that the facilities in the lockups should be upgraded with increased allocation.

[76] Admittedly, the efforts made by the authorities still remain inadequate. As such, the Ministry of Health ("MOH") and the police should cooperate to assure the detainees have access to decent healthcare, including the presence of medical personnel at all lockups and places of detention on a permanent or rotational basis.[86] Where detainees are found unfit to be detained, they should be transferred to secured hospital wards.[87] At the same time, the MOH should ensure that these hospital wards are fully equipped to house the detainees when it is required to do so.[88] To aid the matter, an independent medical team (CMU) should be formed to record and report any form of ill treatment and torture with adequate facilities to reduce custodial death.[89] Such specialised medical team must be sufficiently trained to prepare them in embracing the reality of the system and condition the detainees or prisoners live in.

[77] Furthermore, it has been suggested that a validated screening tool should be equipped to assist prison and detention centres in identifying psychiatric patients.[90] This allows detainees to be screened by the team and if they are found to be unhealthy or mentally unfit, they will be sent to a hospital for further examination. It is recommended that medical officers and prison officers should be given proper training and education to identify the symptoms.[91] Crucially, this is an aspect for the MOH to look into as detaining authorities lack the expertise in this area.

86 Lawyers for Liberty, "5 Faces: A story of police custodial deaths in Malaysia", 2018, p 38.
87 Ibid.
88 Ibid.
89 SUHAKAM, "Laporan Kematian dalam tahanan polis", p 235.
90 Ibid, at p 228.
91 Ibid.

[78] In light of the above efforts, the limited budget to improve the condition of detention centres and insufficient healthcare facilities available to everyone due to the issue of overcrowding remains a challenge.[92] Notably, overcrowding is the main issue which lies within the Prison Department and 70% of prisons in Malaysia are confronted with this issue.[93] As the supply of medication and basic medical facilities are insufficient to keep up with the growing number of detainees, this unfortunately leads to the death of victims who suffer from diseases, although many of these diseases are curable and preventable.

[79] In combating the intractable problem of overcrowding, the Malaysian Public Works Department recommended that the size of the lockups must be expanded to house the increasing number of detainees.[94] Also, the police recommended that only drug addicts who have a criminal record should be detained in the lockup of the AADK (National Anti-Drug Agency) whereas the rest of the detainees who indulge in drug activities but have other criminal records be detained in police lockups for the purpose of investigations and remand.[95] As for drug addicts who await their urine test results, they should be released on police bail.[96] It is hoped that such recommended measures will help to reduce the gravity of the situation.

Inquests

[80] With regards to the inquiry into the cause of death, it is necessary for the Attorney General's Chambers ("AGC") to resume its role as the guardian of public interest.[97] The AGC should highlight the severity of cases of custodial deaths and accord the necessary serious attention to them whenever another unfortunate detainee dies while in custody.[98] The AGC must be able to recognise the importance of inquests as a fact-finding exercise.[99] Assistance must also be afforded to the coroner and discovery of the cause and circumstances of the death must be

92 Ibid, at p 17.
93 Ibid, at p 279.
94 Ibid, at p 163.
95 Ibid, at p 167.
96 Ibid.
97 Lawyers for Liberty, "5 Faces: A story of police custodial deaths in Malaysia", 2018, p 38.
98 Ibid.
99 Ibid.

facilitated by the AGC as opposed to acting akin to defence lawyers for the police.[100] It is recommended that the AGC should act upon the findings and recommendations of the coroner.[101] This includes instituting criminal prosecutions to prevent those delinquent officials from getting away from their wrongdoings. In other cases where there is only scant evidence available, further investigations must be called for by the AGC in probing the victims' deaths so as to prosecute the offenders and deter further custodial deaths.

[81] Hence, it is essential to relook the five cases highlighted in this article and other inquests where verdicts have implicated the detaining authorities and to follow up accordingly.[102] Senior deputy public prosecutors should be assigned by the AGC to prosecute all cases of police brutality and custodial death, and to conduct such prosecutions at the Sessions Court instead of the Magistrates' Court.[103]

Post-mortem reports

[82] Equally as important, reform of the post-death forensic investigations and the post-mortem process is necessary for the administration of justice. Pathologists must carry out their duties responsibly to ensure their medical observations and conclusions are valid to be relied on by investigating authorities, public prosecutors and the Judiciary.[104] This is also to ensure they do not breach the trust of the families of the victims and society at large. Post-mortem reports must speak for the dead instead of helping the detaining authorities to cover up their crimes. Ideally, pathologists should be instructed and trained to actively look out for signs of non-natural death rather than obfuscating the real cause of custodial death and dismissing it as natural.[105]

[83] In order to ensure that pathologists are able to perform their roles competently and independently, it is time that the post-death forensic investigative procedure in custodial death cases be reformed. There must be a process of check and balance, where post-mortem reports are

100 Ibid.
101 Ibid.
102 Ibid, at p 39.
103 Ibid.
104 Ibid, at p 38.
105 Ibid.

subjected to an auditing process by a panel of independent pathologists from different hospitals as recommended in the UK Harold Shipman Inquiry and pathologists are held to account without the need for a second post mortem or inquest process.[106]

[84] In addition, the MOH should facilitate qualified foreign pathologists to conduct post mortems in Malaysia should family members of the deceased so require.[107] Where pathologists are negligent in preparing the post-mortem report, the MOH should severely deal with them by instituting disciplinary action against them.[108] As for medical authorities who "liaise" with the police, there must be a serious reassessment among them to find out their reasons in doing so.

Policy and law

[85] In terms of policy and law, it is recommended that the Civil Law Act 1956 [*Act 67*] provision which denies the family members of the deceased the right to claim exemplary damages against the Government once liability is established regarding custodial death, should be amended or repealed. The courts should award substantial damages because it is believed that this substantial award will send out a clear message to the public authorities on the need to deter future breaches of the right to life.

[86] The law in Malaysia must be?? applied stringently, however, in doing so, the courts are faced with the dilemma of striking an appropriate balance between the rights of the police officer to conduct an investigation and the rights of the detainee as provided in Part II of the Federal Constitution. Therefore, the time is high for relevant authorities to conduct a study on the following issues:

(i) Give a specific definition on deaths in custody;[109]

(ii) Establish an Independent Police Complaints and Misconduct Commission ("IPCMC");[110] and

106 Ibid, at p 33.
107 Ibid, at p 38.
108 Ibid.
109 Human Rights Commission of Malaysia, "Deaths in Police Custody: A Thematic Study on Lock-Up Conditions and Factors Contributing to the Death", 2017.
110 KS Kua, "We need IPCMC to police the Malaysian police", 2019, <https://www.freemalaysiatoday.com/category/opinion/2019/05/03/we-need-ipcmc-to-police-the-malaysian-poli ce/> (accessed May 3, 2019).

(iii) Allow access to the Standard Operating Procedures ("SOP") of the Police on Lock-Up Management.[111]

[87] By giving a proper and standard definition of death in custody, this will cover proper situations in which officials will be deemed punishable.[112] This also helps to eradicate any confusion amongst the police regarding the meaning of custodial deaths in police detention centres. Turning to the second issue, as the investigative procedure in cases of custodial death is remarkably flawed, it is necessary to establish the IPCMC. A detention centre is supposed to be a safe place for every human being, yet more than often it has been transformed into a potential crime scene where the delinquent officers responsible are rarely held accountable for their heinous actions.[113] Therefore, in dealing with the issue of police accountability, the police should ensure that officers are punished when they violate administrative rules. However, this has rarely been done.

[88] As such, following the 2005 Report of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police, the Government should set up a credible IPCMC to ensure that the police observe and apply laws, rules and procedures when inquiring into custodial death cases.[114] This is because a credible and effective IPCMC would undoubtedly provide some closure and justice for the deceased and their families if it is afforded prosecutorial powers in cases where police abuse of power results in harm or death. The IPCMC must respect and abide by the law it is meant to uphold so as to foster a culture of accountability within the force.[115]

[89] However, the IPCMC alone will not be able to combat the underlying issue at hand. Cooperation by the IPCMC with existing

111 Human Rights Watch, "No Answers, No Apology: Police Abuses and Accountability in Malaysia" (2014), <ISBN: 978-1-62313-117 https://www.refworld.org/docid/533e8f2e4.html> (accessed March 4, 2020).

112 SUHAKAM, "Laporan Kematian dalam tahanan polis", p 224.

113 R Wong, "IGP Responsible for Kugan's Death in Custody, Court Rules", *The Malaysian Insider*, 2013, <http://my.news.yahoo.com/igp-responsible-for-kugan-s-death-in-police-045146944.html > (accessed July 15, 2013).

114 Human Rights Watch, "No Answers, No Apology: Police Abuses and Accountability in Malaysia" (2014), <ISBN: 978-1-62313-117 https://www.refworld.org/docid/533e8f2e4.html> (accessed March 4, 2020).

115 R Razak, "IPCMC needs to have investigative powers, Putrajaya told", <https://www.malaymail.com/news/malaysia/2019/12/23/ipcmc-needs-to-have-investigative-powers-putrajaya-t old/1821638> (accessed December 23, 2019).

mechanisms, civil society and the public in resolving these issues is required. In the meantime, the Police Commission also recommends that a code of practice be adopted with regard to the arrest and detention of persons. It calls for an independent custody officer to be responsible for the welfare and custody of every detainee.[116] This is because it believes that by adopting these effective and independent oversight mechanisms to address and rectify these problems in a holistic manner, there is hope that justice and accountability will prevail in the future.

[90] As for the third issue, it is for the police to declassify and make public all police Standard Operating Procedures ("SOPs") and the Inspector General's Standing Orders ("IGSOs") on arrest, detention, medical treatment for detainees, and use of firearms, and ensure that police officers are trained to adhere to them.[117]

[91] The PDRM plays a fundamental role to address all incidents of non-compliance with SOPs and IGSOs strictly, and institute disciplinary proceedings against the police personnel involved regardless of rank.[118] They should also ensure the installation and proper maintenance of CCTV cameras in all police stations, especially lockups.[119] Ideally, all lockups must adhere to the standards prescribed in the Lock-Up Rules 1953 including but not limited to providing access to adequate food, clean water, sanitary conditions, and medical attention.[120]

[92] For police personnel who are found guilty of directly or indirectly causing the death of a detainee, whether through the use of torture or negligence, the police must censure and punish them following a transparent and accountable internal investigation.[121] This is to end the practice of falsifying evidence, including lockup diaries and personal pocketbook diaries.[122] Whoever is responsible for advocating

116 Ibid.
117 Lawyers for Liberty, "5 Faces: A story of police custodial deaths in Malaysia", 2018, p 39.
118 Human Rights Watch, "No Answers, No Apology: Police Abuses and Accountability in Malaysia" (2014), <ISBN: 978-1-62313-117 https://www.refworld.org/docid/533e8f2e4.html> (accessed March 4, 2020).
119 Lawyers for Liberty, "5 Faces: A story of police custodial deaths in Malaysia", 2018, p 39.
120 Ibid.
121 Ibid.
122 Ibid.

or directing such practices, in particular senior police officers, should then be severely disciplined.[123]

Conclusion

[93] In conclusion, the main cause of custodial deaths of the victims being attributable to diseases "puts a lie to the statistics". In fact, most of the deaths are likely caused by the brutal acts of the officers, causing the victims to live a downtrodden life while being detained. The five cases stressed in this article are proven to be a wake up call that all is not well with the enforcement of law system. They should serve as a poignant lesson that custodial death is a problem which must be stamped out. For reason otherwise, another family bearing the loss of their loved ones will be emotionally scarred for life.

[94] Hence, all relevant authorities should take drastic measures to improve the dismal situation, such as improving the healthcare system in detention facilities, addressing the flaws in inquests, ensuring that post-mortem reports are carefully conducted as well as applying stringent laws to apprehend those who brazenly abuse the law and order. As a whole, they must change the culture of detention to ensure better protection of detainee rights such as their right to life guaranteed under Article 5(1) of the Federal Constitution.

[95] Nevertheless, the authorities' acts alone are insufficient. There is still much work to be done to combat the matter. As such, this prompts the public to work hand in hand with the authorities to resolve the issue of custodial deaths. It is hoped that this article in pointing out the deficiency in the administration of the law enforcement system will be able to urge the relevant officials to prevent yet another death in custody. It is worth remembering that even one death in custody is one too many!

123 Ibid.

Judicial Management as the New Corporate Rescue Mechanism

by

*Justice Wong Chee Lin**

Introduction

[1] The law relating to corporate insolvency in Malaysia was previously governed by the Companies Act 1965 [*Act 125*] and the Companies (Winding-Up) Rules 1972. Previously, the approach to deal with corporate insolvency was by way of receivership process where creditors may appoint a receiver and manager. However, the appointment of a receiver and manager does not prevent the winding up of a company as its purpose is to realise the company's assets under a debenture for the interest of the debenture holders and a receiver and manager does not act in the collective interest of all creditors of the company.

[2] The purpose of the judicial management process, on the other hand, is to rehabilitate a company by appointing an experienced insolvency practitioner to restructure the company while protecting the interest of the company's creditors. This process is introduced under a new corporate rehabilitation scheme in the Companies Act 2016 [*Act 777*] ("CA 2016").

[3] The Corporate Law Reform Committee ("CLRC") was established by the Companies Commission of Malaysia ("CCM") pursuant to sections 17 and 19 of the Companies Commission of Malaysia Act 2001 [*Act 614*] on March 17, 2003 to undertake a fundamental review of the current legislative policies on corporate law in order to propose amendments that are necessary for corporate and business activities to function in a cost effective, consistent, transparent and competitive business environment in line with international standards of good corporate governance.

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* Judge of the High Court of Malaya.

[4] As part of the consultative process to obtain feedback from the relevant stakeholders, the CLRC published 12 consultative documents for public consultation. In one of these consultative documents issued in August 2007,[1] the CLRC recommended the introduction of a statutory scheme known as judicial management to facilitate the rehabilitation process of a financially distressed company. The CLRC also recommended in its final report to the CCM on October 20, 2008 that the court should be empowered to make a judicial management order if certain conditions are satisfied.

[5] Large parts of these recommendations were subsequently incorporated into the CA 2016, and it is clear from the Hansard that the judicial management scheme was introduced to rehabilitate companies that are under financial distress and to reduce the number of cases where companies are being wound up:[2]

> **Datuk Liang Teck Meng (Simpang Renggam)**:
> minta Menteri Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan menyatakan berapakah jumlah kes syarikat yang digulungkan sepanjang tempoh 2010 hingga 2014 dan apakah peranan kerajaan dalam menangani kes syarikat yang digulungkan?
>
> **Timbalan Menteri Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan (Dato' Paduka Ahmad Bashah bin Md Hanipah)**:
> … Jumlah syarikat yang digulungkan sepanjang tempoh 2010 hingga bulan Ogos 2014 adalah sebanyak 9,010. Dari jumlah tersebut sebanyak 3,396 syarikat telah digulungkan secara sukarela manakala sebanyak 5,614 syarikat telah digulungkan melalui perintah mahkamah. Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan prihatin berhubung keperluan memperkenalkan satu mekanisme untuk menyelamatkan syarikat-syarikat yang mengalami masalah kewangan. Namun masih boleh dipulihkan untuk beroperasi secara sedia kala.
>
> Dalam hal ini, Suruhanjaya Syarikat Malaysia yang merupakan agensi kementerian ini telah mengambil inisiatif untuk memperkenalkan beberapa mekanisme penyelamat korporat melalui pembaharuan yang sedang dilakukan kepada Akta Syarikat 1965. Mekanisme yang

1 A Consultative Document, "Corporate Insolvency, Rehabilitation and Changes" by the Corporate Law Reform Committee for the Companies Commission of Malaysia.

2 Hansard, *Parlimen Ketiga Belas Penggal Kedua Mesyuarat Ketiga Bil. 31 DR 09102015* at p 19.

dicadangkan ini akan menjadi satu alternative kepada penggulungan atau pembubaran syarikat. Antaranya ialah pengurusan kehakiman …

[Translation[3]

Datuk Liang Teck Meng (Simpang Renggam):
request the Minister of Domestic Trade, Co-operatives and Consumer Affairs to state the number of companies that have been wound up during the period of 2010 to 2014 and what is the government's role in handling the cases of these wound-up companies?

Deputy Minister of Domestic Trade, Co-operatives and Consumer Affairs (Dato' Paduka Ahmad Bashah bin Md Hanipah):
… The number of companies wound up during the period of 2010 to August 2014 is 9,010. From this number 3,396 companies were wound up voluntarily whereas 5,614 companies were wound up under a court order. The Ministry of Domestic Trade, Co-operatives and Consumer Affairs is aware of the need to introduce a mechanism to rescue companies which are facing financial difficulties. However, they can still be restored to operate as they originally did.

In respect of this, the Companies Commission of Malaysia which is an agency of this Ministry has taken the initiative to introduce a number of corporate rescue mechanisms through the revisions which are being made to the Companies Act 1965. The proposed mechanisms will be an alternative to the winding-up or dissolution of a company. Among them is judicial management …]

The power of the court to make orders

[6] The judicial management process in Malaysia is modelled after the existing Singaporean judicial management regime in Part VIIIA of the Singapore Companies Act (Cap 50) and the "Voluntary Arrangements" contained in the Singapore Bankruptcy Act (Cap 20) which were based on the English administration regime.

[7] Subdivision 2 of Division 8, Part III of the CA 2016 introduced corporate rescue mechanism into our law, one of which is judicial management that came into operation on March 1, 2018 *vide* the publication of the Government *Gazette*.[4]

3 Translation of an excerpt of the Hansard at the Thirteenth Parliament Term Third Meeting on 9 October 2014 at p 19.
4 PU(B) 106/2018.

[8] There are 2 (two) categories of applicants who can apply for a company to be placed under judicial management and for an appointment of a judicial manager as provided for in section 404 of the CA 2016. A company or its creditors may apply for a judicial management order ("JMO") if either of them considers that:

(a) the company is unable to pay its debts; and

(b) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up.

[9] Where a company or its directors, under a resolution of its members or board of directors, makes an application under section 404 of the CA 2016, the court may make a JMO pursuant to section 405 of the CA 2016 in relation to the company if:

(a) the Court is satisfied that the company is or will be unable to pay its debts; and

(b) the Court considers that the making of the order would be likely to achieve one or more of the following purposes:

(i) the survival of the company, or the whole or part of its undertaking as a going concern;

(ii) the approval under section 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section;

(iii) more advantageous realisation of the company's assets would be effected than on a winding up.

[10] The court's power to make a JMO and appoint a judicial manager is set out in section 405 of the CA 2016 as produced above, which is *in pari materia* to section 227B of the Singapore Companies Act ("the Singapore CA") and similar to section 8 of the UK Insolvency Act 1986.

[11] The definition of "unable to pay its debts" is found in section 466 of the CA 2016 where the requirements of the statutory demand are strict and it is clear that a company is deemed to be unable to pay its debts if it is unable to satisfy the demand issued under the said section. Failure to pay upon issuance of such notice issued under section 466

of the CA 2016 would lead the company to be deemed unable to pay with action being taken to wind up the company:[5]

(1) A company shall be considered to be unable to pay its debts if –

(a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;

(b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

[12] Section 227B(12) of the Singapore CA provides that the definition of "inability to pay debts" in section 254(2) shall apply for the purposes of that section which provides, *inter alia*, that a company shall be deemed to be unable to pay its debts if a creditor has served a demand and the company has for 3 (three) weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

[13] It is, however, not necessary to show that the liabilities of the company exceed its assets to establish that a company is unable to pay its debts. In the case of *Re Sunshine Securities (Pte) Ltd*,[6] the Court of Appeal was unimpressed with the argument made on behalf of the appellant company that it held properties worth in excess of the amount owed to its respondent creditor. It was held that the company is commercially insolvent so long as the company does not have assets to meet its current liabilities. The same position was held in

5 *Re Yap Kim Kee* [1990] 2 MLJ 108 at 111, *per* Zakaria Yatim J.
6 [1978] 1 MLJ 57; [1977–1978] 1 SLR(R) 629.

the case of *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd*[7] where the petitioning bank served a statutory demand on the company demanding repayment of debts owing and the company failed to pay. The debt was admitted, but it was contended that the court should have rejected the petition. The trial judge made a winding-up order, which was then affirmed by the Court of Appeal.

[14] The word "will" demands a greater degree of certainty over the company's future insolvency. In practice, this is proved by figures, that is, whether the current assets are less or *will* be less than current liabilities.[8] If the first condition is satisfied, the applicant will then need to persuade the court that it meets any one or more of the criteria in section 405(1)(b) of the CA 2016.

[15] The court merely needs to "consider" that there is a "real prospect" that one of the outcomes set out in the subsection is achievable under section 405(1)(b) of the CA 2016. The section does not require the court to be "satisfied" of the company's actual or likely insolvency as expressed by Hoffmann J in *Re Harris Simons Construction Ltd*[9] and approved by the Singapore Court of Appeal in *Deutsche Bank AG v Asia Paper & Pulp Co Ltd*.[10]

[16] The phrase "likely to achieve" was held in the case of *Re Consumer and Industrial Press Ltd*[11] to connote more than "mere possibility" and Peter Gibson J was in the opinion that "the evidence must go further than that to enable the court to hold that the purpose in question will *'more probably than not be achieved'*."

[17] However, such threshold as held in *Re Consumer and Industrial Press Ltd* was considered too high by Hoffmann J in *Re Harris Simons Construction Ltd*[12] for the following reasons:

> First, "likely" connotes probability but the particular degree of probability intended must be gathered from qualifying words (very likely, quite likely, more likely than not) or context. It cannot be a

7 [1980] 2 MLJ 53.
8 TC Choong and VK Rajah, *Judicial Management in Singapore* (Butterworths, 1990), p 30.
9 [1989] 5 BCC 11.
10 [2003] 2 SLR 320.
11 [1988] BCLC 177.
12 Supra, n 9, pp 203 and 204.

> misuse of language to say that something is likely without intending to suggest that the probability of its happening exceeds 0.5 … Secondly, the section requires the court to be "satisfied" of the company's actual or likely insolvency but only to "consider" that the order would be likely to achieve one of the stated purposes. There must have been a reason for this change of language and I think it was to indicate that a lower threshold of persuasion was needed in the latter case than the former … For my part, therefore, I would hold that the requirements of section 8(1)(b) are satisfied if the court considers that there is a real prospect that one or more of the stated purposes may be achieved.

[18] Vinelott J in the case of *Re Primlaks (UK) Ltd*[13] had followed the approach of Hoffmann J in making a JMO and observed as follows:

> … to give the word "likely" the force of "more likely than not" would, in my judgment, stultify the Act and achieve no useful purpose. The court has to weigh the prospect that one or more of the stated purposes would be achieved against the interests of creditors and others who might be adversely affected by it. The question must always be, if there is a real prospect that one or more of the stated purposes would be achieved, is that prospect sufficiently likely in the light of all the other circumstances of the case to justify making the order?

[19] Both interpretations in *Re Harris Simons Construction Ltd* and *Re Primlaks (UK) Ltd* were subsequently approved by the House of Lords in *Cream Holdings Ltd v Banerjee*.[14]

[20] The phrase "going concern" is interchangeable with the phrase "will continue its operations for the foreseeable future". In short, to qualify under this limb, the court will need to consider whether the making of the JMO will allow the applicant to continue its operations for the foreseeable future.

[21] Gerard McCormack in his article titled "Corporate Rescue Law in Singapore and the Appropriateness of Chapter 11 of the US Bankruptcy Code as a Model"[15] noted on the going concern value as follows:

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13 [1989] BCLC 734, pp 741 and 742.

14 [2004] UKHL 44.

15 Gerard McCormack, "Corporate Rescue Law in Singapore and the Appropriateness of Chapter 11 of the US Bankruptcy Code as a Model" (2008) 20 SAcLJ, p 399.

Going concern value resides principally in various relationships "among people, among assets, and between peoples and assets". It is tough to start a business from scratch. Networks of relationships are at the heart of a modern business. Costs incurred in creating most of these necessary relationships will inevitably be lost if the business is scattered to the winds through a piecemeal sale of assets. Substantial additional costs will be incurred in the establishment of new relationships and the starting up of a business afresh. Moreover, centralised management and other benefits from economies of scale can be the source of going concern value. These points have been well made by the Legal Department of the International Monetary Fund ("IMF") who go so far as suggesting that changes in the nature of the economy has meant that reorganisation and restructuring of ailing firms has become more important than ever before:

> "In the modern economy, the degree to which an enterprise's value can be maximized through liquidation of its assets has been significantly reduced. In circumstances where the value of a company is increasingly based on technical know-how and goodwill rather than on its physical assets, preservation of the enterprise's human resources and business relations may be critical for creditors wishing to maximize the value of their claims.
>
> Simply stated, some companies are worth more as going concerns run by existing managers and with existing shareholders than if sold to third parties and managed by new teams. The going concern surplus may result from the informational advantages of existing management or from the sunk costs of arranging assets in strategic blocks. The surplus has to be substantial, however, to justify the very substantial administrative, negotiating and legal costs of the reorganisation proceedings themselves."

[22] If the making of the order would have a more advantageous realisation of the company's assets as opposed to a winding up, the condition in section 405(1)(b)(iii) of the CA 2016 would have been met. A JMO for such purpose is appropriate for companies with tangible assets where evidence can be easily produced to show that with a moratorium and more time granted by judicial management the business to be sold as a going concern can fetch a much higher price.[16]

16 Supra, n 8, p 35.

Persons who may oppose the judicial management order

[23] Following the petition for a JMO, the right of a secured creditor who has appointed or is entitled to appoint a receiver or receiver and manager of the company's property ("debenture holder") is secured whereby the court shall, subject to section 405(5) of the CA 2016, dismiss an application for a JMO if it is opposed by such secured creditor.[17]

[24] Such right to oppose an application for a JMO is detailed in the book *Companies Act 2016: The New Dynamics of Company Law in Malaysia*[18] as follows:

> Under the CA 2016, both conditions to veto the application must be met through the appointment of the above receiver or receiver and manager, and with the secured creditor opposing the application.
>
> Therefore, only a secured creditor who is entitled to appoint a receiver or receiver and manager over the whole, or substantially the whole, of the company's property would be able to exercise this veto. A secured creditor may have obtained substantial fixed charges over the company's property but without a debenture to allow for the appointment of a receiver or receiver and manager. Such a secured creditor would not be able to exercise any veto over the judicial management application.

[25] This "special right" conferred on the debenture holder can also be seen from section 408(1)(b)(ii) of the CA 2016 which provides that, on the making of an application for a JMO, the applicant is required to cause the notice of the application to be given to only one type of creditor, i.e. the same debenture holder described above.

[26] In the event the debenture holder requires time to consider whether to oppose or support the appointment of a judicial manager and is unable to make up his mind before or at the date of hearing, the court seems entitled to appoint an interim quasi-receiver for the period until the date of the next hearing. The power to do so is found in section 405(2) which provides that upon hearing the application for a JMO, the court may dismiss the application or adjourn the hearing conditionally or unconditionally or make an interim order or any

17 CA 2016, s 409.

18 Kenneth Foo Poh Khean and Lee Shih, *Companies Act 2016: The New Dynamics of Company Law in Malaysia* (CLJ Publication, 2017), p 454.

other order that the court thinks fit. Such a possibility was shown by Vinelott J in an English case, *Re A Company (No 00175 of 1987)*,[19] even though such an order would interfere with the right of the debenture holder to subsequently appoint a receiver and manager in order to take control of the company's assets. However, Vinelott J observed that the court's power could only be exercised in exceptional circumstances where the assets or business of the company are in jeopardy.

