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SHORTER ARTICLES AND NOTES

Editorial Note

We end the year 2022 with the second issue of Volume 49 of the *Journal of Malaysian and Comparative Law* (JMCL). We are pleased to announce that starting from the first issue of Volume 49 published in June this year, JMCL is now available fully online via subscription. The previous volumes are fully accessible online without any subscriptions. This is to give JMCL more accessibility and visibility. Most importantly, it is to ensure that our articles reach audiences far and wide so as to impart, spread and share the valuable research and knowledge contributed by our authors.

In this issue, we travel to Bangladesh in the first article, where Junayed Chowdhury assesses the jurisdiction of the Bangladesh courts in foreign seated arbitrations in his riveting piece entitled 'Lost in the Jurisdictional Jungle and Interpretational Maze: Powers of Bangladesh Courts in relation to Foreign Seated Arbitrations'. The author does not mince words when he refers to the Arbitration Act (Act No. 1) 2001 (Bangladesh) as a 'legislative drafting debacle', and argues that the Bangladesh courts have further exacerbated the issue of the applicability of the Act to foreign seated arbitrations by erroneously misinterpreting the Act.

From Bangladesh to the shores of Malaysia, Ng Seng Yi critically analyses the effect of a 'no oral modification' clause in a contract, in his article entitled 'Legal Effect of a No Oral Modification Clause in Malaysia: A Quest for Freedom of Contract'. Comparing Malaysian cases with other jurisdictions, namely, the United Kingdom and Singapore, the author seeks to resolve the question of what happens when parties in a contract orally agree to vary their original agreement notwithstanding the existence of a 'no oral modification' clause in the contract.

Haezreena Begum Abdul Hamid's article 'Understanding the Impact of DNA Evidence in the Criminal Justice System' explores the pervasive reach of Malaysia's Deoxyribonucleic Acid (DNA) Identification Act 2009 in terms of the rights of persons accused in criminal prosecutions in Malaysia. The Act establishes a Forensic DNA Databank to legally store DNA profiles to be used for human identification in forensic investigations, and empowers the authorities to forcefully take DNA samples from suspects, detainees and prisoners. The author argues that this infringes a person's right to privacy and autonomy. More importantly, the author argues that whilst DNA evidence may point to the donor as the source of the sample, it cannot confirm the donor's participation in a crime, and therefore his guilt beyond reasonable doubt, in a criminal trial.

We end this issue in Nigeria, where Damilola Osinuga in 'Determining the Jurisdiction of Courts in a Multimodal Transport Carriage Under Nigerian Law – Cardinal in an African Free Trade Area' considers the jurisdiction of the Nigerian courts in a multimodal transport carriage. The author argues that it is pivotal for Nigeria to determine

the jurisdiction of the court hearing a claim in a multimodal transport carriage, so that consistent judicial interpretation is applied when dealing with such a claim. This is especially important as multimodal transport carriage is becoming increasingly abundant in the African continent in the light of the establishment of the African Continental Free Trade Area to enhance intra-African trade and market integration.

Dr. Sheila Ramalingam
Managing Editor

LOST IN THE JURISDICTIONAL JUNGLE AND INTERPRETATIONAL MAZE: POWERS OF BANGLADESH COURTS IN RELATION TO FOREIGN SEATED ARBITRATIONS

Junayed Ahmed Chowdhury*

Abstract

This article critically assesses the accuracy of the majority judgment in the latest case of *Accom Travels and Tours Limited v Oman Air S.A.O.C* before the High Court Division of the Supreme Court of Bangladesh with respect to the jurisdiction of Bangladesh courts in foreign seated arbitrations under the Arbitration Act (Act No. 1) 2001 (Bangladesh). The article argues that the majority judgment in *Accom Travels and Tours Limited v Oman Air S.A.O.C* lost sight of the jurisdictional parameters of the court and the related interpretational elements under the Arbitration Act (Act No. 1) 2001 (Bangladesh) in relation to foreign seated arbitrations in the light of comparable judgments of India, United Kingdom and the United States of America.

Keywords: Arbitration, international arbitration, foreign seat, jurisdiction of courts, Bangladesh.

I INTRODUCTION

Bangladesh promulgated the Arbitration Act (Act No. 1) 2001 (Bangladesh) ('the Act') by repealing the Arbitration Act 1940 (Bangladesh), which predated the partition of the Indian Subcontinent. Bangladesh's commitment to promoting arbitrations has been expressed by the Government of Bangladesh in various forums. Notably, in 2016, the Honourable Minister for Law, Mr. Anisul Huque MP, stated that the 'Government of Prime Minister Sheikh Hasina has also taken steps to ensure that both foreign and local arbitration awards can be enforced in Bangladesh with ease'.[1]

However, in practical terms, the above statement has faced several roadblocks, particularly with respect to the Bangladesh judiciary's approach towards foreign seated arbitrations under the Act. The most recent example of the problem is the Larger Bench

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1 Mr. Anisul Huque MP, 5th Anniversary Seminar, *ADR: A Business Development Priority for Bangladesh*, (Speech, Bangladesh International Arbitration Centre, 04 June, 2016 (Bangladesh)).

decision of the High Court Division of the Supreme Court of Bangladesh in the case of *Accom Travels and Tours Limited v Oman Air S.A.O.C* ('*Accom*').[2]

This article critically discusses the cases of the Supreme Court of Bangladesh leading up to *Accom* and highlights the confusing state of the Bangladesh judiciary in dealing with foreign seated arbitrations, which can only be described as lost in the jurisdictional jungle and interpretational maze of the Act.

II THE CASE OF *ACCOM*

In *Accom*, the plaintiff filed Title Suit No. 12 of 2015 ('the suit') before the First Court of Joint District Judge, Dhaka seeking a money decree against the defendants jointly and severally on account of damages for an amount of BDT 78 million plus interests. The plaintiff and the first defendant ('Oman Air') entered into a general sales agency agreement on 1 September 2008 followed by a general sales and services agency agreement which were renewed subsequently. However, a dispute arose between the parties. As a result, Oman Air terminated both the agreements by termination notices dated 18 September 2014 and 29 September 2014 respectively. Accordingly, the plaintiff filed the suit against Oman Air for realization of damages in the amount of BDT 78 million plus interests.

Upon registration of the suit and issuance of the summons, Oman Air entered appearance, and thereafter filed an application under sections 10, 7 and 9 of the Act read together with section 151 of the Code of Civil Procedure (Act No. 5) 1908 (Bangladesh) ('the CPC') seeking a stay of the proceedings of the suit on the ground that the agreements mentioned in the suit had an arbitration clause for resolving disputes between the parties and the seat of arbitration in both the agreements is Oman. After hearing the parties, the court allowed the application of Oman Air and dismissed the entire suit on the ground that the suit was not maintainable. The plaintiff appealed against the order of dismissal before the High Court Division of the Supreme Court of Bangladesh.

The appeal was fixed for hearing before a two-member Division Bench of the High Court Division. The only point of law for determination in the appeal was whether, in view of the provisions under sections 3(1) and (2) of the Act, the provisions of sections 10 and 7 of the Act would be applicable in respect of an arbitration where the seat of such arbitration was in a foreign country. In the course of hearing, the Division Bench of the High Court Division found two sets of contrary decisions given by different Benches of the Supreme Court of Bangladesh on this point of law. Accordingly, the Division Bench, without expressing any view of its own, referred the matter to the Honourable Chief Justice of Bangladesh for constitution of a larger Bench. Subsequently, the Honourable Chief Justice of Bangladesh constituted a three-member Larger Bench of the High Court Division to hear *Accom*.

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[2] *Accom Travels and Tours Limited v Oman Air S.A.O.C*, (Unreported, High Court Division of the Supreme Court of Bangladesh (Larger Bench), First Appeal No. 209 of 2016, 12 December 2021) ('*Accom*').

By a 2:1 majority judgment, the Larger Bench of the High Court Division held as follows:

(i) In view of the provisions under sections 3(1) and 3(2) of the Act, the provisions of the Act, except the provisions under sections 45, 46 and 47, are not applicable in respect of an arbitration where the seat of such arbitration is in a foreign country. Thus, the provisions under sections 7, 7A and 10 of the Act cannot be invoked in such a case except that the power of the court concerned to take interim measures under section 7A of the Act may only be invoked at the stage of enforcement of a foreign arbitral award.

(ii) Therefore, the trial court committed gross illegality in dismissing the suit concerned by invoking the provisions under section 7 of the Act, particularly when neither section 7 nor section 10 was applicable in the suit.

(iii) In spite of such non-applicability of the said provisions in the suit concerned, the trial court should have stayed further proceedings of the suit in exercise of its inherent power under section 151 of the CPC and send the matter to be resolved through arbitration as agreed by the parties.

III THE LAW

The relevant laws for the purpose of this article, as discussed in *Accom*, are stipulated in sections 3(1)[3], 3(2)[4], 7[5], 7A[6] and 10[7] of the Act. It is important to note that the Act is

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[3] Arbitration Act (Act No. 1) 2001 (Bangladesh) s 3(1) reads (unofficial English version): This Act shall apply where the place of Arbitration is in Bangladesh.

[4] Arbitration Act (Act No. 1) 2001 (Bangladesh) s 3(2) reads (unofficial English version): Notwithstanding anything contained in sub-section (1) of this section, the provisions of sections 45, 46, and 47 shall also apply to the arbitration if the place of that arbitration is outside Bangladesh.

[5] Arbitration Act (Act No. 1) 2001 (Bangladesh) s 7 reads (unofficial English version): Notwithstanding anything contained in any other law for the time being in force, where any of the parties to the arbitration agreement files legal proceedings in a Court against the other party, no judicial authority shall hear any legal proceedings except in so far as provided by this Act.

[6] Arbitration Act (Act No. 1) 2001 (Bangladesh) s 7A(1) reads (unofficial English version): Notwithstanding anything contained in section 7 unless the parties agree otherwise, upon prayer of either parties, before or during continuance of the proceedings or until enforcement of the award under section 44 or 45 in the case of international commercial arbitration the High Court Division and in the case of other arbitrations the Court may pass orders in the following matters:

…

(e) To issue ad interim injunction;

…

(g) To take any other interim protective measures which may appear reasonable or appropriate to the court or the High Court Division.

[7] Arbitration Act (Act No. 1) 2001 (Bangladesh) s 10 reads (unofficial English version): Arbitrability of the dispute. (1) Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may, at any time before filing a written statement, apply to the Court before which the proceedings are pending to refer the matter to arbitration.

(2) Thereupon, the Court shall, if it is satisfied that an arbitration agreement exists, refer the parties to arbitration and stay the proceedings, unless the Court finds that the arbitration agreement is void, inoperative or is incapable of determination by arbitration.

written in Bangla language and there is an unofficial English translation, which has been quoted by Bangladeshi courts from time to time.[8]

IV PRINCIPLES OF *ACCOM* AND RELATED CASES

In *Accom,* the majority judgment identified two sets of cases that went in opposite directions in dealing with the Bangladeshi court's jurisdiction over foreign seated arbitrations. In the first set of cases[9] it was held that the provisions of the Act, except sections 45, 46 and 47, will not apply to foreign seated arbitrations. In the second set of cases, the majority judgment noted that there are only two cases[10] that held that the provisions of the Act will apply to foreign seated arbitrations.

The majority judgment in *Accom* did not agree with the conclusions reached in *HRC Shipping Limited v M.V. Xpress Manaslu* ('*HRC*')[11] and *Southern Solar Power Limited v BPDB* ('*Southern*')[12] (the second set of cases). It is noteworthy that *HRC* was dealing with the applicability of section 10 of the Act in a foreign seated arbitration and *Southern* was dealing with the applicability of section 7A of the Act in a foreign seated arbitration.

Accom's majority judgment has three aspects in not agreeing with *HRC* and *Southern*. The first aspect is the territorial point ('the Territory Point'). The second aspect of the majority judgment is a more concentrated consideration of *Southern* in the context of sections 7 and 7A of the Act and the reasons for not following *Southern* ('the Southern Point'). The final aspect is the consideration of the inherent power of the court in dealing with foreign seated arbitrations ('the Inherent Power Point').

In deciding not to approve *HRC* and *Southern* on the Territory Point, the majority judgment in *Accom* observed in essence as follows: [13]

(a) Section 3 provided the scope or applicability of the provisions[14] of the Act.

(b) Although the word 'only' has not been used by the legislature in section 3(1) of the Act and despite the fact that the applicability of the provisions under sections 10, 7A, 45 and 46 have not been clearly excluded like the UNCITRAL Model Law on International Commercial Arbitration 1985, it has, nevertheless by section 3(2), categorically stated that sections 45, 46 and 47, namely, the provisions relating to the recognition and enforcement of foreign arbitral awards, will be applicable in respect of arbitrations seated in a foreign country. Therefore, by a joint reading of

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8 Translated versions of the quoted provisions are extracted from the judgments of the Supreme Court of Bangladesh: s 3 - *Sarker Steel Limited v Government of Bangladesh* [2018] 23 BLC 834; s 7 - *Cityscape Planners Ltd. v Kari Abul Kashem* [2019] 71 DLR 482; s 7A - *Solar Power Limited v BPDB* [2020] 25 BLC 501; s 10 - *Maico Jute and Bag Corporation v Bangladesh Jute Mills Corporation* [2003] 55 DLR (AD)23.

9 *Canada Shipping Case* 54 DLR (2002) 93; *Unicol Bangladesh Case* 56 DLR (AD) (2004) 166; *Uzbekistan Airways Case* 10 BLC (2005) 614; Unreported Judgment, Appellate Division of the Supreme Court of Bangladesh, C.P.L.A No. 1112 of 2005; *STX Corporation Ltd. v Meghna Group* 64 DLR (2012) 550 (Bangladesh).

10 *HRC Shipping Limited v M.V. Xpress Manaslu* [2007] 12 MLR (HC) 265 ('*HRC*') and *Southern Solar Power Limited v BPDB* [2020] 25 BLC 501 ('*Southern*').

11 [2007] 12 MLR (HC) 265.

12 [2020] 25 BLC 501.

13 *Accom* (n 2) [4.16].

14 Ibid (emphasis added).

the two provisions under sections 3(1) and 3(2), it is clear that although the word 'only' has not been used by the legislature, *the impact of the said word is very much apparent when*[15] it is seen that the legislature, by section 3(2), has declared only sections 45, 46 and 47 to be applicable when the seat of arbitration is in a foreign country.

The majority judgment in *Accom* concluded on *HRC* and *Southern* on the Territory Point to the effect that the point regarding the absence of the word 'only' making Section 3(1) applicable to both local and foreign seated arbitrations, as expressed in *HRC* and *Southern*, cannot be accepted because the absence or omission of the word 'only' in section 3(1) has been recuperated by the provisions under section 3(2) of the Act.[16]

On the Southern Point, the majority judgment of *Accom* observed as follows:[17]

(a) Section 7A appears to be an exception to section 7 of the Act because while section 7 ousts the jurisdiction of the court to hear a proceeding in respect of matters covered by an arbitration agreement if such proceeding is not in accordance with the provisions of the Act, section 7A provides an exception with respect to interim measures in order for preservation of the subject-matter of arbitration, and the court is empowered under section 7A to pass ad-interim orders in order for such preservation during continuation of the arbitration proceedings, before such proceeding or until enforcement of the award under sections 44 and 45 of the Act.

(b) However, it is pertinent to note that when section 7A has ruled out the applicability of section 7 by saying 'notwithstanding anything contained in section 7', it has not ruled out, in any way, the applicability of sections 3(1) and 3(2), by which, the legislature has declared the scope of applicability of the provisions of the Act including sections 7 and 7A. Therefore, until and unless the legislature amends the provisions under section 7A by incorporating the words 'notwithstanding anything contained in section 3', the provisions under section 7A cannot be invoked in respect of an arbitration where the seat of arbitration is in a foreign country. Hence, *Southern* cannot be followed.

On the Inherent Power Point, the majority judgment of *Accom* observed that the court can rely upon the inherent power under section 151 of the CPC to pass necessary orders that it could not pass under section 10 of the Act due to the territorial limitation of section 3.[18]

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15 Ibid (emphasis added).

16 Ibid [4.17].

17 Ibid [4.24] - [4.26].

18 Ibid [4.39].

V PROBLEMS OF ACCOM AND RELATED CASES

There are five major problems that arise from the majority judgment of *Accom* and the related cases. These are:

(a) Over-reliance on semantics.
(b) Misplaced consideration of the Indian Supreme Court's judgment of *Bharat Aluminium Company v Kaiser Aluminium Technical Services Inc* ('*BALCO*').[19]
(c) Misunderstanding the jurisdictional structure of the Act.
(d) Misunderstanding interpretational principles.
(e) Misunderstanding the lack of inherent power in the Act.

A *Over-reliance on semantics*

On the Territory Point, the majority judgment of *Accom* and all the other cases heavily relied on the word 'only' to distinguish the territorial and extra-territorial features of the Act.

The word 'only' comes from Article 1(2) of the UNCITRAL Model Law on International Commercial Arbitration under which it is stated that 'the provisions of this Law, except articles 8, 9, 17H, 17I, 17J, 35 and 36, apply only if the place of arbitration is in the territory of this State'. There was a reason for inserting the word 'only' in Article 1(2) of the UNCITRAL Model Law. The explanatory memorandum explains that the word 'only' was needed to capture the 'territorial scope of application' of the UNCITRAL Model Law.[20] It is true that if the word 'only' appeared in section 3(1) of the Act, then things would have been easier from an interpretive standpoint. But the fact remains that the word 'only' does not appear in section 3(1) of the Act. The question that arises is this – what is the significance of the absence of the word 'only' in section 3(1) of the Act? The answer, as explained below, is paramount.

The problems posed by the wording of section 3 of the Act is a classic case of ambiguous legislative drafting. The draftsmen of the Act essentially adopted section 3 from the Indian version of the Act (The Arbitration and Conciliation Act 1996 (Act No. 26) (India)) ('Indian Act') while ignoring significant differences between the realities of Bangladesh and those of India.[21] The Indian Act is divided into four parts and Part I applies to arbitrations taking place in India. Section 2(2) of the Indian Act makes it clear that Part I 'shall apply where the place of arbitration is in India'. There cannot be any clearer statement than this to make sure that Part I of the Indian Act will have territorial application. Indeed, *BALCO* (on which *Accom* heavily relied) makes this point very clear when it observed that the Indian Act, while adopting the UNCITRAL Model Law, with some variations, did not include the exceptions mentioned in Article 1(2) of the UNCITRAL Model Law and therefore, the word 'only' would have been *superfluous* as

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19 [2012] 9 S.C.C. 552.