[27] On the other hand, creditors other than a debenture holder or secured creditor have a limited right to oppose the nomination of a judicial manager and not to the making of the JMO. This limited right was observed in the case of *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd & Anor*[20] as follows:

> [53] From a reading of the CA 2016, it appears that "other creditors" of the company is only entitled, during the hearing of the Application for JMO, to oppose the nomination of the judicial manager and not to the making of the judicial management order – see: subsection 407(3) of the CA 2016.
>
> [54] In "Judicial Management in Singapore" by TC Choong and VK Rajah at pages 97–98, the learned author says:
>
>> "The holder of a floating charge, alone amongst security holders, is entitled to notice that a petition has been presented by the company or another creditor. Fixed charged holders and unsecured creditors have to depend on the vigilance of their staff in scanning the daily newspapers, Gazettes or the weekly court lists. By the time such a creditor gets wind of the petition, an interim judicial manager could have been appointed. Some safeguards for the creditors have been incorporated in (the Singapore Companies Act). Section 227B(3)(C) (the equipollent to our section 407(3)) allows a majority in number and value of the creditors to oppose the nomination of a judicial manager by the company. If the Court is satisfied as to the grounds of objection, it may invite the creditors to nominate another judicial manager. This right is, however, restricted as the creditors entitled to object have to be a majority in number as well as in value of the debts owed. Furthermore, on a literal reading of (the Singapore Companies Act), when the

19 [1987] BCLC 467.
20 [2018] 10 CLJ 412.

> nomination of a judicial manager is made by the company itself the (majority in number and value) of the creditors can only be heard in opposition to the nomination of the judicial manager and not to the making of the judicial management order. In practice, however, what has happened in the Singapore Courts is that the creditors in general take the opportunity to present facts to the court which will otherwise have only the often jaundiced version of facts presented by a petitioner (eg the company) before it. Strictly speaking, the court CAN REFUSE to hear them on the ground that they have NO LOCUS STANDI."

[28] The same limited right is also provided for in section 227B(3)(c) of the Singapore CA, which allows a majority in number and value of the creditors to oppose the nomination of a judicial manager by the company. This limited right is, however, restricted as the creditors entitled to object have to be a majority in number as well as in value of the debts owed.

The public interest in judicial management

[29] Even if the granting of a JMO is opposed by a debenture holder or the court is not satisfied that the making of the JMO would be likely to achieve one or more of the purposes set out in section 405(1)(b) of the CA 2016, the court can still make the JMO pursuant to section 405(5)(a) if it considers that public interest so requires it:[21]

> (5) Nothing in this section shall preclude a Court –
>
> (a) from making a judicial management order and appointing a judicial manager if the Court considers the public interest so requires; or …

[30] What constitutes "public interest" is not defined in the CA 2016 or the Singapore CA and the phrase did not receive any specific attention in the Parliamentary Debates or Select Committee deliberations either.[22] Therefore, what the "public interest" phrase represents must be determined on a case by case basis. Justice Chan Sek Keong (as he then was) analysed the "public interest" exception in *Re Cosmotron*

21 Section 405(5)(a) of the CA 2016 has the effect of vesting in the court an overriding power to make a JMO if it considers that the public interest so requires.

22 Supra, n 8, pp 38 and 39.

Electronics (Singapore) Pte Ltd[23] as an "overriding power". The public interest must represent an interest or object that would "transcend" the purposes for the granting of a JMO when there was insufficient evidence to persuade the court that those purposes could be achieved:[24]

> Section 227B(10)(a), in my view, has the effect of vesting in the court an overriding power to make a judicial management order if it considers the public interest so requires notwithstanding that it may not be satisfied that the making of the order would be likely to achieve one or more of the purposes set out in s 227B(1). This is undoubtedly the effect of s 227B(10)(a) in relation to s 227B(1). Whether it has the same effect in relation to s 227B(7) which provides that "a judicial management order shall not be made in relation to a company" in the circumstances prescribed therein, is not absolutely clear.
>
> The expression "public interest" in s 227B(10) is not statutorily defined. But since its existence is a requirement for the exercise of an overriding power, it would connote an interest or object which, if achieved, would transcend any or all of the purposes prescribed in s 227B.

[31] The principal ground for dismissing the petition in the case of *Re Cosmotron Electronics (Singapore) Pte Ltd* was the failure to satisfy the requirements of section 227B(1)(b) of the Singapore CA which is *in pari materia* with our section 405 of the CA 2016. The petitioner had failed to persuade the court that either of the relevant purposes relied on would likely be achieved. The judgment suggests a narrower reading of what constitutes public interest and that is only if it would promote transcendent interests or objectives beyond those explicitly articulated by section 227B(1)(b) of the Singapore CA. The court however declined to speculate on how the public interest exception might apply to other requirements of section 227B of the Singapore CA.

[32] This particular aspect of public interest exception was engaged in the case of *Re Bintan Lagoon Resort Ltd*[25] where a receiver and manager of the company's undertaking in a holiday resort located in Bintan, Indonesia had already been appointed. The application for judicial

23 [1989] 1 SLR 251 at [22] and [23].

24 See s 227B(1)(b) of the Singapore CA which is *in pari materia* with s 405(1)(b) of the CA 2016.

25 [2005] 4 SLR 336.

management was brought by a group of unsecured creditors who sought to wrest control of the process of selling the company's assets from the receiver and manager in favour of judicial management. In dismissing the petition, the Singapore court gave a narrow interpretation to the words "public interest" as follows:

> 13 It will be observed that the test in s 227B(10) is not merely whether it is in the public interest but whether the court considers that "the public interest so requires". … the court has the power (if it considers the public interest so requires) to make a judicial management order even though the making of such order is unlikely to achieve any of the purpose which, by virtue of s 227B(1), are prerequisite to the making of such order. Such a power therefore should not be lightly exercised even if it may be in the public interest to do so. The court must be of the view that the public interest so requires; it should not only be opportune but also importunate that the power be exercised …
>
> 14 The question whether the public interest so requires may perhaps best be answered by considering the likely consequences of not making a judicial management order. Will a refusal to make such order lead to or allow the dismemberment of collapse of a company whose failure will have a serious economic or social impact? … if the company were to fail and the debts owed to such a petitioner had to be written off, it will be of no great moment.
>
> …
>
> 16 Companies do fail sometimes and often with adverse consequences to employees, customers and suppliers. It cannot be seriously suggested that the court should exercise its power under s 277B(10) each time this happens …
>
> 17 Will there be any "political repercussions"? In my view, it is a gross exaggeration to suggest that there will be any … Leaving aside the question whether it is appropriate to entertain such considerations, I should state that, in my view, no case was made out to invoke the court's power under s 227B(10).

[33] The court was not persuaded by the reasons that the Singapore Bintan Lagoon project was conceptualised and supported by the Singapore and Indonesian Governments, and that the livelihoods of employees would be lost if the company was wound up. The question to ask was whether the refusal to make the JMO would lead to or

allow the dismemberment or collapse of a company whose failure will have a serious economic or social impact.

[34] The touchstone of the public interest after *Re Bintan Lagoon Resort Ltd* is now severity of economic or social impact by reason of corporate failure, with a rehabilitative object *per se* insufficient. On the facts, any buyer of the undertaking wishing to continue its operations would have to preserve some employment and chains of supply; the adverse consequences of failure and non-recourse to judicial management were thus overstated.[26]

Effect of judicial management order

[35] Once the JMO is made by the court, it remains in force for six months, unless discharged by the court and the court may extend it by a further six months on application by the judicial manager. This duration is provided for in section 406 of the CA 2016 and is in line with the CLRC's proposal of a maximum moratorium period of one year.

[36] Section 411 of the CA 2016 provides for the effect of a JMO where, *inter alia*, upon the making of a JMO, any receiver and manager shall vacate office, and any application for the winding up of the company shall be dismissed. The making of a JMO also brings into force a statutory moratorium whereby a receiver and manager may not be appointed. Likewise, no resolution shall be passed or order made for the winding up of the company and a creditor may not enforce any security over the company's property nor repossess any goods in the company's possession under any hire-purchase agreement, chattels leasing agreement or retention of title agreement, except with the consent of the judicial manager or leave of the court and subject to such terms as the court may impose.

[37] In *Re Atlantic Computer Systems plc (No 1)*,[27] it was held that goods are considered to be in the possession of the company *vis-à-vis* its supplier even when they are entrusted to a third party for repair or have been sublet by the company as part of its trade:

> Although the computer equipment was mostly on the premises of the end-users to whom it had been sublet, it remained "in the

26 Tracey Evans Chan, "The Public Interest in Judicial Management" [2013] *Singapore Journal of Legal Studies* 278–300.

27 [1991] BCLC 606.

> company's possession" for the purposes of s 11(3)(c) of the 1986 Act and therefore the funders were prohibited from taking steps to repossess the equipment except with the consent of the administrators or the leave of the court. Since the administrators' main objective in wanting to retain possession of the computer equipment was to enable them to renegotiate the financial arrangements between the company and the funders in circumstances where the funders would be prevented by s 11(3)(c) from relying on their full proprietary rights and since the administration process was never intended to strengthen the administrators' position in negotiations with property owners who were prevented from asserting their full rights by virtue of s 11, the funders would be granted leave under s 11(3)(c) to enforce their proprietary rights in respect of the equipment, having regard especially to the fact that the sublease rents were insufficient to enable the administrators to pay all the outgoings under the hire-purchase agreements and headleases.

[38] Furthermore, detention of goods under a lien in the face of demand by the owner amounts to the enforcement of security as was held in *Electro Magnetic (S) Ltd v Development Bank of Singapore Ltd*:[28]

> We now turn to ss 227C(b) and 227D(4)(d) of the Act in relation to steps taken to enforce a lien. Having regard to the nature of a lien we respectfully agree with the principle laid down in *Bristol Airport plc* [1990] 744 Ch; [1990] 2 All ER 493 that mere assertion of a lien over a property in the face of demand by the owner thereof is an act enforcing the lien. Indeed, we cannot see what other act would constitute an enforcement. We therefore agree with the submission made on behalf of the appellants that the respondents in refusing to hand over the bills to the appellants and asserting their lien thereon were in effect enforcing the security and they could only do so with leave of the court. Even if these acts were not sufficient to constitute an enforcement of the security, presenting the bills for payment and collecting the proceeds thereof by the respondents plainly amounted to enforcing the security the respondents had on the bills. In our judgment, the respondents had acted in breach of ss 227C(b) and 227D(4)(d) of the Act.

[39] In addition to that, civil proceedings may not be commenced against a company in judicial management. The word "proceedings"

28 [1994] 1 SLR 734.

connotes a process initiated whether in court or by arbitration or a step in such a process.

[40] In *Stroud's Judicial Dictionary*,[29] it is said that the word "process" is "the doing of something in a proceeding in a civil or criminal court and that which may be done without the aid of a court is not a process." Self-help remedies such as contractual set-off or non-judicial actions such as the service of contractual notice to terminate rights or crystallise liabilities are not proceedings within the section.[30]

[41] The Court of Appeal of Singapore in the case of *Electro Magnetic (S) Ltd v Development Bank of Singapore Ltd*[31] defined the term "proceedings" to include a "process initiated whether in court or by arbitration or a step in such a process." A similar position in the United Kingdom was held in the case of *Bristol Airport Plc v Powdrill*[32] where Sir Nicholas Browne-Wilkinson VC said as follows:

> The natural meaning of the words "no other proceedings … may be commenced or continued" is that the proceedings in question are either legal proceedings or quasi-legal proceedings such as arbitration. It is true that the word "proceedings" can, in certain contexts, refer to actions other than legal proceedings, e.g. proceedings of a meeting. In *Quazi v Quazi* [1980] AC 744 the House of Lords held that a divorce by Talaq in Pakistan constituted other proceedings within the statutory phrase "judicial or other proceedings." But in that phrase the word "other" must have referred to non-judicial proceedings since judicial proceedings had already been expressly referred to. No such special feature is present in section 11(3)(d).
>
> Further, the reference to the "commencement" and "continuation" of proceedings indicates that what Parliament had in mind was legal proceedings. The use of the word "proceedings" in the plural together with the words "commence" and "continue" are far more appropriate to legal proceedings (which are normally so described) than to the doing of some act of a more general nature.

[42] In the event that an application for winding up of a company is made, the said application shall be dismissed as provided for under

29 5th edn (1986).
30 *Re Olympia & York Canary Wharf Ltd* [1993] BCLC 453.
31 Supra, n 28.
32 [1990] Ch 744.

section 411(1)(b) of the CA 2016. Under the UK administration order practice, where the winding-up petition has been issued in a court different to the court making the administration order, it is usual to apply to transfer the winding-up petition so that the court making the administration order can also dismiss the winding-up petition. Otherwise, on the date of the hearing of the winding-up petition, the court will be informed of the administration order, and the court will then dismiss the winding-up petition accordingly.[33]

[43] The court in *Re A Company (No 00175 of 1987)*[34] had interpreted section 10(1)(c) of the UK Insolvency Act 1986 which provides that no other proceedings may be commenced or continued except with the leave of the court after the presentation of the administration petition. Counsel for the petitioner of the winding-up petition argued that the presenter of the winding-up petition has a duty to advertise its petition, and steps preparatory to secure attendance at the hearing of the petition such as advertisement are not prohibited by section 10(1)(c) of the UK Insolvency Act 1986. Harman J disagreed with this contention and held as follows:

> In my view it is plainly quite contrary to the whole essence of the administration petition that anything be done during the pendency of such a petition to continue with legal proceedings and to do anything which may be seen in public to damage the company …
>
> Secondly, because the whole essence of s 10, with s 11 following on, is that the administration process is to have priority over all other processes.
>
> In my view it is plainly desirable (and I believe that it is probably in fact required by law by s 10(1)(c) of the 1986 Act) that there should be no advertisement of a pending winding-up petition until determination of the administration petition.

[44] Once it is accepted that the advertisement and gazetting of a winding-up petition falls within the meaning of "other proceedings" or "legal process" under section 410(c) of the CA 2016, even if the advertisement and gazetting of the winding-up petition are mandatory under the Companies (Winding-Up) Rules 1972, sections 410(c) and

33 Edward Bailey and Hugo Groves, *Corporate Insolvency Law and Practice* (Lexis Nexis Butterworths, 2007), p 379.

34 Supra, n 19.

411(4)(c), being primary legislation, should prevail over subsidiary legislation like the Companies (Winding-Up) Rules 1972.[35]

Powers and duties of judicial manager

[45] After the court has granted the JMO, the judicial manager takes control of all the property to which the company is or appears to be entitled, and all powers conferred, and duties imposed on directors are now exercisable by the judicial manager. Section 414 of the CA 2016 provides as follows:

(1) On the making of a judicial management order, the judicial manager shall take into his custody or under his control all the property to which the company is or appears to be entitled.

(2) During the period for which a judicial management order is in force, all powers conferred and duties imposed on the directors by this Act or by the constitution of the company shall be exercised and performed by the judicial manager and not by the directors, but nothing in this subsection shall require the judicial manager to call any meetings of the company.

(3) The judicial manager of a company shall –

(a) do all such things as may be necessary for the management of the affairs, business and property of the company; and

(b) do all such other things as the Court may order.

(4) Without prejudice to the generality of paragraph (3)(a), the powers conferred by that subsection shall include the powers specified in the Ninth Schedule.

(5) The judicial manager may apply to the Court for directions in relation to any particular matter arising in connection with the carrying out of his functions.

(6) Nothing in this section shall be taken as authorizing the judicial manager of a company to make any payment towards discharging any debt to which the company was subject on the making of the judicial management order unless –

35 Rabindra S Nathan (ed), *Law and Practice of Corporate Insolvency in Malaysia* (Sweet & Maxwell Malaysia, 2019), p 76.

(a) the making of the payment is sanctioned by the Court or the payment is made under a compromise or arrangement so sanctioned; or

(b) the payment is made towards discharging sums secured by a security or payable under a hire purchase agreement, chattels leasing agreement or retention of title agreement to which section 415 applies.

(7) If a request is made by or with the concurrence of the judicial manager for the giving of any of the supplies including water, electricity, gas and telecommunications, after the making of the judicial management order –

(a) the supplier may make it a condition of the giving of the supply that the judicial manager personally guarantees the payment of any charges in respect of the supply given after the judicial manager's appointment; or

(b) the supplier shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the company before the making of the judicial management order are paid.

(8) The judicial manager of a company may summon a meeting of the company's creditors, if he thinks fit, and shall summon such a meeting if he is directed to do so by the Court.

(9) Any alteration in the constitution made by virtue of an order under paragraph (3)(b) is of the same effect as if duly made by resolution of the company, and the provisions of this Act apply to the constitution as so altered accordingly.

(10) The judicial manager shall deliver an office copy of an order sanctioning the alteration of the constitution under paragraph (3)(b) to the Registrar within fourteen days from the making of the order.

(11) A person dealing with the judicial manager of a company in good faith and for value shall not be concerned to inquire whether the judicial manager is acting within his powers.

[46] TC Choong and VK Rajah in their book detailed the powers of a judicial manager as follows:[36]

> Following his appointment, one of the immediate tasks of a judicial manager is to hold detailed and wide-ranging discussions so as to find out whether the company can be kept afloat while plans are being worked out either for the turnaround of the company or for the eventual sale of its assets. This inquiry is of course part and parcel of the discovery process by which the judicial manager ascertains whether the company is viable in the long run. In this regard, the judicial manager should be given powers to borrow and to grant security over the assets of the company in order to raise finance necessary for the company's continued operation …

[47] The judicial manager has also been conferred power under section 427(1) of the CA 2016 to apply for a court order for the delivery and seizure of the following properties from the following persons:

(a) a contributory of member of the company;

(b) any person who has previously held office as receiver or receiver and manager of the company's property;

(c) any trustee for, or any banker, agent or officer of, the company; and

(d) any other person who has in his possession or control of any property, books, papers, or records to which the company appears entitled.

[48] The added advantage of applying for an order for seizure and disposal under section 427(3) of the CA 2016 is that it affords a defence against claims for any loss or damage resulting from the seizure and disposal so long as the judicial manager has reasonable grounds for believing that he is entitled to seize and dispose the same and it is not caused by the judicial manager's negligence.[37]

[49] In *Re T&D Industries plc*,[38] the administrator may dispose of some or even all the assets of the company before calling the creditors'

36 Supra, n 8, p 82.
37 Supra, n 35, p 89.
38 [2000] 1 All ER 333.

meeting, and the rationale for this is that it makes good sense for the judicial manager to be given the flexibility to respond on an urgent basis to the demands of a rescue operation.

[50] Furthermore, the judicial manager can sell, pledge, or mortgage any property which is subject to a floating charge including granting another floating charge over the same assets pursuant to section 415 of the CA 2016, without obtaining a court order. However, the floating charge holder will have the same priority in respect of any property which is subject to the security,[39] and if the said property is sold for cash, the floating charge holder would have priority over other unsecured creditors, but it would fall behind in terms of priority to the debts and liabilities incurred by the judicial manager and the remuneration and expenses of the judicial manager by reason of section 417(3) of the CA 2016.

[51] As for property subject to a security other than a floating charge or any goods under a hire-purchase agreement, chattels leasing agreement or retention of title agreement, the judicial manager has the power upon an application to the court to dispose of such properties.

[52] Notice of not less than seven days has to be given to the security holder or the owner of the goods so that they have the opportunity to oppose the application by the judicial manager to dispose of those goods. The court may authorise the judicial manager to dispose of the property if the court is satisfied that the disposal would likely promote one or more of the purposes specified in the JMO.

[53] The net proceeds of the disposal shall be applied towards discharging the sums secured by the security or payable under the hire-purchase agreement, chattels leasing agreement or retention of title agreement and where the net proceeds of the disposal are less than the sums secured by the security or payable under any of those agreements, the security holder or the owner of the goods, as the case may be, may prove on a winding up for any balance due to him.[40]

[54] Where a condition imposed relates to two or more securities, that condition shall require the net proceeds of the disposal to be applied

39 CA 2016, s 415(5).
40 Ibid, s 415(6).

towards discharging the sums secured by those securities in the order of priorities of such securities.[41]

[55] A third party dealing with the judicial manager in good faith and for value need not be concerned to inquire whether he is acting within his powers. If a judicial manager has an apparent authority to do an act, a third party need not inquire whether his actual authority is restricted.[42] This is notwithstanding that the judicial manager is an officer of the court and is not an officer of the company in the sense that a director is an officer of the company. The judicial manager is also an agent of the company and he shall be personally liable on any contract entered into or adopted by him in the carrying out of his functions except where the contract otherwise provides and where notice of disclaimer has been given to the other party in the adoption of a contract.[43]

[56] As regards to the power of the judicial manager to enter into employment contracts, the author of the book *Law and Practice of Corporate Insolvency in Malaysia*[44] noted as follows:

> In the context of an employment contract, a court-ordered winding up of a company would amount to an automatic termination of a contract of employment. However, this is not the case for the appointment of a judicial manager as the company is still in existence and the business is running. In the case of *Powdrill v Watson* [1995] 1 BCLC 386, it was held that the appointment of an administrative receiver or administrator does not automatically terminate an employee's employment contract. This case is of persuasive authority and would likely be the position in Malaysia under the Companies Act 2016. However, the judicial manager has 30 days from the date of the JM order to decide whether to adopt the contract or not. In *Johannes Budisutrisno Kotjo v Ng Wei Teck Michael* [2001] 4 SLR 232 it was held that judicial managers were proper defendants to an action by an employee on a contract of employment that is deemed adopted after 28 days had expired. Therefore, if this case is followed in Malaysia, a contract is deemed adopted after 30 days.

41 Ibid, s 415(7).
42 This is an aspect of the rule in *Royal British Bank v Turquand* [1856] 6 E & B 327.
43 CA 2016, s 416.
44 Supra, n 35, p 94.

Post appointment of judicial manager

[57] Section 418(2) of the CA 2016 provides that the company must submit a statement of affairs to the judicial manager within 14 days after the receipt of the JMO or such longer period as the judicial manager may allow which should not exceed 60 days. The information required to be submitted in the statement of affairs as at the date of the JMO is provided under section 419(1) of the CA 2016 as follows:

(a) particulars of the company's assets, debts, and liabilities;

(b) the names and addresses of its creditors;

(c) the securities held by the creditors respectively;

(d) the dates when the securities were respectively created; and

(e) such other information as may be determined by the Registrar.

[58] The statement must be submitted and verified by an affidavit of at least one of the directors who was, at the date of the JMO, the director of the company and at least one other person approved by the judicial manager from the following categories:[45]

(a) person who is or has been an officer of the company;

(b) person who has taken part in the formation of the company at any time within one year before the date of the JMO; or

(c) person who is in the employment of the company, including a person who is employed under a contract for services, or has been in the employment of the company within that year, and is in the opinion of the judicial manager capable of giving information required.

[59] The judicial manager shall then lodge a copy of the statement of affairs with the Registrar and send to each creditor mentioned in the company's statement of affairs the following information:[46]

(a) a summary of the company's statement of affairs including the causes of its inability to pay its debts; and

45 CA 2016, s 419(2).

46 Companies (Corporate Rescue Mechanism) Rules 2018, r 21(a) and (b).

(b) any observation on the company's statement of affairs which the judicial manager thinks fit.

Statement of proposal and meeting of creditors

[60] With an extension of time granted by the court, if it thinks fit,[47] a judicial manager has a total of 12 months in which to come up with a proposal which he has to see passed by a majority comprising 75% in value of the creditors of the company. A secured creditor who does not surrender its security can only vote in respect of the unsecured element of its claim. At first glance, it does not seem fair to deprive the secured creditor of the right of voting for the value of its security. In a winding up, a secured creditor can only vote in respect of the portion of its claim which exceeds the value of its security because it stands outside of the winding-up process and can exercise its rights as a secured creditor to realise its security notwithstanding the winding up of the company. If a judicial manager is appointed, a secured creditor cannot exercise its rights as a secured creditor and if the scheme involves taking away its right to its security, it would appear to be unfair that a secured creditor cannot vote in respect of the value of its security. It appears that for a scheme to be sanctioned by a single class of creditors where a secured creditor can only vote in respect of the unsecured portion of its claim, the scheme cannot be such as to affect its security. Where the judicial manager wishes to implement a scheme of compromise or arrangement, he still has to comply with section 366 of the CA 2016 (previously section 176 of the Companies Act 1965), where the scheme has to be approved by separate classes of creditors. At such meetings in relation to a scheme under section 366 of the CA 2016, the rule that a secured creditor can only vote in respect of the unsecured element of its claim does not apply. If it were otherwise, the rights of the secured creditors would have been oppressed by the judicial manager. The judicial manager cannot bypass the requirements of section 366 of the CA 2016 by including the scheme of arrangement as part of his proposal to be voted upon by a single class of creditors.

[61] In *Re Swiber Holdings Ltd and another matter*,[48] the court held that although a secured creditor may only vote in respect of the unsecured

47 CA 2016, s 406.
48 [2018] SGHC 180.

element of its claim, a creditor who holds security over the property of a third party is entitled to vote for its full claim without deducting the value of the security. The court also considered the situation where the creditor has realised its security after lodging the proof of debt and whether the creditor must update the proof of debt to reduce its claim. The court held that the creditor may have to reduce its proof, depending on certain factors. If the proof is lodged in the insolvency of the principal debtor, the creditor is entitled to maintain its proof for the full value of the debt unless:

(a) it receives the full value of the debt, in which case it is not entitled to maintain its proof; or

(b) it receives the full value of the part of the debt guaranteed, in which case it must reduce its proof accordingly.

[62] If the proof is lodged in the insolvency of the guarantor, the creditor must update its proof to reflect the reduced value of the principal debt. Significantly, the court considered but decided to depart from longstanding English case law[49] which provided that such creditors need not update their proofs even if the principal debt had reduced.

[63] Section 423(1) of the CA 2016 provides that the judicial manager shall manage the company in accordance with the proposals which have been approved. If the judicial manager intends to make substantial revisions or amendments to the proposals, then there is a need to seek the approval of 75% majority in value of the creditors by calling another creditors' meeting.[50] As noted by Bailey and Groves,[51] the court may interfere with an administrator's analysis of what is a substantial revision but it is unlikely to do so unless the administrator is acting unreasonably. However, no creditors' meeting is necessary if the revisions are insubstantial.