20 Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 [13].

21 Seidman, Ann and Robert B. Seidman, *ILTAM: Drafting Evidence-based Legislation for Democratic Social Change,* Boston University Law Review (2009) (89) 435, 448.

none of the exceptions of Article 1(2) of the UNCITRAL Model Law were included in section 2(2) of the Indian Act.[22]

B *Misapplication of* BALCO

The majority judgment of *Accom* also heavily relied on *BALCO* to justify the territorial aspect of the Act. The majority observed that in *BALCO,* exactly the same argument was made as regard the absence of the word 'only' in the corresponding provisions of the Indian Arbitration Act, namely Section 2 (2) of the Indian Arbitration Act, which was rejected.[23]

The majority judgment of *Accom* relied on *BALCO* to substantiate the point that the absence of the word 'only' in section 3(1) of the Act did not diminish the territorial nature of that section and despite such absence, the Act would not be applicable to foreign seated arbitrations. In this regard, the majority judgment of *Accom* observed as follows:[24]

> Therefore, it appears that although the word 'only' has not been used by our Legislature in sub-section (1) and that the applicability of the provisions under Sections 10, 7A, 45 and 46 have not been clearly excluded like the UNCITRAL Model Law (where the place of arbitration is in Bangladesh), it has, by sub-section (2), categorically stated that the provisions under Sections 45, 46 and 47, namely the provisions relating to the recognition and enforcement of foreign arbitral award, will be applicable in respect of such arbitration where the seat of arbitration is in a foreign country. Therefore, by joint reading of these two provisions under sub-sections (1) and (2) of Section 3, it is clear that although the word 'only' has not been used by our Legislature, the impact of the said word is very much apparent when we see that our Legislature, by sub-section (2), has declared only three Sections, namely Sections 45, 46 and 47, which are applicable when the seat of arbitration is in a foreign country.

It is submitted that due to structural differences between the Act and the Indian Act, any reference to *BALCO* is not apposite in the Bangladeshi arbitration law context. The reasoning in *BALCO* regarding the word 'only' holds because structurally the Indian Act bifurcated the territorial limits of its applicability in two different 'Parts' (Parts I and II). For example, in the Indian Act, the court's supervisory and supporting jurisdiction (explained below) with respect to local seated arbitration appears in section 8 of Part I and for foreign seated arbitration in section 45 of Part II (like section 10 of the Act). Before the amendment in 2015 (the Arbitration and Conciliation (Amendment) Act 2015 (India)), the Indian court's supporting or subject matter jurisdiction (explained below) under section 9 (like section 7A of the Act) was only in Part I but not in Part II. Therefore, before the amendment in 2015, the Indian Act had clear legislative intent not to apply the court's supporting or subject matter jurisdiction (explained below) under section 9 (like section 7A of the Act) to Part II dealing with foreign seated arbitration. Since before the

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22 *BALCO* (n 19) [68].

23 *Accom* (n 2) [4.18].

24 Ibid [4.16].

amendment of 2015, there was a distinct bifurcation in the Indian Act about the territorial application and related jurisdictional limit with regard to foreign seated arbitration, there was no need to use the word 'only' in that Act (as observed by *BALCO*).[25] However, the Act does not have any such bifurcation feature (like the Indian Act before the amendment in 2015). Here lies the significance of the absence of the word 'only' in the Act. Due to several jurisdictional parameters within the Act, which are explained below, the word 'only' has taken a centre-stage in the jurisdictional framework of the Act.

C *Misunderstanding the jurisdictional structure*

Jurisdiction is the bedrock of any legislation. There may be several types of jurisdiction in a conventional statute – appellate, revisional, subject matter, inherent etc. In arbitration laws, there are some unique types of jurisdictions. These are supervisory, supportive and enforcement jurisdictions.[26] To understand the majority judgment's flaws in *Accom*, it is important to understand what these specific types of jurisdictions mean and how they operate.

1 *Supervisory jurisdiction*

The starting point to understand jurisdictional issues in arbitrations seated abroad is to note the comments of Lord Justice Kerr in *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* ('*Naviera*'):[27]

> All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law. (1) The law governing the substantive contract. (2) The law governing the agreement to arbitrate and the performance of that agreement. (3) The law governing the conduct of the arbitration. In the majority of cases all three will be the same. But (1) will often be different from (2) and (3). And occasionally, but rarely, (2) may also differ from (3).
>
> …
>
> English law does not recognise the concept of a "de-localised" arbitration (see Dicey & Morris at pp 541, 542) or of "arbitral procedures floating in the transitional firmament, unconnected with any municipal system of law" (Bank Mellat v Helliniki Techniki SA [1984] QB 291 at p 301 (Court of Appeal)). Accordingly, every arbitration must have a "seat" or locus arbitri or forum which subjects its procedural rules to the municipal law there in force. This is what I have termed law (3). . . . Prime facie, i.e. in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also the law of the "seat" of the arbitration. The lex fori is then the law of X and, accordingly, X

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25 *BALCO* (n 19) [68].

26 The Honourable Justice Clyde Croft, *Commercial Arbitration in Australia: The Past, The Present and The Future,* (Chartered Institute of Arbitrators, London, 25 May 2011), 30: 'The majority of courts in developed arbitral jurisdictions are vested with at least some degree of supervisory, supportive and enforcement jurisdiction over all forms of arbitration'.

27 [1988] 1 Lloyd's Rep 116, 119.

> is the agreed forum of the arbitration. A further consequence is then that the courts which are competent to control or assist the arbitration are the courts exercising jurisdiction at X.

The above observation succinctly captures the general concept of the court's supervisory jurisdiction in a foreign seated arbitration. It will be noted from the above observation in *Naviera* that generally, in case of a foreign seated arbitration (Country X in *Naviera*), in the absence of some express and clear provision to the contrary, both substantive and curial (that is, procedural) laws of an arbitration shall be governed by and under the supervisory jurisdiction of Country X where the arbitration is seated.[28] The term 'supervisory jurisdiction' in effect relates to the curial (or procedural) law of a country that regulates, as the UK Supreme Court in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* ('*Enka*') describes, 'the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute and includes the procedural powers and duties of the arbitrator'.[29] Thus, like the curial law, the supervisory or curial jurisdiction is concerned with the courts' jurisdiction to support and enforce the arbitration and it includes, for example, the power to remove or replace an arbitrator, to enforce or set aside an arbitral award, and to grant injunctions to support the arbitration including anti-suit injunctions.[30] In that sense, supervisory jurisdiction of the court is a combination of the curial (or procedural) jurisdiction, the supporting jurisdiction and the enforcement jurisdiction.

2 *Supporting jurisdiction*

The concept of supporting jurisdiction (also called jurisdiction in aid or support of arbitration) is exactly what the phrase means – a type of jurisdiction of the court to enable unhindered workings of arbitrations. In the context of arbitrations seated abroad, generally, to accommodate international dispute resolution process (for example, international arbitrations or cross-border litigation) the existence of the supporting jurisdiction of a country, which is not the seat of the arbitration or litigation, is embedded in a statute.[31] However, it should be kept in mind that generally a court's supporting jurisdiction operates within a narrow confinement. In *ICICI Bank Uk plc v Diminco NV* ('*ICICI*'),[32] Justice Popplewell in the English High Court (Queen's Bench Division) observed as follows:

> Drawing the strands together, I derive the following principles as applicable when the court is asked to grant a freezing order in support of foreign proceedings under section 25.

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28 See also *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, 70 ('*Enka*').

29 Ibid.

30 Ibid.

31 Civil Jurisdiction and Judgments Act 1982 (UK), c. 27, s 25: which empowers the court to grant all forms of interim relief in aid of foreign courts.

32 [2014] EWHC 3124 (Comm).

> (1) It will rarely be appropriate to exercise jurisdiction to grant a freezing order where a defendant has no assets here and owes no allegiance to the English court by the existence of *in personam* jurisdiction over him, whether by way of domicile or residence or for some other reason. Protective measures should normally be left to the courts where the assets are to be found or where the defendant resides or is for some other reason subject to *in personam* jurisdiction.
>
> (2) Where there is reason to believe that the defendant has assets within the jurisdiction, the English court will often be the appropriate court to grant protective measures by way of a domestic freezing order over such assets, and that is so whether or not the defendant is resident within the jurisdiction …

3 *Enforcement jurisdiction*

Enforcement jurisdiction is actually an extension of the supervisory jurisdiction. In *Enka,* the UK Supreme Court held that supervisory jurisdiction is concerned with the courts' jurisdiction to support and enforce the arbitration and 'includes, for example, the power … to enforce or set aside an arbitral award'.[33] The same principle is also captured by the Indian Supreme Court.[34]

4 *Subject matter jurisdiction*

If the supervisory jurisdiction is considered to include (as in *Enka* and *Indus Mobile Distribution v Datawind Innovations* ('*Indus*'))[35] the curial (or procedural) jurisdiction, the supporting jurisdiction and the enforcement jurisdiction, then two other jurisdictions become relevant. These are subject matter jurisdiction and inherent jurisdiction. Subject matter jurisdiction refers to the court's authority over the subject matter of a general class of cases.[36] Subject matter jurisdiction can be limited[37] or unlimited[38], and is always vested by statute.[39] For example, the jurisdiction to grant equitable relief is a limited subject matter jurisdiction[40] and the jurisdiction to try all suits of a civil nature is an unlimited subject matter jurisdiction.[41]

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33 *Enka* (n 28).

34 *Indus Mobile Distribution v Datawind Innovations* [2017] 7 SCC 768, [14]-[15] ('*Indus*').

35 Ibid.

36 *Harvey v Derrick* [1995] 1 NZLR 314, 326.

37 *Ernesto Rodriguez and Alan Hall v Great American Insurance Company*, C. A. 2020-0387-JRS (Del. Ch. Oct. 20, 2021) (Court of Chancery of Delaware) ('*Ernesto*').

38 *Allenger v Pelletier* [2020] SGHC 279.

39 *Ernesto* (n 37).

40 Ibid.

41 Code of Civil Procedure (Act No. 5) 1908 (Bangladesh) s 9; *Allenger v Pelletier* [2020] SGHC 279.

5 *Inherent jurisdiction*

The concept of inherent jurisdiction, as *Islam and Neogi on the Law of Civil Procedure*[42] observed, 'furnishes the legislative recognition of age-old and well-established principle that every court has inherent power … to do real and substantial justice for the administration of which alone it exists or to prevent abuse of the process of the court'.[43] For example, section 151 of the CPC captures the inherent jurisdiction of the court.[44]

6 *Where does jurisdiction reside in a statute?*

Jurisdictional power is not confined to or stipulated in any particular section or chapter of a statute and may be scattered around in multiple sections with distinct purpose and effect.[45] For example, in the CPC, section 9 talks about unlimited subject matter jurisdiction, section 17 stipulates limited jurisdiction for suits regarding immovable property, section 19 deals with limited jurisdiction for suits for compensation for wrongs done to person or movables, section 20 talks about territorial jurisdiction, section 96 stipulates appellate jurisdiction, section 115 is about revisional jurisdiction and section 151 deals with inherent jurisdiction of the court.

7 *Summary of the jurisdictional structure*

Based on the above jurisdictional concepts, it is submitted that the following observations emerge from an analysis of the Act:

(a) The Legislature has drawn out the collective purpose of the Act under section 3, which through various provisions, has stipulated the supervisory and enforcement jurisdictional limits of the courts. Under section 3(1), the Legislative purpose is to set out the territorial extent of the court's supervisory and enforcement jurisdictions (stipulated in various sections) in local seated arbitrations.

(b) Thus, the court has supervisory jurisdiction for local seated arbitrations under sections 15 and 16 (read with section 12) of the Act because under these sections the court has the power to remove or replace an arbitrator (as observed in *Enka*) or the court has the power of regulation of conduct of arbitration (as observed in *Indus*). This supervisory jurisdiction is territorial in nature in that the court is empowered to exercise this power for local seated arbitrations.

(c) The court also has enforcement jurisdiction for local seated arbitration under sections 42, 43, and 44 of the Act because under these sections, as observed in *Enka*, the court has the power to enforce or set aside an arbitral award. Again, this supervisory jurisdiction is territorial in nature in that the court is empowered to exercise this power for local seated arbitrations.

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42 Islam, Mahmudul and Porbir Neogi, *The Law of Civil Procedure* (Mullick Brothers, 2nd ed, 2015), 515.

43 *Harun-or-Rashid v Gulaynoor Bibi* [2014] 19 BLC 123.

44 Code of Civil Procedure (Act No. 5) 1908 (Bangladesh) s 151: Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

45 *Central India Ayush Drugs v State Of Maharashtra* AIR 2016 Bom 261 ('*Ayush Drugs*'); *Anil Hoble v Kashinath Jairam Shetye* [2015] SCC Online Bom 3699 ('*Anil Hoble*').

(d) On the other hand, under section 3(2), the Legislative purpose is to set out the extra-territorial extent of the court's supervisory (and/or enforcement) jurisdictions (stipulated in various sections) in foreign seated arbitrations.
(e) Thus, the court has enforcement jurisdiction (or supervisory jurisdiction) for foreign seated arbitration under sections 45 and 46 of the Act because under these sections the court has the power to enforce or set aside an arbitral award (as observed in *Enka*) or the court has the power to annul the award (as observed in *Indus*). This enforcement jurisdiction is extra-territorial in nature in that the court is empowered to exercise this power for foreign seated arbitrations.
(f) Additionally, the Legislature, through section 7A of the Act, empowered the court with limited subject matter jurisdiction (or supporting jurisdiction) to provide interim relief for both local and foreign seated arbitration. This supporting or subject matter jurisdiction is both territorial and extra-territorial in nature in that the court is empowered to exercise this power for both local and foreign seated arbitrations.
(g) Also, the court has both supervisory and supporting jurisdictions for both local and foreign seated arbitrations under section 10 because under this section the court has the power to refer the parties to arbitration or to deny arbitration on some stipulated grounds. These supervisory and supporting jurisdictions are both territorial and extra-territorial in nature in that the court is empowered to exercise these powers for both local and foreign seated arbitrations.
(h) The court does not have inherent jurisdiction in view of the jurisdiction ouster clause of section 7.
(i) The court has enforcement jurisdiction for local and foreign seated arbitrations under sections 44 and 45 respectively.
(j) All the above jurisdictional powers are not confined to or stipulated in any particular chapter or section (as observed in *Central India Ayush Drugs v State Of Maharashtra* ('*Ayush Drugs*')[46] and *Anil Hoble v Kashinath Jairam Shetye* ('*Anil Hoble*')).[47]

It is submitted that in *Accom*, the majority judgment lost sight of the parameters and positioning of the jurisdictional concepts within the structural settings of the Act. The majority judgment deals with the jurisdictional issue by observing as follows:[48]

> …It appears from the provisions under Section 7 that by this provision the Legislature has determined the jurisdiction of the Court in respect of the matters covered by the arbitration agreement...
>
> By incorporating Section 7A, as quoted above, in 2004 vide Arbitration (Amendment) Act 2004 (Act No. 02 of 2004), with effect from 19.02.2004, the Legislature has conferred power on the High Court Division, in respect of International Commercial Arbitration, and on the Court of District Judge concerned, in respect of other arbitrations, to take ad interim measures by way of orders or

46 *Ayush Drugs* (n 45).
47 *Anil Hoble* (n 45).
48 *Accom* (n 2) [4.22], [4.33].

> ad-interim injunction etc. in order for preservation of the subject matters of the arbitration … Therefore, this Section 7A appears to be an exception to Section 7 of the said Act in that while Section 7 ousts the jurisdiction of the Court to hear a proceeding in respect of the matters covered by the arbitration agreement if such proceeding is not in accordance with the provisions of the said Act, Section 7A provides an exception as regards interim measures in order for preservation of the subject-matter of arbitration …

By using the words 'jurisdictional footing' as used in *Southern*,[49] the majority judgment in *Accom* rested the 'entire' jurisdictional basis on section 7 of the Act by holding that 'by this provision the Legislature has determined the jurisdiction of the Court in respect of the matters covered by the arbitration agreement'. The same point is also made in *Southern*, where the court observed that section 3 'is not about jurisdiction of the Courts'[50] and section 7 'is the provision by which jurisdiction … regarding arbitration matters have been conferred upon the Courts'.[51] It is submitted that section 7 is not the 'only' jurisdictional provision of the Act. Rather, it is a jurisdictional ouster clause which, as observed by the majority judgment in *Accom,* states that notwithstanding anything contained in any other law for the time being in force, where any of the parties to the arbitration agreement files a legal proceedings in a court against the other party, 'the court shall not have jurisdiction to hear any such proceeding which has not been initiated in accordance with the provisions of the Arbitration Act, 2001'.[52] In other words, section 7 of the Act is a jurisdiction ouster clause with 'specified jurisdictional carve-outs' ('the court shall not hear any such proceeding which has not been initiated in accordance with the provisions of the Arbitration Act, 2001'). It is submitted that the majority judgement of *Accom* and *Southern* did not consider that these 'specified jurisdictional carve-outs' are scattered around the Act[53] just like the provisions in the CPC[54] and as observed in *Ayush Drugs* and *Anil Hoble*.

On the other hand, if the analysis is done through these 'specified jurisdictional carve-outs' of the Act, we will see that all these carve-outs serve specific purposes with a single objective, which, as the majority judgment in *Accom* correctly observed,[55] is to sustain the 'flavor of internationality in the field of arbitration'. The Preamble of the Act is also useful to understand these 'specified jurisdictional carve-outs' of the Act, where it is stated that the Act is 'the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitrations'.[56] The Preamble does not state that the Act is the law relating to international commercial arbitration 'seated or held in Bangladesh' and the definition of 'international commercial arbitration' in

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49 *Southern* (n 12) [55].

50 Ibid [36].

51 Ibid [55].

52 *Accom* (n 2) [4.22].

53 For example, Arbitration Act (Act No. 1) 2001 (Bangladesh) ss 7A, 10, 42, 48.

54 Code of Civil Procedure (Act No. 5) 1908 (Bangladesh) ss 9, 17, 19, 20, 96, 115, 151.

55 *Accom* (n 2) [4.7].