[64] The English approach in cases of urgency and where the revisions are substantial is that the administrator might apply to court for directions rather than adopting the procedure for obtaining the approval by way of a creditors' meeting as seen in the case of *Re Smallman Construction Ltd*.[52] The administrators in that case laid

49 *Re Amalgamated Investment and Property Co Ltd* [1985] 1 Ch 349.
50 CA 2016, s 423(2)–(4).
51 Supra, n 33, p 412.
52 [1989] BCLC 420.

before the creditors of a company a scheme which the creditors approved. However, the scheme could not be implemented as persons outside the company would not accept it. These persons put forward an alternative scheme which was acceptable to the administrators as being in the interests of the company but which was different from that approved by the creditors. The administrators then sought the authorisation of the court to enter into this alternative scheme since it was imperative that the scheme be accepted expeditiously and there was insufficient time in which to obtain the approval of the company's creditors. Knox J in that case came to the following conclusion:

> Where the scheme approved by a company's creditors pursuant to s 24 of the Insolvency Act 1986 proved impracticable, the court had jurisdiction under s 14(3) of the Act in exceptional circumstances to authorise administrators to enter into an alternative scheme. As it was not commercially practicable for the administrators to obtain the consent of the creditors under s 25 of the Act to the alternative scheme which needed to be implemented expeditiously, the facts in the present case were exceptional and the court would approve the scheme …
>
> I emphasise that it will only be in the very exceptional circumstances of there not being a practical possibility of going through the procedure envisaged by s 25 that this residual jurisdiction of the court should, in my judgment, be exercised at any time after s 17(2)(a) has ceased to apply and s 17(2)(b) has come into force. But I am satisfied that this is such an exceptional case, and I therefore propose to make the order.

[65] Hence, under section 423(4) of the CA 2016, any substantial revisions of the proposal which had been approved by the creditors under section 421(3) of the CA 2016 would require a formal approval and only in exceptional circumstances and in a case of great urgency would it be possible for the court to invoke its residual jurisdiction to give directions under section 414(5) of the CA 2016 to allow the judicial manager to enter into a revised proposal without prior consent of the creditors.[53]

Discharging the judicial management order

[66] Finally, there are only four situations in which the JMO is capable of being discharged. It is incumbent on the judicial manager

53 Supra, n 35, p 109.

to apply for the discharge of the JMO if, in the creditors' meeting, the judicial manager's proposal (with or without modification) has not been approved by 75% of the total value of creditors whose claims have been accepted by the judicial manager and the judicial manager reports the result of the meeting to court.[54]

[67] Section 424(1) and (2)(a) of the CA 2016 provide for the second and third situation in which the judicial manager should make an application to discharge the JMO, which is when the purpose of the judicial management has been successfully achieved or is incapable of achievement. The fourth and final situation wherein the JMO is capable of being discharged is provided under section 425(1)(a) and (3)(d) of the CA 2016 which is when the company's affairs, business, and property are being or have been managed by the judicial manager in a manner which is or was unfairly prejudicial to the interests of its creditors or members, or if a particular act or omission by the judicial manager is or would be so prejudicial to them.

Conclusion

[68] The purpose of judicial management is to prevent viable companies in financial difficulties from being liquidated. The availability of a judicial management scheme suggests that company directors who find that the company is in trading difficulty should hand over control to a judicial manager, in order to minimise the potential loss to the company and help the directors to avoid personal liability for fraudulent trading and possible disqualification. Although there can be justified views that the appointment of a judicial manager can be a most expensive and time-consuming exercise whose ultimate victims in the event the salvage attempt is unsuccessful will be the creditors themselves, the most important contribution of judicial management is that it provides a mechanism whereby the future of an insolvent company can be objectively considered and professionally assessed in the interests of all parties concerned.

54 CA 2016, s 421(5).

Child Witnesses: Competency, Credibility, and Corroboration

by

*Justice Evrol Mariette Peters**

Introduction

[1] The starting point in addressing the competency of witnesses is section 118 of the Evidence Act 1950 [*Act 56*] ("Evidence Act"). The provision is of general application and applies to both civil and criminal trials. Section 118 reads:

> 118. *Who may testify*
>
> All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, *by tender years*, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

(Emphasis added.)

[2] The general rule, therefore, is that all persons are competent witnesses unless they are unable to understand questions or to provide rationale answers to such questions; and being a person of tender years is a statutory recognition of the basis for such inability.

"Person of tender years"

[3] The issue that arises revolves around a "person of tender years". Almost inevitably, a "child" comes to mind, although it must be noted that a "child" and a "person of tender years" may not be one and the same. However, both terminologies have been used interchangeably, and hence the reference to the competency of a "child" in section 118 of the Evidence Act.

Who is a "child"

[4] There is no definition of "child" in the Evidence Act, although it is found in various other statutes such as the Penal Code [*Act 574*],

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Child Act 2001 [*Act 611*], Age of Majority Act 1971 [*Act 21*], Evidence of Child Witnesses Act 2007 [*Act 676*], and the Sexual Offences Against Children Act 2017 [*Act 792*]. The definition of a "child", therefore, would include a person below the ages of 10,[1] 12,[2] 16,[3] or 18,[4] depending on which statute applies.

[5] Although there is no definition of "tender years", competency, pursuant to section 118 of the Evidence Act, is not tested on the basis of the age *per se*, but instead, on the child's capacity to understand. Hence, no precise age limit is prescribed, since persons of the same age differ in cognitive development, and the ability to comprehend questions and to provide rationale answers.

[6] The court is, therefore, duty bound to ascertain the intellectual capacity and understanding of the witness to provide a rational account of what he had seen or heard or done on a particular occasion. Hence, whilst it may not be unusual to accept the testimony of children of six or seven years old if they appear to possess sufficient understanding, there have been instances where a child as old as 15 years was considered a "person of tender years".[5]

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1 Penal Code, s 82: *Act of a child under 10 years of age* – "Nothing is an offence which is done by a child *under ten years* of age."

2 Ibid, s 83: *Act of a child above 10 and under 12 years of age, who has not attained sufficient maturity of understanding* – "Nothing is an offence which is done by a child *above ten years of age and under twelve*, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion."

3 Evidence of Child Witnesses Act 2007, s 2: *Interpretation* – "child witness means a person *under the age of sixteen years* who is called or proposed to be called to give evidence in any proceedings but does not include an accused or a child charged with any offence."

4 Sexual Offences Against Children Act 2017, s 2: *Application* – "This Act shall apply to a child who is *under the age of eighteen years* and where this Act relates to any other written law, to a child of such age as specified in such written law." Also see the Child Act 2001, where a child is defined in s 2: *Interpretation* to mean a person *under the age of eighteen years*; and the Age of Majority Act 1971, s 2: *Age of majority* – "Subject to section 4, the minority of all males and females shall cease and determine within Malaysia *at the age of eighteen years* and every such male and female attaining that age shall be of the age of majority."

5 See *Arumugam Mothiyah v PP* [1995] 1 CLJ 58, although in *Steven Pangiraja & Ors v PP* [2014] 4 CLJ 418, the Court of Appeal was of the opinion that a child of 15 years was not a person of tender years.

[7] In order to make this ascertainment, the court should test the capacity of such child by putting suitable questions to him. These questions are put to him during what is known as a preliminary examination.[6]

Competency of a child

[8] In determining the competency of a child, the judge has to first ascertain his or her basic competency, which concerns the child's ability to perceive, remember, and communicate. The judge should then proceed to determine his or her truth-lie competency, which is purposed to ascertain the child's ability to tell the truth.

[9] However, a preliminary question that needs to be answered is why the preoccupation, since time immemorial, with the competency of children? The answer lies in our general perception of children as echoed by Thomson CJ in *Chao Chong & Ors v PP*,[7] in dealing with a 12-year-old witness:

> One reason why children's evidence is regarded with suspicion is that there is always the danger that a child may not fully understand the effect of taking an oath. In this country where evidence is taken on affirmation that consideration loses much of its force. Another reason, however, which in this country possesses undiminished force is that it is a matter of common knowledge *that children at times find it difficult to distinguish between reality and fantasy. They find it difficult after a lapse of time to distinguish between the results of observation and the results of imagination.* In our view something of the sort should have been put to the jury. At the very lowest they should have been invited to consider their own experience in connection with stories told by children. It was not sufficient merely to observe that there is a risk in acting on the uncorroborated evidence of a child. In any event we have grave doubts as to whether even so far as it goes that observation is strong enough.
>
> (Emphasis added.)

[10] Reference may also be made to JD Heydon's *Evidence: Cases and Materials*[8] where the reasons for suspecting the genuineness of children's evidence have been summarised by the author, as follows:

6 See *Sidek bin Ludan v PP* [1995] 3 MLJ 178.

7 [1959] 1 LNS 11; [1960] MLJ 238. See also *Ravamanickam v PP* [1965] 1 LNS 146; *Loo Chuan Huat v PP* [1971] 1 LNS 68.

8 JD Heydon, *Evidence: Cases and Materials*, 2nd edn (London: Butterworths, 1984), p 84.

(a) a child's powers of observation and memory are less reliable than an adult's;

(b) children are prone to live in a make-believe world so that they magnify incidents which have happened to them or invent them completely;

(c) they are also very egocentric so that details seemingly unrelated to their own world are quickly forgotten by then;

(d) because of their immaturity, they are very suggestible and can easily be influenced by adults and other children;

(e) children often have little notion of the duty to speak the truth, and they may fail to realise how important their evidence is in a case and how important it is for it to be accurate; and

(f) children sometimes behave in a way evil beyond their years. For instance, they may consent to sexual offences against themselves and then deny consent.

[11] It is interesting to note that there is no concrete evidence to support any contention that children fabricate more than adults, or that they are less capable of telling the truth. In fact, some psychologists have theorised that very young children are incapable of lying, although it is more generally accepted that there is no correlation between age and honesty.[9]

[12] It has, therefore, been argued[10] that:

(1) there is no correlation between age and honesty and children are not more likely than adults to lie in court;

(2) children's powers of observation and recall in short term are not inferior to those of adults, though they may recall different things and their memory may perhaps fade faster;

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9 Morton, "When Can Lying Start?" (1988) No 13 *Issues in Criminological and Legal Psychology*; Davies and Drinkwater, *The Child Witness – Do the Courts Abuse Children?* (British Psychological Society, Leicester, 1988), p 35.

10 See Abu Bakar Munir, "Evidence of Children – Some Proposals for Reform" [1995] 3 CLJ lxiii, where the author cites the Report of the Law Reform Commission of Western Australia on Evidence of Children and other Vulnerable Witnesses 1991.

(3) the immature tendency to mix fact and fantasy does not apply to children after about the age of six; and

(4) the form of adult abuse is not likely to be a theme of childish fantasy.

[13] However, in Malaysia, it is entrenched in case law that, as a general rule, the evidence of children should be treated with circumspection.

The preliminary examination

[14] The subsequent issue for consideration is the method in determining the competency of the child witness.

[15] In *Sidek bin Ludan v PP*,[11] it was stated by Abdul Malik Ishak J that the trial court's obligation to determine the competency of a child is by way of a preliminary examination and that this is derived from the wording of section 133A of the Evidence Act.

[16] It is pertinent to note that section 133A of the Evidence Act applies to criminal trials only. The section reads:

> Where in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, *if, in the opinion of the court*, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States, shall be deemed to be a deposition within the meaning of that section …
>
> (Emphasis added.)

[17] The object of questioning the child before his actual examination by way of preliminary examination is to ensure that the time of the court is not wasted, especially if it is subsequently found that the child does not possess sufficient intelligence to give evidence. If the child answers the questions satisfactorily, the judge will certify that the child is a competent witness.

11 [1995] 3 MLJ 178.

[18] The test for a child's competency is said[12] to involve four fundamental issues, which should all be taken into account by the judge in his or her determination of a child's competency, namely:

(a) the child's mental capacity to observe an event;

(b) the child's capacity to remember the event about which he or she has to testify;

(c) the child's ability to communicate about the event; and

(d) the child's possession of sufficient intelligence to appreciate the obligation to speak the truth.

[19] Section 133A, however, does not prescribe the form or manner of such inquiry. The child, therefore, should be asked a few simple questions initially, and if needed, more difficult questions should gradually be posed to him, for the purpose of determining his intelligence quality.[13]

[20] Justice Hamid Sultan Abu Backer, in dealing with the evidence of children aged 12 and 14 in *Tajudin Salleh v PP*,[14] observed:

> Under this section it is for the court to decide whether a child or anybody is a competent witness or whether the witness has intellectual competency. The competency or incompetency of a witness is usually decided by the trial judge on a preliminary examination of the witness called "*voire dire*". In the case of a child witness, it should have that capacity to understand the difference between truth and falsehood. *This is tested by the judge by putting simple questions like, "what is your name?" "Where do you live?" "What day of the week is today?" etc.* The object of putting questions on "*voire dire*" before actual examination of that witness is to ensure that the time of the court is not wasted, if it is subsequently found that the child is not intelligent enough to give evidence. If the child answers the questions satisfactorily, the judge will certify that the child is a competent witness.
>
> (Emphasis added.)

12 Bekink M, "The Testimonial Competence of Children: A Need for Law Reform in South Africa" PER / PELJ 2018(21) – DOI <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3407>.

13 *Mohammad Abdul Kadir v PP* [2012] 8 CLJ 490, *per* Mohd Zaki Abdul Wahab JC (as he then was) in dealing with children of the ages of 9 and 11.

14 [2008] 2 CLJ 745.

[21] Although emphasis has been given to the significance of the preliminary examination, the issue that arises is whether it is fatal to the prosecution's case if the judge had not conducted one.

[22] This question was answered in the negative by the Court of Appeal in *PP v Chan Wai Heng*,[15] in dealing with a 9-year-old witness:

> Certain judicial statements from India also indicate that there is no fixed procedure by which the trial judge could ascertain whether a child understands the duty of speaking the truth although he does not understand oath or affirmation.
>
> In *J.V. Wagh v. State of Maharashtra* [1996] Cri. LJ 803 Vishnu Sahai J who had to address a similar issue stated:
>
>> "There can be no dispute that it would have been certainly better for the learned Judge to have first conducted a preliminary examination of the prosecutrix by putting some questions to her and on the basis of answers given by her in reply to them satisfied himself whether she was possessed of sufficient understanding. *However, the failure to hold a preliminary examination of a child witness does not introduce a fatal infirmity in the evidence*. I am fortified in my view by a Division Bench decision of the Allahabad High Court reported in 1959 Cri. LJ 796, *Ram Hazoor Pandey, Appellant v. State, Respondent*, wherein in paragraph 11 Their Lordships have observed thus:
>>
>>> 'Although it is not necessary to have a preliminary examination, namely, *voire dire*, of a child witness in order to make his testimony admissible, nevertheless, such a course is desirable and should be resorted to, for it offers an opportunity to the court to assess the mental capacity of a child witness.'
>>
>> *The whole object of a preliminary examination is to ascertain the level of understanding of a witness. If the same can be assessed from the statement she gave in Court, failure to record a preliminary examination would have no adverse bearing on the prosecution case.* On a perusal of the statement of the prosecutrix, it is implicitly clear that she was possessed of sufficient understanding …"
>
> Another decision also dealt not only with the question of a preliminary examination but also the question of corroboration, which is pertinent

15 [2008] 5 CLJ 805.

to the second aspect of the issue pertaining to the requirements of the proviso to section 133A of the Evidence Act.

In *Kabiraj Tudu v. State of Assam* [1994] Cri. LJ 432 (Gauhati High Court) *per* UL Bhat, CJ and DN Baruah, J, the following statement is relevant:

> "Whenever a witness appears before Court, the Court will proceed on the basis that he is competent to testify. When a witness is a person of tender years or extreme old age or a person who suffers from disease or other abnormality of the body or mind, the Court is alerted to test his competency. *Similarly, where a witness is a child the Court is alerted on the need to decide whether oath can be administered. Ordinarily this satisfaction is to be arrived at by preliminary examination of the witness by the Court. This does not mean that in the absence of preliminary examination the evidence becomes inadmissible since the general rule is in favour of the competency and satisfaction, if necessary, can be arrived in the course of the evidence.* However, trial Courts would do well to conduct preliminary examination to satisfy themselves in regard to the competency under Section 118 of the Evidence Act as well as under the proviso to Section 4(1) of the Oaths Act. It is highly desirable to bring on record the questions and answers put to the witness and to make a record of the satisfaction of the Court. Even in the absence of specific record of preliminary questions or the satisfaction the appellate Court could examine the nature and tenor of the evidence recorded, the manner in which the witness faced in cross-examination and satisfy itself about the competency under both the provisions."

(Emphasis added.)

[23] This was reiterated by Hamid Sultan JCA in *Steven Pangiraja & Ors v PP*:[16]

> *There is no requirement under the Act to conduct a preliminary inquiry though case laws requires the competency to be tested for child of tender years and not child per se.* The learned judge had carefully dealt with the evidence of the child according to law, and this is reflected in many parts of the judgment.
>
> …
>
> Support for the above proposition is found in a number of Indian cases which had dealt with a similar provision *in pari materia* to s. 118

16 [2014] 4 CLJ 418.

of the EA 1950. For example, in *Nafar Sheikh v. Emperor* [1914] ILR 41 Cal 406 Justice Mookerjee had this to say:

> "*Reliance has been placed upon the decision in Fakir v. Emperor 1907 (11) C.W.N. 51 which, it has been urged, is authority for the proposition that it is obligatory upon a Judge to test the capacity of a witness of tender years by appropriate questions and to form his opinion as to the competency of such a witness before the actual examination commences.* It may be conceded that there are expressions in the judgment in the case mentioned which tend to support this broad statement, but, in my opinion, the proposition thus widely formulated is not justified by the terms of s. 118, Evidence Act. That section lays down that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them or from giving rational answers to these questions by tender years."
>
> The Legislature has not prescribed an inflexible rule of universal application to the effect that before a child of tender years is questioned, the Court must by a preliminary examination test his capacity to understand and to give rational answers and must form an opinion as to the competency of the witness before the actual examination commences. In fact, the case of *Reg v. Whitehead* (35) L.J.M.C. 186 shows that the incompetency of a witness may very well appear in the course of his examination-in-chief and that the evidence of a witness so found to be incompetent may at that stage be withdrawn from the jury. The true rule on the subject is concisely stated by Brewer J in *Wheeler v United States* (159) US 523 in these terms: 'The decision of this question (whether the child witness has sufficient intelligence) rests primarily with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial Judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous.' *The mere circumstance that the Sessions Judge did not interrogate the witnesses before their examination began with a view to test their capacity does not, in the view I take of the actual effect of S. 118, Evidence Act, invalidate the trial.* But in the present case there are circumstances which, in my opinion, rendered it plainly desirable that such a course should have been pursued."

(Emphasis added.)

[24] Similar sentiments were echoed by the Court of Appeal in *Shamsinar Abdul Halim lwn PP*,[17] in the following words of Kamardin Hashim JCA (in Bahasa Malaysia):

> Melalui pembacaan kami, seksyen 133A tersebut *bukanlah satu yang mandatori untuk hakim bicara atau pihak pendakwaan untuk mengadakan satu siasatan awal untuk menentukan takat kepandaian seseorang saksi kanak-kanak*. Hakim bicara mempunyai budi bicara untuk menerima keterangan seseorang saksi kanak-kanak yang masih mentah sekiranya pada pendapat Mahkamah kanak-kanak itu memahami apa sebenarnya sesuatu sumpah itu.
>
> … Hakim bicara telah melaksanakan budi bicara kehakimannya dalam kes ini apabila membenarkan SP11 memberi keterangan secara bersumpah dengan tanpa perlu mengadakan siasatan awal untuk menentukan tahap kepandaian SP11 sama ada SP11 memahami keperluan untuk berkata benar. Walau apa pun, keterangan SP11 telah disokong oleh lain-lain keterangan daripada saksi-saksi SP9, SP10, SP13 dan SP15 terhadap identiti Perayu Kedua sebagai orang yang telah menembak si mati.
>
> (Emphasis added.)
>
> [Translation
>
> According to our reading, section 133A is not one that makes it mandatory for the trial judge or for the prosecution to conduct a preliminary examination to determine the level of intelligence of a child witness. The trial judge has the discretion to accept the evidence of a child witness who is of tender years, if in the opinion of the Court, that child understands the nature of an oath.
>
> …The trial judge exercised his judicial discretion in this case in allowing SP11 to give sworn evidence without having to conduct a preliminary examination to determine the level of intelligence of SP11, that is, whether SP11 understood the duty to tell the truth. In any event, the evidence of SP11 was corroborated by other evidence from SP9, SP10, SP13 and SP15 with regard to the identity of the Second Appellant as the person who shot the deceased.
>
> (Emphasis added.)]

17 [2018] 1 LNS 422.

[25] The preliminary examination, although desirable, is therefore not mandatory and the failure to conduct such examination is not fatal, provided the evidence of the child is assessed.

[26] Furthermore, since section 133A of the Evidence Act applies only to criminal trials, the requirement for a preliminary examination to determine the competency of a child in civil trials is further diluted.

Competency of a child under the Sexual Offences Against Children Act 2017

[27] A pertinent issue is whether the Sexual Offences Against Children Act 2017 ("SOACA") has diluted the requirement of establishing the competency of a child.

[28] A brief background of the SOACA is necessary before scrutinising its sections.

[29] The SOACA which came into force on July 10, 2017 is an Act to provide for certain sexual offences against children and their punishment, in addition to other sexual offences against children and their punishment in other written laws, and in relation to it, to provide for the administration of justice for children and connected matters.

[30] Its application is extended to offences prescribed by the Schedule to the SOACA, found in several statutes such as the Penal Code,[18] Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 [*Act 670*],[19] Child Act 2001,[20] Communications and Multimedia Act 1998 [*Act 588*],[21] and the Film Censorship Act 2002 [*Act 620*].[22]

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18 Sections 354: *Assault or use of criminal force to a person with intent to outrage modesty*; s 372: *Exploiting any person for purposes of prostitution*; s 375: *Rape*; s 375B: *Gang rape*; s 376: *Punishment for rape*; s 376A: *Incest*; s 376B: *Punishment for incest*; s 377A: *Carnal intercourse against the order of nature*; s 377B: *Punishment for committing carnal intercourse against the order of nature*; s 377C: *Committing carnal intercourse against the order of nature without consent, etc*; s 377CA: *Sexual connection by object, etc*; s 377D: *Outrages on decency*; s 377E: *Inciting a child to an act of gross indecency*; s 509: *Word or gesture intended to insult the modesty of a person*.

19 Section 14: *Offence of trafficking in children*; s 15: *Offence of profiting from exploitation of a trafficked person*.

20 Section 31: *Ill-treatment, neglect, abandonment or exposure of children*; s 43: *Offences*.

21 Section 211: *Prohibition on provision of offensive content*; s 233: *Improper use of network facilities or network service, etc.*

22 Section 5: *Obscene film*.

[31] The issue that arises is whether the SOACA has abolished the requirement of establishing the competency of a child. Reference is made to both section 17 of the SOACA and section 118 of the Evidence Act.

[32] Section 17 of the SOACA reads:

> 17. *Presumption as to capacity of a child witness*
>
> Notwithstanding anything contrary in any other written law, in any proceedings against any person relating to any offence under this Act, or any offence specified in the Schedule where the victim is a child, *a child is presumed to be competent to give evidence unless the court thinks otherwise*.

(Emphasis added.)

[33] Section 118 of the Evidence Act reads:

> 118. *Who may testify*
>
> *All persons shall be competent to testify unless* the court considers that they are *prevented* from understanding the questions put to them, or from giving rational answers to those questions, *by tender years*, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

(Emphasis added.)

[34] The issue is whether section 17 of the SOACA is any different from section 118 of the Evidence Act. A scrutiny of the provisions reveal that both sections operate on the principle that a child is presumed competent,[23] and that such presumption is displaced if the court thinks otherwise.

[35] Furthermore, just like how there is no mandatory requirement for a preliminary examination when dealing with the competency of a child in section 118 of the Evidence Act, there is also none in the application of section 17 of the SOACA.[24]

[36] However, an aspect of section 17 which needs to be scrutinised is the phrase "where the victim is a child, a child is presumed to be competent". The question that arises is whether the child who is

23 The phrase "All persons" in s 118 includes a child.

24 On the application of s 17 of the SOACA, see *Ahmad Hafizal Darusalam lwn PP* [2019] 1 LNS 1172.

testifying must also be the victim. The answer, which appears to be in the affirmative, means that if the child is merely a witness, but neither a victim nor the complainant, section 17 of the SOACA will have no application.

[37] A further limitation in section 17 is that the provision is confined only to the SOACA, which means that it applies only to cases where the accused is charged for an offence under the SOACA or its Schedule.[25]

[38] These factors limit the application of section 17 of the SOACA.

To swear or not to swear … and how to swear?

[39] The next step in addressing the competency of a child is to determine if he should give evidence on oath. This is due to the fact that the evidence of a child witness given on oath or otherwise affects the application of the corroboration rules.

[40] Although sworn evidence is loosely referred to as evidence on oath, the difference between an oath and affirmation must be appreciated. In *Ahmani Sdn Bhd v Abu Karim Baharom & Ors*,[26] the difference was highlighted by KN Segara J:

> "Oath" means a solemn appeal to a deity or revered person or object in witness that the statement is true; "Affirm" means make affirmation, and "affirmation" means a solemn declaration by a person who conscientiously declines taking an oath. [*The Concise Oxford Dictionary* (5th edn)].

[41] The Oaths and Affirmation Act 1949 [*Act 194*], in section 7, provides the witness with the option to testify upon affirmation to tell the truth, without the need to swear upon oath. The section reads:

> 7. *Where oath required affirmation may be made*
>
> Where any person is required by this Act or any other written law to take an oath the requirement shall be deemed to be complied with if an affirmation is made.

[42] According to KN Segara J in *Ahmani Sdn Bhd v Abu Karim Baharom & Ors*, a form of affirmation sufficient to satisfy the requirement of Oaths and Affirmation Act 1949 is as follows:

25 See supra, nn 18–22.
26 [2000] 2 CLJ 625.

> I, A. B. solemnly and sincerely declare as follows (or "that as touching the matters in question I will speak the truth the whole truth and nothing but the truth").

[43] It must be borne in mind, therefore, that when reference is made to "sworn evidence", it includes evidence given upon affirmation.

[44] Whether a child gives sworn evidence depends on whether he understands the nature of an oath. In *R v Hayes*,[27] it was explained by Bride LJ:

> The important consideration we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal, social conduct.

[45] There are several arguments in support of abolishing the distinction between a child who gives evidence on oath and one who does not. This is based on the contention that there is no evidence to show that one who takes an oath or affirmation tells the truth, even when he is aware that lying on oath is an offence. This means that appreciating the solemnity of telling the truth cannot guarantee that the truth will be told. Conversely, it does not follow that failing to sufficiently articulate the nature of an obligation in the form of an oath will result in lying. Research indicates that there is no correlation between understanding the meaning of the oath and taking it, and actually speaking the truth in court,[28] especially so with the secularisation of the process of taking the oath.

[46] In the article "The Relationship between Competency of a Witness and Swearing a Religious Oath or Making Non-Religious Affirmation before the Malaysian Courts",[29] it was stated by the author:

> It is commonly believed that the evidence will be strengthened when the witness elects to swear a religious oath. This is most perplexing.

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27 (1977) 64 Cr App R 1.

28 Ontario Law Reform Commission, *Report on Child Witnesses* (OLRC, Toronto, 1991).

29 Teoh Shu Ye, "The Relationship between Competency of a Witness and Swearing a Religious Oath or Making Non-Religious Affirmation before the Malaysian Courts" [2019] 1 LNS xciv.

> To the author, there are three important logical factors that must be borne in mind in denying such an unproven belief as abovementioned. Firstly, the diversity of individual witnesses from different ethnic and cultural backgrounds who can understand the significance of taking an oath or making an appropriate form of affirmation; secondly, how can the court confirm that the witness who swears the oath has reflected on his religious beliefs and is therefore truthful when giving evidence; and, thirdly, how does the court determine the witness who is aware of his rights and with no religious sacred text involved is not being truthful in his testimony since it is a solemn promise duly made by him which binds on his conscience (irrespective of him being either a heathen or a religious individual).