56 The Bengali version of the preamble of the Act reads: *"আন্তর্জাতিক বাণিজ্যিক সালিস, বিদেশী সালিসী রোয়েদাদ স্বীকৃতি ও বাস্তবায়ন এবং অন্যান্য সালিস সম্পর্কিত বিধান প্রণয়নকল্পে প্রণীত আইন।চ.*

section 2(c) also does not stipulate the locality of such arbitration. It is important to note here that the Act repealed the Arbitration Act 1940 (Bangladesh), which, in its Preamble stated that the Arbitration Act 1940 was to consolidate and amend the law relating to arbitration 'in Bangladesh'. Therefore, there is a stark contrast between the Act and the Arbitration Act 1940 (Bangladesh) regarding the legislative intent of 'internationality' of arbitrations. This point was also made by the minority judgment of *Accom*.[57] Therefore, it is submitted that when sections 3(1) and 3(2) stipulated the 'scope'[58] of the Act, they are referring to the application of the curial law of Bangladesh (that is, the supervision and enforcement related law) to Bangladesh seated arbitration under section 3(1) and to foreign seated arbitration under section 3(2). The meaning of curial law is succinctly explained by the UK Supreme Court in *Enka* in the following words:

> What is commonly referred to as the curial law is, according to Mustill and Boyd, Commercial Arbitration, 2nd ed (1989), pp 60-62, 64-68, the law dealing with "the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute" (p 60) and includes "the procedural powers and duties of the arbitrator" (p 62). The curial law is (almost) invariably the law of the seat of the arbitration. … Inextricably linked to this is what may be referred to as the curial or supervisory jurisdiction of the courts. This is concerned with the courts' jurisdiction to support and enforce the arbitration. It includes, for example, the power to remove or replace an arbitrator, to enforce or set aside an arbitral award …

The same principle of curial law and enabling supervisory and enforcement jurisdictions under the jurisdictional carve-outs of section 7 of the Act can also be demonstrated by the following examples with reference to *Naviera*:

(a) If a contract is governed by English law (that is, as per in *Naviera, '*(1) The law governing the substantive contract and (2) The law governing the agreement to arbitrate and the performance of that agreement)' and arbitration is to be held in London, United Kingdom (that is, as per in *Naviera,* '(3) The law governing the conduct of the arbitration' or curial law), then in terms of section 3(1) of the Act, a Bangladesh court will not have any supervisory jurisdiction over that foreign seated arbitration, but a Bangladesh court will have supporting and enforcement jurisdiction in terms of section 3(2) read together with sections 7A and 10.

(b) If a contract is governed by English law (that is, as per in *Naviera,* '(1) The law governing the substantive contract and (2) The law governing the agreement to arbitrate and the performance of that agreement') and arbitration is to be held in Dhaka, Bangladesh (that is, as per in *Naviera,* '(3) The law governing the conduct of the arbitration' or curial law), then in terms of section 3(1) of the Act, a Bangladesh court will have supervisory and enforcement jurisdiction over that local seated arbitration.

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[57] Per Justice Md. Ashraful Kamal, *Accom* (n 2), 77.

[58] The Bengali translation of the word: : *পরিধি*.

(c) If a contract is governed by Bangladeshi law (that is, as per in *Naviera,* '(1) The law governing the substantive contract and (2) The law governing the agreement to arbitrate and the performance of that agreement)' and arbitration is to be held in Dhaka, Bangladesh (that is, as per in *Naviera,* '(3) The law governing the conduct of the arbitration' or curial law), then in terms of section 3(1) of the Act, a Bangladesh court will have supervisory and enforcement jurisdiction over that local seated arbitration.

(d) If a contract is governed by Bangladeshi law (that is, as per in *Naviera, '*(1) The law governing the substantive contract and (2) The law governing the agreement to arbitrate and the performance of that agreement)' and arbitration is to be held in London, UK (that is, as per in *Naviera, '*(3) The law governing the conduct of the arbitration' or curial law), then in terms of section 3(1) of the Act, a Bangladesh court will not have any supervisory jurisdiction over that foreign seated arbitration but a Bangladesh court will have supporting and enforcement jurisdiction in terms of Section 3(2) read together with Sections 7A and 10.

It is submitted that the majority judgment in *Accom* lost sight of the above jurisdictional carve-outs of section 7.

Furthermore, the majority judgment deals with the *Southern Point* in the following words:[59]

> It is pertinent to note that when Section 7A has ruled out the applicability of Section 7 by saying "notwithstanding anything contained in Section 7", it has not ruled-out, in any way, the applicability of Section 3, sub-sections (1) and (2), by which the Legislature has declared the scope of applicability of the provisions of the said Act including Sections 7 and 7A. Therefore, until and unless the Legislature amends the provisions under Section 7A by incorporating the words 'notwithstanding anything contained in Section 3', the provisions under Section 7A cannot be invoked in respect of an arbitration where the seat of arbitration is in a foreign country, except at the stage of enforcement of foreign arbitral award. Because, such enforcement of foreign award has been accommodated by sub-section (2) of Section 3 itself by declaring that the provisions under Sections 45, 46 and 47 will be applicable even if the seat of arbitration is in a foreign country. This being the position through our extensive examination of the relevant provisions of law, in particular Section 7A along with the provisions under Section 3 of the said Act, we hold that the expressions, as occurring in sub-section (1) of Section 7A, namely the expressions "until enforcement of award under Sections 44 or 45", do not in any way override the limited or territorial applicability of the provisions of the Arbitration Act, 2001 as declared by Section 3, sub-sections (1) and (2), of the said Act. Thus, we have no option but to ignore the said decision of the said single bench of the High Court Division in Southern Solar case.

[59] *Accom* (n 2) [4.26].

It is submitted that in the above observation on the *Southern Point*, the majority judgment in *Accom* convoluted the interrelation between sections 3, 7 and 7A without understanding the distinct jurisdictional purposes of these sections. It should be kept in mind that section 3 of the Act has stipulated the supervisory and enforcement scope of the Act. The absence of the word 'only' in section 3 is significant because the supervisory and enforcement jurisdictions are not the only jurisdictions that the courts have under the Act. However, despite the word 'only' not being present in the Act, by holding that 'the impact of the said word is very much apparent' in section 3(2) of the Act, the majority judgment in *Accom* effectively (and impliedly) applied the maxim *expressio unius est exclusio alterius* (to express one is to exclude others) to exclude other jurisdictional application of the Act to foreign seated arbitration. As explained below, it is submitted that this maxim is inapplicable to the Act.

As a matter of statutory interpretation, the rule of *expressio unius est exclusio alterius* is of no significance and is to be given no consideration in the construction or interpretation of a statute when the application of such rule contravenes legislative intent.[60] Let us examine some of the provisions of the Act in the context of this maxim. In the Act, we have section 3(1) enumerating the applicability of the Act in Bangladesh. Section 10 is a general grant of supervisory and supporting jurisdictions to the court which standing alone would include those powers applicable to local seated arbitrations as per section 3(1). Moreover, in section 10 of the Act there is no express or implied indication that it only applies for arbitrations seated in Bangladesh. In other words, if sections 3(1) and 10 were not asenacted, no one would contend that section 10 of the Act does not include supervisory and supporting jurisdictions in connection with arbitrations seated outside Bangladesh.[61] In other words, it is submitted that the legislative intent of jurisdictional parameters of section 10 in no way affects the provisions contained in section 3(1). Therefore, the maxim *expressio unius est exclusio alterius* (to express one is to exclude others) should not be applied to the Act to defeat the legislative intent of the jurisdictional parameters of section 10.

The majority judgment in *Accom* did not consider that sections 7A and 10 also have supporting or subject matter jurisdiction of the court, which could operate outside the supervisory and enforcement scope of section 3 of the Act. As explained above, under the principles of *expressio unius est exclusio alterius,* by section 3 these additional jurisdictions are not excluded by the legislature from the Act. Let us take section 10 again as an example to understand this analysis. Section 10 allows the court to provide supporting jurisdiction in aid of an arbitration seated within or outside Bangladesh. The legislature in 2004, when inserting section 7A,[62] thought it fit to leave section 10 as it is and did not confine its supporting jurisdictional reach within the territory of Bangladesh. This goes on to show that the legislature intended not to disturb the supporting jurisdiction of the court in foreign seated arbitrations. Indeed, there was no need to disrupt the structural integrity of section 10. The issue can be seen from another angle. If the party denouncing

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60 *Wachendorf v Shaver*, 149 Ohio St. 231 (Ohio 1948) (Supreme Court of Ohio).

61 Ibid.

62 Arbitration (Amendment) Act (Act No. 2) 2004 (Bangladesh).

the agreed arbitration clause in an agreement is a Bangladesh subject or has Bangladesh assets, then the Bangladesh court, in exercise of its *in personam* jurisdiction, can always invoke section 10 (in terms of *ICICI*) and refer the parties to arbitration. This analysis of section 10 (in line with *ICICI*) is equally applicable to the supporting (or subject matter) jurisdiction under section 7A.

If section 7A is analysed, we will come to the same conclusion. The majority judgment in *Accom* stated that for section 7A to have extra-territorial effect, the *non-obstante* provision of section 7A should have included section 3 along with section 7. It is submitted that this is an incorrect analysis of the problem for two reasons. Firstly, the majority judgment in *Accom,* while pivoting the 'jurisdictional footing' (like *Southern*) entirely on section 7, also classified section 3 in the same jurisdictional category as section 7, when in reality section 3 contains no such jurisdictional element. The judgment of *Southern* correctly makes this point when it states that section 3 does not talk about jurisdiction[63] but stops short of accurately articulating what section 3 meant. The scope of the Act in section 3 in simple terms, as Erskine May puts it, 'represents the reasonable limits of its collective purposes, as defined by its existing clauses and schedules'[64] (for example, sections 7, 7A, 10, 11, 12, 44, 46 etc.). Therefore, it is submitted that there was no need for section 7A to put a *non-obstante* provision for section 3 because that would be tantamount to section 7A rewriting the legislative 'extent' of the Act (which is discussed further below), which would have been absurd. Secondly, the majority judgment in *Accom* (also *Southern*) did not comprehend that the *non-obstante* clause in section 7A is actually a redundant exercise which in no way affected the structural integrity of section 7. This is because once we see that section 7 is a jurisdiction ouster clause with 'specified jurisdictional carve-outs' (as stated in *Accom* - 'the court shall not hear any such proceeding which has not been initiated in accordance with the Arbitration Act, 2001'), there was no need to put the *non-obstante* provision in section 7A since section 7, through the 'specified jurisdictional carve-outs', allowed courts to assume specific jurisdictions if the Act so permitted. To put it another way, by virtue of the 'specified jurisdictional carve-outs' in section 7, the court could exercise jurisdiction over a matter so long as a section in the Act stipulated so. For example, the legislature has rightly drafted section 10 without any *non-obstante* provision like section 7A and yet, it has empowered the court to exercise supporting jurisdiction within a given parameter in line with the 'specified jurisdictional carve-outs' in section 7.

D *Misunderstanding interpretational concepts*

It is submitted that from a statutory interpretational perspective, the majority judgment in *Accom* did not consider the difference between the 'extent' and 'application' of the Act. As *Bennion on Statutory Interpretation* ('*Bennion*') puts it: [65]

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63 *Southern* (n 12) [36].

64 Natzler, David and Mark Hutton (editors), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usageof Parliament* (LexisNexis, 25th ed, 2019) [28.81].

65 Bennion, Francis, *Statutory Interpretation* (LexisNexis, 6th ed, 2015), 306.

> Extent defines the area within which the enactment is law. Application is concerned with the persons and matters in relation to which the enactment operates. These may be within or outside the area of its extent.

It is submitted that the majority judgment in *Accom* did not appreciate that sections 3(1) and 3(2) stipulate the 'extent' of the enactment contained in those sections, which set out the territorial reach of the legislation. But sections 3(1) and 3(2) do not determine the 'extent' and 'application' of the Act in foreign seated arbitrations, which are dealt with, *inter alia*, in sections 7A and 10 of the Act. In this regard, *Bennion* states that: [66]

> The sections dealing with territorial extent are expressed in terms of enactments rather than Acts because it is possible for different provisions of an Act to extend to different territories.

The aforesaid statement of law is crucial to understand the jurisdictional structure of the Act and the related interpretation exercise. Section 3(1) does not set out the territorial limit for the 'effect' of the powers or jurisdictions conferred by the relevant provisions of the Act. Rather, it is submitted that section 3(1) merely stipulates that the provisions of the Act conferring powers or jurisdictions shall be exercised in arbitrations held within the territories of Bangladesh. On the other hand, section 3(2) does not set out the territorial limit for the 'effect' of *all* the powers or jurisdictions conferred by the relevant provisions of the Act and *only* deals with the'extent' of the enforcement power or jurisdiction of sections 45, 46 and 47 in case of foreign seated arbitrations. In other words, while section 3(1) only deals with the 'extent' of the Act (that is, its territorial reach for Bangladesh seated arbitrations) but the 'application' or 'effect' of powers or jurisdictions under relevant provisions of the Act is stipulated in other parts of it; for example, sections 7A and 10, which apply equally to both local and foreign seated arbitrations. On the other hand, section 3(2) only deals with the 'extent' of the enforcement power or jurisdiction of sections 45, 46 and 47 but not the other jurisdictional sections of the Act (for example, sections 7A and 10). These principles of 'extent' and 'application' were applied in the dissenting judgment of Lord Justice Richards in the case of *Serious Organised Crime Agency v Perry* ('*SOCA*')[67] (reversed by the United Kingdom Supreme Court in [2012] UKSC 35) where section 461(2) of the Proceeds of Crime Act 2002 was the subject matter of analysis, which stipulated that 'In Part 8, Chapter 2 extends to England and Wales and Northern Ireland only'. Lord Justice Richards, in his dissenting judgment, while holding that Part 8 did not have extra-territorial effect (which was also concluded by the United Kingdom Supreme Court in [2012] UKSC 35), observed as follows: [68]

> Carnwath LJ has cited … the general principle stated in Bennion, that "[u]nless the contrary intention appears … an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters".

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66 I Ibid.

67 [2010] EWCA Civ 907.

68 Ibid [58].

> As Lord Mance said in Masri v Consolidated Contractors Int (UK) Ltd (No.4) [2010] 1 AC 90 at [10], whether and to what extent the principle applies in relation to foreigners outside the jurisdiction depends ultimately upon who is "within the legislative grasp, or intendment" of the relevant provision …

It is submitted that sections 7A and 10 of the Act should be interpreted in the same line as the observation of Lord Justice Richards in *SOCA* because foreign seated arbitrations are 'within the legislative grasp, or intendment' of sections 7A and 10 of the Act.

Furthermore, the majority judgment in *Accom* did not consider the meaning of the word 'enactment' appearing in *Bennion*,[69] which is defined in section 3(17) of the General Clauses Act (Act No. 10) 1897 (Bangladesh) ('General Clauses Act') as to include 'any provision contained in any Act'. An enactment is a single proposition contained in a sectional unit.[70] This concept is also captured in section 28(1) of the General Clauses Act which states that 'any provision in an enactment may be cited by reference to the section or sub-section of the enactment in which the provision is contained'. Thus, under section 3(17) read together with section 28(1) of the General Clauses Act , each section in the Act is an 'enactment' which, as *Bennion* states,[71] has different 'extent' and 'application'. Sections 3(1) and 3(2) lay out specific propositions (enactments) that apply to or have effect in local and foreign seated arbitrations. But it is submitted that in addition to the propositions (enactments) of sections 3(1) and 3(2), there are other propositions (enactments) in sections 7A and 10 of the Act that apply to or have effect in both local and foreign seated arbitrations. Therefore, it is submitted that the majority judgment in *Accom* failed to appreciate that there exist fundamental differences between the effect of the 'enactments' in sections 3 on the one hand and the 'enactments' in section 10 and 7A on the other hand, in terms of their 'extent' and 'application' in relation to foreign seated arbitrations.

The distinction between legislative 'extent' and 'application' discussed above can be exemplified by other laws of Bangladesh. In the CPC, section 1(3) states that it 'extends to the whole of Bangladesh'. If section 1(3) of the CPC is taken on its own (as the majority judgment in *Accom* did for section 3(1) of the Act), then it would be taken to apply 'only' within the territories of Bangladesh or 'only' for subject matters that are within the territories of Bangladesh. From that standpoint, we can take a single provision of the CPC to analyse this hypothesis. In section 92 of the CPC, in relation to public charities, it is, *inter alia*, stipulated that two or more persons, having an interest in a trust created for public purposes of a charitable or religious nature, may institute a suit in the principal civil court of original jurisdiction within the local limits where 'the whole or any part of the subject-matter of the trust is situate', to obtain a decree for 'removing any trustee or appointing a new trustee'. Now, the question that arises is this – under section 92 of the CPC, is a Bangladesh court competent to entertain a suit for the administration of a charity, for removal of trustees, and for appointment of new trustees when the charity is a foreign charity carrying its management in a foreign country with trustees

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69 Francis Bennion, *Statutory Interpretation* (LexisNexis, 6th ed, 2015), 376.

70 Ibid, 378.

71 Ibid, 306.

that are non-resident foreigners when some of the properties of that foreign charity are situated in Bangladesh? At first brush, it appears that under section 1(3) of the CPC read together with section 92, a Bangladesh court is not competent to entertain a suit for the administration of a foreign charity, for removal of trustees, and for appointment of new trustees. In *Fazlehussein v Yusufally* ('*Fazlehussein*'),[72] this argument was made before the Bombay High Court (the Code of Civil Procedure 1908 (India) is in *pari materia* with the CPC) where it was observed as follows:[73]

> … it is argued on behalf of the defendants that the provisions of the Civil P. C. can only apply within the limits of the State and they cannot have any extra territorial operation, and that a State by legislation cannot confer jurisdiction upon Municipal Courts, to deal with immoveable property outside their jurisdiction… nor can it exercise any powers against persons who are not domiciled in the country and who do not submit to the jurisdiction of the Municipal Court.
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> In the present case, the charity is a foreign charity; it is administered in a foreign country, and even the trustees are residing in a foreign country, and normally this Court would not be entitled to administer that charity or to give directions with regard to administration of that charity to persons who are not subject to its process. The question then is : Does the fact that some of the properties are within the jurisdiction confer jurisdiction upon this Court to entertain the present suit and to interfere with the administration of a foreign charity by exercising jurisdiction over the defendants who are non-resident foreigners, or even to grant any other relief?
>
> The expression 'jurisdiction' is used … not in the sense of territorial or inherent authority to entertain an action, but is used in the sense of sanction behind the judgment in its operation beyond the limits of the territory in which the Court functions. The context in which the expression is used makes it abundantly clear that it was not sought to lay down that a claim in which 'inter alia' a relief seeking to remove trustees of a foreign charity and to interfere with the administration of a foreign charity is asked cannot be entertained.
>
> If that view is right, then obviously this Court has jurisdiction to entertain the suit on the allegations made in the plaint, that there are certain properties which are the subject-matter of the trust which are situate within the jurisdiction of this Court, though the Court in the exercise of its authority will not interfere with the administration, of a foreign trust and will not exercise its equity jurisdiction in respect of non-resident defendants.
>
> In the present suit the plaintiffs have claimed reliefs for declaration of title of the trust, for removal of trustees, and appointment of new trustees for vesting the property in new trustees, for accounts and for framing scheme and for further and other reliefs. Even if this Court be incompetent to grant the reliefs, which interfere

[72] AIR 1955 Bom 55.

[73] Ibid [6], [8], [11], [12].

> with the administration of the trust in the foreign countries, such as framing a scheme, removal of trustees and appointment of new trustees and corresponding reliefs, this Court can at least protect the property within its jurisdiction for the benefit of the trust, and to that end pass all such consequential orders as may be necessary.

Thus, *Fazlehussein* shows that even though section 1(3) of the CPC lays out its territorial 'extent', section 92 has been interpreted to have extra-territorial 'application' when a foreign charity with non-resident trustees in a foreign country has some properties in Bangladesh. It is submitted that the same line of interpretation of *Fazlehussein* should apply to section 3(1) that deals with 'extent' and sections 7A and 10 of the Act that deal with 'application'.

E *The Act lacks inherent jurisdiction*

The majority judgment in *Accom* observed on the Inherent Power Point that if a court is prevented from ordering a stay of judicial proceedings because of the non-applicability of section 10 of the Act in view of the provisions under Section 3, then the court should exercise its inherent power under section 151 of the CPC to secure ends of justice and to prevent the abuse of the process of the court in order to avoid potential conflicting decisions between the arbitral tribunal in a foreign country and the court in Bangladesh.[74] It is submitted that this observation is unsustainable for the following reason.

The jurisdiction ouster clause of section 7 limits the applicability of the CPC in relation to the Act. The minority judgment in *Accom* points to this aspect by observing as follows (unofficial English translation):[75]

> If parties agree to arbitrate, then under Section 7, notwithstanding anything contained in any other law for the time being in force, no court shall have jurisdiction to hear any legal proceedings except as provided in the Arbitration Act, 2001. Since the parties to the instant suit agreed to submit to arbitration, any legal proceedings under any other law including the Code of Civil Procedure is without jurisdiction …

It is submitted that the above observation of the minority judgment in *Accom* is the correct proposition of the law. The erstwhile Arbitration Act 1940 statutorily allowed the application of the CPC in terms of section 41(a) where it was stated that 'the provisions of the Code of Civil Procedure, 1908 shall apply to all proceedings before the Court, and to all appeals, under this Act'. There is no provision in the Act that is comparable to section 41(a) of the Arbitration Act 1940. It is true that the Act does not specifically state that the CPC will not apply, but it is submitted that the jurisdiction ouster clause of section 7 makes a clear indication of limited juridical intervention in arbitrations through the 'specified

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74 *Accom* (n 2) [4.39].

75 Ibid 80; The original Bangla version reads: *ধারা ৭ মোতাবেক পক্ষগনের মধ্যে সালিসে অর্পণ সম্মত হলে বর্তমান প্রচলিত অন্য কোন আইনে যাহই থাকুক না কেন সালিসি আইন, ২০০১ ব্যতিত অন্য কোন আইনগত কার্যধারা শুনানির এখতিয়ার আদালতের থাকবে না। যেহেতু বর্তমান মোকদ্দমার পক্ষগন সালিসে অর্পনে সম্মত হয়েছিল সেহেতু অন্য কোন আইনগত কার্যধারা তথা দেওয়ানী কার্যবিধির অধীন কার্যধারা এখতিয়ার বহির্ভূত ...*

jurisdictional carve-outs' (discussed above). By stipulating in section 7 that no judicial authority shall hear any legal proceedings 'except in so far as provided by this Act', the legislature has laid out specific provisions in the Act under which a court can interject within defined parameters and it is submitted that those statutory parameters in the Act do not, like section 41(a) of the Arbitration Act 1940, include the application of the CPC.

The Indian Supreme Court has grappled with this issue in two cases in the context of section 5 of the Indian Act, on which section 7 of the Act is based and the Code of Civil Procedure 1908 (India) (which is the CPC in Bangladesh). In *ITI Ltd. v Siemens Public Communications Network Ltd* ('*ITI*'),[76] the Indian Supreme Court, following *Bhatia International vs Bulk Trading S. A.*[77] (which has been overruled by *BALCO*), held that the jurisdiction of the civil courts to which a right to decide a *lis* between the parties has been conferred, can only be taken away by a statute in specific terms, and the exclusion of such right cannot be inferred because there is always a strong presumption that the civil courts have the jurisdiction to decide all questions of a civil nature and on that basis, it cannot draw an inference that the Code of Civil Procedure 1908 (India) is inapplicable merely because the Indian Act has not provided for the Code of Civil Procedure 1908 (India) to be applicable.[78] The case of *ITI* came up before the Indian Supreme Court in the case of *Mahanagar Telephone Nigam Ltd. v M/S. Applied Electronics* ('*Mahanagar*')[79] where the court, referring to section 5 of the Indian Act (on which section 7 of the Act is based), section 41 of the Indian Arbitration Act 1940, and the Code of Civil Procedure 1908 (India) (which is the same as the CPC) disagreed with *ITI* and observed as follows:

> Section 5 which commences with a non-obstante clause clearly stipulates that no judicial authority shall interfere except where so provided in Part 1 of the 1996 Act. As we perceive, the 1996 Act is a complete Code and Section 5 in categorical terms along with other provisions, lead to a definite conclusion that no other provision can be attracted. Thus, the application of CPC is not conceived of and, therefore, as a natural corollary, the cross-objection cannot be entertained …. The three-Judge Bench decision in International Security & Intelligence Agency Ltd. (supra) can be distinguished as that is under the 1940 Act which has Section 41 which clearly states that the procedure of CPC would be applicable to appeals. The analysis made in ITI Ltd. (supra) to the effect that merely because the 1996 Act does not provide CPC to be applicable, it should not be inferred that the Code is inapplicable seems to be incorrect, for the scheme of the 1996 Act clearly envisages otherwise and the legislative intendment also so postulates.
>
> … we are unable to follow the view expressed in ITI Ltd. (supra) …

It is submitted that the Indian Supreme Court in *Mahanagar* captures the correct legal proposition and the majority judgment in *Accom* failed to consider the impact of section

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[76] *ITI Ltd. v Siemens Public Communications Network Ltd.* AIR 2002 SC 2308; 2002 (2) Arb LR 246 (SC) 12.

[77] (2002) 4 SCC 105

[78] Ibid [11].

[79] *Mahanagar Telephone Nigam Ltd. v M/S. Applied Electronics* [2017] 2 SCC 37.

7 of the Act on the non-applicability of the court's inherent power under section 151 of the CPC.

VI CONCLUSION

Any judicial exercise is a reactive process where the court relies upon the law and facts as presented before it to resolve a problem. When the legislative draftsmen do not deal adequately with the foreign dimension in a statute, the court then has to find an acceptable solution to this problem. The Act is an example of a legislative drafting debacle and it is submitted that the majority judgment in *Accom* has not presented an acceptable solution to the problem of applicability of the Act in foreign seated arbitrations, which will not bode well with Bangladesh's bid to project herself as an arbitration friendly investment destination.

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LEGAL EFFECT OF NO ORAL MODIFICATION CLAUSE IN MALAYSIA: A QUEST FOR FREEDOM OF CONTRACT

Ng Seng Yi*

Abstract

A 'No Oral Modification' clause ('NOM clause') essentially prohibits any subsequent variation of the contract unless it is similarly made in writing. Although such clause serves as a boilerplate clause in most circumstances, it has however unexpectedly become the cause of litigation in many instances across Commonwealth jurisdictions, dealing with the predicament of what should happen where the parties have subsequently orally agreed to vary their original agreement despite the existence of a NOM clause. This conundrum depicts that the notion of freedom of contract is itself not entirely straightforward. To this end, three distinct schools of thought in interpreting the same have been recently developed by the apex court of the United Kingdom and Singapore in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* and *Charles Lim Teng Siang and another v Hong Choon Hau and another* respectively. This article seeks to examine the legal approach(es) taken by the Malaysian courts in construing the enforceability of the NOM clause in the light of Malaysian case law and legislative regime, as well as the distinctive positions adopted by its judicial counterparts. It is found that while there appears to be at least two decisions of the Malaysian High Court adopting slightly diverging approaches, the local judicial trend largely suggests that the parties may contract out of section 92 of the Malaysian Evidence Act 1950 (and the exceptions therein) and the legal effect of the NOM clause is to be upheld. It is also submitted that a NOM clause is useful for several sensible commercial reasons.

Keywords: No oral modification, freedom of contract, contract law, Malaysia

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I INTRODUCTION

The concept of freedom of contract is so fundamental to,[1] and is often seen as a pivotal function of the law of contract.[2] To this end, contracting constitutes an expression of the free will of the parties[3] to agree on any terms they think fit. More often than not, a 'No Oral Modification' clause ('NOM clause') is incorporated in the contract to uphold the original contractual intention of the parties which has been reduced into writing. However, the question of whether such clause is legally effective to confine the parties' own future contractual rights arguably remains a controversial and evolving legal issue in Commonwealth jurisdictions. In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*,[4] Lord Sumption, who delivered the majority judgment of the UK Supreme Court held that a NOM clause is enforceable and shall be accorded full legal effect ('Lord Sumption's Approach'). Lord Briggs, in his Lordship's concurring judgment, agreed with Lord Sumption that a NOM clause has legal effect, but went on to state that parties could however agree to remove a NOM clause orally. To this end, the court must be satisfied that the parties have by necessary implication or express representation agreed to dispense with the requirement of the NOM clause to validate an oral variation ('Lord Briggs' Approach').

Indeed, the two distinct schools of thought in treating the enforceability of a NOM clause as propounded in *MWB* have sparked vigorous academic debates among legal scholars,[5] and have been judicially considered in other Commonwealth countries. One notable instance is the decision of the Singapore Court of Appeal in *Charles Lim Teng*

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1 In *Printing and Numerical Registering Company v Sampson* (1875) LR 19 Eq 462, 465, Sir George Jessel MR notably observed that 'men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice'. This passage was cited by the Federal Court in *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1, 12 [27] (FC). See also, a brief discussion by the learned authors on the evolution of freedom of contract motivated by economic and social affairs: Sir Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract (*Oxford University Press, 31st ed, 2020) 4.

2 *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15, 38 [47] (FC). Freedom of contract is however qualified by law in certain circumstances, for instance, (i) public policy or illegality: Contracts Act 1950 (Malaysia) ('Contracts Act') s 24; *Merong Mahawangsa Sdn Bhd & Anor v Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619, 651 [69] (FC) (ii) restraint of trade: Contracts Act s 28; *Polygram Records Sdn Bhd v The Search & Anor* [1994] 3 MLJ 127, 162-163 (HC); (iii) penalty: Contracts Act s 75.

3 Janet O'Sullivan, *O'Sullivan & Hilliard's The Law of Contract* (Oxford University Press, 9th ed, 2020) 3-4.

4 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] 4 All ER 21 (UKSC) ('MWB').

5 Paul S Davies, 'Varying Contracts in the Supreme Court' (2018) 77(3) *Cambridge Law Journal* 464; James C Fisher, 'Contract Variation in the Common Law: A Critical Response to Rock Advertising v MWB Business Exchange' (2018) 47(3) *Common Law World Review* 196; Janet O'Sullivan, 'Party-agreed Formalities for Contractual Variation – A Rock of Sense in the Supreme Court?' (2019) 135(Jan) *Law Quarterly Review* 1; Joshua Tayar, 'Concerning the Enforceability of No Oral Modification Clauses: Rock Advertising Ltd v MWB Business Exchange Centres Ltd' (2019) 20(1) *Business Law International* 81; Elad Finkelstein and Shahar Lifshitz, 'The Tension between the Real and the Paper Deal Concerning "No Oral Modification" Clauses' (2021) 80(3) *Cambridge Law Journal* 460; Thomas Raphel, 'Tying Your Own Hands: the Supreme Court's Decision in Rock Advertising' (2022) 138 (Apr) *Law Quarterly Review* 299; Andrew Burrows, 'Anti-Oral Variation Clauses: Rock-Solid or Rocky?' in Paul S Davies and Magda Raczynska (ed) *Contents of Commercial Contracts Terms Affecting Freedoms* (Hart Publishing, 2020) 35.

Siang and another v Hong Choon Hau and another,[6] where it in turn suggested in *obiter* a diverging approach, ie a NOM clause merely raises a rebuttable presumption that there would be no effective variation in absence of a written agreement, and to rebut the same would necessitate cogent evidence of an oral variation agreed upon by the parties ('*Charles Lim*'s Approach').

It should be pointed out at this juncture, as a NOM clause is commonly found in written contracts as a boilerplate clause, the Malaysian courts have in fact in numerous earlier occasions adjudicated upon the legal effect of a NOM clause before *MWB* and *Charles Lim*. This article seeks to examine the legal approach(es) taken by the Malaysian courts in construing the enforceability of the NOM clause in the light of Malaysian case law and the local legislative regime, as well as the distinctive positions adopted by its judicial counterparts.

In this article, Part II seeks to discuss the case of *MWB* alongside the approaches propounded by Lord Sumption and Lord Briggs, whereas Part III studies the decision of the Singapore Court of Appeal in *Charles Lim*. Part IV discusses the relevant local legislative regime and case law in Malaysia, supplemented by a brief discussion on the relevant policy considerations. Finally, this article concludes in Part V.

II THE CASE OF *MWB*

In *MWB*, the parties entered into a licence agreement where Rock Advertising was to rent an office space from MWB for a term of twelve months in return for the payment of licence fees. Rock Advertising fell into arrears of the said fees. Pursuant to verbal discussions between the principal of Rock Advertising and a senior credit controller of MWB, the parties agreed on a revised payment schedule. A more senior representative of MWB subsequently rejected this proposal, and sought to evict Rock Advertising and to claim arrears of the outstanding rent. One of the issues before the court was whether the oral agreement between the parties in respect of the payment plan had varied the licence notwithstanding the existence of a NOM clause in the licence agreement. The trial judge ruled that, *inter alia*, the variation was ineffective as it was not recorded in writing as required by the NOM clause therein. On appeal, Kitchin LJ (with whom McCombe LJ and Arden LJ concurred) held that the oral variation was effective notwithstanding its non-compliance with the NOM clause. It was noted that the overriding notions of freedom of contract and party autonomy allow parties to remain free to depart from the NOM clause previously agreed upon by the parties. Interestingly, this ruling coincided with the earlier English case laws, including the *obiter* view of the England and Wales Court of Appeal's decision in *Globe Motors Inc and others v TRW Lucas Varity Electric Steering Ltd and another*.[7]

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6 *Charles Lim Teng Siang and another v Hong Choon Hau and another* [2021] 2 SLR 153 (CA Singapore) ('Charles Lim').

7 *Globe Motors Inc and others v TRW Lucas Varity Electric Steering Ltd and another* [2017] 1 All ER (Comm) 601 (EWCA). In *Glove Motors*, the England and Wales Court of Appeal in examining its two earlier conflicting authorities in *United Bank Ltd v Asif* (unreported) and *I-Way Ltd v World Online Telecom UK Ltd (formerly Localtel Ltd)* [2002] EWCA Civ 413, preferred the latter which held that a contract could, in principle, be varied orally notwithstanding a NOM clause. This mirrors a well-known passage of the New York Court of

At the Supreme Court, Lord Sumption (with whom Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed) in delivering the leading judgment, reversed the Court of Appeal's ruling and upheld the decision at first instance that a NOM clause was legally effective invalidating the said impugned oral variation. Lord Briggs concurred but for different reasons.

Lord Sumption perceived party autonomy as a 'fallacy' which merely 'operates up to the point when contract is made, but thereafter only to the extent that the contract allows'.[8] His Lordship suggested that failing to enforce a NOM clause is the real threat to party autonomy as it does not give effect to the parties' freedom to autonomously decide the form of any variation.[9] Whilst acknowledging that simple contracts are not constrained by any formal requirements where oral agreements can be enforceable,[10] and that such flexibility 'enables agreements to be made quickly, informally and without the intervention of lawyers or legally drafted documents',[11] Lord Sumption suggested that there are legitimate commercial reasons that businessmen might see such flexibility as a 'mixed blessing' and therefore seek to give effect to a NOM clause for three reasons, ie (i) to prevent 'attempts to undermine written agreements by informal means', (ii) to avoid 'disputes not just about whether a variation was intended but also about its exact terms', and (iii) as 'a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree to them'.[12] Besides, Lord Sumption said that both entire agreement and NOM clauses essentially serve a similar purpose, ie to 'achieve contractual certainty about the terms agreed' by the contracting parties, and there is no sensible reason to enforce one but not the other.[13] Lord Sumption also suggested that parties' failure to comply with the formalities prescribed in a NOM clause is often not that they intend to dispense with it, but rather that they have overlooked it.[14]

On the other hand, whilst agreeing with Lord Sumption in general, Lord Briggs in his Lordship's concurring judgment took a slightly different approach. Lord Briggs opined that if the parties enter into a written agreement containing a NOM clause, such clause is enforceable as long as either party insists upon it. Accordingly, any oral variations shall be treated as invalid unless and until they are reduced to writing, or the NOM clause is itself expressly dispensed with by the parties. This, in turn, 'fully reflects the autonomy of parties to bind themselves as to their future conduct, while preserving their autonomy to agree to release themselves from that inhibition'.[15] Next, Lord Briggs disagreed with Lord Sumption's analogy on the entire agreement clause. His Lordship viewed that, unlike a NOM clause, an entire agreement clause does not seek to bind the parties as to their

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Appeal's judgment in *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 at 387-388 where Cardozo J stated that '[t]hose who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived'.

8 *MWB* (n 4), 26-27 [11].

9 Ibid.

10 *MWB* (n 4), 25-26 [7].

11 *MWB* (n 4), 27 [12].

12 Ibid.

13 *MWB* (n 4), 28-29 [14].