[47] Excluding the relevant evidence of an unsworn witness under section 133A of the Evidence Act, therefore, appears to run counter to the aspiration of rendering ready and available all relevant evidence before the court, and it also discounts the ability and wisdom of the judge to make decisions regarding the weight to be given to evidence and the credibility of witnesses.

[48] This is fortified by section 12 of the Oaths and Affirmation Act 1949, which provides that the omission to give evidence upon oath or affirmation should not render the evidence inadmissible. The section reads:

> No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

[49] However, the distinction between a child testifying on oath as opposed to giving unsworn evidence is maintained in the Evidence Act, and it is the judge who decides the nature of the child's evidence, as it affects the application of the corroboration rules.

[50] In the same preliminary examination, this exercise is conducted to determine whether the child is in a position to take the oath. In *Yusaini bin Mat Adam v PP*,[30] reference was made to Andrews and

30 [1999] 3 MLJ 582.

Hirst *Criminal Evidence*[31] where it was elaborated by KC Vohrah J (as he then was) as follows:

> Even for the purpose of giving unsworn testimony, it was still necessary to establish by positive means that the child understood the ordinary duty of telling the truth. It was the duty of a court or judge to determine competence and the proper level of competence before proceeding to admit evidence from a child. This could involve the child being asked questions by the trial judge, and it could also involve the calling of expert opinion evidence from child psychologists.
>
> If a child was allowed to testify without such prior examination, any conviction based on that child's evidence was liable to be quashed on the ground of material irregularity:

[51] Justice Mohd Zaki Abdul Wahab in *Mohammad Abdul Kadir v PP*[32] observed the following:

> If the result proved he had the intelligence quality to give evidence, he could be shown with a document containing the prescribed form of oath. The child should then be asked to read or should be assisted to read the prescribed form of oath. Following that, the child should be asked if he understands the oath as shown to him. Depending on the answer, the magistrate should decide which form of evidence to be recorded from the child.

The corroboration requirement

Sworn evidence

[52] If the judge decides that the child should give sworn evidence, corroboration is required only as a matter of practice and prudence, and not as a matter of law.

[53] At this juncture, it is pertinent to note that corroboration as expounded in *R v Baskerville*[33] refers to independent testimony that affects the accused by connecting or tending to connect the accused with the crime. It must be evidence which implicates him, that is,

31 Andrews, JA and Hirst, M, *Criminal Evidence*, 3rd edn, (London: Sweet & Maxwell, 1997).
32 [2012] 8 CLJ 490.
33 [1916] 2 KB 658.

which confirms in some material particular not only the evidence that a crime had been committed, but also that the accused had committed it.

[54] The principles in *R v Baskerville* have been assimilated into Malaysian jurisprudence through a plethora of cases including *Attan bin Abdul Ghani v PP*,[34] *Farose bin Tamore Mohmad Khan v PP*,[35] and *PP v Lim Kiang Chai*.[36]

[55] The requirement of corroboration as a matter of practice and prudence only, means that the judge has the discretion to either insist that the child should be corroborated, or dispense with such requirement. If the judge insists on the requirement for corroboration, he must then be sure of it before he convicts the accused. An illustration may be seen in the case of *PP v Mohd Noor Abdullah*,[37] where although a 14-year-old child witness gave sworn evidence, the judge insisted that her evidence should be corroborated.

[56] However, if the judge dispenses with such requirement, he must then administer the corroboration warning, which is mandatory. It has been said that "there is no magic formula and no set words that must be adopted to express the warning. Rather, the good sense of the matter must be expounded with clarity and in the setting of a particular case".[38]

[57] Although the corroboration warning does not involve some legalistic ritual, the manner in administering the corroboration warning was clarified in the case of *Dalip Bhagwan Singh v PP*,[39] where it was held that the judge's mere act of warning himself will not be sufficient to prevent the quashing of the conviction. It is important, therefore, for the judge to state further that despite the uncorroborated evidence of the witness, he has decided to convict nonetheless, because he is convinced that the case has been proved beyond a reasonable doubt.

[58] The failure of the judge to administer the corroboration warning would render the conviction illegal.

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34 [1970] 2 MLJ 143.
35 [2016] 6 MLJ 277, FC.
36 [2016] 2 MLJ 153, FC.
37 [1992] 3 CLJ (Rep) 404.
38 *Ng Yau Thai v PP* [1987] 2 MLJ 214, SC, *per* George Seah SCJ.
39 [1998] 1 MLJ 1, FC.

Unsworn evidence

[59] If the judge decides that the child should give unsworn evidence, the first point of reference is section 8 of the Oaths and Affirmations Act 1949. The section reads:

> 8. *Evidence of persons of immature age*
>
> Any person who by reason of immature age ought not in the opinion of the court to be admitted to give evidence on oath or affirmation, shall be admitted to give evidence after being cautioned by the court to speak the truth, the whole truth, and nothing but the truth.

[60] If the child witness gives unsworn evidence in criminal trials, the proviso in section 133A of the Evidence Act is triggered. The proviso reads:

> Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence *unless that evidence is corroborated by some other material evidence* in support thereof implicating him.
>
> (Emphasis added.)

[61] Although there are grounds to argue that the child's intelligence is frequently underestimated, the Evidence Act provides with clarity that the unsworn evidence of a child shall not be used to convict the accused person in the absence of corroboration.

[62] The implication of the proviso to section 133A of the Evidence Act was detailed by Justice Abdul Malik bin Ishak in *Sidek bin Ludan v PP*[40] as follows:

> The proviso to s 133A of the Act in simple terms means this: A conviction cannot stand on the uncorroborated evidence of an unsworn child witness. It is insufficient for the trial court to merely administer a warning on the dangers of so convicting as the amendment now makes it a rule of law, more explicitly, that the evidence of an unsworn child witness shall be corroborated. This amendment distinguishes between the testimony of a sworn and an unsworn child witness. In the case of a sworn child witness the old rule of prudence applies, *viz*, the need to give an exhaustive warning on

40 [1995] 3 MLJ 178. See also *Mohd Naki Mohd Yusuf v PP* [2014] 7 CLJ 441, FC.

the dangers of convicting on such uncorroborated evidence. Whereas in the case of an unsworn child witness, s 133A of the Act applies.

What amounts to corroboration

Mutual corroboration

[63] The subsequent issue that arises is whether mutual corroboration of children giving unsworn evidence is allowed. The answer is in the negative, based on the phrase "unless that evidence is corroborated by some other material evidence in support thereof" found in the proviso to section 133A of the Evidence Act. This phrase was clarified by Lord Cross of Chelsea in *Director of Public Prosecutions v Hester*:[41]

> Again, the words "some other material evidence" are, to my mind, ambiguous. Do they mean evidence from a witness other than the unsworn child for whose evidence corroboration is being sought? Or do they mean evidence admitted otherwise than by virtue of the section? On the first construction the evidence of unsworn child *A* could be corroborated by the evidence of unsworn child *B* and *vice versa*, but on the second construction it could not. The second construction has in fact been adopted hitherto by the courts of this country and of Northern Ireland. I think that that is right.

[64] In *PP v Mohammad Terang bin Amit*,[42] Justice Muhammad Kamil affirmed the findings of the learned magistrate in applying the law as cited in *Director of Public Prosecutions v Hester*, that is, an accused person is not to be convicted on the unsworn evidence of a child unless it is corroborated by some other material evidence in support thereof implicating the accused, and if there are two or more children giving unsworn evidence to the same effect, still there can be no conviction unless there is some other evidence corroborating their testimonies.

[65] The ruling in *Director of Public Prosecutions v Hester* would mean that mutual corroboration between two children giving sworn evidence is allowed, as well as between one child who gives sworn evidence and another who does not.

[66] Other forms of corroboration that may be used to corroborate a child giving unsworn evidence include medical evidence, the

41 [1973] AC 296, HL.
42 [1999] 1 MLJ 154.

condition of the child, conduct of the accused, and former statements of that child.

Medical evidence

[67] In cases involving rape, medical evidence becomes crucial as it may provide evidence of penetration and injuries which may corroborate the contention that the intercourse was non-consensual. However, although medical evidence is generally inconclusive of the elements of rape,[43] on a charge of statutory rape where consent is irrelevant, medical evidence showing any fresh tear in the hymen is sufficient to corroborate the evidence of the victim on the issue of penetration.[44]

Distress condition

[68] The distress condition of the child complainant or witness is a further example of evidence that may amount to corroboration of his or her unsworn evidence. However, judges have cautioned against relying on such evidence since it may not be independent.

[69] In *Liew Kim Yong v PP*[45] where reference was made to *R v Redpath*,[46] it was elaborated by Grimberg JC in the Singapore Court of Appeal:

> It is well established that there must be a guarded approach to *ex post facto* crying or distress as evidence of corroboration – see, for example, *R v Wilson* (1979) 58 Cr App R 304 – because distress might result from other causes dissociated from the alleged offence; or the complainant "might be putting on an act or simulating distress" – the words of Lord Parker CJ in *R v Redpath* (1962) 46 Cr App R 319. That the learned trial judge warned himself of the danger is manifest. In doing so, he adopted Lord Parker's phraseology:
>
> > "Jackie's mother had found her in a distressed state barely a few hours after the rape. The circumstances under which the mother found her did not suggest that Jackie was putting on an act and was simulating distress. Her mother had found her crying in the bedroom and, when questioned, had refused to tell the mother what had happened because she was too ashamed to do so.

43 *James v R* (1970) 55 Cr App Rep 299, PC.
44 *Syed Abu Tahir a/l Mohamed Esmail v PP* [1988] 3 MLJ 485.
45 [1989] 3 MLJ 323.
46 (1962) 46 Cr App R 319, CCA.

> Jackie's distressed condition lent support to her story of being raped."

Former statements of witness

[70] With regard to using the former statements of the witness to corroborate himself,[47] reference is made to section 157 of the Evidence Act which reads:

> 157. *Former statements of witness may be proved to corroborate later testimony as to same fact*
>
> In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact *at or about the time when the fact took place*, or before any authority legally competent to investigate the fact, may be proved.

(Emphasis added.)

[71] The words "at or about the time when the fact took place" found in section 157 has been interpreted in *PP v Teo Eng Chan*,[48] *PP v Paneerselvan*,[49] and *PP v Mohamed Terang bin Amit*[50] to mean "the first reasonable opportunity" or "as speedily as could reasonably be expected". In *PP v Teo Eng Chan* it was stated by P Coomaraswamy J in the Singapore High Court:

> Our law is contained in s 157 of the Evidence Act which provides that a witness' testimony may be corroborated by any former statement made by such witness "… relating to the same fact at or about the time the fact took place or before any legal authority competent to investigate the fact". The expression "at or about the time the fact took place" is not to be limited in terms of hours or days. *It is limited by the terms "first reasonable opportunity" or "as speedily as could reasonably be expected"*.
>
> (Emphasis added.)

[72] This would mean that if the child witness relates the incident at the first reasonable opportunity after the incident, that statement may

47 *Lim Guan Eng v PP* [2000] 2 MLJ 577, FC.
48 [1988] 1 MLJ 156.
49 [1991] 1 MLJ 106.
50 [1999] 1 MLJ 154.

be used to corroborate the child during the trial, although it will be considered a weak type of corroboration due to the fact that it is not independent, as it emanated from the child himself.[51]

A time for change?

[73] Section 133A of the Evidence Act, which was introduced in the Evidence Act in 1971,[52] is the equivalent of section 38 of the UK Children and Young Persons Act 1933 ("UK CYP Act"). In England, prior to 1933, children could testify in criminal proceedings only if they were found competent to swear the same oath as adult witnesses. Section 38 of the UK CYP Act first introduced the principle of unsworn evidence in criminal cases.

[74] However, despite the repeal of section 38(1) of the UK CYP Act by the UK Criminal Justice Act 1988 ("UK CJA"), section 133A is still maintained in the Evidence Act. On this note, some suggestions and enlightening comments made by KC Vohrah J (as he then was) in *Yusaini bin Mat Adam v PP*[53] are observed:

> Section 38 of the UK Children and Young Persons Act 1933 has been repealed and replaced by some other law and perhaps it is time to study why it was repealed and whether we should do the same to our section 133A of the Evidence Act bearing in mind, too, the experience of other Commonwealth countries on the matter of children's evidence in court and also that in our judicial system jury trials have been abolished. In addition, rules relating to corroboration need a re-look and the necessity for the examination procedures of child witnesses to be child-friendly need to be taken into account.

[75] It is encouraging to note that the call to change, advocated by Justice KC Vohrah, in particular those related to child-friendly procedures, was heeded when the Evidence of Child Witnesses Act 2007 came into force.

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51 *Liew Wah Ming v PP* [1963] MLJ 82; *Mohd Yusof Rahmat v PP* [2009] 2 CLJ 673, CA. See also Mohd Akram b Shair Mohamed, "The Corroboration Controversy Created by s 157 of the Evidence Act 1950" [2013] 6 MLJ cxx.

52 I.e. via the Evidence Ordinance (Extension) Order 1971 [*PU(A) 261/1971*].

53 [1999] 3 MLJ 582.

Evidence of Child Witnesses Act 2007

[76] The Evidence of Child Witnesses Act 2007 ("ECW Act") came into force on December 31, 2007. Its application is not mandatory[54] and merely provides the child witness, defined as a person under the age of 16 years,[55] with a choice of the manner in which he wishes to give evidence.[56]

[77] A child witness, according to the ECW Act, may, at any stage of a trial, give evidence in any one or a combination of the following:

(a) by having a screen between him and the accused or a child charged with any offence;[57]

(b) by live link;[58] and /or

(c) by video recording.[59]

[78] It appears that the ECW Act does not affect the rules regarding competency or corroboration, but only facilitates the manner in which the child is to give evidence. This is clear from section 16 of the ECW, which reads:

> 16. *Application of Evidence Act 1950 and Criminal Procedure Code*
>
> The provisions of the Evidence Act 1950 and the Criminal Procedure Code shall continue to apply except in so far as those provisions are expressly modified by this Act.

[79] The changes brought about by the ECW Act, therefore, do not have any bearing whatsoever on the implications of section 133A of the Evidence Act.

Corroboration of a child giving unsworn evidence under the SOACA

[80] The subsequent issue that arises is whether the corroboration requirement prescribed for children giving unsworn evidence under section 133A is eradicated by the SOACA.

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54 See *Mohammad Nizam Mohd Yusof lwn PP* [2013] 1 LNS 157.
55 ECW Act, s 2.
56 Ibid, s 3.
57 Ibid, s 4.
58 Ibid, s 5. See also Criminal Procedure Code, s 272B.
59 Ibid, s 6. See also *PP lwn Tan Yean Siang & Satu Lagi* [2017] 1 CLJ 606; *Muhammad Adib Sufyan Azman v PP* [2019] 8 CLJ 254.

[81] The relevant provision in the SOACA is section 18 which reads:

> 18. *Evidence of child witness*
>
> Notwithstanding anything contrary in any other written law, in any proceedings against any person relating to any offence under this Act, or any offence specified in the Schedule where the victim is a child, the court may convict such person of such offence on the basis of the uncorroborated evidence of a child, given upon oath or otherwise.

[82] Section 18 of the SOACA is meant to be a departure from section 133A of the Evidence Act.[60] In fact, in his speech titled "The Role of Dissenting Judgments in the Malaysian Judicial System" that was presented at the 17th Tan Sri Ahmad Ibrahim Memorial Lecture, Tan Sri Richard Malanjum commented:

> Another example would be the judgment of KC Vohrah J (as he then was) in *Yusaini bin Mat Adam v PP*. In that case, His Lordship after referring to the change in law in England, recommended that section 133A of the Evidence Act 1950 be repealed. That section makes it mandatory for a judge to corroborate the unsworn evidence of child witness before using it to sustain a conviction.
>
> While Parliament has not yet repealed the said section 133A, it has passed the Sexual Offences Against Children Act 2017. Under that Act, in cases where children are victims of sexual crimes, their evidence no longer requires mandatory corroboration. *The Explanatory Statement to the Sexual Offences Bill, states that this was for the express purpose of departing from section 133A. This, in my view, vindicates Justice Vohrah for his comment*.
>
> (Emphasis added.)

[83] However, the effect that section 18 of the SOACA has on section 133A is limited in view of the fact that the SOACA itself is confined to offences within the SOACA and those stipulated in its Schedule.

[84] Secondly, an aspect of section 18 that needs to be scrutinised is the phrase "where the victim is a child, the court may convict … on the basis of the uncorroborated evidence of a child". The question that

60 See *Ahmad Hafizal Darusalam lwn PP* [2019] 1 LNS 1172.

arises is whether the child who is testifying must also be the victim. The answer, which appears to be in the affirmative,[61] means that if the child is merely a witness, but neither a victim nor the complainant, section 18 will have no application.

[85] It is opined, therefore, that section 18 of the SOACA is severely limited and is only a slight dilution on the implications of section 133A of the Evidence Act, rather than an absolute exception to it.[62]

Developments in other countries

[86] In the United States, various grounds of witness' incompetence, including age, have been eliminated,[63] and child witnesses are treated by the courts like other general witnesses, as far as competency is concerned, and the acid test is whether the witness understands the difference between lying and telling the truth in court, whether on oath or affirmation, or otherwise.

[87] In the UK, it is pertinent to note that before the repeal of section 38 of the UK CYP Act, tireless efforts were made for reform, on the basis that the corroboration rules presented a formidable obstacle to the prosecution of offences against children.

[88] Although children may be confused by the concepts of duty, truth, oath and perjury, and that caution should always be exercised by judges, it does not automatically mean that the evidence of children should be discounted altogether.

[89] As finally enacted, the UK CJA contained four main provisions relating to child witnesses. Section 32 of the UK CJA focuses on trial procedure, permitting children under the age of 14 to give evidence by video link in criminal trials for offences of a sexual or violent nature.

[90] Section 34 of the UK CJA addresses the rules of evidence. Subsection (1) repeals the proviso to section 38(1) of the UK CYP Act whereby an accused person could not be convicted on the unsworn evidence of a child without there being some independent

61 See views expressed in Abu Bakar Munir, *et al*, "Child Evidence In The Sexual Offences Against Children Act 2017: So Close, Yet So Far" [2018] 6 MLJ xxxii.

62 See also ibid; Abu Bakar Munir, *et al*, "The Sexual Offences Against Children Act 2017: Flaws in the Law" [2018] 5 MLJ cxx; Dr Manique Cooray , "Sexual Offences Against Children Bill 2017 (Malaysia): Some Observations" [2017] 3 MLJ cvii.

63 Federal Rules of Evidence, r 610.

corroboration of the child's evidence. Subsection (2) abolishes the requirement for the jury to be warned of the danger of convicting on the uncorroborated evidence of a child where the only reason for the warning is that the evidence is that of a child. Subsection (3) allows unsworn evidence admitted under section 38 of the UK CYP Act to corroborate evidence, whether sworn or unsworn, given by any other person. The live link became operational on January 5, 1989.

[91] What is interesting to note is the abolition in the UK of the corroboration warning requirement as well. In Malaysia, the corroboration warning requirement is mandatory in cases where the requirement of corroboration itself is dispensed with in cases where children are giving sworn evidence, and that the lack of such corroboration warning would render the conviction illegal. Again, this is an impediment to the quest of obtaining the truth from child witnesses.

[92] The corroboration warning is also an aspect that needs to be relooked as the failure to administer the corroboration warning when accepting the uncorroborated evidence of sworn children may render the conviction illegal.

[93] It is opined that the corroboration warning does not affect the substance of the evidence of the child witness and especially so when the corroboration warning was traditionally administered to the jurors. However, now that jury trials have been abolished,[64] the corroboration warning does not really serve its original purpose, except for the requirement for the judge to declare in his judgment that he had reminded himself of the risks of convicting on the uncorroborated evidence of the child.

Conclusion

[94] Dealing with child witnesses is not an easy task. On one hand, there have been repeated calls to abolish the provision, based on empirical evidence and psycho-legal research on the cognitive development of children to show that there is no reason for the mandatory corroboration requirement for children giving unsworn evidence as prescribed by section 133A of the Evidence Act.

64 Jury trials have been abolished with effect from February 17, 1995 by s 11 of the Criminal Procedure Code (Amendment) Act (A908).

[95] On the other hand, there is still apprehension of the quality of the evidence of children, and to err on the side of caution, most judges have slanted towards treating the evidence of child witnesses with caution.

[96] Although children may not be able to describe things or events perfectly in adult terms, they are still able to convey the message. An example may be seen in the case of *Mohd Yusof Rahmat v PP*,[65] where a 5-year-old child gave an imperfect description of rape, when she said that the accused had put his "*ular*" into her "*em-em*". Following a series of consultations with a child psychiatrist, it was confirmed that the description of "*ular*" meant penis to the victim, whilst "*em-em*" referred to her vagina.

[97] This demonstrates that children are able to remember and recount incidences, although perhaps not fully in adult terms. To assume that all children are unable to distinguish between reality and fantasy is a dangerous generalisation and would lead to unjust consequences.

[98] In conclusion, in the interest of justice, more latitude should be given to the judge to use his wisdom and power to accept the evidence of a child witness, whether on oath or otherwise, or to insist on corroboration or to dispense with such requirement altogether, with or without the requirement to administer the corroboration warning.

65 [2009] 2 CLJ 673.

The Daien Maru No 18 – The Aftermath

by

*Justice Ong Chee Kwan**

[1] This article seeks to discuss three legal issues arising from the decision in *The Daien Maru No 18*.[1] First, the question whether the right of arrest of the vessel post a judgment *in rem* is available if at the time of the arrest, the ownership of the vessel has changed to a third-party purchaser without notice of the earlier claim. Second, whether the judgment creditor is entitled to the increased value of the vessel between the time of the writ and the arrest. Third, whether there is any time limit to the right of arrest post the judgment *in rem*.

[2] On December 20, 1963, the vessel *Alletta*, then owned by the first defendants, came into collision with the plaintiffs' vessel *England* in the River Thames. The plaintiffs obtained a judgment *in rem* in their claim for damages against the first defendants. Ten years later on June 20, 1973, *Alletta* was sold by the first defendants to the second defendants, who knew nothing of the actual or potential claim against the first defendants. They renamed her *Tarmac I*. The first defendants had agreed to indemnify the second defendants in respect of any claims incurred prior to the time of delivery being made against the vessel under the contract of sale. On July 9, 1973, on an *ex parte* application by the plaintiffs, an order of arrest against the vessel was issued and the vessel was duly arrested. Aggrieved, the second defendants applied to have the arrest discharged and the vessel released from arrest.

[3] Mocatta J ordered the warrant of arrest to be discharged and further declared that the plaintiffs were not at the date of issue of the warrant of arrest entitled to arrest the *Alletta*[2] (renamed as *Tarmac I*). His Lordship's reasonings are stated in the following passage of his judgment:

> If a ship may be arrested after judgment on liability has been obtained against her and she is by the date of the arrest the property of a third

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* Judicial Commissioner of the High Court of Malaya.

1 [1986] 1 Lloyd's Rep 387.

2 *The Alletta* [1974] 1 Lloyd's Rep 40 at 50.

> party who had bought her without knowledge of the maritime lien, grave injustice may be done. The third party may have no right of indemnity or, which is less unlikely supposition, his indemnity may be worthless. His vendor may, through lack of adequate funds, incompetent legal advice or other reason, not properly and fully contested the issue of liability. Despite Mr. Sheen's efforts to answer these supposed circumstances by saying that the Court would find some method of reopening the issue of liability so as to enable the third party to contest it properly and anew, I cannot see how such an end could be achieved. I refer again to what was said in *The Point Breeze* at p. 142. The position would be quite different from that obtaining when an arrest is effected after transfer of the *res* to such a third party, but before there had been judgment on liability. The third party can then intervene; see O. 75, r. 17. Similar circumstances, *mutatis mutandis*, can readily and perhaps more realistically be envisaged in relation to the right of a mortgagee, who can intervene to protect his interest, if this be possible on the facts, against the claim of a holder of an alleged maritime lien provided the vessel mortgaged be arrested *before* judgment on liability; *aliter*, if the arrest be subsequent to such judgment.[3]

[4] The legal principle relied upon by Mocatta J when he held that the plaintiffs' right of arrest was lost after judgment was that after the judgment on liability had been obtained against the first defendants as owners of the *Alletta* (which was upheld by the Court of Appeal), the plaintiffs' rights in respect of the collision as against the *Alletta* had become merged in the judgment.

[5] *The Alletta* had stood for the position that there can be no rearrest when a judgment on the merits has been given and security had previously been obtained for the cause of action for which judgment has been obtained, until 1986 when LP Thean J in *The Daien Maru No 18*[4] held that an *in rem* claimant who sued *in rem* and obtained a judgment for his claim can still assert that the ship is security for the judgment obtained and is therefore entitled to arrest the ship.

[6] In *The Daien Maru No 18*, the defendants, the owners of the vessel *Daien Maru No 18*, commenced an action *in rem* against the charterers claiming, *inter alia*, possession of the vessel and arrested the vessel. Subsequently, the plaintiffs who were members of the crew on board

3 Ibid.
4 [1986] 1 Lloyd's Rep 387.

the vessel filed a caveat against the release of the vessel and thereafter commenced an action *in rem* against the defendants claiming wages earned, subsistence money and expenses for their return home. After the defendants entered an unconditional appearance, the plaintiffs applied for leave to enter judgment against the defendants and judgment was entered against the defendants. About a month after the judgment, the defendants obtained an order releasing the arrest of the vessel in their *in rem* action against the charterers. The plaintiffs then arrested the vessel. The defendant contended that as the plaintiffs had obtained a final judgment, they had lost the right of arrest since the plaintiffs' cause of action had merged in the judgment, citing *The Alletta*.

[7] LP Thean J declined to follow the decision of Mocatta J in *The Alletta* and allowed for the arrest of the vessel notwithstanding that the plaintiffs' cause of action had merged in the judgment. His reasonings can be gleaned from the following passages in his judgment:

> If the plaintiff by instituting an action *in rem* against a ship (assuming that such action was properly constituted under the High Court (Admiralty Jurisdiction) Act) can "properly assert as against all the world" that the ship is a security for his claim and arrest the same, then it seems to me that after such plaintiff has obtained judgment for his claim in that action he can, on principle, also properly assert that the ship is a security for the judgment obtained and therefore is entitled to arrest the ship (assuming that no bail has been previously put up for the ship). That once a judgment has been obtained in an action the claim therein is merged in the judgment, is correct and is beyond dispute. It does not follow however, and I can find no authority to the effect, that the right to security in the ship is lost or extinguished by such merger. On principle, I do not see why such right to security, which is enforced by arrest of the ship, should be lost merely because the claim or cause of action has merged in such judgment. Arrest of a ship in an action *in rem* is a mere procedure and its object is to obtain security that the judgment should be satisfied: see the judgment of Sir Boyd Marriman, P. in *The Beldis*, (1936) 53 Ll.L Rep. 255; [1936] P. 51 at pp. 270 and 67 and 272 and 73-73. See also *The Cap Bon.* [1967] 1 Lloyd's Rep. 543 at 547, where Mr. Justice Brandon (as he then was) held that the object of an action *in rem* was to provide security for a plaintiff in respect of a judgment of Court in the same action or sum due under a settlement in that action and such security was not available for payment of an award of an arbitration tribunal. Having regard to these authorities it seems to me extremely odd that the right to security in a ship which arises

> from an action *in rem* against a ship and the arrest thereof which is a remedy to provide for such security should be lost or extinguished once final judgment is pronounced or obtained in that action.

[8] The logic in LP Thean's judgment is clearly compelling. If a plaintiff can assert against all the world that a vessel is a security for a claim which is yet to be determined and can arrest the vessel on that basis, surely after the plaintiff's claim had been determined and adjudged in his favour, the plaintiff can assert the same right against the vessel as a security for his judgment. To reject such an assertion will mean that the plaintiff is actually worse off after establishing his claim.

[9] *The Daien Maru No 18* has been followed by the High Court of Hong Kong in *The ALAS*[5] where Justice Peter Ng expressed his agreement with the reasonings by LP Thean J where he stated:

> Regarding Mr. Alder's submission that the procedure of arrest is not available once a plaintiff's claim has crystallised in an *in rem* judgment, it does not assist the Defendants in any way since the Plaintiff has not yet obtained *in rem* judgment in this action. Even that proposition of law, supported as it is by *The Alletta* [1974] 1 Lloyd's Rep 40 is of dubious weight – it was not followed by the High Court of Singapore in "*The Daien Maru No. 18*" [1986] 1 Lloyd's Rep 387 for good reasons. Arrest of a ship in an action *in rem* is a mere procedure the object of which is to obtain security from which the judgment can be satisfied: *The Beldis* (1936) 53 Ll L Rep 255; *The Cap Bon* supra. Like Thean J, I find it extremely odd that the right of security by the arrest of a vessel is available to a plaintiff who merely asserts a claim whereas it is lost when he finally obtains a judgment in the action.

[10] An action *in rem* is said to be distinguished from a judgment *in rem*. The former is a proceeding against a *res* whereas the latter is described by Evershed LJ in *Lazarus-Barlow v Regent Estates Co Ltd*[6] as:

> … a judgment of a court of competent jurisdiction determining the status of a person or thing … (as distinct from the particular interest in it of a party to the litigation); … and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided.

5 [2014] 4 HKLRD 160.
6 [1949] 2 KB 465.

[11] The effect of a judgment *in rem* in respect of a *res* is to settle the status of the *res* and in so doing is valid, not merely *inter se* the parties, but against the world at large.

[12] This leads to the question of whether the decision of LP Thean J will apply where the ownership of the vessel has changed hands and is in the hands of a third party who had purchased the vessel without any notice of the plaintiff's claim? It is trite and an established position that once an action *in rem* against a vessel has been commenced, it can be proceeded with against that vessel despite any subsequent change in the ownership of the vessel, even if the change has taken place before the writ is served.[7] If the plaintiff can assert his claim against the vessel in the hands of a subsequent purchaser before judgment, why should this change after judgment? What is there to prevent the plaintiff from arresting the vessel after judgment for his claims even against a third party who had bought the vessel after the judgment without notice of the plaintiff's claim following LP Thean J's decision in *The Daien Maru No 18*?

[13] LP Thean J seems to accept the position that the arrest after judgment *in rem* would be effective even against a third party who subsequently owned the vessel. This can be seen from his reference to Brandon J's judgment in *The Monica S*.[8] At page 390 of the judgment, LP Thean J stated thus:

> It has been decided by Justice Brandon (as he then was) in the case of *The Monica S*., [1967] 2 Lloyd's Rep 113 that once an action *in rem* against a ship has been commenced under s. 3(4) of the Administration of Justice Act, 1956 of England (which is *in pari materia* with s. 4(4) of our High Court (Admiralty Jurisdiction) Act (Cap. 6), it can be proceeded with against that ship despite any subsequent change in the ownership of the ship, even if the change has taken place before the writ is served. That decision was approved by the Court of Appeal in England in *Re Aro Co. Ltd* [1980] 1 Ch. 196 where it was held that a plaintiff by commencing an action *in rem* against a ship, even if the writ has not been served or the ship has not been arrested, puts himself in a position of a secured creditor.

7 See *Re Aro Co Ltd* [1980] 1 Ch 196; *Kuo Fen Ching & Anor v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] SGCA 95.

8 [1967] 2 Lloyd's Rep 113.

[14] However, a different approach was taken in the United Kingdom ("UK") in relation to the right to arrest a ship to enforce a foreign judgment *in rem*.

[15] A foreign judgment *in rem* pronounced by a court of competent jurisdiction in respect of a vessel within its jurisdiction is recognised by an English court and will be enforced in the admiralty court in the UK by a separate proceeding *in rem* if the judgment remains unsatisfied.

[16] In *The City of Mecca*,[9] a Spanish vessel, *The Insulano*, was run down and sunk by a British vessel, *The City of Mecca*, off the Portuguese coast. After the collision, *The City of Mecca* was put into Lisbon where proceedings were instituted against her in the Tribunal of Commerce at Lisbon. *The City of Mecca* left Lisbon without giving security in these proceedings. She was eventually found solely to be blamed for the collision by the Tribunal of Commerce and the decree was affirmed by the final Court of Appeal of Portugal. The decree remained unsatisfied and on *The City of Mecca* coming within the jurisdiction of the English admiralty court, the plaintiffs attempted to enforce the Portuguese judgment in an action *in rem*.

[17] Sir Robert Phillimore accepted that the court had jurisdiction to arrest founded on comity, to enforce the judgments of foreign admiralty courts. He observed:

> … it is the duty of one admiralty court, a duty arising from the international comity, to enforce the decree of another upon a subject over which the latter had jurisdiction.

[18] More recently, in *The Despina GK*,[10] the cargo owners brought an action *in rem* against the *Despina GK* in the Swedish admiralty court in respect of cargo laden aboard which had been dumped at sea. They obtained a judgment against the shipowners for 2,410,188 Dutch guilders with interest. The shipowners paid part of the sum awarded. When the *Despina GK* entered an English port, the cargo owners issued a writ *in rem* claiming the sum outstanding under the Swedish judgment and applied for a warrant of arrest against the vessel. In permitting the warrant of arrest to be maintained, Sheen J held that a judgment creditor who has obtained a final judgment against

9 (1879) 5 PD 28.
10 [1983] 1 QB 214.

a shipowner by proceeding *in rem* in a foreign admiralty court can bring an action *in rem* in the UK court against that vessel to enforce the decree of the foreign court if that is necessary to complete the execution of that judgment.

[19] The jurisdictional basis for Sheen J's decision was based on international comity with respect to the execution of the sentences of foreign admiralty courts, that is, the duty of the admiralty court in England to enforce the decree of a foreign admiralty court.[11] It was not based on the survival of a maritime claim or the right to security that LP Thean J had relied upon. Sheen J in fact referred to the residual jurisdiction of the admiralty court resulting from section 20(1) of the UK Senior Courts Act 1981 pursuant to which a judgment creditor can bring an action *in rem* to enforce a judgment. Section 20(1) of the UK Senior Courts Act 1981 provides:

> 20. (1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say:
>
> …
>
> (c) any other Admiralty jurisdiction which it had immediately before the commencement of this Act.

[20] In coming to his decision, Sheen J drew a distinction between claims which give rise to a maritime lien which may be enforced against the ship notwithstanding a change of ownership and those claims which may only be enforced by an action *in rem* if the person who would be liable *in personam* is still the owner of the vessel at the time when the writ is issued.

[21] Presumably because the judgment creditor's claim in the case was not in the nature of a maritime lien, Sheen J had in his judgment stated that the judgment creditor's right to enforce such foreign judgment is only available "provided that the ship is the property of the judgment debtor at the time when she is arrested".[12]

[22] In fact, another reason for LP Thean J's decision in *The Daien Maru No 18*[13] was based on the existence of a maritime lien in that case. At page 391 of his judgment, he said:

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11 Ibid, at 217–218.
12 Ibid, at 219.
13 [1986] 1 Lloyd's Rep 387.

> There is another reason that impels me to arrive at the conclusion that in the instant case the right of arrest of the vessel has not been lost by reason of the judgment having been entered in favour of the plaintiffs. The plaintiffs have a maritime lien on the vessel which arose out of the services provided for the vessel. (So had the *Alletta* (sup.) which arose out of damage caused by that ship). A maritime lien on a ship is a claim or a privilege upon the ship and when it arises it attaches to or travels with the ship into whosesoever possession it comes so that an innocent purchaser of the ship may find his property, the ship, subject to a claim which existed prior to the date of purchase.

[23] However, it would seem that while a foreign *in rem* judgment can be enforced through an action *in rem* in the UK, such enforcement does not apply to a domestic *in rem* judgment. The international comity rationale does not apply to domestic *in rem* judgments to permit arrest to enforce the same.

[24] In *The Kalamazoo*,[14] there was a collision, the American vessel was arrested, bail was put up for £3,500 and the ship released. The action then proceeded and after judgment on liability for the plaintiff, the latter's proctors delivered a claim for damages in excess of £3,500. Before the registrar had made his report, the plaintiff started a second action by way of a warrant of arrest. Dr Lushington set this aside stating:

> It is perfectly competent to take bail to the full value, but the effect of taking bail is to release the ship in that action altogether. It would be perfectly absurd to contend that you could arrest a ship, take bail to any amount, and afterwards arrest her again for the same cause of action. The bail represents the ship, and when a ship is once released upon bail she is altogether released from that action.

[25] *The Kalamazoo* was followed by Bateson J in *The Point Breeze*.[15] This is also a case which had arisen from a collision. This time it was a collision between a French vessel and an American vessel *Point Breeze*. Two days after the collision, bail was asked for in the sum of £3,500. Then after a writ was issued against *Point Breeze*, solicitors acting on behalf of her owners accepted service and gave an undertaking to put up bail. After judgment was given the plaintiffs asked for additional bail in the sum of £3,000. They arrested *Point Breeze* at Southampton

14 (1851) 15 Jur 885.
15 [1928] P 135.

for that amount. The defendants by motion sought to set aside the warrant of arrest. In setting aside the warrant of arrest, Bateson J stated:

> The only right to arrest in a damage case is that which the party claiming has got a maritime lien, and a maritime lien follows the ship to other's people's hands. The position of people who have ships that have been released on bail – if I were to allow this arrest to stand – might be very unfortunate.

[26] The principal objection to the rearrest seems to be that an arrest after bail had been posted would not be fair to the third party who bought the vessel subsequent to the event since the vessel would never be free of the maritime lien unless and until a judgment is satisfied.

[27] If one were to follow LP Thean J's reasoning in *The Daien Maru No 18*, who held that the right to security in the ship did not merge with the judgment (as opposed to the claim), it must then follow that notwithstanding the absence of the international comity rationale, a domestic *in rem* judgment must similarly be capable of being enforced by way of an arrest as long as there was either no bail or no adequate bail provided earlier. Indeed, it can be said that LP Thean J's rationale in *The Daien Maru No 18* is a better jurisprudential basis for the enforcement of foreign *in rem* judgments than the international comity rationale. Interestingly, pursuant to the UK Admiralty Practice Direction under CPR rule 61.5(1), a judgment creditor can now arrest a vessel although it has been commented that the rule seems to presuppose that no security had been obtained before judgment. CPR rule 61.5(1) provides:

> In a claim *in rem* –
>
> (a) a claimant; and
>
> (b) a judgment creditor
>
> may apply to have the property proceeded against arrested.

[28] In fact, the Australian Law Reform Commission No 33 [16] favours doing away with the distinction between foreign and domestic *in rem* judgments altogether. At paragraph 191 of the report, it states thus:

> Should the *in rem* enforcement of foreign judgments continue, and if so, should that right of action be extended to local *in rem* judgments?

16 (1982) ALRC 33.

> On the first question, it can be argued that the "international comity" argument no longer provides a convincing rationale for the *in rem* enforcement of foreign *in rem* judgment. It is arguable that the ordinary methods of recognising and enforcing foreign judgment by action *in personam* are adequate to discharge any duty flowing from "comity" between admiralty courts in different countries. Certainly the duty provides little justification for distinguishing between foreign and local *in rem* judgments. It seems clear that the two should either stand or fall together.

[29] A decision by the High Court of Hong Kong deserves mention as the learned judge, William Waung J, took *The Daien Maru No 18* decision as support for allowing an arrest of a vessel in the hand of a new owner to answer a judgment *in rem* that has been obtained by the plaintiff before the High Court of Malaya.

[30] In *Alan Soh v The Owners of the Columbus Caravelle*,[17] the plaintiff was a Singaporean employed on board the vessel *Columbus Caravelle* pursuant to a contract of employment. His contract was terminated and he commenced an *in rem* action in Malaysia against the termination. He was not successful in arresting the vessel in Malaysia but managed to obtain a judgment *in rem* at the trial in the absence of the defendant. Thereafter, the plaintiff registered the *in rem* judgment in Hong Kong and pursuant to the registration of the judgment issued an *in rem* admiralty action against the vessel on the same day and had the vessel arrested. The new owners of the vessel applied to set aside the registration and to declare that the Malaysia judgment *in rem* was not enforceable in Hong Kong. It was argued that it was unfair to allow the registration of a judgment carrying with it the consequence of arrest and sale of the ship because the new owners were deprived of the chance to defend the proceedings on the merits.

[31] In dismissing the new owners' application, William Waung J held as follows:

> 16. … I have earlier expressed my view why this is not a valid argument in relation to the objection based on public policy. Nor do I believe that the law prohibits execution after judgment when there was no previous arrest of the vessel and this is especially so in the case of a judgment *in rem* based on a maritime lien as in this case …

17 [1998] MLJU 120.

> 17. The weight of learning subsequent to *The Daien Maru* is in favour of *The Daien Maru* as can be seen in *Jackson on Enforcement of Maritime Claims*, 3rd edition at 14.83-4, *Meeson on Admiralty Jurisdiction and Practice*, 2nd edition at page 134 and the English CPR 49 F PD 6.1 declaring that arrest is available to a judgment creditor *in rem*.
>
> 18. The value of an action *in rem* is that once a vessel had been properly served or deemed to have been served, then the vessel is bound to answer the judgment which might be entered against it including the right of the plaintiff for that vessel to be arrested and sold, at any time. This is the essence of an action *in rem* and the value of an action *in rem*, namely giving security to the plaintiff to be answerable to the claim. If Mr. Smith is correct that a new owner can be heard to say after the judgment *in rem* that the vessel cannot be the subject of execution or enforcement by arrest and sale because it would be unfair to deprive the new owner of a chance to defend the claim, then the plaintiff will have an admiralty *in rem* security of doubtful value and will have to constantly deal with a succession of new owners all wanting to have another chance to defend. In my judgment, the test of the enforcement of an *in rem* judgment is not whether it binds the new owners or not but whether it binds the ship irrespective of whether there had been a full trial on the merits and irrespective of whether the ship has been arrested or not and irrespective of any change of ownership. If judgment *in rem* was obtained (after proper service), then the plaintiff in my view should be able to keep his judgment and not having to face challenges again and again by new owners. The new owners on purchase of the vessel assumed the risk that the vessel might be the subject of either a maritime lien or statutory lien or *in rem* judgment. No special privileges should be given to new owners.

[32] If the right to security in the form of arrest of the vessel survives the judgment *in rem* and if the plaintiff who had issued and served a writ *in rem* against a vessel is constituted as a secured creditor (let's not discuss whether the plaintiff's position as secured creditor only crystalises upon the service of the writ and not mere issuance), then should it not follow that the distinction between a claim for maritime lien or a statutory lien is of no consequence when the arrest is effected on the vessel after judgment in the case where a new owner has purchased the ship without any notice of the claim?

[33] Can the decision in *The Despina GK* that permits the arrest for the purposes of enforcing the foreign judgment but only as long as the

ship remains in the ownership of the judgment debtor be justified? If the arrest of the ship can still proceed notwithstanding the change of ownership of the ship prior to the judgment, why should the position be any different after the judgment? Does not the same logic apply, i.e. that the plaintiff who had established his claim in the form of a judgment ought not be placed in a worse position than before judgment?

[34] The objection to allowing the enforcement of such *in rem* judgment against an innocent third-party purchaser of the vessel who had purchased the ship after the judgment is as stated by Mocatta J which is that if arrest is permitted after judgment, the innocent third-party purchaser will be gravely prejudiced as he will have no opportunity to be joined or intervene on the question of liability. Where a lien has come into existence prior to the sale of the vessel but before judgment, the innocent purchaser at least has the opportunity to be joined or to intervene before liability is determined. The law should not impose on new owners the risks of having the ship being made answerable to unsatisfied *in rem* judgments as it is sometimes not possible to conduct the necessary searches into all legal proceedings involving the vessel prior to the purchase of the vessel. The indemnity of the vendor of the vessel may also prove to be worthless.

[35] While the aforesaid may be forceful arguments *against* favouring the arrest of the vessel after judgment even when the ownership of the ship has changed in the hands of an innocent third-party purchaser, it is submitted that it is no answer to the legal principle that the plaintiff's position as a secured creditor must continue to survive after judgment. It is simply incongruous to maintain a position that a creditor whose security in the *res* is one that binds the whole world cannot enforce his security after a new owner had taken over. Further, the innocent third-party purchaser will be protected by the usual indemnity clause in the sale contract and can look to the previous owner for its losses. The risks of the indemnity being worthless although admittedly can occur, nevertheless, is confined to exceptional circumstances.

[36] Accordingly, it is submitted that the legal position in respect of an arrest of the vessel after judgment is that such right of arrest against the vessel is permitted for enforcement of the judgment both in respect of foreign judgments as well as local judgments *in rem* as long as either no bail or inadequate bail was provided before the judgment. Further, this right to arrest is available notwithstanding that the vessel is no

longer the property of the judgment debtor and it is also irrelevant whether the claim is a maritime lien or a statutory lien.

[37] In fact, even the position that no action *in rem* and therefore arrest of a ship can be taken to enforce an arbitration award as held by the UK Court of Appeal in *The Beldis*[18] is now very much diluted. It seems that after an arbitration award is obtained, the plaintiff may still proceed with an action *in rem* and apply to arrest the vessel if the action *in rem* is based not on the arbitration award but on the maritime claim invoking the *in rem* jurisdiction of the court to arrest the ship as security for the anticipated judgment *in rem*. This was in fact the case in *The Alas*[19] where the Honourable Peter Ng J said:

> Regarding Mr. Adler's submission that the procedure of arrest is not available once a plaintiff's claim has crystallised in an arbitral award. I am equally unable to accept it. The submission is contrary to *The Rena K* line of cases which held that an unsatisfied arbitral award is no bar to a cause of action *in rem*. If a plaintiff is entitled to pursue its *in rem* claim notwithstanding the existence of an arbitral award, he must be entitled to invoke the Admiralty jurisdiction of the Court to arrest a vessel as security for that *in rem* claim.

[38] Of course the reason a plaintiff is entitled to pursue an *in rem* claim even after obtaining an arbitral award is because of the "no bar rule" established by Brandon J in *The Rena K*.[20] This rule is expressed as follows:

> It has, however, been held that a cause of action *in rem*, being of a different character from a cause of action *in personam*, does not merge in a judgment *in personam*, but remains available to the person who has it as long as, and to the extent that, such judgment remains unsatisfied.

[39] The next issue is whether in the case of inadequate bail, the judgment creditor when arresting the ship can improve on his security if at the time of the arrest, the value of the vessel has been enhanced. Assume the following scenario: *A* has a maritime claim against the vessel arising out of a collision. At the time *A* issued the writ *in rem*

18 [1936] P 51.
19 [2014] 4 HKLRD 160.
20 [1979] QB 377.

and arrested the vessel, the vessel was subject to a mortgage which is valued at 70% of the value of the vessel. *A*'s claim is not fully assessed at the time of the writ. Bail representing what *A* had estimated to be his claim was provided and the vessel was released. Thereafter *A* obtains a judgment *in rem* against the vessel for a sum in excess of the bail amount. *A* then arrested the vessel. However, at the time of the arrest, the vessel is no longer encumbered with the mortgage. Can *A* be permitted to recover from the vessel an amount that would be in excess of the unencumbered value of the vessel before judgment?

[40] In *The Alletta*, the first defendants had in fact sought to oppose the arrest submitting that they had been prejudiced in that the increased value of the vessel between June 24 and July 19 had resulted in their having to put up security in excess of the value of the vessel at the date of her sale. However, this argument did not find any favour with Mocatta J who said:

> The value of a vessel changes from day to day and will often be affected by expenditure upon her by her owners, such as, for example, may be necessary to enable her to maintain her class. I do not consider the vessel's increased value the kind of prejudice which would be likely to weigh much in the balance against the exercise of a maritime lien were the first defendants still own the *Alletta*. As they do not I consider the point is irrelevant.

[41] It is submitted that the position must be that the plaintiff ought not to be permitted to recover any sums that would result in the plaintiff improving its position as at the date the writ *in rem* was first filed and served. This is because the right of the plaintiff to the security must be based on the state of things at the time of the institution of the *in rem* action and this cannot be altered by subsequent events.

[42] Support for this proposition can be found in the following passages from *The Cella*[21] where Lord Esher MR said:

> Now, the jurisdiction given to the Admiralty Division by the Act in question can, as I have said, be exercised by an action *in rem*, that is to say, upon the production of a proper affidavit, a warrant of arrest is issued and under it the marshal may seize the ship, and the court will adjudicate upon it. Possession is taken by the marshal in order

21 (1888) 13 PD 82.

> that the ship may be sold, and that the right of the plaintiff may be satisfied out of the ship. These rights must exist before the ship is seized, for the court adjudicates upon the ship on the ground that it had jurisdiction to seize it and realize it for the plaintiff, on account of something which happened before the seizure, which in this case was repairing her. Even without the cases cited for the plaintiff, it would seem to me to be clear that whatever may be the judgment of the court, it must take effect from the time of the writ. The judge is to enforce the writ, and to determine the rights of the parties at the time the writ is served.

[43] In the same case, Lopes J said:

> From the moment of the arrest the ship is held by the court to abide the result of the action, and the rights of parties must be determined by the state of things at the time of institution of the action and cannot be altered by anything which takes place subsequently.

[44] Based on the aforesaid, it would not be right that the plaintiff, whose right of security to the vessel at the time when the writ was issued was one subject to an encumbrance but can subsequently enjoy a better security through a rearrest of the vessel which is freed of the encumbrance post judgment.

[45] Another issue that falls for consideration is whether there is any time limit for a plaintiff who had secured a judgment *in rem* to exercise his rights to arrest the vessel to enforce on his judgment. It is clear from the judgment in *The Daien Maru No 18* that the right to security does not merge with the judgment and therefore can still be available to the plaintiff post the judgment. However, what is not considered is the time limit, if any, for the exercise of the right. Should the time limit to arrest be different between a claim for maritime lien and a statutory lien?

[46] In *The Heinrich Bjorn*,[22] Fry LJ, delivering the judgment of the Court of Appeal, highlighted the difference in the claim between a maritime lien and a statutory lien in this manner:

> But if the material man may thus arrest the property to enforce his claim, how does his claim differ from a maritime lien? The answer is that a maritime lien arises the moment the event occurs which

22 (1885) 10 PD 44.

> creates it; the proceeding *in rem* which perfect the inchoate right relates back to the period when it first attached: "the maritime lien travels with the thing into whosesoever possession it may come": *The Bold Bucclough*, and the arrest can extend only to the ship subject to the lien. But, on the contrary, the arrest of a vessel under the statute is only one of several possible alternative proceedings *ad fundandam jurisdictionem*; no right in the ship or against the ship is created at any time before the arrest; it has no relation back to any earlier period; it is available only against the property of the person who owes the debt for necessaries; and the arrest need not be of the ship in question, but may be of any property of the defendant within the realm.

[47] It would seem from the above that the right to arrest the vessel in both a maritime lien claim and a statutory lien claim only comes into existence at the time the proceeding *in rem* is commenced. Although a maritime lien arises the moment the event occurs which creates it, the right to arrest remains inchoate until the *in rem* proceeding is commenced.

[48] If the right to arrest only arises upon the commencement of the *in rem* proceedings and since this right survives the judgment in the *in rem* action, is there no time limit to the enforcement of the same? In *The Alletta*, the vessel was arrested more than 10 years after the judgment *in rem*.

[49] Perhaps an arrest after judgments *in rem* ought to be treated more as an execution of the judgment rather than an enforcement of the security to the maritime claim? Under the Arrest Convention 1952, "arrest" is defined in Article 1(2) as "the detention of a ship by judicial process to secure a maritime claim but does not include the seizure of a ship in execution or satisfaction of a judgment".

[50] It would seem under the Convention that an arrest must take place before a court judgment as the arrest is for the purpose of securing the maritime claims. Clearly, an arrest before judgment is not an execution proceeding as there is no judgment at the time of the arrest. In *The Zafiro*,[23] Mr Justice Hewson, after holding that the arrest of a vessel pursuant to a writ *in rem* issued by necessaries men was not an execution within the meaning of section 325 of the UK Companies Act 1948, said:

23 [1959] 1 Lloyd's Rep 359 at 367.

> … Execution, in my view, succeeds and does not precede, judgment, whereas in arrest there is no existing judgment upon which to execute.

[51] However, the same cannot be said in an arrest after a judgment. In the case where the owner of the ship chose not to enter an appearance and a judgment *in rem* in default is obtained, the only way to enforce the judgment *in rem* will be through a remedy *in rem* which would be by arresting the vessel and getting the vessel sold. Looking at it from the terminology of the Convention, the arrest of a ship post judgment *in rem* would not be an arrest "to secure a maritime claim" but a "seizure of a ship in execution or satisfaction of a judgment".

[52] If the arrest after judgment is an execution of the judgment, then the time limit to arrest for the purposes of enforcement of the judgment should also be governed by the Limitation Act 1953 [*Act 254*] where section 6(3) clearly states that a judgment cannot be enforced after the expiration of 12 years from the date on which the judgment became enforceable.

[53] Notwithstanding the Limitation Act 1953, it is further suggested that the right to arrest to enforce the judgment may be lost by laches and or estoppel.

[54] The principle that the right of arrest of a vessel may be lost by laches finds some support in a few cases. The classical statement of the law on this is to be found in *The Bold Buccleugh*.[24] There, after a collision, a vessel was sold without notice to the purchaser of the unsatisfied claim against her and later, on the vessel entering Hull, a warrant of arrest was executed against her at the instance of the owners of the other vessel with which she had been in a collision. In the judgment of the Privy Council, Sir John Jervis said:

> This rule, which is simple and intelligible, is, in our opinion applicable to all cases. It is not necessary to say that the lien is indelible and may not be lost by negligence or delay where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are laid in good faith, the lien may be enforced, into whosesoever possession the thing may come.

24 (1851) 7 Moo PC 267.

[55] Then in *The Europa*,[25] Dr Lushington considered whether reasonable diligence had been exercised. In that case, a collision had taken place on December 13, 1859. The action was entered in February 1860 and the vessel was sold late in 1861 and extensively repaired. The vessel was arrested in January 1863. Having examined the evidence which showed that *The Europa* had twice been in Liverpool since the collision and might have been arrested there, he found that this omission did not amount to the absence of reasonable diligence.