14 *MWB* (n 4), 29-30 [15].

15 *MWB* (n 4), 32 [25].

future conduct.[16] Lord Briggs endorsed a 'more cautious recognition of the effect of a NOM clause, namely that it continues to bind until the parties have expressly (or strictly by necessary implication) agreed to do away with it', which would ultimately promote commercial certainty and avoid disputes on the alleged oral variation.[17]

Following the diverging approaches propounded in *MWB*, a cursory review of the English case law decided thereafter reveals that Lord Sumption's Approach has generally been adopted by the English courts to enforce a NOM clause regulating the manner in which a contract can be validly modified.[18]

III THE CASE OF *CHARLES LIM*

In *Charles Lim*, two intriguing issues were put before the enlarged five-judge coram of the Singapore Court of Appeal,[19] ie (i) whether a clause which prohibits variation, supplement, deletion or replacement unless made in writing and signed by or on behalf of both parties applies to rescission, and (ii) assuming that an oral variation has been proved, can the other party rely on such a clause to invalidate such variation?[20]

The appellants commenced an action against the respondents for a breach of a sale and purchase agreement ('SPA') due to failure to complete a purported share transaction. The respondents contended that the SPA had earlier been orally rescinded by mutual agreement, but such position was contested by the appellants. The Singapore High Court found that the SPA was validly rescinded.[21] On appeal, the appellants raised a new point pertaining to a NOM clause contained in the impugned SPA, which stipulated that:

> No variation, supplement, deletion or replacement of or from this Agreement or any of its terms shall be effective unless made in writing and signed by or on behalf of each Party.

Steven Chong JCA, in delivering the judgment of the Singapore Court of Appeal, dismissed the appeal for two reasons, ie (i) the wordings employed in the NOM clause demonstrated that it did not apply to oral rescission, and (ii) even if the said NOM clause had invalidated the oral rescission, the appellants would have been estopped from

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16 *MWB* (n 4), 33 [28].

17 *MWB* (n 4), 34 [31].

18 See, eg, *NHS Commissioning Board v Vasant (trading as MK Vasant & Associates) and other* [2020] 1 All ER (Comm) 799, 807 [32] (EWCA); *Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd and others* [2020] 2 All ER (Comm) 97, 103 [24] (EWCA); *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 [77]-[81] (EWCA).

19 Notably, a five-judge panel of the Singapore Court of Appeal would normally only convene to hear 'selected cases of jurisprudential significance, so that where difficult or unsettled issues arise for consideration, these are resolved with the benefit of the collective wisdom and insights of a larger pool of judges: see Sundaresh Menon, 'Response by Chief Justice Sundaresh Menon' (Opening of the Legal Year 2014, Singapore, 3 January 2014) [31]. See also, Lau Kwan Ho, 'Enlarged Panels in the Court of Appeal of Singapore' [2019] 31 *Singapore Academy of Law Journal* 907.

20 *Charles Lim* (n 6), 156 [2].

21 *Lim Teng Siang Charles and another v Hong Choon Hau and another* [2020] SGHC 182 (HC Singapore).

enforcing the SPA.[22] Notwithstanding the fact that the NOM clause in question was not engaged, the Singapore Court of Appeal nevertheless went on to make certain provisional observations on the legal effect of a NOM clause.

Whilst acknowledging that there are legitimate commercial reasons to incorporate a NOM clause (similar to those set out by Lord Sumption in *MWB*),[23] Steven Chong JCA enunciated that the existence of such reasons 'do not offer a legitimate basis to prevent parties from varying a contract orally where such an oral variation can be proven',[24] and went further to set out three schools of judicial thought pertaining to the legal effect of a NOM clause. Apart from Lord Sumption's Approach and Lord Briggs' Approach in *MWB*, Steven Chong JCA identified a third approach as the proposition endorsed in obiter by the Singapore Court of Appeal earlier in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd*,[25] ie 'a NOM clause merely raises a rebuttable presumption that in the absence of an agreement in writing, there would be no variation'.[26] His Honour expressed reservations against the approaches propounded by Lord Sumption and Lord Briggs, and preferred the *Comfort Management* approach.

To begin with, Steven Chong JCA disagreed with Lord Sumption's Approach as to what party autonomy entails. In His Honour's view, there ought to be a fine distinction between individual autonomy and the collective autonomy of the contracting parties. Save for limited situations such as illegality, if the parties mutually agree to subsequently vary the contract orally notwithstanding an initial limitation imposed by a NOM clause, their autonomy to do so should be upheld as it reflects the 'more recent intention of the parties'.[27] Whilst His Honour concurred with some of the statements of Lord Briggs which uphold the parties' collective autonomy, it was opined that Lord Briggs' Approach was impractical,[28] and that the *Comfort Management* approach was preferred because under this approach, in inferring that the parties have by necessary implication agreed to depart from a NOM clause, it does not strictly require the parties to 'have specifically addressed their minds to dispense with the NOM clause when agreeing to an oral variation'.[29] Rather, the test should be:

> [W]hether at the point when parties agreed on the oral variation, they would necessarily have agreed to depart from the NOM clause had they addressed their mind to the question, regardless of whether they had actually considered the question or not.[30]

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22 *Charles Lim* (n 6), 178-179 [86].

23 *Charles Lim* (n 6), 164 [36].

24 *Charles Lim* (n 6), 164 [37].

25 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 (CA Singapore).

26 *Charles Lim* (n 6), 165 [38].

27 *Charles Lim* (n 6), 166-167 [43]-[47].

28 *Charles Lim* (n 6), 169 [52].

29 *Charles Lim* (n 6), 171-172 [61].

30 *Charles Lim* (n 6), 169 [54]. Curiously, it is conceptually similar to the necessity test as explained by Lord Briggs in *MWB* (n 4), 33 [30].

The test appears to then focus on the proper application of evidential rules and not by the law of contract. Drawing an analogy with the inherent difficulty in proving civil fraud, Steven Chong JCA emphasised that whilst the *Comfort Management* approach requires the party alleging oral variation to rebut the presumption by adducing more cogent evidence to prove the same, it does not constitute a third standard of proof.[31] In other words, the standard remains as the civil standard on a balance of probabilities. Once the burden of proof is discharged, the NOM clause would not apply because the purported oral variation reflects the collective decision of the contracting parties.[32]

On this note, it may be relevant to highlight at this juncture that while the Singapore Court of Appeal in *Charles Lim* postulated its approach premised on evidential rules, it however did not seem to have considered the scope of section 94 of the Singapore Evidence Act 1893[33] (*in pari materia* with section 92 of the Malaysian Evidence Act 1950 which is modelled upon the Indian Evidence Act) which in essence provides for the exclusion of evidence of oral agreement save for certain exceptions. For the discussions that follow in the next section to this article, it would appear that the decision of the Singapore Court of Appeal in *Charles Lim* on the issue of construction of extrinsic evidence may be inconsistent with its earlier decisions, especially in relation to its omission to consider section 94 of the Singapore Evidence Act 1893 (and the provisos therein).

IV LEGAL ANALYSIS

A *Oral agreement (variation) in Malaysia*

In general, oral agreement has legal effect and is enforceable by the contracting parties. In fact, under the Malaysian contract law regime, so long as the legal requirements such as offer,[34] acceptance,[35] consideration[36] and capacity[37] are fulfilled, an agreement enforceable by law[38] is a contract[39] and is binding upon the parties.[40] It does not require a contract to be reduced into writing before it is to be accorded with legal force. The law is trite in this regard.[41]

What is often contentious is not the validity or legal effect of an oral agreement per se, but the existence of the oral agreement. In many instances, the issue of whether an oral agreement exists, albeit the evidence of which in certain circumstances is admittedly

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31 *Charles Lim* (n 6), 170 [56].

32 *Charles Lim* (n 6), 170-171 [58].

33 Evidence Act 1893 (Chapter 97) (Singapore).

34 Contracts Act s 2(a).

35 Contracts Act s 2(b).

36 Contracts Act s 2(d).

37 Contracts Act s 11.

38 A contract may be vitiated and voidable in the absence of free consent of the parties. In this regard, a consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation and mistake: see Contracts Act ss 14-18, 21-23. An agreement is void if, *inter alia*, it is against public policy, illegal, in restraint of trade, uncertainty or by wager: see Contracts Act ss 24-31.

39 Contracts Act s 2(h).

40 See *Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1, 32 [57] (CA); *Philip Bell Booth Capping Corp Ltd v Navaratnam a/l Narayanan* [2016] 6 MLJ 698, 714 [50] (CA).

41 See generally, Visu Sinnadurai, *Sinnadurai: Law of Contract* (Lexis Nexis, 4th ed, 2011) Ch 2-3 and 7.

not easily recognised by the courts,[42] is a factual question or triable issue[43] to be dealt with by the trial court based on the civil standard of proof on a balance of probabilities, having due regard to oral and documentary evidence adduced by the litigating parties[44] and the surrounding facts and circumstances.[45] To that end, the Malaysian apex or appellate courts would usually not disturb the finding of the existence of an oral agreement as found by the trial judge.[46]

Under the Malaysian Evidence Act 1950, it is a general evidential rule that evidence of oral agreement shall not be admitted to contradict, vary, add to or subtract from the terms of a written contract, subject to several exceptions.[47] It should be noted that the admissibility of extrinsic evidence as governed by, *inter alia*, section 92 of the Malaysian Evidence Act 1950, is analogous to section 94 of the Singapore Evidence Act 1893, both of which are largely modelled on the Indian Evidence Act drafted by Sir James Fitzjames Stephen. Accordingly, the Indian and Singapore case law which discuss the said provision may be of relevance in this context.

To this end, the Indian Supreme Court in *Bai Hira Devi and others v the Official Assignee of Bombay*[48] had an instance to consider, *inter alia*, the scope and effect of section 92 of the Indian Evidence Act. It was held that the said section 92 only applies to the contracting parties. In other words, a non-contracting party would not be precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the agreement.[49] The Privy Council in an earlier occasion in *Maung Kyin and another v Ma Shwe La and others*[50] similarly held that a non-contracting party is not governed by the said section or by the rule of evidence which it contains. The Privy Council, on an appeal from the Chief Court of Lower Burma in its appellate jurisdiction, further observed in *obiter* that it is trite law that oral evidence is not admissible despite 'attempts have

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42 *Baldah Toyyibah (Prasarana) Kelantan Sdn Bhd v Dae Hanguru Infra Sdn Bhd and another appeal* [2020] 5 MLJ 630, 634 [4] (CA).

43 *Syarikat Seri Padu Sdn Bhd v Intan Enterprises Company* [1982] 2 MLJ 17, 18 (FC).

44 See, eg, *Desa Samudra Sdn Bhd v Autoways Construction Sdn Bhd & Ors* [2009] 8 MLJ 335, 345-346 [34] (HC)

45 See, eg, *Thiagrajen a/l Veluchamy v Suraish Naidu a/l Re Naidu & Anor* [2009] 9 MLJ 68, 77-83 [23]-[34] (HC)

46 See, eg, *Chase Perdana Bhd v Md Afendi bin Hamdan* [2009] 6 MLJ 783,793 [25] (FC); *John Ambrose v Peter Anthony & Anor* [2017] 4 MLJ 374, 384-386 [27]-[34] (CA); *Mega Meisa Sdn Bhd & Ors v Mustapah bin Dorani and another appeal* [2020] 6 MLJ 594, 624 [72](CA). It is trite law that an appellate court should not interfere with the trial judge's findings on primary facts unless satisfied that the learned trial judge was plainly wrong: see, eg, *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, 117 [148] (FC).

47 Evidence Act 1950 (Malaysia) s 91 read together with s 92. For completeness, the prohibition against the admissibility of oral evidence under section 92 of the Malaysian Evidence Act 1950 would apply when all, as opposed to some only, of the contractual terms are reduced into writing in an agreement. Where there is evidence that some terms are given orally and some in writing, oral evidence can be given to prove the terms orally agreed to: see *Tan Chong & Sons Motor Company Sdn Bhd v Alan Mcknight* [1983] 1 MLJ 220, 229 (FC). For completeness, reliance upon a proviso must be specifically pleaded: *Ho Shee Jan v Hadayat Harta Holdings Sdn Bhd* [1989] 1 MLJ 33, 35 (SC).

48 *Bai Hira Devi and others v the Official Assignee of Bombay* (1958) 2 Madras LJ 108 (SC Indian).

49 Ibid, 111-112 .

50 *Maung Kyin and another v Ma Shwe La and others* (1917) 2 Madras LJ 648 (PC).

been made to engraft an exception on this rule in favour of evidence relating to the acts and conduct of the parties'.[51]

The Singapore Court of Appeal had also in several earlier occasions[52] considered the scope and application of, *inter alia,* section 94 of the Singapore Evidence Act 1893 (and the provisos therein). In *Ng Lay Choo Marion v Lok Lai Oi,*[53] the Singapore apex court in considering the applicability of proviso (b) to section 94, said that consideration should be given to the degree of formality of the agreement. In this instance, evidence was inadmissible to prove the oral terms as the agreement in question had indeed a high degree of formality and the parties were fully aware of the alleged subject matter of the oral terms.[54] In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*,[55] the Singapore Court of Appeal noted that the courts generally ought to be more reluctant to permit extrinsic evidence to affect an agreement. Whilst an extrinsic evidence may be admissible under proviso (f) to section 94, 'so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context', and that such extrinsic evidence 'must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon', the Singapore apex court went on to emphasise that courts should always be 'careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them'[56] Pausing here, it can be seen from the earlier case law in the Indian and Singapore jurisdictions that courts would generally be reluctant to allow extrinsic evidence to vary the terms of a written contract.

Back home, and for the purpose of this article, proviso (d) to section 92 of the Malaysian Evidence Act 1950 is of relevance here:

> *Exclusion of evidence of oral agreement*
> 92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:
>
> Provided that –
>
> …
>
> (d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved

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51 Ibid, 649. See also, *J. Kalayarasi and another v SAM Ibrahim Sahib* [2011] 1 Madras LJ 1136 [25] (HC Indian); *Sait Balumal Dharmadas Firm Bankers v Gollapudi Venkata Chelapathi Rao and another* (1955) 1 Madras LJ 12 [15] (HC Indian).

52 See, eg, *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 (CA Singapore); *Latham v Credit Suisse First Boston* [2000] 2 SLR 693 (CA Singapore); *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221 (CA Singapore).

53 *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221 (CA Singapore).

54 Ibid, 227-228.

55 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 (CA Singapore).

56 Ibid, 1096-1097 [132].

> except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

It would appear from the said proviso (d) that the parties are entitled to adduce evidence to demonstrate the existence of a subsequent oral agreement to rescind or modify terms of a written contract,[57] unless such contract falls into the category of a contract which is by law required to be in writing, for instance, a lease registrable under the Sabah Land Ordinance,[58] a standard form of contract of sale prescribed under the Housing Development (Control and Licensing) Regulations 1989[59] and the like. In the same vein, it is trite law that an agreement which varies or modifies the contract required by law to be in writing must also be reduced into writing.[60]

B *Case law – contracting out of section 92 of the Malaysian Evidence Act 1950 and the legal effect of a NOM clause*

In light of the statutory evidential rules set out in the above section, one may wonder whether parties may contract out of section 92 of the Malaysian Evidence Act 1950 (including the exceptions thereof) by incorporating a NOM clause into a contract. In other words, can parties exercise their autonomy and freedom of contract to limit their future contractual freedom by incorporating a NOM clause to strictly prevent any oral variations to the terms of a written contract unless made in the prescribed manner, which in effect disregards the said statutory evidential rules?

The case of *Macronet Sdn Bhd v RHB Bank Sdn Bhd*[61] arguably serves as a starting point to shed some light on this. One of the contentious issues submitted before the Malaysian High Court therein was, whether the evidence of a precontractual representation and an oral agreement could be admitted and relied upon by the parties to demonstrate a variation to the written contract in the light of section 92 of the Malaysian Evidence Act 1950 and a purportedly designated entire agreement clause contained in the said contract.

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[57] *Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay (deceased)) v Cheok Toh Gong & Ors* [1996] 1 MLJ 843, 853D (SC). *Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor* [1999] 1 MLJ 193, 226 (FC); *KSK Sawmill Sdn Bhd v FW Solutions Sdn Bhd* [2020] 2 MLJ 423, 432 [19] (CA).

[58] *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241 (FC). See also, *Leong Gan & Ors v Tan Chong Motor Co Ltd* [1969] 2 MLJ 8, 9 (OCJ).

[59] It is trite law that parties cannot add to or vary the prescribed contract of sale. Any unauthorised modification or variation would be null and void: see, eg, *Sea Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31, 34 (FC); *Loh Tina & Ors v Kemuning Setia Sdn Bhd & Ors and another appeal* [2020] 6 MLJ 191, 216 [98]-[100] (CA).

[60] *Teo Siew Peng v Guok Sing Ong & Anor* [1983] 1 MLJ 132, 133-134 (CA Singapore).

[61] *Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11 (HC) (Macronet'). See also, *Antara Elektrik Sdn Bhd v Bell & Order Bhd* [2002] 3 MLJ 321, 324 (HC) which was decided approximately a month before *Macronet*. There, although it was unclear from the judgment whether a NOM clause existed in the impugned contract, it was nevertheless observed that 'parties are bound by what they have agreed and neither party can go against what they had earlier agreed unless it was mutually varied. A variation of a written agreement must be made in writing'.

It should be highlighted that, the said entire agreement clause also incorporated the effect of a NOM clause as follows:[62]

> This agreement (together with any documents referred to herein) constitute the whole agreement between the parties hereto and *it is expressly declared that no variation hereof shall be effective unless made in writing and agreed to by both parties*. (emphasis added)

The Malaysian High Court judge Abdul Aziz J (later FCJ) enunciated that the said entire agreement clause (which in effect incorporated a NOM clause) was an agreement between the parties, and in adhering to such a clause, they 'must be presumed to have known of the existence of s 92 and of the exceptions in it and to have intended what the clause intended, that is to exclude any attempt to vary the agreement by an oral agreement or statement, which attempt can only be made through the exceptions in s 92'.[63] By doing so, the parties were in fact agreeing not to resort to those exceptions.