[56] In *The Kong Magnus*,[26] the collision occurred in 1878 and the writ was not issued until 1889. Despite the lapse of more than 10 years and the fact that the ship, a Norwegian steamer, had on 47 occasions put into British ports between the collision and the issue of the writ, the action was allowed to proceed. Sir James Hannen said:

> There are no decisions which enable me to fix any period in relation to laches, and I come to the conclusion that the principle that should guide my decision is this, that in each case it is necessary to look at the particular circumstances, and to see whether it would be inequitable, after the period of time, which of course is to be taken into account, and after the circumstances which may have happened (including amongst those the loss of witnesses, the loss of evidence, and including the change of property) to entertain a suit of this kind.

[57] Further, in *The Key City*,[27] a case from the United States, three principles were laid down in relation to laches:

(a) that while the courts of admiralty are not governed in such cases by any statute of limitation, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defence.

(b) that no arbitrary or fixed period of time has been, or will be, established as an inflexible rule but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case.

(c) that where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defence will be held valid under shorter time, and to a more rigid scrutiny

25 (1863) Brown & Lush 89.
26 [1891] P 223.
27 (1871) 81 US Rep (14 Wallace) 653.

of the circumstances of the delay, then when the claimant is the owner at the time the lien is accrued.

[58] It is submitted that to ameliorate the harshness of the right of arrest after judgment against the vessel, especially against the innocent third-party purchaser of the vessel without notice of the antecedent claim, the defence of laches should be more readily available.

[59] In a recent case before the admiralty court,[28] the defence of laches was successfully argued resulting in the arrest of the vessel being set aside. The facts of the case are interesting.

[60] The plaintiff's claim was in respect of goods or materials supplied to the ship *Semua Bahagia* for her operation or maintenance. The plaintiff arrested the vessel at Johore Port on November 8, 2016. At the time of arrest, the vessel was laid up with no crew on board the vessel. It was a wholly unmanned vessel. There is no evidence that the notice of service of the writ and the warrant of arrest was ever given to the company which owned the vessel. No appearance was entered.

[61] The plaintiff proceeded to obtain a judgment in default against the vessel on January 10, 2017. No order was applied by the plaintiff when entering judgment in default or any time thereafter for the vessel to be sold. The vessel therefore remained under arrest subsequent to the said judgment. The reason the plaintiff did not proceed to seek an order for sale after the arrest could very well be due to the existence of three mortgages registered against the vessel at the time of the arrest.

[62] Subsequent to the judgment in default, the shipowner company went into liquidation. The liquidator appointed had no notice of the arrest and proceeded to sell the vessel to a third party who eventually intervened in the action. The intervener had, subsequent to the sale, changed the name of the vessel and had in fact chartered the ship out a few times before she was detained on the ground that she was still under the warrant of arrest issued by the plaintiff.

[63] On the application by the intervener to set aside the arrest, it was argued before the court that the plaintiff ought not to be permitted to enforce the warrant of arrest against the vessel because:

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28 Admiralty in Rem No. WA-27NCC-68-11/2016, *Majorole Shipping Sdn Bhd v Owners and other persons having interests in the ship or vessel 'SEMUA BAHAGIA'* (case unreported at the time of this article).

(a) after arresting the vessel and obtaining the judgment in default *and* for 19 months *after* obtaining the judgment, the plaintiff did nothing to realise the security provided by the arrest of the vessel. The plaintiff sat on its rights. The continuing arrest of the vessel constitutes an abuse of the court process. The plaintiff did not proceed to seek the sale of the vessel because the plaintiff knew that there were three mortgages on the vessel which debts would take priority over its claims. The plaintiff obviously did not want to incur costs and expenses of the arrest and sale knowing that any proceeds that might be realised will be used to pay off the mortgagee banks without any balance left to meet its claims;

(b) the plaintiff was lackadaisical throughout its arrest of the vessel. The plaintiff failed to appoint security guards over the vessel, failed to give notice of the arrest of the vessel to her registered owner and failed to realise that the vessel had been moved out of Johore Port after she was sold. The warrant of arrest was not even affixed to the vessel; and

(c) the intervener was a bona fide purchaser of the vessel and had *no* notice that the ship was under arrest. It was not possible to conduct a writ search from the court system to check if a vessel is in fact under arrest.

[64] The above is a clear example where the defence of laches can be mounted to defeat the attempt by a plaintiff seeking to enforce a judgment by arresting the vessel.

[65] Finally, prior to *The Daien Maru No 18*, if the judgment exceeds the value of the *res*, the excess can be recovered by the ordinary methods of execution against the assets of the owner of the vessel *in personam*. This is because when the owner of the vessel enters an appearance in an admiralty action *in rem*, the owner is effectively the defendant in respect of the action *in rem* as well as the action *in personam*. The two proceedings remain separate.[29] Lord Denning explained this in the following terms in *The Banco*:[30]

> If the defendant enters appearance, the action *in rem* proceeds just as an action *in personam*. If judgment is entered against the defendant,

29 See *Kuo Fen Ching & Anor v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 2 SLR(R) 793 at 796, [6].

30 [1971] P 137.

> it can be executed against any of his property within jurisdiction, be it his other ships or any other goods. A writ fi. fa., or other writ of execution, can be issued against his property but only after judgment has been obtained: … If no appearance is entered, however, the action remains, as it began, an action *in rem* only, operating only against the ship arrested. If judgment is entered in default of appearance it can be enforced by sale of the ship, but not against the defendant personally.

[66] Where the *res* is retained as security in the action *in rem* and is sold in the action, it will no longer form part of the owner's property and therefore can no longer be available for execution. Where bail or other security is put up to secure the release of the vessel and these subsequently prove insufficient, the vessel which is still owned by the defendant can be seized in execution.

[67] The decision in *The Daien Maru No 18* means that now, in cases where no bail had been previously put up for the vessel in the action and the judgment *in rem* is entered and is not satisfied or fully satisfied by the owner, in addition to a writ of seizure and sale of the vessel, the judgment creditor can still proceed to arrest the vessel to obtain security for his judgment *in rem*.

[68] In the usual pre-judgment arrest of a vessel, the value of the security to the plaintiff is limited to the actual value of the *res* taking into account all encumbrances on the *res*, including the mortgages and other liens which rank higher than the plaintiff's claim.

[69] Given that the right to security in the vessel is not lost by reason of the judgment *in rem*, there is nothing to stop a plaintiff from commencing a writ *in rem* and proceeding to judgment without arresting the vessel where at the time of the commencement of the writ *in rem*, the vessel is still subject to encumbrances which will effectively render the arrest meaningless. Instead, the plaintiff can simply wait out the judgment *in rem* until such time when the vessel is no longer encumbered before issuing a warrant of arrest. This is likely to be the case where the vessel is sold after judgment to a third party who had proceeded to pay the mortgagee all the outstanding under the mortgage to clear the encumbrance.

[70] In a jurisdiction where there is either no available means of conducting a writ *in rem* search and the available means are inadequate, the aforesaid scenario may pose a risk to third-party purchasers of a

vessel. It is possible that the judgment creditor and the owner of the vessel may conspire to "transfer" the liability of the judgment *in rem* to the new purchaser by an arrangement where the enforcement of the judgment *in rem* is withheld until after the owner manages to sell the vessel to a third party.

[71] In the light of the issues raised above, it is hoped that there will be opportunities for the courts to encounter factual situations where at least some of the issues raised can be further elucidated and settled.

The Singapore Convention on Mediation: Supplying the Missing Piece of the Puzzle for Dispute Resolution

by

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I. Introduction

[1] In late 2018, the United Nations General Assembly passed a resolution to adopt the UN Convention on International Settlement Agreements Resulting from Mediation and to make corresponding amendments to the Model Law on International Commercial Conciliation.[1] This development is the culmination of several years of work by the UN Commission on International Trade Law ("UNCITRAL") to create a multilateral instrument providing for the cross-border enforcement of mediated settlement agreements. The Convention was named the Singapore Convention on Mediation ("Singapore Convention") when it was signed by 46 countries on August 7, 2019.[2] Six additional countries have recently signed the Convention, bringing the total number of signatories to 52.[3] Having

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1 United Nations, "Resolution Adopted by the General Assembly on 20 December 2018", UN Doc A/Res.73/198, <https://undocs.org/en/A/RES/73/198> (accessed December 16, 2019); UNCITRAL, "Report of the United Nations Commission on International Trade Law, Fifty-First Session" (June 25 to July 13, 2018), paras 14–49, <https://undocs.org/en/A/73/17%20> (accessed December 16, 2019). The Singapore Convention still requires ratification by three signatory states before coming into force.

2 Singapore Convention on Mediation, <https://www.singaporeconvention.org> (accessed December 16, 2019); see also Singapore Ministry of Law, "46 States Signed New International Treaty on Mediation" (August 7, 2019), <https://www.singaporeconvention.org/news-7aug-signing-ceremony.html> (accessed December 16, 2019).

3 Tham Yuen-C, "Five More Countries Sign UN Treaty on Mediation", *The Straits Times*, November 21, 2019, <https://www.straitstimes.com/politics/five-more-countries-sign-un-treaty-on-mediation> (accessed December 16, 2019).

been ratified by three countries, the Convention will take effect on September 12, 2020.[4]

[2] The Singapore Convention is meant to achieve for mediation what the New York Convention has done for international arbitration. The widespread support for the New York Convention – starting from 10 states in 1958 and increasing to the current number of 161 states – attests to the popularity of arbitration as a mode of dispute resolution. By comparison, the high level of preliminary support for the Singapore Convention – including Malaysia and 19 other Asian countries – within merely a few months attests to the common sentiment across the globe on the need for a uniform enforcement regime for mediation. More importantly, it reflects the substantial growth and increasing awareness of mediation that have fuelled international efforts to develop a harmonised legal framework to support agreements resulting from mediation. In sum, the Singapore Convention supplies a critical missing piece of the puzzle in the international dispute resolution landscape.[5]

[3] The future success of the Singapore Convention is highly dependent on the sound application of its provisions by the courts in signatory states that is informed by an accurate understanding of the mediation process. This article thus discusses the fundamental role to be played by the courts in supporting and regulating mediated settlement agreements under the Singapore Convention. Part II

4 As of March 14, 2020, Singapore, Fiji and Qatar have ratified the Singapore Convention. The convention will come into force on September 12, 2020, six months after the third country Qatar's ratification. See United Nations Information Service, "The United Nations Convention on International Settlement Agreements Resulting from Mediation will enter into force following ratification by Singapore, Fiji and Qatar" (March 13, 2020) <http://www.unis.unvienna.org/unis/en/pressrels/2020/unisl293.html>; "The Singapore Convention on Mediation draws closer to entry into force with ratifications by Singapore and Fiji" (February 26, 2020) <http://www.unis.unvienna.org/unis/en/pressrels/2020/unisl292.html> (accessed March 13, 2020).

5 See Singapore Ministry of Law, "Singapore and Fiji are the First Two Countries to Deposit the Instrument of Ratification of the Singapore Convention on Mediation" (February 26, 2020), <https://www.mlaw.gov.sg/news/press-releases/singapore-and-fiji-are-the-first-two-countries-to-deposit-the-instrument-of-ratification-of-the-singapore-convention-on-mediation> (accessed March 13, 2020), where Senior Minister of State for Law described the Convention as the missing third piece in international commercial dispute resolution.

examines the symbiotic relationship that has existed between the courts and mediation prior to the Singapore Convention. Although mediation is distinctive from litigation, both processes have been increasingly perceived as co-equal and complementary modes of dispute resolution within the justice system. However, the conventional method of enforcing mediated settlement agreements in the courts has proved inadequate because of the costs of litigation. Part III discusses the limitations of relying on litigation to support mediated settlement agreements, and other reasons that prompted international efforts to create a cross-border enforcement regime. It also analyses the carefully crafted scope of the Singapore Convention, noting the efforts to ensure that the final instrument accommodated the diversity and flexibility of mediation practices. The final section discusses how the provisions of the Convention – particularly the grounds for non-enforcement in article 5 – have been drafted to be consonant with both the unique characteristics of the mediation process and the need for mediation to comply with due process and public policy concerns. It is argued that the Singapore Convention has struck a delicate balance between interests arising from the interface between mediation and the courts. It is vital that the courts in signatory states are also cognisant of these interests, so as to apply the Singapore Convention accurately and to maintain the complementary relationship between the courts and the mediation process.

II. Mediation and the courts

[4] The concept of mediation is not new to the courts. Lord Bingham remarked that "the law loves compromise".[6] The courts have been accustomed to giving judicial force to privately negotiated settlements by granting consent judgments and using contractual principles to determine the existence of negotiated agreements. When examining negotiations, the courts have also recognised the need to respect the confidentiality of settlement discussions. Hence, the "without prejudice" rule has been devised to ensure that statements or documents used in the course of negotiation for settlement purposes are inadmissible as evidence.[7] These well-established principles have

6 Lord Bingham in his foreword to the 4th edition (1996) of *The Law and Practice of Compromise* by David Foskett QC.

7 *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280; *Aird v Prime Meridian Ltd* [2006] EWCA Civ 1866 at [5].

also been used to deal with litigation involving mediation. The English decision in *Brown v Rice*[8] is a case in point. The court relied on the contractual offer and acceptance principles to find that an agreement had been reached after the formal mediation process despite the absence of a written settlement agreement.

[5] With the growing institutionalisation of the mediation profession in many countries, the question arises as to whether common law principles suffice for the courts to support and regulate mediated settlement agreements. To address this issue, it is first necessary to examine the nature of the mediation process.

The distinctive characteristics of the mediation process

[6] Mediation is a rather different creature from arbitration, litigation and negotiation. Commonly described as facilitated negotiation, the mediation process is meant to assist the parties to reach a voluntary agreement on how to resolve their dispute.[9] Unlike negotiation, a third party is involved in the mediation discussions. However, in contrast to a judge or an arbitrator, the mediator does not perform a decision-making function. Instead, the mediator helps the parties make their own decisions through a range of techniques, including facilitating communication, crystallising the underlying issues and helping the parties develop options.[10] Reflecting this common understanding of mediation, the Singapore Convention has defined mediation as a process in which "parties attempt to reach an amicable settlement of their dispute with the assistance of a third person … lacking the authority to impose a solution upon the parties".[11]

8 [2007] All ER (D) 252 (Mar).

9 See for example Uniform Law Commission, *Uniform Mediation Act 2003*, USA, s 2(1); Australia Mediator Standards Board, *National Mediator Accreditation Practice Standards* (July 2015) s 2.2.

10 See for example s 2.2 of Australia Mediator Standards Board, *National Mediator Accreditation Practice Standards* (July 2015), describing how the mediator helps the parties explore interests, generate options and consider their alternatives; and s 3(1) of Singapore's Mediation Act 2017 (No 1 of 2017), describing the mediator's role in assisting the parties to identify the issues in dispute, explore and generate options, communicate with one another and voluntarily reach an agreement.

11 Singapore Convention on Mediation, art 2(3) <https://www.singaporeconvention.org>. Incidentally, this definition was first utilised in UNCITRAL, "Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law" GA Res 57/18 adopted at 57th Session (January 24, 2003).

[7] The distinctive characteristic of mediation is thus the parties' right of self-determination. The modern mediation movement in many jurisdictions grew out of such an emphasis, and the continuing attraction of mediation is also linked to this quality. It is this particular feature of mediation that has preserved the marked difference between mediation and adjudication, making the former an "alternative" dispute resolution process that is known to allow parties greater participation in the outcome of their dispute.

[8] The basis for the mediation outcome also vastly differs from adjudication via a trial or arbitration. The mediation outcome is measured not by substantive fairness according to existing legal principles, but by the parties' private considerations. A Singapore decision articulated it this way:[12]

> Privately settled terms in respect of the ancillary matters in a divorce *may not always appear to be fair.* But divorce is a very personal matter, and each party would have his own private reasons for demanding, or acquiescing, to any given term or condition in the ultimate settlement. (Emphasis added.)

[9] This particular characteristic of mediation may, at first blush, seem perplexing, as it seems inconceivable for any dispute resolution process to neglect the law. Nevertheless, while the primary basis for the parties' decision within mediation may not necessarily be legal principles, this does not necessarily mean that the relevant law is not considered during the mediation. It is common in any mediation for all the parties to consider and evaluate the relative strengths of their legal positions, as well as the practical implications of proceeding with litigation. In negotiation terminology, this entails considering one's "alternatives" – what will happen in the event that a settlement is not arrived at.[13] Nonetheless, while the parties may be aware of what they are potentially entitled to at a trial, they may eventually agree on a settlement differing from this outcome because of other more important concerns, such as the need to preserve a relationship or to avoid incurring additional litigation expenses.

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12 *Lee Min Jai v Chua Cheow Koon* [2005] 1 SLR(R) 548 at [5].

13 See generally Roger Fisher and William Ury, *Getting to Yes: How to Negotiate Agreement Without Giving in* (USA: Penguin Books, 1991).

[10] Another unique feature of the mediation process is its confidential nature. The mediation process takes the parties' discussion out of public scrutiny, enabling them to negotiate freely without their statements being construed as evidence for or against them. The attraction of mediation in this regard lies in minimising publicity of the dispute. In this respect, mediation is akin to negotiation and hence the courts have used the "without prejudice" rule to deal with both processes.

[11] Finally, as in other dispute resolution processes, mediation is meant to bring about finality for the parties, with no further litigation concerning the settled issues. In this regard, the Singapore Court of Appeal in *Gay Choon Ing Loh Sze Ti Terence Peter*[14] stressed that "[o]nce an agreement has been established … that concludes the matter".[15] In the same vein, the Singapore High Court in *Real Estate Consortium Pte Ltd v East Coast Properties Pte Ltd*[16] elaborated that a compromise puts an end to the parties' dispute as the compromise agreement "essentially takes over as the basis of the parties' legal and contractual relationship", such that parties are not allowed to reopen prior issues.[17]

The symbiotic relationship between mediation and the courts

[12] Although mediation is known to be an out-of-court process, it cannot be given recognition apart from the courts. It has been observed that the legitimacy of mediation "requires the use of the very litigation system which the parties eschewed in the first place".[18] Conversely, the courts have acknowledged the significance of mediation because of the role it plays in reducing the costs of litigation, and its ability to provide a broader range of outcomes than formal adjudication. Hence, mediation and the courts have a symbiotic relationship because of their respective need for the other.

[13] Furthermore, mediation and litigation have been increasingly perceived as co-equal dispute resolution processes, with each playing an equally legitimate role in advancing access to justice. Lord Justice Neuberger aptly described the complementary roles of mediation and litigation this way:

14 [2009] 2 SLR(R) 332.
15 Ibid, at [54].
16 [2010] 2 SLR 758.
17 Ibid, at [58].
18 Laurence Boulle, "International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework" (2014) 7 *Contemporary Asia Arbitration Journal* 35 at 58.

> The central role is that of formal adjudication by the courts administering equity and law. That lies at the heart of our civil justice system; without it doing so we have no framework for securing the enforcement of rights and the rule of law. Neither arbitration nor ADR, as beneficial as they are, can provide that framework. Supplementary and complementary roles are played by those two dimensions of justice. They too can secure justice for individuals through the resolution of disputes. But they do so because they exist within the framework of law and its enforcement by formal adjudication. Without formal adjudication they would be mere epiphenomena.[19]

[14] Similarly, this author has suggested elsewhere that the courts' interaction with the parties in many jurisdictions has been shifting from that of a detached adjudicator to a more proactive problem solver, offering a range of dispute resolution processes to fit the exact contours of the dispute. Accordingly, the courts should recognise the coequality of both consensual and adjudicatory processes within the justice system.[20]

[15] Notably, mediation has played an increasingly significant role in the justice system because it has been recognised that access to justice must take into account the rising costs of litigation. In the UK, proportionality of costs is a foundational principle in the civil justice landscape.[21] Lord Dyson stressed in this respect that no one piece of litigation should be permitted to "utilise more of the court's resources than is proportionate, taking account of the needs of other litigants".[22] Singapore's Chief Justice Menon also called for the conceptualisation of the rule of law to be broadened to recognise the importance of ensuring

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19 Lord Neuberger, "Equity, ADR, Arbitration and the Law: Different Dimensions of Justice", the Fourth Keating Lecture, Lincoln's Inn, May 19, 2010, para 43.

20 Jean-Francois Roberge and Dorcas Quek Anderson, "Judicial Mediation: From Debates to Renewal" (2018) 19 *Cardozo Journal of Conflict Resolution* 613 at 621–624.

21 See r 1.1(1) of the Civil Procedural Rules ("CPR") that underscored the importance of exercising firm judicial control over proceedings to "deal with cases justly and at proportionate cost".

22 Lord Dyson MR, "The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme", speech delivered at the District Judges' Annual Seminar, Judicial College, March 22, 2013. See also Andrew Higgins and Adrian Zuckerman, "Lord Justice Briggs' 'SWOT' Analysis Underlines English Law's Troubled Relationship with Proportionate Costs" (2017) 35(1) CJQ 1 at 10 (arguing that the system should define proportionate cost by reference to the value of the rights in issue, and then reduce the amount of process and costs needed to resolve them).

access to justice. CJ Menon suggested the adoption of a user-centric approach focusing on affordability, efficiency, accessibility, flexibility, effectiveness, proportionality and peacebuilding.[23]

[16] In summary, mediation and adjudication have a complementary relationship within the justice system. At the same time, they are distinctive processes, and their differences have to be preserved within the justice system. Turning then to the issue of mediated settlement agreements ("MSAs"), the central question facing the courts is how to enforce these agreements in a way that respects the unique qualities of the mediation process. A secondary question, which was alluded to above, is whether the existing common law principles are adequate to facilitate the enforcement of MSAs. As will be evident from the sections below, both questions have been addressed by the Singapore Convention.

III. Creating a multilateral instrument for the enforcement of cross-border mediated settlement agreements

The need for the convention

[17] Common law countries have been accustomed to using well-established contractual and evidential principles to determine the existence of MSAs and to enforce them. However, it has been increasingly acknowledged that this conventional method of enforcing settlement agreements has caused the parties substantial inconvenience. First, additional expense is needed to commence a legal action and prove the existence of a contract. Second, where there are disputes concerning the existence of a contract and its terms, mediation confidentiality is likely to be compromised as the court is likely to make an exception to the "without prejudice" rule and examine the parties' mediation communications as evidence. The rule itself lacks certainty because of the expanding number of exceptions

23 Chief Justice Sundaresh Menon, Keynote Lecture delivered at the Negotiation and Conflict Management Group (NCMG) ADR Conference 2019, "Technology and the Changing Face of Justice" (November 14, 2019), <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/ncmg---keynote-lecture.pdf>, [56]–[58]; Chief Justice Sundaresh Menon, Law Society Mediation Forum, "Mediation and the Rule of Law" (March 10, 2017), <https://www.supremecourt.gov.sg/Data/Editor/Documents/Keynote%20Address%20-%20Mediation%20and%20the%20Rule%20of%20Law%20(Final%20edition%20after%20delivery%20- %20090317).pdf> (accessed December 16, 2019).

to the rule. The court in *Unilever plc v The Procter & Gamble Co*[24] set up nine exceptions, and the English Supreme Court in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd*[25] added two other exceptions. Lord Neuberger, when commenting on the exceptions in a later decision, stated that it was inappropriate to create further exceptions in order to preserve legal and practical certainty.[26] Criticising the current state of the without prejudice rule, Briggs LJ noted that if mediation confidentiality is protected only by the rule, mediation will lose one of its main attractions as a dispute resolution process.[27]

[18] It is therefore unsurprising that many jurisdictions have introduced ways to bypass the uncertain litigation process in order to enforce an MSA. A wide variety of enforcement mechanisms have been created, ranging from allowing MSAs to be enforced as court orders or arbitral awards, to the introduction of hybrid processes such as "med-arb" or "arb-med-arb" to convert MSAs into arbitral awards.[28] Nonetheless, while these innovations may plug the gap for the enforcement of domestic MSAs, they are less effective for the enforcement of *cross-border* MSAs. The mechanisms are ultimately constrained by the availability of the New York Convention or the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters in the relevant country where enforcement is sought. This is a highly dissatisfactory state of affairs for the growing international mediation landscape.

[19] The Singapore Convention finds its genesis in the growing desire to deal with the lacuna in the international enforcement mechanism for mediation. The previous Model Law on International Commercial Conciliation merely stated that a mediated settlement agreement

24 [2000] 1 WLR 2436.

25 [2010] UKSC 44; [2011] 1 AC 662; [2010] 4 All ER 1011.

26 *Ofulue v Bossert* [2009] 2 All ER (D) 119 at [98]. See also Dorcas Quek Anderson, "Piercing the Veil of Confidentiality in Mediation to Ensure Good Faith Participation" (2019) 31 *Singapore Academy of Law Journal* 713 at 716–721.

27 Justice Briggs, "Mediation Privilege" (2009) 159 *New Law Journal* 506 at 507.

28 Edna Sussman, "A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements" (2015) *Transnational Dispute Management* 6 at 6–7; Ellen Deason, "Procedural Rules for Complementary Systems of Litigation and Mediation" (2004–2005) 80 *Notre Dame Law Review* 553 at 588. See also Eunice Chua, "Enforcement of International Mediated Settlement Agreements Without the Singapore Convention" (2019) 31 *Singapore Academy of Law Journal* 572.

should be "binding and enforceable", but left the specific method of enforcement to be determined by individual states.[29] A proposal was thus made to UNCITRAL in 2014 to address this glaring gap.[30] When commencing its work to agree on a suitable drafted multilateral treaty, the UNCITRAL Working Group on Dispute Settlement ("Working Group") noted that mediation could be lagging behind arbitration due to the absence of a harmonised framework to enforce international mediated settlement agreements.[31] Reference was made to several studies reflecting the global sentiment that the absence of an enforcement regime impeded the growth of mediation, and that the creation of an international instrument would encourage greater use of mediation for cross-border disputes.[32] An international enforcement regime would thus put mediation on equal standing with arbitration in terms of competitive advantages.

[20] The large number of signatories to the Singapore Convention attests to the widespread acknowledgement that the instrument

29 Model Law on International Commercial Conciliation, art 14 ("If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable … [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement]").

30 UNCITRAL, "Planned and possible future work – Part III, Proposal by the Government of the United States of America: Future work for Working Group II" (June 2, 2014), UN Doc A/CN.9/822; UNCITRAL, UN Doc A/CN.9/832.

31 UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-Second Session" (New York, February 2–6, 2015), UN Doc A/CN.9/832, (February 11, 2015), p 5 (stating that a convention would encourage parties to consider investing resources in conciliation, by providing greater certainty that any resulting settlement agreements could be relied on and easily enforced, and that the preparation of a convention would itself encourage the use of conciliation).

32 SI Strong, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation" (2016) 73 *Washington and Lee Law Review* 1973 at 2055, finding that 74% of respondents thought an international instrument akin to the New York Convention would encourage the use of mediation; see also International Mediation Institute, "How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements" (2014), <https://www.imimediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements> (accessed December 16, 2019), showing that 90% of respondents agreed that the absence of any kind of international enforcement mechanism for international mediated settlement agreements presented a major impediment or was at least one deterring factor to the growth of mediation as a mechanism for resolving cross-border disputes.

supplies the missing piece for the international dispute resolution enforcement regime. It reflects the recognition of mediation as a co-equal mode of dispute resolution alongside well-established processes such as arbitration. It is noteworthy that the preliminary support for the Singapore Convention is overwhelmingly greater than the 10 signatories to the New York Convention when the latter was first open for signing in 1958.[33] The widespread ratification of the latter Convention by 161 countries bodes well for the future of the Singapore Convention.

The carefully crafted scope of the Singapore Convention

Commercial mediations

[21] The Singapore Convention applies only to commercial mediations. Although the term "commercial" has not been expressly defined, article 1(2) clarifies that the Convention does not apply to conflicts relating to family, inheritance or employment law, or consumer disputes.[34] The Singapore Convention further excludes MSAs arising from court proceedings or recorded as arbitral awards, so as to avoid overlaps with the Hague Conference instruments and the international arbitral enforcement regime.[35]

International mediations

[22] In addition, the Singapore Convention only deals with international disputes. An "international" MSA entails parties having their places of business or habitual residence in different states; or having their place of business in a state different from where the obligations are to be substantially performed or where the subject-matter of the MSA is most closely connected. [36]

33 The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Contracting States, <http://www.newyorkconvention.org/countries> (accessed December 16, 2019).

34 Singapore Convention on Mediation, Text of Convention, < https://www.singaporeconvention.org/convention-text.html> (accessed December 16, 2019).

35 Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19 *Pepperdine Dispute Resolution Law Journal* 25 (referring to the intervention of European Union at the 64th Session on February 2, 2016).

36 Singapore Convention on Mediation, art 3(1) and (2)(b) <https://www.singaporeconvention.org/convention-text.html> (accessed December 16, 2019).

Settlement agreements that result from mediation

[23] The Convention applies to settlement agreements "resulting from mediation": article 1(1). Article 2(3) has defined mediation broadly, focusing on two distinctive qualities – the mediator's lack of authority to impose a solution on the parties, and the reaching of an amicable settlement. Furthermore, the Singapore Convention accommodates the diversity of mediation practices by clarifying that what properly constitutes as mediation does not depend on the expression used by the parties or the basis upon which the process is carried out. Accordingly, the Singapore Convention potentially applies to a wide range of mediations, including those conducted by trained professionals under the auspices of established mediation institutions, as well as mediations that take place on a more informal basis.

The legal effect of MSAs

[24] There was some initial disagreement within the Working Group on whether the terms "recognition" and "enforcement", which were used in the New York Convention, should also be used in the Singapore Convention.[37] The term "enforcement" was relatively uncontroversial, referring primarily to using the MSA affirmatively as a sword. Article 3(1) thus obliges the signatory states to "enforce a settlement agreement in accordance with its rules of procedure".

[25] By contrast, the term "recognition" was a more divisive issue. Some delegates argued that the term "recognition" was only appropriate for acts of states and not private agreements. On the other hand, other delegates asserted that the concept of recognition was crucial so that an MSA could be validly used as a defence in court proceedings.[38] Article 3(2) eventually described the effects of recognition while avoiding the express use of the term. The MSA can be invoked "in order to prove that the matter has already been resolved".

37 Khory McCormick and Sharon Ong, "Through the Looking Glass: An Insider's Perspective into the Making of the Singapore Convention on Mediation" (2019) 31 *Singapore Academy of Law Journal* 520 at 533–534.

38 UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session" (Vienna, September 7–11, 2015), UN Doc A/CN.9/861, (September 17, 2015), pp 14–15.

[26] It should be noted that the Convention has not intervened in procedural aspects of individual states' domestic enforcement legislation. It merely provides a simple mechanism allowing a party to seek enforcement in a contracting state. Once the court grants approval for enforcement under the Singapore Convention, it will effect enforcement according to its procedural rules.

Declarations that may be made by the signatory states

[27] An unusual feature of the Singapore Convention relates to the declarations that states are permitted to make under article 8. Although the Convention will generally apply to all MSAs, signatory states are given the option to apply the Convention only to the extent that the parties to the MSA have agreed to its application.[39] The availability of such a declaration was meant to facilitate widespread participation in the Convention, while also respecting some countries' views that the consensual nature of mediation required parties to expressly "opt in" to the enforcement regime.[40]

[28] Furthermore, states may declare that the Convention does not apply to MSAs to which the state or any governmental agency is party to: article 8(1)(a). This gives states flexibility if they have concerns about situations in which a mediated settlement agreement is signed by a person or agency authorised by its domestic law.[41]

IV. Creating an enforcement regime that respects the unique qualities of the mediation process

[29] The relatively swift process of creating the Singapore Convention tends to overlook the significant challenges faced by the Working Group in balancing numerous interests. Several commentaries have described how there was an impasse amongst delegates till a breakthrough in February 2017, when a five-issue compromise agreement was reached to strike a balance between the different concerns while achieving a harmonised approach to the enforcement of MSAs. Much has been

39 Schnabel, n 35 at 43 (commenting that states can choose to apply the Singapore Convention on an opt-in basis).

40 Natalie Morris-Sharma, "Constructing the Convention on Mediation: The Chairperson's Perspective" (2019) 31 *Singapore Academy of Law Journal* 487 at 510.

41 Schnabel, n 35 at 57.

written on the multiple interests that had to be taken into account.[42] This section will focus primarily on the following two areas of tension:

(i) Maintaining the informality of mediation versus preventing abuse of the enforcement mechanism; and

(ii) Ensuring due process and fair outcomes in mediation as opposed to excessive intervention in mediations.

Maintaining the informality of mediation versus preventing abuse of the enforcement mechanism

[30] The Singapore Convention has imposed minimal formality requirements in order to keep the enforcement mechanism as simple as possible while also preventing abuse.[43] The relevant party only has to show a written MSA that has been signed by the parties, and evidence that the MSA resulted from mediation. The latter could take the form of the mediator's signature on the MSA, any other document confirming mediation, or an attestation by the body administering the mediation.[44] It was decided that there would be no additional requirement of a review mechanism in the state where the MSA was arrived.[45] The

42 See Natalie Morris-Sharma, "Constructing the Convention on Mediation: The Chairperson's Perspective" (2019) 31 *Singapore Academy of Law Journal* 487; Natalie Morris-Sharma, "The Changing Landscape of Arbitration: UNCITRAL's Work on the Enforcement of Conciliated Settlement Agreements" (2018) *Austrian Yearbook on International Arbitration* 123; Khory McCormick and Sharon Ong, "Through the Looking Glass: An Insider's Perspective into the Making of the Singapore Convention on Mediation" (2019) 31 *Singapore Academy of Law Journal* 520; Schnabel, n 35; Tim Schnabel, "Implementation of the Singapore Convention: Federalism, Self-execution, and Private Law Treaties" (forthcoming in *American Review of International Arbitration*, 2019).

43 UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-Fifth Session" (Vienna, September 12–13, 2016), UN Doc A/CN.9/896, p 13.

44 Singapore Convention on Mediation, art 4(1)(b) <https://www.singaporeconvention.org/convention-text.html> (accessed December 16, 2019).

45 UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-Fifth Session" (Vienna, September 12–13, 2016), UN Doc A/CN.9/896, pp 15–16; Natalie Morris-Sharma, "The Changing Landscape of Arbitration: UNCITRAL's Work on the Enforcement of Conciliated Settlement Agreements" (2018) *Austrian Yearbook on International Arbitration* 123 at 130.

practical realities of using electronic communications to conclude an MSA were also acknowledged in article 1(2).[46]

[31] In addition, the Convention does not require an earlier agreement to mediate, unlike the strict requirement for an arbitration agreement in the New York Convention. This approach implies that there is no equivalent concept of *competence-competence* which involves establishing the preliminary jurisdiction of a mediation in the international enforcement regime. The state where mediation takes place also has no role in reviewing the jurisdiction of the mediation.

[32] Following from the above, there is no concept of the "seat" of mediation in the Singapore Convention. An arbitration is usually governed by the law of the seat of arbitration, and the parties may rely on the state to support the arbitral process. The New York Convention has maintained this link, having referred to the "law of the country where the arbitration took place". The New York Convention thus applies to foreign arbitrations taking place in a state different from the state of enforcement.[47] By contrast, the parties in a cross-border mediation may not necessarily choose a particular location for a mediation because they desire its laws to govern the mediation. Furthermore, an international mediation may involve numerous jurisdictions, making it impossible to affirmatively identify a "seat" of mediation.[48] In this regard, Schnabel observed that "the scope of the convention could not be delineated by referring to whether relief is sought in a jurisdiction other than the mediated settlement's state of origin, as no particular state of origin is designated".[49]

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46 Singapore Convention on Mediation, art 4(1)(a) < https://www.singaporeconvention.org/convention-text.html> (accessed December 16, 2019); Natalie Morris-Sharma, "Constructing the Convention on Mediation: The Chairperson's Perspective" (2019) 31 *Singapore Academy of Law Journal* 487 at 499, referring to UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-Third Session" (Vienna, September 7–11, 2015), UN Doc A/CN.9/861, (September 17, 2015), pp 10–11; UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-fourth Session" (New York, February 1–5, 2016), UN Doc A/CN.9/867, (February 10, 2016), p 21; and UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, September 12–23, 2016), UN Doc A/CN.9/896, (September 30, 2016), p 12.

47 *Redfern and Hunter on International Arbitration,* 6th edn (Oxford University Press, 2015), pp 179–182.

48 Schnabel, n 35 at 21.

49 Ibid.

Ensuring due process and fair outcomes in mediation as opposed to excessive intervention in mediations

[33] Despite the minimal formality requirements, the Singapore Convention has introduced robust ways to regulate MSAs. This approach is in keeping with the complementary relationship between mediation and the courts, in which the courts only enforce agreements that respect due process and public policy. The Working Group faced the challenge of creating grounds of non-enforcement that were not excessively burdensome and intrusive, thus undermining the overall goal of creating an enforcement mechanism that was sufficiently flexible.[50] At the same time, any enforcement mechanism would not be complete without clear grounds for non-enforcement relating to due process. Article 5 was eventually drafted to introduce the following grounds of non-enforcement of MSAs:

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

   (a) A party to the settlement agreement was under some incapacity;

   (b) The settlement agreement sought to be relied upon:

      (i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

      (ii) Is not binding, or is not final, according to its terms; or

      (iii) Has been subsequently modified;

   (c) The obligations in the settlement agreement:

      (i) Have been performed; or

      (ii) Are not clear or comprehensible;

50 UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session" (Vienna, September 7–11, 2015), UN Doc A/CN.9/861, (September 17, 2015), p 17.

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

[34] The above grounds for refusing enforcement broadly relate to the following categories:

(i) the parties (1(a));

(ii) the MSA (1(b), (c) and (d));

(iii) the mediator's conduct and the mediation process (1(e) and (f)); and

(iv) the enforcing state's policies and mandatory laws (2(a) and (b)).[51]

These categories will be analysed in turn below.

The parties

[35] Article 5(1)(a) relating to the party's lack of capacity is identical to article V(1)(a) of the New York Convention that refers to the legal

51 UNCITRAL, "Note by Secretariat for the 65th Session", UN Doc A/CN.9/WG.II/WP.198, (June 30, 2016), p 11.

ability of a party to enter into an agreement on its own behalf.[52] Factors such as a party lacking mental capacity or a party being a minor will be relevant. It has been noted that this ground is unlikely to be commonly relied on as the parties in international commercial mediations are likely to be represented by lawyers.[53]

The mediated settlement agreement as a contract

[36] One of the common approaches in domestic law is to treat an MSA as a contract. Contractual formation principles — including offer and acceptance, consideration and certainty of terms — have been utilised to decide whether the parties have arrived at a contractual agreement to settle their dispute. The vitiating factors in contract law, such as misrepresentation, mistake and duress, are also relied on in deciding whether the agreement is void or voidable. Common law jurisdictions including the USA, England, Australia and Singapore rely predominantly on this framework. Other civil law legal systems such as Germany and Italy also regard domestic MSAs as contracts and subject to the general contractual principles.[54]

[37] The contractual framework is alluded to in the Convention's provisions relating to:

(i) whether the MSA is "null and void, inoperative or incapable of being performed under the law parties have validly subjected [the mediation] or … under the law deemed applicable by the competent authority": article 5(b)(i);

52 See Ignacio Suarez Anzorena, "The Incapacity Defence Under the New York Convention" in E Gaillard and D Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008), pp 615 and 621; UNCITRAL Secretariat, "Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (2016 edn), p 135.

53 Schnabel, n 35 at 51.

54 UNCITRAL, "Settlement of commercial disputes: Compilation of comments by Governments", UN Doc A/CN.9/WG.II/WP.196/Add, (January 25, 2016), pp 1 and 2 (Italy stating that certain agreements arising from mediation under Decree No 28 can be enforced by presenting it to court or having lawyers certify the agreement, while other settlement agreements are treated by the law as contracts); UNCITRAL, "Settlement of commercial disputes: Compilation of comments by Governments", UN Doc A/CN.9/846, (March 27, 2015), p 16 (Germany stating that agreements resulting from mediation are regarded as contracts, and an action can be brought in court requesting compliance with the contract).

(ii) whether there are binding and final terms: article 5(b)(ii);

(iii) whether the terms were clear or comprehensible: article 5(c)(ii);

(iv) whether enforcement would be contrary to the contract: article 5(d);[55] and

(v) whether the obligations in the MSA have been performed: article 5(c)(i)), or have been subsequently modified article 5(b)(iii).

[38] With regard to ground (i), the Working Group drew inspiration from articles II(3) and V(1)(a) of the New York Convention concerning when arbitration agreements would be deprived of legal effect.[56] These relevant provisions in the New York Convention relate to the preliminary determination of arbitral jurisdiction rather than the substantive grounds for non-enforcement of the arbitral award. Nevertheless, the courts have analysed arbitration agreements like any contractual agreement.[57] Most domestic laws relied on will largely apply contractual defences such as fraud and duress, albeit with variations across jurisdictions. The Working Group thought that this "generic nature" of analysing arbitration agreements, which has been interpreted by several jurisdictions in a harmonised fashion, could be relied on to determine whether there was a valid MSA.[58]

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55 UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session" (Vienna, September 7–11, 2015), UN Doc A/CN.9/861, (September 17, 2015), p 18 (noting that the possible categories of defences related to the genuineness of the settlement agreement, the readiness or validity of the agreement to be enforced, public policy and where the subject-matter was not capable of being enforced at the place of enforcement).

56 Ibid, at p 17; UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, September 12–23, 2016), UN Doc A/CN.9/896, (September 30, 2016), p 18.

57 Franco Ferrari and Friedrich Rosenfeld, "Limitations to Party Autonomy in International Arbitration" (forthcoming 2018), referring in fn 22 to S J Ware, "Employment Arbitration and Consent" (1996) *Hofstra Law Review* 25 at 112, stating that "the problem of determining consent in arbitration law is merely an application of that problem in contract law"; and S J Ware, "Arbitration and Unconscionability After Doctor's Associates" (1996) *Wake Forest Law Review* 31 at 1001 and 1006.

58 UNCITRAL Commission, "International commercial mediation: draft convention on international settlement agreements resulting from mediation, Note from Secretariat for the Commission's Fifty-First Session" (New York, June 25 to July 13, 2018), UN Doc A/CN.9/942, (March 2, 2019), p 11.

[39] The contractual characteristics of the arbitration agreement have effectively been transplanted into the Singapore Convention to form substantial grounds of non-enforcement for the MSA. The contractual legal framework is appropriate because of the integral role of self-determination in the mediation process. As explained in part II, the hallmark of mediation is the parties' freedom to arrive at a consensual decision. Accordingly, any undue influence or other type of contractual defence exerted by the mediator or the opposing party will undermine the party's autonomy in arriving at the MSA and should not be countenanced.

[40] It should be noted that the court's analysis of the contractual validity of the MSA should be based on the "law to which the parties have validly subjected it, or … the law deemed applicable". The parties' choice of law for the mediation should be respected. Alternatively, the enforcing state's conflict of laws rules ought to be used to determine the applicable contractual law to be used.[59]

[41] Ground (ii) relating to whether the terms are binding requires the courts to consider the parties' intentions as reflected in the written MSA. The parallel ground in article V(1)(e) of the New York Convention allows for non-recognition when the award has yet to become binding or has been set aside or suspended by a competent authority. The deliberate inclusion of the words "according to its terms" in the Singapore Convention clarifies that the court has to refer closely to the terms of the MSA, and no other extrinsic materials, to ascertain whether the parties intended the settlement to be final.[60] Hence, it is clear that the court should not adopt some countries' approaches of analysing the parallel provision in the New York Convention according to the availability of appellate review of the arbitral award at the seat of arbitration.[61]

59 Schnabel, n 35 at 45; Shoyu Chong and Felix Steffek, "Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspectives" (2019) 31 *Singapore Academy of Law Journal* 448 at 480–481.

60 Schnabel, n 35 at 36.

61 Gary Born, *International Arbitration: Law and Practice*, 2nd edn (Kluwer Law International, 2016), pp 406–407, referring to *Societe Nationale d'Operations Petrolieres de la Cote d'Ivore Holding v Keen Lloyd Res Ltd* XXIX YB Comm Arb 776 (2004) (Hong Kong Court First Instance 2001) (holding that an award is binding if it is no longer open to an appeal on the merits); and *Inter-Arab Inv Guarantee Corp v Banque Arabe et Intertionale d'Investissements* XXII YB Comm Arb 643 (Brussels Court of Appeal 1997) (that relied on the parties' arbitration agreement that provided that the award was binding).

[42] Similarly, grounds (iii), (iv) and (v) refer to specific instances of respecting the parties' intentions in the MSA. The parties' intentions must have been reflected clearly and in a comprehensible way. This allows the court to refuse enforcement of MSAs that are manifestly confusing and ill-defined such that the competent authority is unable to decipher the relief to be given.[62] Furthermore, the state may refuse to give relief to any term that seems to be contrary to the parties' agreement in the MSA. Such circumstances may include the parties' stipulation of the fulfilment of certain conditions before the relevant obligation arises, or the parties' agreement to limitations on their ability to seek relief.[63] Finally, the grounds referring to the obligations in the MSA being subsequently modified or having been already performed also oblige the court to interpret the MSA according to the parties' intentions. Cumulatively, these grounds attest to the centrality of party autonomy in mediation.

The mediator's conduct and the mediation process

[43] The most distinctive ground of non-enforcement probably relates to article 5(1)(e) and (f). There were strong views within the Working Group that professional mediation ethical rules apart from party autonomy – including neutrality and equal treatment of parties – should be endorsed as due process principles within mediation.[64] The discussions thus focused heavily on the types of serious mediator misconduct warranting a refusal of enforcement. Consequently, the Working Group agreed to two additional grounds of non-relief – one relating to fair treatment, and the other relating to the mediator's failure to disclose information that was likely to raise doubts about mediator impartiality.[65] These aspects of misconduct had to be sufficiently serious and objective grounds, "without which failure that party would not have entered into the settlement agreement".[66] The former ground was

62 Schnabel, n 35 at 37.

63 Ibid, at p 38.

64 UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session" (Vienna, September 7–11, 2015), UN Doc A/CN.9/861, (September 17, 2015), p 17.

65 UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, September 12–23, 2016), UN Doc A/CN.9/896, (September 30, 2016), p 20.

66 Ibid, at pp 19–20; UNCITRAL Commission, "International commercial mediation: draft convention on international settlement agreements resulting from mediation, Note from Secretariat for the Commission's Fifty-First Session" (New York, June 25 to July 13, 2018), UN Doc A/CN.9/942, (March 2, 2019), p 5.

eventually articulated as a serious breach of "standards applicable to the mediator or mediation" in article 5(1)(e), while the latter was encapsulated as a failure to "disclose … circumstances that raise justifiable doubts as to the mediator's impartiality or independence" in article 5(1)(f).[67]

[44] The applicable mediation standards in article 5(1)(e) refer to the relevant legislation governing the mediation or professional codes of mediation conduct.[68] This could take the form of an internal code of conduct created by a mediation organisation (such as the Centre for Effective Dispute Resolution),[69] or standards associated with mediation accreditation bodies (such as the International Mediation Institute).[70] There are also country-specific mediation standards that the mediator may be obliged to adhere to. The EU, Australia, Hong Kong and Singapore have formulated such codes of conduct for their mediators.[71] The Working Group agreed that the text accompanying the Convention would provide an illustrative list of such standards that would refer to elements such as independence and fair treatment.[72] It

67 UNCITRAL Commission, "International commercial mediation: draft convention on international settlement agreements resulting from mediation, Note from Secretariat for the Commission's Fifty-First Session" (New York, June 25 to July 13, 2018), UN Doc A/CN.9/942, (March 2, 2019), p 5; UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-Eighth Session" (New York, February 5–9, 2018), UN Doc A/CN.9/934, (February 19, 2018), p 10.

68 UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session" (New York, February 6–10, 2017), UN Doc A/CN.9/901, (February 16, 2017), p 16.

69 Centre for Effective Dispute Resolution (CEDR), "Code of Conduct for Third Party Neutrals", <https://mk0cedrxdkly80r1e6.kinstacdn.com/app/uploads/2019/11/Code-of-Conduct-for-Third-Party-Neutrals.pdf> (accessed December 16, 2019).

70 International Mediation Institution, "Code of Professional Conduct", <https://www.imimediation.org/practitioners/code-professional-conduct/> (accessed December 16, 2019).

71 EU, "European Code of Conduct for Mediators", Australia_National Mediator Accreditation Standards; Hong Kong Mediation Code, <http://www.hkmaal.org.hk/en/HongKongMediationCode.php>; Singapore International Mediation Institute, Code of Professional Conduct for SIMI Mediators, <http://www.simi.org.sg/What-We-Offer/Mediators/Code-of-Professional-Conduct> (accessed December 16, 2019).

72 UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session" (New York, February 6–10, 2017), UN Doc A/CN.9/901, (February 16, 2017), p 16; UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-Seventh Session" (Vienna, October 2–6, 2017), UN Doc A/CN.9/929, (October 11, 2017), pp 15–16.

has been suggested that to the extent that no such binding standards applied to the mediator or the mediation at the time of the mediation, the competent authority cannot deny relief based on reference to best practices or requirements in other jurisdictions.[73]

[45] The related ground of article 5(1)(f) arose out of the discussions within the Working Group to introduce consistency between the Singapore Convention and the Model Law on Conciliation concerning fair treatment as well as a failure to disclose circumstances impinging on the mediator's impartiality.[74] Some delegates pointed out that disclosure requirements were common in relevant applicable mediation standards and domestic mediation legislation,[75] whereas others noted that mediators in some jurisdictions are not obliged to make similar disclosures as arbitrators.[76] It was eventually agreed that this ground would be introduced, subject to the high threshold described below. In addition, it was clarified that the ground would not apply if the undisclosed circumstances were known by the relevant party.[77] This ground effectively highlights a specific instance of due process principles in mediation, which may or may not be present in the relevant mediation standards.[78] As Schnabel observed, it "creates an autonomous standard that can be relied upon regardless of whether any 'applicable' standards [under article 5(1)(e)] required disclosures".

[46] Notably, there are two aspects that circumscribe the application of article 5(1)(e) and (f). First, the party arguing for non-enforcement must fulfil a very high threshold for mediator misconduct. The breach of mediation standards must be "serious", while the mediator's failure to disclose circumstances must raise "justifiable doubts" concerning the mediator's impartiality. Second, there must be a strong causative

73 Schnabel, n 35 at 52.

74 UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, September 12–23, 2016), UN Doc A/CN.9/896, (September 30, 2016), p 19; Model Law on Conciliation for International Conciliation, arts 5(4), 5(5) and 6(3).

75 UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session" (New York, February 6–10, 2017), UN Doc A/CN.9/901, (February 16, 2017), p 15.

76 Schnabel, n 35 at 53; Ibid, at p 14.

77 Schnabel, n 35 at 53.

78 UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session" (New York, February 6–10, 2017), UN Doc A/CN.9/901, (February 16, 2017), p 16.

link between the breaches and the parties' consent in entering the MSA. Under both article 5(1)(e) and (f), it has to be apparent that the disputing parties would have withheld their consent to the MSA and "not entered into" the MSA because of the mediator's misconduct. These two requirements were introduced by the Working Group in order to balance the need for due process in the mediation process with the risk of subjective interpretation of mediation standards that would undermine the utility of the Singapore Convention.[79]

[47] In practice, the grounds of non-enforcement relating to the MSA and the mediator's misconduct have to be evaluated with reference to evidence concerning mediation communications. While such communications are usually inadmissible because of the "without prejudice" rule, the common law clearly allows exceptions in the circumstances listed below that mirror the above grounds for non-enforcement in the Singapore Convention:

(i) evidence of settlement, where there is an issue as to whether an agreement has been concluded;

(ii) where evidence of the negotiations is admissible to show that an apparent agreement should be set aside on the ground of misrepresentation, fraud or undue influence;[80] and

(iii) where there is a dispute as to the interpretation of the settlement.[81]

The enforcing state's policies and mandatory laws

[48] The grounds for non-enforcement in the preceding section relate to due process and how the mediation was conducted. The grounds in

79 UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, September 12–23, 2016), UN Doc A/CN.9/896, (September 30, 2016), p 19; UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-sixth Session" (New York, February 6–10, 2017),UN Doc A/CN.9/901, (February 16, 2017), p 8 (Working Group noting that including grounds based on fair treatment would contribute to ensuring that the process leading to a settlement agreement was conducted in an appropriate manner, provide a review mechanism by a court or an enforcing authority through which the parties could be protected, and highlight the importance of ethics and conduct of conciliators).

80 *Unilever plc v The Procter & Gamble Co* ("*Unilever*") [2000] 1 WLR 2436 at 2444–2445.

81 This is one of two new exceptions added in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd'* [2010] UKSC 44; [2011] 1 AC 662; [2010] 4 All ER 1011.

article 5(2) relate to the courts' control over the content of the mediated settlement agreement. This article mirrors the two grounds for non-recognition in the New York Convention – a conflict with the state's public policies, and the subject-matter being not capable of settlement by mediation (instead of arbitration). Both grounds broadly allow the enforcing state to decline giving effect to the parties' intended terms because it deems their agreement to be inconsistent with its public policies. The Working Group pointed out that the standard for the defences in the Convention should be comparable to those in the New York Convention and the Model Law on Arbitration.[82] Hence, it is most likely that contracting states will be guided by the existing arbitration jurisprudence when interpreting article 5(2). Similar to the New York Convention, these defences could be considered by the court on its own intiative even if not raised by the parties.[83]

[49] With regard to article 5(2)(a), the Working Group noted that it was up to the relevant enforcing state to decide what constituted public policy.[84] Public policy could cover both procedural and substantive aspects, and include matters relating to national security or national interest.[85] Public policy has been interpreted narrowly by most courts in relation to the New York Convention. For instance, the UK Court of Appeal stated that considerations of public policy in this defence "should be approached with extreme caution", limiting it to instances when "the enforcement of the award would be clearly injurious to the public good or, possibly, enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised".[86] Given that party self-determination is exercised to a greater extent in mediation than

82 UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, September 12–23, 2016), UN Doc A/CN.9/896, (September 30, 2016), p 7; UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-Seventh Session" (Vienna, October 2–6, 2017), UN Doc A/CN.9/929, (October 11, 2017), p 16.

83 UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-fifth Session" (Vienna, September 12–23, 2016), UN Doc A/CN.9/896, (September 30, 2016), p 8.

84 UNCITRAL, "Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-Seventh Session" (Vienna, October 2–6, 2017), UN Doc A/CN.9/929, (October 11, 2017), p 16.