The principle of law in *Macronet* was subsequently referred to and applied by the Malaysian Court of Appeal in several notable occasions.[64] In *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd*,[65] the impugned sale and purchase agreement between the parties therein contained an entire agreement clause and a NOM clause separately. Although *Macronet* was considered in the context of the entire agreement clause,[66] Nik Hashim JCA in delivering the judgment of the Malaysian Court of Appeal nevertheless went on to describe the distinct NOM clause therein to essentially mean that '[u]ntil an agreement in writing is reached by the parties, all rights and obligations under the agreement remain valid and enforceable'.[67]

In *Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor*,[68] the impugned distributorship agreement between the parties therein stipulated an entire agreement clause which also incorporated a NOM clause (similar to the clause in *Macronet*). The Malaysian Court of Appeal referred to *Macronet* and rejected the contention by one of the parties to the said distributorship agreement alleging the existence of a subsequent oral partnership agreement, due to the presence of the entire agreement clause therein.

In fact, as can be seen from a catena of the Malaysian High Court cases decided thereafter, it appears that the legal principle set out in *Macronet* has been consistently adopted by the Malaysian courts to oust the operation of the exceptions to section 92 of the Malaysian Evidence Act 1950 by reason of incorporation of a NOM clause in the contract.[69] To this end, local case law seems to indicate that a NOM clause is legally

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62 *Macronet* (n 61), 24.

63 *Macronet* (n 61), 25.

64 For completeness, see *Harin Corp Sdn Bhd v Rimbun Tekad Premix (Terengganu) Sdn Bhd* [2016] 3 MLJ 782, 792-793 [21]-[25] (CA), but it was in relation to an entire agreement clause.

65 *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585 (CA) ('Master Strike'), 592 [6].

66 Ibid, 594 [9].

67 Ibid, 598 [23].

68 *Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor* [2015] 4 MLJ 525 (CA).

69 *Orix Credit Malaysia Sdn Bhd v Raub Australian Gold Mining Sdn Bhd* [2015] 1 LNS 1065 [26]-[29] (HC). See also, *Maybank Investment Bank Berhad & Ors v Million Westlink Sdn Bhd & Anor* [2015] 1 LNS 1301

effective, and any subsequent variations to the written contract must be reduced into writing. Incidentally, this appears to be similar to Lord Sumption's Approach in according full legal effect to a NOM clause.

Notwithstanding the above case law, as can be seen from the discussion in the subsequent section to this article below, the Malaysian High Court in at least two instances thereafter appears to have adopted different approaches, ie the Lord Briggs' Approach and the *Charles Lim's* Approach, in construing the legal effect of a NOM clause. In other words, it appears that there are three different approaches presently taken by the Malaysian courts to interpret the effectiveness of a NOM clause.

C *The case of Ng Sau Foong (Lord Briggs' Approach)*

In *Ng Sau Foong v Rhombus Food & Lifestyle Sdn Bhd & Anor*,[70] one of the contentious issues before the Malaysian High Court was whether a condition precedent expressly provided in a share sale agreement has been varied or waived orally by the parties, notwithstanding the provision of a NOM clause in the said agreement (although it was arguably not raised in the pleadings). The said NOM clause provided that:

> 12.8 Amendments & Additions
> No amendment, variation, revocation, cancellation, substitution or waiver of or addition or supplemental to, any of the provisions of this agreement shall be effective unless it is in writing and signed by both of the parties.

In this regard, the Malaysian High Court Judge Ong Chee Kwan JC considered both Lord Sumption's Approach and Lord Briggs' Approach, and went on to adopt Lord Briggs' Approach with slight modifications. To that end, it was held that the impugned oral variation was valid despite the existence of a NOM clause contained in the share sale agreement.

Ong Chee Kwan JC's additions to Lord Briggs' Approach were in three-fold. Firstly, in a contract where a NOM clause is expressly agreed upon by the parties, it should be treated distinctly from a contract where a NOM clause is inserted into the contract by lawyers without the parties' conscious instructions. In the latter scenario, the court should 'more readily imply that by the parties' oral agreement to vary, the [NOM] clause is to be treated as done away with', because the parties might not be aware of the NOM clause.[71] Secondly, it is in the interest of businessmen to expect the courts to give effect to a contract mutually agreed upon by the parties, even if it was made orally disregarding the NOM clause contained in the said contract. It was also suggested that parties would have reduced their oral variation into writing or waived the formality of a NOM clause,

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[50(a)] (HC); *Ismail bin Othman & Ors v Seacera Group Bhd & Ors* [2022] 1 LNS 442 [28] (HC); For entire agreement clause: see, eg, *Amazing Place Sdn Bhd v Couture Homes Sdn Bhd & Anor* [2011] 7 MLJ 52, 61-62 [23]-[25] (HC); *Berjaya Times Square Sdn Bhd v Twingems Sdn Bhd & Anor* [2012] 1 LNS 166 [37]-[40](HC); *Da Land Sdn Bhd v Ong Koh Hou @ Won Kok Fong and another case* [2018] 1 LNS 205 [28] (HC).

70 *Ng Sau Foong v Rhombus Food & Lifestyle Sdn Bhd & Anor* [2020] 8 MLJ 155 (HC) ('Ng Sau Foong').

71 Ibid, 173 [37(a)].

if the same clause was brought to their knowledge during the purported oral variation.[72] Thirdly, whilst recognising the importance of contractual certainty and expediency, Ong Chee Kwan opined that it should not prevail over the doctrine of party autonomy.

Pertinently, Ong Chee Kwan JC went on to consider and distinguish some of the earlier cases, inter alia, the Malaysian High Court's decision in *HTJ Development Sdn Bhd v Teoh Chin Kee & Anor*,[73] and the case of *Macronet* which were subsequently applied by the Malaysian Court of Appeal in *Master Strike.* With the greatest of respect, such judicial considerations may however require careful inspection.

First, it is curious to note that the Malaysian High Court in *Ng Sau Foong* did not consider the fact that in *Macronet*, it dealt not only with pre-contractual representations, but also with an oral variation agreement made after the conclusion of the impugned contract between the parties, as explicitly found by the trial judge therein based on the affidavit evidence.[74] In addition, if one peruses the entire agreement clause in question in *Macronet* (see above) in detail, the said entire agreement clause also incorporated the essence of a NOM clause. As aptly explained by the learned trial judge in *Macronet* after citing the same in the judgment, '[t]he effect of that clause is that the agreement, because it constituted the whole agreement, could not be varied for any reason or under any circumstances except by another agreement in writing'.[75]

Second, as discussed in the earlier section of this article, unlike the impugned provision in *Macronet* with the combined effect of an entire agreement clause and a NOM clause, the sale and purchase agreement in *Master Strike* contained the same in two separate clauses. This is analogous to the standalone NOM clause in *Ng Sau Foong*. In specifically dealing with the NOM clause, the Malaysian Court of Appeal in *Master Strike* in fact accorded full legal effect to the NOM clause and observed that 'any variation to the agreement must be in writing'.[76]

Third, while the Malaysian High Court in *HTJ Development* did refer to *MWB* purportedly on the issue of estoppel as pointed out by the learned High Court Judge in *Ng Sau Foong*, it should be noted that the Malaysian High Court in *HTJ Development* however took judicial cognisance that the same was 'not the key issue before the Supreme Court [in *MWB*]'.[77] In any event, it should be highlighted that in specifically dealing with the effectiveness of an entire agreement clause (with a combined effect of a NOM clause, as similarly found in *Macronet*), the Malaysian High Court in *HTJ Development* made reference to *Macronet* cited in its earlier proceedings, and went on to state that 'where there is an express contractual provision stating that any variation must be made in writing and signed by all parties, there cannot be any implied variation'.[78] Pertinently,

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72 Ibid, 173 [37(b)].

73 *HTJ Development Sdn Bhd v Teoh Chin Kee & Anor* [2018] 1 LNS 1849 (HC) ('HTJ Development').

74 *Macronet* (n 61), 22.

75 *Macronet Sdn* (n 61), 24.

76 *Master Strike* (n 65), 598 [23].

77 *HTJ* (n 73), [69].

78 *HTJ* (n 73), [42]-[44]. The Malaysian High Court also referred to the cases of *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysian Sdn Bhd* [2004] 6 MLJ 1 (HC) and *Paramaha Enterprises Sdn Bhd & Ors v The Government of the State of Sabah & Anor* [2015] 2 CLJ 268 (CA). Pertinently, the case of *MWB* was briefly discussed in the context of an estoppel issue at [68]-[72].

the case of *HTJ Development*, which was decided after *MWB*, appears to have adopted Lord Sumption's Approach that a NOM clause is legally effective.

Despite the reasons stated above, it remains curious that the Malaysian High Court in *Ng Sau Foong*, in interpreting the legal effect of a NOM clause, nevertheless went on to distinguish the earlier local cases of *Macronet, Master Strike* and *HTJ Development*. The truth remains that the factual matrix of these earlier cases share similar traits in substance as *Ng Sau Foong*.

D *The case of Bank Islam Malaysia Berhad (Charles Lim's Approach)*

In *Bank Islam Malaysia Bhd v Mustaffar @ Mustaffa bin Yacob & Anor*,[79] the Malaysian High Court in dealing with a NOM clause provided in a guarantee agreement, suggested that the evidence of subsequent oral variation 'must be of sufficient force to overcome the presumption that the complete agreement(s), which requires written consent to modification, expresses the intent of the parties'.[80] In this case, the Malaysian High Court concluded that the evidence adduced by the proponent of an oral modification was insufficient to warrant an inference that parties had reached an oral agreement to vary the written contract. This appears to be similar to the approach adopted by the Singapore Court of Appeal later in *Charles Lim* where a NOM clause was said to merely raise a rebuttable presumption that in the absence of an agreement in writing, there would be no variation. However, it should be noted that the Malaysian High Court in *Bank Islam Malaysia* did not consider the long line of established cases (including decisions of the Malaysian Court of Appeal) which in effect ruled that the provision of a NOM clause would oust the operation of the evidential rules under the Malaysian Evidence Act 1950, and a NOM clause is legally effective. In this regard, it may be difficult to see how the cases of *Bank Islam Malaysia* as well as *Ng Sau Foong* can be reconciled with the other cases, and it remains to be seen if these cases would be approved by the appellate court at an appropriate occasion in the near future.

E *The Malaysian common law*

It is trite that modern English common law may be persuasive, but is not strictly binding upon the Malaysian courts.[81] To this end, the Malaysian courts are 'free to formulate Malaysia's own common law',[82] having regard to the relevant written law in force in Malaysia (if any), and the 'local circumstances' or 'local inhabitants'.[83] In fact, the

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79 *Bank Islam Malaysia Bhd v Mustaffar @ Mustaffa bin Yacob & Anor* [2012] 6 MLJ 252 (HC).

80 Ibid, 263 [28].

81 *Jamil bin Harun v Yang Kamsiah & Anor* [1984] 1 MLJ 217, 219 (PC).

82 *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389, 415 [42] (FC) (per Abdul Hamid Mohamad FCJ).

83 Civil Law Act 1956 (Malaysia) s 3(1). See also the oft-cited observations made by Peh Swee Chin J (as he then was) in *Syarikat Batu Sinar Sdn Bhd & Ors v UMBC Finance Bhd & Ors* [1990] 3 MLJ 468, 473-474 (HC).

Malaysian courts have in several occasions decided to not follow English common law in dealing with cases involving the law of contract.[84]

As discussed above, it appears that the legal effect of a NOM clause has been judicially considered by the Malaysian courts in numerous occasions even before the decisions of the UK Supreme Court and Singapore Court of Appeal in *MWB* and *Charles Lim* respectively. Having considered the relevant provisions of the Malaysian Evidence Act 1950 (which are modelled on the Indian Evidence Act), the law appears to be relatively established (albeit yet to be considered by the Malaysian Federal Court), that the contracting parties may contract out of the said statutory regime, and that a NOM clause is legally effective which renders any subsequent oral variations invalid unless made in writing. This, in turn, happens to be similar to Lord Sumption's Approach in giving full legal effect to a NOM clause. It remains to be seen if the Malaysian Federal Court is accorded with an opportunity to consider these earlier decisions and the local legislative regime, as well as the decisions of its judicial counterparts in *MWB* and *Charles Lim*. At present, the legal position on the legal effect of a NOM clause using Lord Sumption's Approach as discussed above would still constitute good law.

F *Policy considerations*

For completeness, it would appear from local case law that in many instances, the provision of a NOM clause has been incorporated into an entire agreement clause.[85] Accordingly, it is argued that judicial observations made to interpret an entire agreement clause in these occasions may also be applicable to the interpretation of a NOM clause to a greater extent.

In any event, as both the entire agreement and NOM clauses constitute boilerplate provisions mutually agreed by the parties, legally speaking it does not matter whether it has been included in the contract merely as a standard clause or otherwise. It bears reminding the basic rule in the law of contract that what have been agreed by the contracting parties should be given effect to. One would remember the oft-quoted statement by the Malaysian Federal Court in *Michael C Solle v United Malayan Banking Corporation*:[86]

> The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement.

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84 See, eg, the decision of the High Court in *Polygram Records Sdn Bhd v The Search* [1994] 3 MLJ 127 (HC), where Visu Sinnadurai J observed that the provisions of the Contracts Act in respect of the doctrine of restraint of trade differs from that under the common law, and therefore the English cases on restraint of trade could not be relied upon. See also, Visu Sinnadurai, *Sinnadurai: Contracts Act A Commentary* (Lexis Nexis, 2015) [1.10]-[1.13].

85 See, eg, *Wong Yee Boon v Gainvest Builders (M) Sdn Bhd* [2020] 3 MLJ 571, 598 [60] (FC) (dissenting judgment); *Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor* [2015] 4 MLJ 525, 540 [27] (CA); *Donald James Rae & Anor v Bruno Sorrentino and another appeal* [2015] 2 MLJ 218, [5] (CA); *Macronet* (n 61), 24.

86 *Michael C Solle v United Malayan Banking Corporation* [1986] 1 MLJ 45, 46-47 (FC).

Further, as the parties have made a commercial decision by choice to agree on the incorporation of a NOM clause, the parties ought to stand by it premised on the notion of freedom of contract.[87] This is especially so in the case of a written contract which is clear and unambiguous in setting out its provisions (including boilerplate clauses such as a NOM clause). There shall be no room to read into the said written contract once it has been concluded, and no extraneous evidence may be employed to modify or vary the contractual terms already set out in the written contract unless made in the prescribed written manner.[88]

To this end, the judicial policy consideration in upholding the NOM clause (incorporated in an entire agreement clause or otherwise) is understandably largely premised on the reason that it promotes contractual certainty.[89] As contractual variation is only valid if it is made in writing, it would arguably prevent false claims that parties have entered into an oral agreement to modify the contract. Be it a commercial organisation or an individual, it is also commercially wise to reduce commercial arrangements in writing and to maintain a proper written record of the contract including any modifications made thereto to avoid commercial ambiguity. This is particularly of considerable practical advantage to large commercial institutions as it may help eliminate the risk of an employee or agent, unintentionally or otherwise, in agreeing to a proposal which is not consistent with the written contract. Not to mention, it would substantially ease the burden of the parties to prove the existence of a contractual variation in litigation proceedings.

In addition, it is apposite to point out that despite the presence of a NOM clause in a written contract, the contracting parties may still depart from the said NOM clause or otherwise, so long as the prescribed manner to vary the same is adhered to accordingly. Parties' autonomy to specifically intend their contractual relationship to be reduced into a written form must be upheld accordingly. To this end, in the true essence of freedom of contract, the contracting parties should be allowed to limit their own contractual freedom within the confines of a commercial relationship.

V CONCLUSION

Although a NOM clause serves as a boilerplate clause in most circumstances, it has however unexpectedly constituted the cause of litigation in many instances across Commonwealth jurisdictions, dealing with the predicament of what should happen where the parties have subsequently orally agreed to vary their original agreement despite the existence of a NOM clause. This conundrum depicts that the notion of freedom of contract is itself not entirely straightforward. Three distinct schools of thought in construing the same have been recently developed via judicial pronouncements by the apex court in the UK and Singapore.

To this end, the Malaysian judicial trend in construing a NOM clause appears to be relatively consistent with Lord Sumption's Approach, even before *MWB* was decided in

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87 See also, *Pembinaan SPK Sdn Bhd v Jalinan Waja Sdn Bhd* [2014] 2 MLJ 322 [29] (CA).

88 *Koh Siak Poo v Perkayuan Oks Sdn Bhd & Ors* [1989] 3 MLJ 164, 165 (SC).

89 See, eg, *Common Ground TTDI Sdn Bhd v Ken TTDI Sdn Bhd (Common Ground Works Sdn Bhd & Ors, third parties)* [2021] 1 LNS 1709 [56] (HC).

2018. This can be demonstrated through the earlier Malaysian High Court's decision in *Macronet,* as applied by the Malaysian Court of Appeal in *Master Strike* and *Network Pet Products*, which essentially ruled that a NOM clause mutually agreed by the contracting parties in effect ousts the operation of the exceptions to section 92 of the Malaysian Evidence Act 1950, and that any subsequent variations to the contract must strictly be reduced into writing.

Interestingly, despite the judicial trend as upheld by the Malaysian appellate court to render a NOM clause with full legal effect, the Malaysian High Court in at least two other decisions in *Ng Sau Foong* and *Bank Islam Malaysia Berhad* however, appear to have adopted slightly different approaches, ie the Lord Briggs' Approach and the *Charles Lim's* Approach respectively, in construing the legal effect of a NOM clause. On a relevant note, while Singapore has substantially similar statutory evidential rules as Malaysia (both of which are modelled upon the Indian Evidence Act), the Singapore Court of Appeal in *Charles Lim* unfortunately did not consider the legal effect of a NOM clause in the context of the Singapore Evidence Act 1893 (*in pari materia* with the Malaysian Evidence Act 1950). The said judicial pronouncement also appears to be inconsistent with the earlier decisions of the Singapore Court of Appeal on the construction of extrinsic evidence.

Therefore, it remains to be seen should the Singapore Court of Appeal in *Charles Lim* contemplate the same, whether the approach adopted to construe the legal effect of a NOM clause would be different, and whether such judicial analysis would then influence the Malaysian courts as both countries share similar legislative regime?

It would also be recalled that there are sensible commercial reasons to require contractual variations to be made in writing, for instance, to promote contractual certainty, and that the courts should respect parties' autonomy and freedom of contract to agree to impose such formality on themselves. In light of the relatively evolving legal position with respect to the effectiveness of a NOM clause across several Commonwealth countries, it is hoped that the Malaysian apex court would be accorded with an appropriate occasion in the near future to offer authoritative judicial guidance and clarity on the legal effect of a NOM clause in Malaysia.

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Comfort Management Pte Ltd v OGSP Engineering Pte Ltd [2018] 1 SLR 979 (CA Singapore)
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Macronet Sdn Bhd v RHB Bank Sdn Bhd [2002] 3 MLJ 11 (HC)
Master Strike Sdn Bhd v Sterling Heights Sdn Bhd [2005] 3 MLJ 585 (CA)
Maung Kyin and another v Ma Shwe La and others (1917) 2 Madras LJ 648 (PC)
Michael C Solle v United Malayan Banking Corporation [1986] 1 MLJ 45 (FC)
MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2018] 4 All ER 21 (UKSC)
Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor [2015] 4 MLJ 525 (CA).
Ng Lay Choo Marion v Lok Lai Oi [1995] 3 SLR 221 (CA Singapore)
Ng Sau Foong v Rhombus Food & Lifestyle Sdn Bhd & Anor [2020] 8 MLJ 155 (HC)
Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR 1029 (CA Singapore)

UNDERSTANDING THE IMPACT OF DNA EVIDENCE IN THE CRIMINAL JUSTICE SYSTEM

Haezreena Begum Binti Abdul Hamid*

Abstract

The widespread use of deoxyribonucleic acid ('DNA') data to detect offenders and exonerate the innocent have been applauded by law enforcers and the judiciary as a breakthrough in the science of criminal investigation. However, the use of DNA evidence in court and methods of collection have raised important legal, medical and ethical questions. Among the questions raised is if the provisions compelling suspects to give DNA samples violate their personal autonomy and privacy rights. Despite this, the Deoxyribonucleic Acid (DNA) Identification Act 2009 ('DNA Act') permits law enforcers to collect DNA samples from suspects, detainees, prisoners and drug users. Such practices demonstrate how the DNA Act is able to reconfigure the criminal justice system through methods that are capable of overriding a person's autonomy and privacy rights. Therefore, this article aims to examine three main areas. First, how the DNA Act provides an avenue for law enforcers to collect DNA through force. Second, how illegally obtained evidence can be admitted in court on the grounds of relevancy. Third, whether the weight and value of DNA evidence is sufficient to prove a case beyond reasonable doubt. The article will conclude by asserting two main points. First, that compelling certain individuals to give their DNA samples infringes a person's right to privacy and autonomy. Second, that DNA samples can only estimate the probability that the donor is the source of the sample but cannot confirm the person's participation in a crime. Therefore, this article argues that DNA evidence alone cannot implicate a person beyond reasonable doubt in a criminal trial.

Keywords: evidence, DNA collection, coercive, privacy, admissibility in court

I INTRODUCTION

The widespread use of deoxyribonucleic acid ('DNA') data to detect offenders and exonerate the innocent have been applauded by law enforcers and the judiciary as a breakthrough in the science of criminal investigation.[1] All forensic methods for individualization such as fingerprints, dental impressions, striations on bullets, hair and

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1 U.S. Department of Justice Office of Justice Programs, 'Using DNA to Solve Cold Cases' (2022). Retrieved from https://www.ojp.gov/pdffiles1/nij/194197pdf.

fibre comparisons, voice spectrograms, neutron-activation analysis, blood-grouping and serum-protein and enzyme typing have been able to match samples with reasonable accuracy to particular individuals suspected of committing a crime.[2] DNA evidence in particular has been considered the gold standard for forensic techniques for jurors and the courts.[3] DNA could be found in white blood cells, sperm, vaginal secretion, mucosal fluid, sweat, saliva, ears, hair roots, bones, teeth and organs such as heart and liver, muscles and skin.[4] Under normal situations, DNA will be extracted from the nucleus which is located in the cell that forms the tissue and organs and tested to obtain its sequence as comparison data.[5] In this regard, Kaplan et al.,[6] noted that DNA and fingerprinting were perceived as the two most accurate forensic techniques out of the 10 techniques evaluated, and these two types of evidence were also deemed foundationally valid in the United States President's Council of Advisors on Science and Technology ('PCAST') report.[7] In Malaysia, DNA testing is carried out by the Malaysian Chemistry Department under the Ministry of Science, Technology & Innovation ('MOSTI').[8] DNA profiling analysis is offered at the Headquarters of the Chemistry Department in Petaling Jaya, as well as at its other branches at Kuching, Sarawak and Penang.[9]

Given the advanced method of profiling suspects, Malaysia enacted its own Deoxyribonucleic Acid (DNA) Identification Act in 2009 ('DNA Act') for the purpose of determining a person's identity. This could include the suspect's or the victim's identity in a crime. The purpose of the DNA Act is to establish a DNA databank by the name of Forensic DNA Databank Malaysia ('FDDM').[10] The primary objective of the databank is to keep and maintain seven indices of DNA profiles, which consist of crime scene index, suspected persons index, convicted offenders index, detainee index, drug dependants index, missing persons index and voluntary index.[11] These indices will be used for the purpose of human identification in relation to forensic investigation.[12] The DNA Act was amended in 2015 to allow the police to forcibly collect samples from suspects, detainees, prisoners, and drug users.[13] Such practices demonstrate how the DNA Act is able to reconfigure the criminal justice system through methods that is capable of overriding

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2 National Research Council (US) Committee, *The Evaluation of Forensic DNA Evidence* (Washington (DC): National Academies Press 1996).

3 Shichun Ling, Jacob Kaplan, and Colleen M. Berryessa, 'The Importance Of Forensic Evidence For Decisions On Criminal Guilt' *Science & Justice* 61, no. 1 (2021) ('Ling, Kaplan, and Berryessa').

4 Ahmad Azam Mohd. Shariff et al., 'Analysis on Admissibility of DNA Evidence in Malaysian Syariah Courts," *Academic Journal of Interdisciplinary Studies* 8, no. 4 (2019) ('Shariff et al'); 159-69.

5 Ibid.

6 Jacob Kaplan, Shichun Ling, and Maria Cuellar, 'Public Beliefs About The Accuracy And Importance Of Forensic Evidence in the United States' *Science & Justice* 60, no. 3 (2020).

7 William C Thompson and Eryn J Newman, 'Lay Understanding of Forensic Statistics: Evaluation of Random Match Probabilities, Likelihood Ratios, and Verbal Equivalents' *Law and human behavior* 39, no. 4 (2015).

8 Shariff et al. (n 4).

9 Ibid.

10 DNA Act 2009 s 3(1).

11 DNA Act 2009 s 3(3).

12 DNA Act 2009 s 4(1).

13 See DNA Act 2009 ss 12, 13.

a person's autonomy and privacy rights. Autonomy (literally, 'self-rule') refers to the capacity to live according to one's own reasons and motives.[14]

Although there is no express provision on the right to privacy in the Malaysian Federal Constitution, this right is presumed to be an integral part of the right to life as enumerated under Article 5 of the Federal Constitution.[15] There are also several laws which provide limited rights to privacy such as the laws on data protection and criminal law. The Personal Data Protection Act 2010 ('PDPA') for instance was passed to protect personal information but it has limited application.[16] The absence of specific law on privacy provides legitimacy to the police officers to forcibly collect DNA samples from persons of interests even if it intrudes a person's right to privacy and autonomy. Despite such innovative methods of obtaining evidence, the weight and value accorded to DNA samples are only considered corroborative and probative. This is because matching samples can only estimate the probability that the donor is the source of the sample but cannot confirm a person's role or participation in a crime.[17] In addition, the use of DNA evidence needs to be supported by other primary or secondary type of evidence such as eyewitness accounts and written documents.[18] Despite the need for such corroborative evidence, forensic evidence is considered to be more accurate in determining the presence and participation of the accused in the commission of a crime.[19] Such high confidence attributed to DNA evidence has been criticised by human rights activists and law advocates as being highly discriminatory to the accused and overstretching the applicability of DNA evidence could defeat the purpose of justice and fair trial.[20] Similar concerns were raised by human rights advocates in Malaysia with regards to its DNA Act. The FDDM for instance is under the direct control of law enforcement agencies and they are allowed to use and re-use sensitive information stored in the databank. There is also no oversight mechanism in place to prevent any misuse.[21]

Therefore, this article will delve into the tenets of the DNA Act and explore three main areas. First, how the DNA Act provides an avenue for law enforcers to collect DNA through force. Second, how illegally obtained evidence can be admitted in court on the grounds of relevancy. Third, whether the weight and value of DNA evidence is sufficient to prove a case beyond reasonable doubt. The article will conclude by asserting two main points: first, that compelling certain individuals to give their DNA samples infringes a person's right to privacy and autonomy; second, that DNA samples can only estimate the probability that the donor is the source of the sample but cannot confirm the person's

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14 Olejarczyk, J. P., & Young., M., *Patient Rights And Ethics* (Panama: Stats Publishing LLC 2021) ('Patient Rights And Ethics').

15 Haezreena Begum Abdul Hamid, 'May I Have Some Privacy Please?' *Malayan Law Journal* 1, no. 1 (2022).

16 Ibid.

17 Nicole Wyner, Mark Barash, and Dennis McNevin, 'Forensic Autosomal Short Tandem Repeats and Their Potential Association With Phenotype' (2020) Mini Review, *Frontiers in Genetics* 11, no. 884 ('Nicole Wyner et al').

18 Ling, Kaplan, and Berryessa (n 3).

19 Ibid.

20 Muhamad, Mohd Munzil bin., 'Reliability and Conclusiveness of DNA Evidence in Criminal Trial' (2010) *Malayan Law Journal* 1, no. 1 ciii.

21 Mohd Munzil bin Muhamad, 'Concerns Over the Governance of Forensic DNA Databank Malaysia' *Malayan Law Journal* 2, no. 1 (2019).

participation in a crime. Such evidence can only establish that the person matches the profile and cannot implicate the person beyond a reasonable doubt.

II DNA AND LEGAL PROCEDURES

Advances in DNA technology and the discovery of DNA typing or polymorphisms[22] have permitted the creation of DNA databases of individuals for the purpose of criminal investigation.[23] DNA is the basic genetic material within each living cell that determines a person's individual characteristics.[24] Forensic DNA profiling uses a category of DNA variations called short tandem repeat ('STR') markers to establish the identity of missing persons, confirm familial relations, and link persons of interest to crime scenes.[25] These accordion-like stretches of DNA contain core repeat units of between two and seven nucleotides in length that are tandemly repeated from a half dozen to several dozen times.[26] While the human genome contains thousands of STR markers, only a small core set of loci[27] have been selected for use in forensic DNA and human identity testing.[28] The complete process for STR typing includes sample collection, DNA extraction, DNA quantitation, PCR[29] amplification of multiple STR loci, STR allele separation and sizing, STR typing and profile interpretation, and a report of the statistical significance of a match (if observed).[30] Section 2 of the DNA Act defines a DNA profile as the genetic information derived from a forensic DNA analysis. In forensics, DNA testing is typically used to identify individuals, using only small samples of body fluids or tissue such as blood, semen or hair left at a crime scene.[31] Within the DNA Act, DNA samples can be divided into two categories: intimate samples and non-intimate samples. According to sections 2 and 13 of the DNA Act, intimate samples would include samples of blood,

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22 Polymorphism involves one of two or more variants of a particular DNA sequence. The most common type of polymorphism involves variation at a single base pair. Polymorphisms can also be much larger in size and involve long stretches of DNA. Called a single nucleotide polymorphism, or SNP (pronounced snip), scientists are studying how SNPs in the human genome correlate with disease, drug response, and other phenotypes. 'Polymorphism', *The Forefront of Genomics*, 2021. Retrieved from: https://www.genome.gov/genetics-glossary/Polymorphism.

23 Margarita Guillén et al., 'Ethical-Legal Problems of DNA Databases in Criminal Investigation' *Journal of Medical Ethics* 26, no. 4 (2000), https://doi.org/10.1136/jme.26.4.266, http://jme.bmj.com/content/26/4/266.abstract. ('Margarita Guillén et al').

24 See the website of 'Forensic DNA Analysis: Issues' 1991, accessed December 22, 2021, https://www.ojp.gov/pdffiles1/pr/128567.pdf.

25 Nicole Wyner, Mark Barash, and Dennis McNevin, 'Forensic Autosomal Short Tandem Repeats and Their Potential Association With Phenotype' Mini Review, *Frontiers in Genetics* 11, no. 884 (6 August 2020), https://doi.org/10.3389/fgene.2020.00884.

26 John M. Butler, 'Short Tandem Repeat Typing Technologies Used in Human Identity Testing' *BioTechiques* 43 (2007), https://doi.org/ 10.2144/000112582.

27 A locus or loci is the specific physical location of a gene or other DNA sequence on a chromosome: see Elizabeth K. Mallott, 'Locus' in *Encyclopedia of Animal Cognition and Behavior*, ed. Jennifer Vonk and Todd Shackelford (Cham: Springer International Publishing, 2017).

28 Ibid.

29 Polymerase chain reaction (PCR) is an amplification technique for cloning the specific or targeted parts of a DNA sequence to generate thousands to millions of copies of DNA of interest.

30 Ibid.

31 Muhamad, Mohd Munzil bin., 'Reliability and Conclusiveness of DNA Evidence in Criminal Trial' (2010) *Malayan Law Journal* 1, no. 1 ciii.

semen or any other tissue or fluid taken from a person's body, urine, or buccal swabs taken from any part of a person's genitals (including pubic hair) or from a person's body orifice other than the mouth. Non-intimate samples are defined under the same provisions and include samples of hair other than pubic hair, nail or from under a nail, swabs taken from any part of a person's body other than what constitutes an intimate sample, and saliva. One prominent question that has frequently been raised by advocates and human rights activists is the method of collection of DNA samples from individuals who are in the state's custody and detention.[32] According to section 12(1) of the DNA Act, any police officer of or above the rank of a Deputy Superintendent of Police (authorised officer) can authorise intimate samples of a person who is suspected of committing a crime ('suspect'), a detainee, or a drug dependant[33] to be taken for forensic DNA analysis.[34] However, there are three main factors in the process of taking an intimate sample. First, the sampler will need to consent to the collection of the sample and sign a prescribed form.[35] Second, the sample can only be taken by a government medical officer; and third, the authorized officer can only give his authorization if he suspects that the person has committed an offence and believes that the sample can confirm or disprove the offence.[36] This whole process is similar to the collection of non-intimate sample except that the collection of samples can be taken by a government medical officer, a police officer or a chemist.[37] A police officer may use all means necessary for the purpose of taking or assisting the taking of a non-intimate sample from a person.[38]Although the above provisions seem to include the donor's consent in the process of DNA collection,[39] section 13(7) of the DNA Act permits police officers to collect non-intimate DNA samples from anyone 'reasonably suspected' of having committed any crime even if the person refuses to allow his or her DNA sample to be taken. In this instance, the person will be produced before a magistrate who can order the person's DNA sample to be taken on the grounds that the person's sample could prove or disprove the person's participation in an offence. Following this order, the suspect will need to allow his or her DNA samples to be taken. This whole process suggests that the authorities can forcefully collect a suspect's DNA sample in the event of a refusal. Indeed, the word 'force' does not appear in the provision, but the wording and practices suggest that a person is forced to allow his or her DNA samples to be taken.[40] Previous case law has suggested that samples taken from a donor without their consent can be considered harmful within the meaning of section 323 of the Penal

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32 Ibid.

33 See DNA Act s 13(2)(A): An order or a decision has been made pursuant to the Drug Dependants (Treatment and Rehabilitation) Act 1983 against a drug dependant.

34 See DNA Act s 13(2)(A), (B).

35 Ibid.

36 Ibid.

37 DNA Act s 13(6).

38 DNA Act s 13(7).

39 DNA Act s 12(2)(B).

40 The word 'force' in this article does not necessarily mean a physical act but the act of compelling a person to do something which has been earlier refused, see Collins Dictionary. Retrieved from: https://www.collinsdictionary.com/dictionary/english/compel.

Code. In the High Court case of *Peter James Binsted v Juvencia Autor Partosa*,[41] KC Vohrah J held:

> That in a DNA test, it is common knowledge that either a blood, tissue or bone specimen will be taken from the person for testing. If a person refuse [sic] to submit himself to such a testing, he is perfectly entitled to do so; a person cannot be subject to hurt within the meaning of s 319 of the Penal Code against his will by submitting himself to such testing. Whoever carried out such testing without the person's consent would violate s 323 of the Penal Code for voluntarily causing hurt to the person and a court cannot, in the absence of a specific legislative provision, order such person to submit himself to an unlawful act to be committed on his person.[42]

Although this case was decided prior to the enactment of the DNA Act, it continues to be cited in recent cases which involve involuntary DNA testing. The recent cases however do not subscribe to the decision made in *Peter James Binsted*'s case and dismissed the argument of harm. For example, in the Court of Appeal case of *Lim Hooi Teik v Lee Lai Cheng (sebagai sahabat wakil Lee Chee Zheng dan untuk dirinya)*,[43] Vernon Ong JCA (as he then was) held:

> that the decision of the High Court in *Peter James Binsted v Juvencia Autor Partosa* is distinguishable as it is no longer necessary to take a blood, tissue or bone specimen; it is sufficient for a swab to be taken of the mouth for that purpose. At any rate, the order of the High Court did not require the defendant to give a blood specimen. As such, there is no hurt that will be suffered by the defendant.

Also, in the case of *Lee Lai Ching v. Lim Hooi Teik*,[44] Zamani A Rahim J said:

> Therefore, an order for DNA testing should not be construed as 'hurt' as defined in the Penal Code because the mens rea (intention) or objective behind the DNA test is to determine the paternity of the minor.
>
> No intentional harm is caused to the defendant as a sample of his blood is required for the sole purpose of a DNA test. Further, with the advent of technology, DNA test may not necessarily require an extraction of the defendant's blood, but a simple swab of the defendant's sweat or saliva would suffice.[45]

Despite the nuances of opinion on the cases cited above, the practice of taking DNA samples from suspects and persons of interests clearly violates the right to privacy. It is pertinent to note that privacy is a fundamental right, essential to autonomy and the

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41 [2000] 2 MLJ 569.
42 Ibid, 571 [C], [D].
43 [2015] MLJU 2200.
44 [2013] 4 MLJ 272.
45 Ibid, [16-17].

protection of human dignity[46] as enumerated under Article 5 of the Federal Constitution. Privacy refers to the right 'to be let alone' and the right to live free from intrusion by others and autonomy relates to a person's capacity to govern oneself and self-expression.[47] The right to privacy is enshrined under Article 12 of the Universal Declaration of Human Rights 1948, which stipulates:

> No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

This right is also embedded under Article 17 of the International Covenant on Civil and Political Rights which states:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honour and reputation.