85 Ibid.

86 *Deutsche Schachtbau-und Tie ohrgesellscha mbH v Shell International Petroleum Co Ltd* [1990] 1 AC 295, CA (England and Wales).

arbitration, it is most likely that public policy will also be narrowly circumscribed by the courts when applying article 5(2)(a). This author has also argued elsewhere that a narrow interpretation of public policy will be consonant with the overall purpose of the Singapore Convention to level the relative standings between mediation and arbitration. Similar standards should be used when applying the grounds of non-enforcement for both arbitral awards and MSAs, so as to effectively confer comparable standing to both dispute resolution processes.[87]

[50] Article 5(2)(b) is related to the concept of arbitrability of disputes in terms of whether the state mandates certain matters to be within the exclusive purview of the courts. There has been a small number of matters in domestic arbitration legislation that have been deemed non-arbitrable. It has been observed that the small number of non-arbitrable matters are likely due to the trend of encouraging the saving of costs through the private resolution of disputes.[88] It is probable that the same approach in deciding which cases are arbitrable in the enforcing state will be adopted in determining which cases may not be mediated. Furthermore, many of the non-arbitrable matters, such as employment, labour, family and consumer disputes, do not fall under the ambit of the Singapore Convention that applies only to commercial disputes. It is likely that only matters involving disputants with severely unequal bargaining power will be deemed incapable of settlement by mediation. There are likely to be very few such situations within commercial disputes.

V. Conclusion

[51] The Singapore Convention marks a milestone in the growth of mediation and the legitimate place it takes within the justice system. The symbiotic relationship between the courts and the mediation process in many jurisdictions has now been acknowledged and strengthened.

87 Dorcas Quek Anderson, "Supporting Party Autonomy in the Enforcement of Cross-Border Mediated Settlement Agreements: A Brave New World or Unchartered Territory?" in Burkhard Hess and Loic Cadiet (eds), *Privatizing Dispute Resolution and Its Limits* (Nomos, Max Planck Institute of Procedural Law, 2019).

88 "Request for the Recognition and Enforcement of an Arbitral Award" in *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration, 2011), p 105.

At the same time, the Convention has resolved the previous challenges involved in enforcing a mediated settlement agreement with the courts' assistance. While the final instrument has created a standalone enforcement regime for international commercial mediations that has bypassed the need to litigate or arbitrate, the Convention requires the future support of the courts in signatory countries in order to be truly successful and to bring its intended result to fruition.

[52] It is therefore crucial for the courts to attain a sound understanding of the underlying concerns and interests that were delicately balanced in this instrument. In applying the grounds of non-enforcement in article 5, the courts should balance the need to subject MSAs to public policy and due process standards, and the equally important need not to intervene excessively with the parties' exercise of autonomy and confidential discussions. A large part of the court's regulation of MSAs entails protecting the parties' exercise of autonomy. As such, the contractual framework is likely to be used to ensure that the MSA has not been arrived at through undue influence, duress or any other contractual defence that has undermined the parties' consent. There should also be awareness that the relevant mediation standards used to appraise the MSA under article 5(1)(e) are not necessarily found within the enforcing state's mediation tradition, but are the standards that the parties have intended to apply to the mediation or mediator. Furthermore, the enforcing state should not impose its own mediation formality requirements on the relevant MSA, for the Singapore Convention has required very minimal formalities for the MSA as a prerequisite to enforcement. Finally, the courts may make reference to the general approach in applying the New York Convention when deciding whether the content of the MSA has breached the enforcing state's public policies or involves an area that is not capable of settlement by mediation. To respect the parties' autonomy in arriving at the most suitable settlement meeting their interests, the courts should only disallow the enforcement of settlement terms that breach very well-established policies.

[53] The Singapore Convention has underscored as well as clarified the role of mediation in the international and domestic dispute resolution landscapes. As mediation takes on a more prominent role alongside litigation and arbitration, it is hoped that its distinctive characteristics are preserved and respected by the courts in their future enforcement of MSAs.

The Growing Trend in the Introduction of Provisions Prohibiting General Avoidance and Necessitating Broad Disclosure in Revenue Legislation at National and International Levels – How Does This Impact the Rule of Law?

by

*Dato' Mohd Arief Emran bin Tun Arifin**

A. Introduction

[1] Tax avoidance is seen as the scourge of public finance. In abusive form, tax avoidance defeats the objective of collecting taxes in an efficient, equitable and effective manner. It is therefore not surprising that Legislatures have introduced, in some form or another, general anti-avoidance rules ("GAAR") or provisions to counter the growth of tax avoidance.

[2] The trend to introduce GAAR to deal with tax avoidance has raised concerns amongst lawyers and jurists as being contrary to the rule of law. The criticism lies in the uncertainty as to what constitutes tax avoidance and how GAAR provide wide discretionary powers to the Revenue authorities to impose tax avoidance measures on taxpayers. These critics argue that GAAR and its related disclosure rules are contrary to the rule of law. These should be abandoned in favour of improved drafting of legislation to enable taxpayers to understand the law. Otherwise, civil liberties of the public will be affected.

[3] This article attempts to answer the above and will address this in four parts:

(1) The growth of general anti-avoidance and disclosure rules: domestic law and internationally;

(2) GAAR as applied in Malaysia;

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(3) The processes of GAAR and disclosure rules: as applied in the United Kingdom ("UK"); and

(4) Consider whether the said GAAR and disclosure rules are contrary to the rule of law.

B. Growth of GAAR and disclosure requirements – domestic law and internationally

[4] PricewaterhouseCoopers ("PwC") highlighted that as of October 2016, the tax laws of many countries have adopted GAAR to empower Revenue authorities to deny taxpayers the benefits of schemes or arrangements that are deemed to have an impermissible tax-related purpose or are abusive tax avoidance.[1] It also highlighted, that as of October 2016, GAAR have been introduced or will soon be operative, in Australia, Canada, China, the European Union ("EU"), India, the Netherlands, New Zealand, Poland and the UK. At an international level, GAAR models have been introduced or proposed to deal with the issue of tax avoidance. Examples of these are Action 6 of the Organisation for Economic Co-operation and Development ("OECD") Base Erosion and Profit Shifting Project ("BEPS") and the EU Anti-Tax Avoidance Directive ("ATAD I & II").

[5] It was also recognised that the war against tax avoidance will not be successful without the requirement of disclosure of information by MNEs (multinational enterprises) and taxpayers and the sharing of information between tax and Revenue authorities. The EU introduced the Council Directive (EU) 2018 (DAC6) which requires EU Member States to legislate into their domestic law the obligation on tax intermediaries and some taxpayers, duty to disclose information about certain defined cross-border transactions and the sharing of this information between Member States. The UK also introduced into its law the Disclosure Tax Avoidance Scheme in 2014,[2] which requires promoters and participants of tax avoidance schemes to report the detailed information as to the working of the scheme and the participants of the said scheme. The UK also introduced regulations

1 PwC, Paper of Recent Developments in General Anti Avoidance Rules, <pwc.com/go/en/tax/newsletters/tax-controversy-dispute-resolution/assets/PWC-TCDR%20Insights-GAAR-recent-developments.pdf>.

2 Taxes Management Act, s 20(1) and (3), now replaced by the Finance Act 2008, s 113 and Sch 36.

in 2016 following the country-by-country reporting as proposed by the OECD that requires MNEs to provide Her Majesty's Revenue and Customs ("HMRC") with information that may assist the HMRC with its assessment of any international tax avoidance risk.[3]

C. GAAR and the Malaysian position

[6] The Malaysian tax law position concerning GAAR is provided for in section 140 of the Income Tax Act 1967 [*Act 53*], parts of which are reproduced herein:

> (1) The Director General, where he has reason to believe that any transaction has the direct or indirect effect of –
>
> (a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;
>
> (b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;
>
> (c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or
>
> (d) hindering or preventing the operation of this Act in any respect,
>
> may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction.

[7] Section 140 of the Income Tax Act 1967 gives wide powers to the Director General to determine whether the transaction undertaken by a taxpayer is a transaction that attempts to avoid or alter the incidence of tax. This wide statutory power is, however, subject to limitations that have been imposed by the judgments of the superior courts in Malaysia recognising the importance of the distinction between

3 Lynne Oats and Penelope Tuck, "Corporate Tax Avoidance: Is Tax Transparency the Solution?" *Accounting and Business Research* 49:5, pp 565–583.

legitimate tax planning and tax avoidance that falls within the ambit of section 140 of the Income Tax Act 1967.

[8] The leading case concerning the applicability of this section is *Sabah Berjaya Sdn Bhd (SB) v Ketua Pengarah Hasil Dalam Negeri*.[4] In this case, the taxpayer is a private limited company and a subsidiary wholly owned by the Sabah Foundation. The foundation was approved as an institution of a public character which means that gifts of money made to the foundation were tax deductible in the hands of the donor. The taxpayer has been donating all its profits to the foundation for eight years. The Inland Revenue Board was unhappy with the decision made by the taxpayer and disallowed the sums donated by the appellant to the foundation. The Special Commissioner and the High Court decided against the taxpayer and an appeal was filed and heard at the Court of Appeal. The Court of Appeal overturned the finding of the High Court and the Special Commissioner. Gopal Sri Ram JCA, as he then was, held that the taxpayer was not engaged in tax avoidance. In his grounds of judgment, his Lordship stated as follows:

> The section is not *sui generis*. It has parallels in other jurisdictions where it has received judicial consideration. Of the cases that have dealt with its equipollent, *Commissioner of Inland Revenue v Challenge Corporation Ltd* [1986] STC 548 is the most notable. It is a decision of the Privy Council on an appeal from New Zealand. The Special Commissioners referred to it in their Deciding Order. The Judicial Committee had before it, in that case, s 99 of the Income Tax Act 1976 of New Zealand. It is a provision that is in *pari materia* with s 140 of the Act.
>
> Lord Templeman, when delivering the majority opinion of the Board, drew a distinction between tax evasion, tax avoidance and tax mitigation. It is only the first two that fall within the purview of the statute: the last does not. In the course of delivering the advice of the Board on behalf of the majority, his Lordship said (at p 554 of the report):
>
>> "Tax evasion also can be dismissed. Evasion occurs when the commissioner is not informed of all the facts relevant to an assessment of tax. Innocent evasion may lead, to a reassessment. Fraudulent evasion may lead to a criminal prosecution as well as reassessment.

4 [1999] 3 CLJ 587.

In the present case Challenge fulfilled their duty to inform the commissioner of all the relevant facts.

The material distinction in the present case is between tax mitigation and tax avoidance. A taxpayer has always been free to mitigate his liability to tax. In the oft quoted words of Lord Tomlin in *IRC v Duke of Westminster* [1936] AC 1 at 19 'Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be'. In that case however the distinction between tax mitigation and tax avoidance was neither considered nor implied.

Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability. Section 99 does not apply to tax mitigation because the taxpayer's tax advantage is not derived from an arrangement but from the reduction of income which he accepts or the expenditure which he incurs.

Thus when a taxpayer executes a covenant and makes a payment under the covenant he reduces his income. If the covenant exceeds six years and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the payment under the covenant.

When a taxpayer makes a settlement, he deprives himself of the capital which is a source of income and thereby reduces his income. If the settlement is irrevocable and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the reduction of income.

Where a taxpayer pays a premium on a qualifying insurance policy, he incurs expenditure. The tax statute entitled the taxpayer to reduction of tax liability. The tax advantage results from the expenditure on the premium.

A taxpayer may incur expense on export business or incur capital or other expenditure which by statute entitles the taxpayer to a reduction of his tax liability. The tax advantages result from the expenditure for which Parliament grants specific tax relief.

When a member of a specified group of companies sustains a loss, s 191 allows the loss to reduce the assessable income of

other members of the group. The tax advantage results from the loss sustained by one member of the group and suffered by the whole group.

Section 99 does not apply to tax mitigation where the taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability.

Section 99 does apply to tax avoidance. Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had."

[9] In the present case, the appellant did not pretend to donate its entire profit to the foundation. On the evidence there was an actual donation. So, no question of tax evasion arises. That is probably why the respondent never raised a case of evasion against the appellant at any stage.

[10] The ambit and the application of the power of the Director General to invoke section 140 of the Income Tax Act 1967 were considered by the Court of Appeal in *Syarikat Ibraco-Peremba Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[5] where Umi Kalthom JCA held:

> [28] The distinction between what is accepted and what is not in the way of reducing the amount of tax to be paid used to be conveniently described by the terms tax avoidance and tax evasion respectively. Section 140(1)(c) of the Act in particular, has the effect of demolishing that convenient description. The Act now empowers the Director-General, without prejudice to such validity as it may have in any other respect or for any other purpose, where he has reason to believe that any transaction has the direct or indirect effect of evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by the Act, to disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction. Thus the oft quoted

5 [2015] 10 CLJ 114.

words of Lord Tomlin in *IRC v Duke of Westminster* [1936] AC 1 and quoted by Lord Templeman in *Commissioner of Inland Revenue v Challenge Corporation Ltd (*supra) that every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be is now only partially true, for whether he succeeds or not, according to s 140(1)(c), depends upon the determination of the Director-General. *We make the observation that it is for the taxpayer to demonstrate that the transaction or the arrangement by which the income was produced was so preordained by compliance with the requirements of law or accepted business practices to limit risk exposure, and that the tax savings were purely incidental*.

[29] *Other than the above all that remains solely at the taxpayer's discretion is "tax mitigation", which as explained by Lord Templeman is not subject to the section because the taxpayer's tax advantage is not derived from an "arrangement" but from the reduction of income which he accepts by reducing his income, or the higher expenditure which he incurs, or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability.*

(Emphasis added.)

[11] The power of the Inland Revenue Board to invoke section 140 of the Income Tax Act 1967 is also restricted under section 140(5) which states:

(5) Where in consequence of any adjustment made under this section an assessment is made, a right to repayment is refused or a return of a repayment of tax is required, particulars of the adjustment shall be given with the notice of assessment, with the notice refusing the repayment or with the notice requiring the return of a repayment, as the case may be.

[12] This provision was considered by the High Court *in Bandar Utama City Corp Sdn Bhd v Director-General of Inland Revenue*.[6] The High Court held that section 140(5) of the Income Tax Act 1967 encapsulates "the fundamental rules of natural justice, in particular, *audi alteram partem*". The court also held that it is important that the taxpayer is informed of the particulars of the allegations on the subject-matter which the Inland Revenue Board has argued is tax avoidance. This is to ensure that the taxpayer is made aware of the allegation and

6 [1997] 1 LNS 444.

able to consider whether to file an appeal against the said decision. Otherwise, the powers of the Inland Revenue Board may be too wide and may contravene the rule of law.

[13] Also note that this statutory duty was confirmed by the Supreme Court in *Director General of Inland Revenue v Hup Cheong Timber (Labis) Sdn Bhd*,[7] where Wan Hamzah SCJ stated:

> If from evidence the Revenue was satisfied that the transaction whereby the taxpayer paid the sum of $1.4m to the Persatuan was a transaction made for the purpose of evading or avoiding liability to pay income tax, the Revenue should take action pursuant to s 140 to make adjustment with a view to counter-acting the effect of the transaction, *and in that event the Revenue should under sub-s (5), give to the taxpayer particulars of the adjustment together with the notice of assessment.*

[14] The Federal Court has also held that there is now a Malaysian common law duty to give reasons for any decision made by any governmental bodies or any statutory bodies. This duty was clearly laid out in *Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-pekerja Bank*.[8] In that case, Balia Yusof Wahi JCA, delivering the judgment of the Federal Court, held:

> [86] It is also settled public law principle and principle of natural justice that a public decision-making body is under a duty to give reasons for its decision. Indeed, a reasoned decision can be an additional constituent of the concept of fairness (*Rohana Ariffin v Universiti Sains Malaysia & Another Case* [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 380; [1989] 1 MLJ 487, *Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors* [2005] 3 CLJ 517; [2005] 5 MLJ 193. The giving of reason is also one of the fundamentals of good administration.
>
> [87] The absence of any provision in the statute requiring the decision maker to give reasons ought not to be understood or taken to mean that there is no such duty to give reason unless that very statute specifies that no reason needs be given. The absence of such a provision ought not to be regarded as a cloak under which the decision maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested parties or the public at large.

7 [1985] 2 MLJ 322.
8 [2017] 4 CLJ 265.

[88] In a case where the decision is one that is straight forward and one that is not mired in circumstances that would invite further or deeper rationalisation, then, perhaps the need to give reason by the decision maker may not arise. The circumstances arising in the particular case may by implication, demand the imposition of the duty to give reasons. Lord Mustill in the House of Lord case of *Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 said:

> "I accept without hesitation … that the law does not at present recognise a general duty to give reasons for an administrative decision. *Nevertheless it is equally beyond question that such a duty may in appropriate circumstances be implied*." (Emphasis added.)

[89] In our view, in exercising his powers and/or discretion and making a decision under s 12 of TUA 1959 the DG must have a reason for that decision. It is not a fanciful decision and the discretion can never be exercised willy nilly. Being in that position, it is reasonable and appropriate to imply that he ought to have given reason/s for his decision. He did not do so, for he was under the erroneous belief (as stated in his affidavit in reply) that he has "kuasa budi bicara yang mutlak". He has not.

[15] Another important aspect of section 140 of the Income Tax Act 1967 is that the Director General is not entitled to impose on the taxpayer an obligation to maximise his taxation and arrange his or her affairs to the satisfaction of the Inland Revenue Board. It is not for the Revenue to direct how a taxpayer is to arrange his commercial affairs. This is clearly stated by Gopal Sri Ram JCA in *Sabah Berjaya* (supra) and in the decision of the High Court in *Ensco Gerudi v Ketua Pengarah Hasil Dalam Negeri*,[9] which was affirmed by the Court of Appeal. In *Ensco Gerudi*, the High Court agreed that it was not for the Inland Revenue Board to impose additional requirements that were not provided for in the enabling legislation which afforded a tax advantage to a taxpayer. As long as the taxpayer had acted in accordance with the statutory provisions and had not manipulated the statute contrary to its principles, the Revenue cannot complain and impose additional requirements to apply the tax avoidance powers under section 140 of the Income Tax Act 1967.

9 No 14-11-08-2014.

[16] Therefore, the Malaysian courts have interpreted the powers provided to the Director General under section 140 of the Income Tax Act 1967 to be in line with the general principles of tax law and ensuring that the said wide powers do not infringe the rule of law. The taxpayer is still entitled to act and plan its affairs following the statutory rights provided to it but is not entitled to manipulate the law contrary to the principle or purpose of the statute.

D. GAAR and disclosure rules processes in the United Kingdom

[17] The GAAR and disclosure rules processes applicable in the UK are considered in the following paragraphs and then tested, as an example, to ascertain whether the GAARs is compatible with the rule of law.

[18] The UK GAAR is found in sections 206 and 207 of the UK Finance Act 2013. The UK GAAR targets what is seen as abusive tax avoidance. Under section 206 of the Finance Act 2013, arrangements will be tax arrangements if it would be reasonable to conclude, having regard to all the circumstances, that their main purpose, or one of their main purposes, was obtaining a tax advantage. Once a tax arrangement is found to exist, the next step is to assess whether the arrangement is abusive. The arrangements will be abusive if the entering into or carrying out of the arrangements cannot reasonably be regarded as a reasonable course of action concerning the relevant tax provisions, having regard to all the circumstances. This is what is usually referred to as the double reasonableness test. If GAAR applies, the tax advantage will be counteracted by reasonable and just adjustments.[10]

[19] Section 211 of the UK GAAR also contains evidentiary rules that go beyond the established rules of statutory interpretation as laid down in *Pepper v Hart*.[11] Under the said provision, a court or tribunal, in determining any issue in connection with an anti-abuse rule, may consider:

(a) guidance, statements or other material (whether of the HMRC, a Minister of the Crown or anyone else) that was in the public domain at the time the arrangements were entered into; and

(b) evidence of established practice at that time.

10 *Tiley's Revenue Law*, 9th edn (Hart Publishing); UK Finance Act 2013, ss 206 to 210.
11 [1992] UKHL 3.

[20] The procedural requirements of the UK GAAR are provided for under Schedules 43 to 43C of the Finance Act 2013. If a designated HMRC officer considers that GAAR is applicable concerning the affairs of a taxpayer, a notice with the required details as required under paragraph 3 of Schedule 43 must be given to the taxpayer, setting out the counteraction that the officers consider ought to be taken. The taxpayer is allowed to send a response to the notice to the designated officer within 45 days. If the issue is not resolved following paragraphs 3, 4 and 4B of Schedule 43, the designated officer shall then refer to matter to the GAAR Advisory Panel.

[21] Both the designated HMRC officer and the taxpayer shall be allowed to make representations to the GAAR Advisory Panel. Once any matter is referred to the GAAR Advisory Panel, its chair will then arrange for a sub-panel consisting of three members to consider the matter and the sub-panel must consider all issues and representations made to it by both parties. An opinion or opinions must then be produced by the sub-panel. The GAAR Advisory Panel is supposed to be independent of the HMRC and is not considered to be a quasi-judicial body. The GAAR's counteraction measures will be subject to the usual appeal procedures with normal time limits. The UK has also required providers or advisers of tax avoidance schemes to report such schemes to the HMRC as required under the Disclosure of Tax Avoidance Schemes 2014. Failure to disclose such schemes may attract strict penal consequences. This is to enable the HMRC to reach to the introduction of tax avoidance schemes and at the same time to close any possible loopholes in the law that is being utilised by tax planners and advisers.

E. Is GAAR incompatible with the rule of law

[22] The UK GAAR has attracted considerable criticism on the ground that it breaches the rule of law. David Goldberg QC argues that GAAR, in its present form, is incapable of curing the problem of the UK tax system and will not solve tax avoidance. He opines that the UK GAAR is uncertain as the concept of reasonableness is not properly defined. His concern is further amplified by the discretionary powers given to the HMRC to make laws.[12] This breaches the essential requirement of certainty required by the rule of law.

12 David Goldberg QC, *Debate on the GAAR: Threat or Opportunity for the Rule of Law*.

[23] This view is also echoed by Patrick Way QC. He also argues that the double reasonableness test is vague and is subjective. He also argues that there is no clear definition of the double reasonableness test and this may attract a different interpretation by each judge or tribunal as there is no clear guidance in the legislation. This is further aggravated by the decision to blend "reasonableness" and "abuse". These are two separate legal concepts and should not be muddled together. By muddling these two concepts, a clear objective rule will not be achieved and will lead to uncertainty in the application of the law.[13]

[24] Detractors of GAAR argue that the general anti-avoidance rules are vague and detract from the requirement of certainty. One could conclude that the truly objectionable aspect of GAAR is that no one knows how far their reach extends. More so when one applies the concept of the rule of law, as explained by John Rawls of Stanford University or FA Hayek. The concept of liberty in reliance on the law is offended by having vague and what is seen as unclear and arbitrary law.[14]

[25] This is not helped by the procedural aspects of GAAR. In the UK, the criticism lies in the appointment of the GAAR Panel. Although supposedly independent from the HMRC, its members are appointed by the Commissioners of the HMRC and the Advisory Panel is funded by the HMRC. This dependence on HMRC does not bode well and leads to questions relating to the independence of the Advisory Panel.

[26] Despite the above criticism, it is important to note that the essential requirements of the rule of law are satisfied by the UK GAAR and GAAR generally. Taking the core of the principles of the rules of law as laid down by Lord Bingham,[15] GAAR are generally (a) applied to all persons and bodies within the State; (b) the laws and opinions are made public; (c) have retrospective effect; and (d) are publicly administered in the courts. Even Lord Bingham concedes that there are outliers and exceptions to the general concept of the rule of law. The criticism lies in the potential uncertainty of GAAR but in some

13 Patrick Way QC, *The Rule of Law, Tax Avoidance and the GAAR*.
14 Ibid.
15 Tom Bingham, *The Rules of Law* (Penguin Books, 2011).

cases, we may need to shift the focus from certainty towards how to enable decisions to be made fairly and legitimately.[16]

[27] It is worth noting that the rule of law also requires an effective legal system. There is no point of certainty if the law is easily avoided or abused. Without GAAR and the disclosure rules, tax legislation may be abused by taxpayers and will also not be applied equally. Aaronson QC in his report[17] argued that the Judiciary will not be required to stretch the interpretation of the law to achieve a just decision and will ensure the legitimacy of the court's decision. Without GAAR, the four main pillars of the rule of law may not exist in the tax system.

[28] Therefore, even if certain aspects of the rule of law may be infringed by GAAR, overall, they are essential for an effective tax legal system. As Professor Joseph Raz opines, the rule of law is merely one yardstick against which a legal system may be measured and that a breach of aspects of the said rule may be the lesser evil.[18]

[29] Regarding the procedural aspects of UK GAAR, one accepts that there may be a weakness, but nonetheless, taxpayers are not without protection. Arguably, the decision of the GAAR Advisory Panel is still subject to judicial review and would be subject to the appeal processes afforded in law. GAAR also generally do not have retrospective effect as seen in the UK and most modern legal systems.

[30] The same criticism has also been laid against section 140 of the Income Tax Act 1967. The statutory provision provides wide powers to the Director General to disregard any scheme or transaction undertaken by a taxpayer on the ground of tax avoidance. There are no clear statutory provisions that explain clearly what is meant by tax avoidance and how the said statutory power is to be read in line with the right of a taxpayer to plan his affairs to mitigate its taxes. This uncertainty creates issues of compliance for taxpayers and may, therefore, breach one of the main tenets of the rule of law as laid by

16 Judith Freedman, "Defining Taxpayer Responsibility: In support of a General Anti Avoidance Principle" (2004) British Tax Review (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=900043).

17 A study to consider whether a general anti-avoidance rule should be introduced in the UK tax system dated November 11, 2011 (available at https://webarchive.nationalarchives.gov.uk/20130402163458/http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf).

18 Supra, n 15.

Dicey,[19] i.e. the requirement of the certainty of the law. However, this uncertainty has been tempered by the judges of the Malaysian courts who have the wisdom to impose restrictions on the Director General as stated earlier.

F. Conclusion

[31] Based on the above, it is shown that GAAR and its processes attract considerable criticism due to the vague nature of its provisions and the powers given to the authorities. Nonetheless, due to the nature of the harm that tax avoidance causes, GAAR breaches of the rule of law, if any, are tolerated.

[32] What is essential, instead of putting too much emphasis on the requirement of certainty, is a robust check and balance system that must exist in the legal system. The tax system exists in an ecosystem that must balance the demands of the Revenue and that of the taxpayers. GAAR may be tolerated if they operate within a legal system that enshrines an independent bar and independent Judiciary. This will ensure that authorities do not utilise GAAR contrary to the intention of Parliament. This balancing act is necessary. On the one hand, these GAAR have been enacted by Parliament to prevent abusive tax planning schemes created by the taxpayer to defeat the intention of Parliament. On the other hand, the taxpayers have a right to plan their affairs to mitigate their damages. This trite principle of law remains part and parcel of Malaysian law and that in most of the Commonwealth. Therefore, the task of ensuring that the rights of both the taxpayer and the Revenue lies between the shoulders of the judges to ensure that the powers afforded to the Revenue are not abused. GAAR on its own may not be contrary to the rule of law but may be wrongly applied.

19 AC Dicey, *Introduction to the Study of the Law of the Constitution* (available at https://files.libertyfund.org/files/1714/0125_Bk.pdf).