Therefore, everyone has the right to the protection of the law against such interference or attacks. Given that the right to privacy and autonomy is an essential right, the act of compelling a person to submit to DNA collection should be regarded as intrusive and an infringement of a person's fundamental rights. Nevertheless, such rights have been clearly derogated through the DNA Act which legitimises forceful taking of DNA samples.

III DNA AND FORCED COLLECTION

In 2015, the DNA Act established a DNA databank in Malaysia known as FDDM. The function of FDDM is to legally store DNA profiles and any related information to be used for human identification in forensic investigations. It stores the data from analyses carried out by the Chemistry Department, police or any government agency designated by the Home Affairs Minister. The data is also used to locate missing people, identify human remains and provide information relating to criminal and civil cases.[48] Both genetic profiles and samples may also be kept indefinitely, except when an individual has been acquitted or when further investigation reveals that they were not involved in the commission of any crime.[49] The United Nations Special Rapporteur on the right to privacy has noted that DNA databases can raise human rights concerns, such as 'potential misuse for government surveillance, including identification of relatives and non-paternity, and the risk of miscarriages of justice'.[50] Thus, the Human Rights Watch argues that the

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46 Bart van der Sloot, 'The Right To Be Let Alone By Oneself: Narrative and Identity in a Data-Driven Environment (2021) *Law, Innovation and Technology* 13, no. 1.

47 Patient Rights And Ethics (n 14).

48 Hashom Mohd Hakim et al., 'Experiences, Challenges And The Future Direction Of Forensic DNA Databanking In Malaysia' (2019) *Journal of Sustainability Science and Management* 14, no. 2 ('Hashom').

49 DNA Act ss 5, 8.

50 See the website of 'China: Police DNA Database Threatens Privacy 40 Million Profiled Includes Dissidents, Migrants, Muslim Uyghurs' 2017, accessed October 11, 2022, https://www.hrw.org/news/2017/05/15/china-police-dna-database-threatens-privacy.

collection of DNA without the subject's full informed consent can only be justified in very limited circumstances, such as when necessary to the investigation of a serious crime and must be prescribed by law for reasons that comport with human rights.[51]

In 2008 the Grand Chamber of the European Court of Human Rights ('ECHR') in the case of *Gaughran v The United Kingdom*[52] outlawed the collection and indefinite retention of fingerprints, cell samples and DNA profiles. The ECHR, in reaching its conclusion, reasoned that sweeping, indiscriminate DNA databases violated the right to personal privacy. It added that DNA collection may be appropriate in relation to state security and crime prevention, but only if the collection system is heavily regulated by established law and open to the careful scrutiny of a judiciary. Similarly in the United States of America, in *Maryland v. King*,[53] the Supreme Court ruled that the collection and retention of DNA profiles of people convicted of violent crimes were legal, given the limited types of collection, analysis, and use of samples provided by statute. While some may view this decision favourably, many others may consider this as a serious infringement of privacy right and autonomy. Furthermore, there are no safeguards against misuse of DNA samples. Thus, policymakers need to strike a balance between the potential intrusiveness and effectiveness of forensic DNA profiling and databasing.[54]

In Malaysia, although the right to refuse DNA collection is still granted to individuals pursuant to section 13(7) of the DNA Act, the authorities are given the power to forcefully take DNA samples from suspects, detainees and prisoners and conduct medical tests for the purpose of investigation. As has been established here, this clearly violates a person's right to privacy and personal autonomy pursuant to international law and is also against medical and legal ethics. Therefore, Guillén et. al. considers the act of DNA collection for the purpose of investigation as intrusive, invasive and coercive if it was taken without obtaining prior consent from the donor.[55] The forceful collection and onward processing of DNA samples also contravenes Principle 4 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment which reads:

> It is a contravention of medical ethics for health personnel, particularly physicians:
> (a) To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees, and which is not in accordance with the relevant international instruments.

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51 Ibid.

52 The European Court of Human Rights in the case of *Gaughran v. the United Kingdom* (Application no. 45245/15); this judgment has become final under Article 44 § 2 of the European Convention.

53 569 U.S. 435, 133 S. Ct. 1958 (2013).

54 R. Williams and P. Johnson, 'Inclusiveness, Effectiveness And Intrusiveness: Issues In The Developing Uses Of DNA Profiling In Support Of Criminal Investigations' *J Law Med Ethics* 33, no. 3 (Fall 2005), https://doi.org/10.1111/j.1748-720x.2005.tb00517.x.

55 Margarita Guillén et al (n 23).

Whilst the article acknowledges that medical personnel are not the individuals who are directly responsible in obtaining the donor's signatures, they are authorised to collect the DNA samples and conduct tests and experiments once they receive the consent from the authorised officer.[56] This could adversely affect the right to privacy of the donors. According to Berson, the collection of DNA from convicted prisoners creates the potential for abuse of genetic information stored in databases and also infringes the right to be let alone and the right to live free from intrusion by others for those who are yet to be convicted of a crime.[57] Despite the sweeping powers given to authorities within the DNA Act, the presence of DNA can only determine the presence of the donor at the scene of a crime and cannot prove that the donor committed the crime. This means that DNA results cannot effectively prove a case beyond reasonable doubt but can only establish the presence of the donor on the item, articles or the scene of the crime. Thus, DNA evidence can only be considered to be circumstantial evidence as it does not definitively prove the point which needs to be proved and only provides a strong inference in favour of that point.[58] Therefore, conviction based on DNA evidence, especially where the sample contains a mixture of DNA profiles, will require other evidence to be established.

IV DNA EXPERTS

The proliferation of DNA evidence in investigations and trials has required a fairly rapid expansion in the number of reliable experts and laboratories.[59] This is concerning because this opens up the possibility for wrongful conviction and discredited forensic evidence. To maintain its credibility and reliability, DNA evidence can only be interpreted and analysed by experts in the relevant field. Thus, experts who present and interpret the results of DNA tests must be 'qualified by knowledge, skill, experience, training or education'.[60] The question is whether the person has enough knowledge 'to make it appear that his opinion or inference will aid the trier in the search for truth'.[61] Ultimately, it is the Court who decides and has the power to either use or discard an expert's opinion on a particular subject matter. The validity of an expert opinion also does not guarantee the authenticity and reliability of the DNA samples.[62] Neither can an 'expert' prevent the access, tampering or contamination of the DNA samples.[63] Similarly in Malaysia, expert

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56 See DNA Act ss 12, 14.

57 Berson, Sarah B. 'Debating DNA Collection' *NIJ Journal* 2022, no. 264 (2008): 1-13. https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/228383.pdf ('Berson'). See also Hashom (n 48).

58 L Meintjes-van der Walt and P Dhliwayo, 'DNA Evidence as the Basis for Conviction' *Potchefstroom Electronic Law Journal (PELJ)* 24 (2021), http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812021000100030&nrm=iso.

59 National Research Council (US) Committee on DNA Technology in Forensic Science, *DNA Technology in Forensic Science* (Washington (DC): National Academies Press (US) 1992).

60 See Brandon L. Garrett & Gregory Mitchell, 'The Proficiency of Experts' (2018) *University of Pennsylvania Law Review* (2018) 166, 901. See also Rule 702, American Federal Rules of Evidence, 2021.

61 United States Court of Appeals, Second Circuit. *United States of America, Appellee, v. John W.s. Mccormick, Defendant-appellant, 58 F.3d* 874 (2d Cir. 1995).

62 Tony Ward, 'Explaining and Trusting Expert Evidence: What is a 'Sufficiently Reliable Scientific Basis'?', (2020) *The International Journal of Evidence & Proof* 24, no. 3, 233.

63 Ibid.

witnesses such as pathologists, forensic psychologists and chemists do not have the sole and exclusive access to the DNA Database in Malaysia as it is linked to the Chemistry Department of Malaysia and the Royal Malaysian Police DNA Lab. This indicates that the DNA Database can be accessed by certain agencies and data can be retrieved by the police officers who are in charge. In this context, Frumkin et Al[64] found that individuals who have access to a DNA profile in a database could construct a sample of DNA to match that profile without obtaining any tissue from that person and engineer a crime scene. This suggests that DNA evidence can be misused and fabricated to incriminate or exonerate a person. Prevailing studies have acknowledged the fact that DNA analysis is subject to error and may be misinterpreted.[65] For instance, in cases of sexual assault, DNA mixtures may result from a combination of the victim and perpetrator's bodily fluids and create a complex and challenging result to interpret.[66] Often, the debate centres around the question of how their DNA got there?[67] While DNA matching evidence is probative, a match only estimates the probability that the donor is the source of the sample but cannot confirm the donor's role or participation in a crime.[68] In the case of *Pendakwa Raya v Hanif Basree bin Abdul Rahman*,[69] the issue of DNA as a proof of identity was discussed in detail. Zaki Tun Azmi FCJ said:

> The likelihood of another person having an identical DNA to him, according to SP14, is in the proportion of, something like, between 1 in 41 million, to 330 x 1018, in 6.2 quintillion (6.2 x 1018) calculated based on Malaysian Malay database depending on the type of specimen. In other words, such proof is practically conclusive. But in order to be able to utilize DNA for identification of a person, the person who has that DNA profile must be identified and related to a sample of his body fluid or any other part of his body. An expert in DNA can only say whether the DNA belongs or does not belong to an identified person.[70]
>
> –The accused's DNA found in circumstances that may have created suspicion of his guilt is not enough to prove his guilt. If there are reasonable explanations as to why his DNA was found in those circumstances, the benefit must be given to him, and he must be acquitted and discharged.
>
> Several inferences could be made from the findings of such evidence on the body of the deceased. The discovery of the accused's DNA profile on the body of the deceased per se cannot be sufficient to conclude that he caused her death. There could be so many explanations why his DNA was found on her body.

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64 Frumkin, Dan, Adam Wasserstrom, Ariane Davidson, and Arnon Grafit, Authentication of Forensic DNA Samples (2009) *Forensic Science International Genetics* 4, no. 2, 95-103 ('Frumkin et al').

65 Ibid.

66 Ibid.

67 Titia Sijen and Sally Ann Harbison, 'On the Identification of Body Fluids and Tissues: A Crucial Link in the Investigation and Solution of Crime' (2021) *Genes* 12, no. 11.

68 J J Koehler, 'DNA Matches and Statistics: Important Questions, Surprising Answers' (1993) *Journal Judicature* Volume 76, no. 5, 222.

69 [2008] MLJU 116.

70 Ibid, [22], [24-25].

Based on the above case, we can infer that DNA evidence remains merely corroborative as it is unable to establish a person's guilt or innocence. In this circumstance, the basic principles of evidence which require the testimonies of witness, production of documents, digital evidence and real evidence prevails while the inclusion of DNA evidence into the pool of evidence is subject to the discretion of the court. Ultimately it is the court that decides, and they have the discretion to either allow or reject DNA evidence to be accepted and admitted during court proceedings.[71] This is commendable given that DNA evidence is merely corroborative and does not establish a person's guilt or innocence. Furthermore, DNA evidence must be handled in a scrupulously careful manner to avoid later allegations of tampering or misconduct which can compromise the case of the prosecution towards acquittal or to overturning a guilty verdict upon appeal.[72] Thus, to solely use DNA evidence to convict a person is unsafe because DNA samples are often at risk of being contaminated or tampered with, given that the custody of the samples shifts from one party to the other. As a result, the defence of contamination and breaks in the chain of custody remain the two most used defences in rebutting the authenticity of the DNA evidence in criminal trials.[73] Thus, the court may admit the DNA sample as evidence but are often cautious in accepting such evidence without any corroboration.bIn the case of *Public Prosecutor v Syed Muhamad Faysal bin Syed Ibrahim*,[74] the accused was acquitted from a murder charge without the defence being called because the case relied on circumstantial evidence. Although the prosecution called 15 witnesses to testify in the case, the learned judge decided that there was no independent witness(es) who would come forward to relate the incident or the truth despite producing various exhibits and expert reports. There was also no identification parade held in the case to identify the accused; no clear evidence on how samples such as nail clippings and blood were taken from the deceased or the accused; and no medical evidence or testimony given by the forensic pathologist on the probable time of death of the deceased. Such shortcomings succeeded in absolving the accused completely from the crime because the court was unable to connect the accused with the murder that took place in 2001. The learned judge also said that although DNA evidence is recognised by the court, it cannot replace testimonies from witnesses, nor can it speak to a fact.[75] Thus, DNA evidence can only lead to the drawing of an inference while the weight and value of evidence still remain within the domain of the courts.The case of *Public Prosecutor v Syed Muhamad Faysal bin Syed Ibrahim* demonstrates how DNA evidence is unable to replace the basic rules of primary and secondary evidence.[76] The existence of a person's DNA can only link the person to the place, object or victim but is not sufficient to link a person to a crime. Therefore, testimonies of witnesses and confessions still remain the favoured forms of evidence together with documentary, real or digital evidence as prescribed by the Evidence

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71 DNA Evidence (n 56).

72 DP Lyle, 'Working The Scene: Evidence Collection and Protection' in Forensic for Dummies (*Indiana:Wiley Publishing Inc*., 2004) 25.

73 Hashom (n 48).

74 [2004] MLJU 184.

75 Ibid.

76 See Part III of this article.

Act 1950. Furthermore, DNA evidence can be contaminated if proper protocols are not adhered to, whereas eyewitness evidence is still considered to be the most powerful form of evidence in a trial because of its reliability and accuracy.[77] Therefore, this article argues that DNA evidence is only one part of a prosecution's case and cannot provide a definite solution to solving crimes.

V ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE IN MALAYSIAN COURTS

Although researchers and scholars have long documented the problem of wrongful conviction through DNA testing,[78] elucidating confessions through coercive means continues around the world, including in Malaysia. This is because the general rule in Malaysia is that procuring evidence through illegal means does not taint its veracity, thus it cannot be a cause for rejection at trial.[79] Jain explains that evidence can be illegally obtained through a range of methods.[80] This can include eavesdropping, illegal search, violating the body of a person, and a variety of other shocking methods.[81] Such practices are further aggravated by the court's approach on admitting illegally obtained evidence if such evidence is found to be relevant to the facts in question. For example, in the Federal Court case of *Benjamin William Hawkes v Public Prosecutor*,[82] Zabariah FCJ held that 'it is trite law that even in cases of evidence obtained illegally, its admissibility is unaffected as the issue is actually relevancy'. The Court further referred to Lord Goddard's explanation in the Privy Council's case of *Kuruma, Son of Kaniu v The Queen*:[83]

> The test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible, and the court is not concerned with how the evidence is obtained.

Such considerations suggest that the courts will not exclude illegally obtained evidence just because the method of collection does not conform to the requirements stipulated under section 27 of the Evidence Act 1950. What is important to the court is that the evidence is reliable and hence, can be admitted.[84] In this context, section 27 of the Evidence Act deals with the admissibility of a statement made by a person in police custody, regardless of whether the statement amounts to a confession or not. The judiciary's approach in admitting evidence procured through illegal or coercive means raises important questions

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77 John T. Wixted, Laura Mickes, and Ronald P. Fisher, 'Rethinking the Reliability of Eyewitness Memory' (2018) *Perspectives on Psychological Science* 13 no. 3, 324.

78 Leo, R. A., 'False Confessions: Causes, Consequences, and Implications' (2009) *Journal of the American Academy of Psychiatry and the Law* 37(3) 332.

79 *Kendal v. Commonwealth* (Ky. 1942) 259 S. W. 71; *Leatherman v. State* (1912) 11 Ga. App. 756, 76 S. E. 102.

80 S.N. Jain, 'Admissibility of Illegally Obtained Evidence' (1980) *Journal of the Indian Law Institute* 22, no. 3, 322.

81 Ibid.

82 [2020] 5 MLJ 417.

83 [1955] AC 197.

84 Hashom (n 48).

regarding the methods used in collecting DNA samples. For example, in the case of *Hanafi bin Mat Hassan v PP*,[85] the accused was charged in the Shah Alam High Court with the rape and murder of one Suzaily Mokhtar on 7 October 2000. The learned trial judge found the accused guilty on both the charges and he was convicted and sentenced to death in respect of the murder charge and to 20 years' imprisonment and whipping of 12 strokes of the *rotan* in respect of the rape charge. He appealed against both the convictions and sentences, but his appeal was dismissed. Among the objections raised by his defence counsel was the fact that the blood sample taken from the accused for the purpose of conducting the DNA tests was not taken voluntarily because he was handcuffed at the time. The Court dismissed the objections raised by the defence counsel and said:

> The court has no discretion to refuse to admit evidence on the ground that it was illegally obtained if it is relevant. Therefore, the evidence relating to the blood sample taken from the accused was admissible as it was relevant even if it was taken without his consent. This rule applies, inter alia, to cases involving illegal searches, evidence obtained by secret listening devices or by undercover police operations. It also applies to evidence obtained by unfair procedures.

The Court also referred to the case of *R v McNamara*[86] where it was held that there is no analogy between the taking of a blood sample without consent and the taking of a statement which was not voluntary. Further explanation was given in the Canadian case of *AG for Quebec v Begin*[87] where the court held:

> In taking a blood sample, the accused does not say anything because he is not asked any question. Thus, the question of self-incrimination or involuntariness does not arise. The objection raised must therefore be addressed on the basis of the blood sample of the accused having been taken without his consent. The general rule is that illegally or improperly obtained evidence remains admissible in law if it is relevant to the matters in issue.

In respect of DNA evidence, VT Singham J in the case of *Public Prosecutor v Syed Muhammad Faysal bin Syed Ibrahim*[88] held:

> In any event, it is to be observed that DNA evidence only leads to the drawing of an inference, the weight and value of the evidence still remain within the domain of the courts. Nevertheless, while the admission of DNA evidence is recognised in this jurisdiction, it does not speak as to a fact but it is only an incriminating piece of evidence and the DNA profiling establishes no more than that the suspect could be the offender, not that he or she is the offender. It merely tends to show or possibly link a suspect with the crime scene or with the victim by other circumstantial

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85 [2004] 6 MLJ 303 [68].
86 [1951] 99 CCC 107.
87 [1955] SCR 593 at page 596.
88 [2004] 6 MLJ 305 [10].

evidence in a criminal trial so as to implicate the suspect or the person charged in court.

The above cases clearly demonstrate that the presence of DNA evidence can only act as an incriminating piece of evidence but cannot establish if the person is the offender. It merely shows a possible link of the person with the crime scene or with the victim but does not establish or prove that the person is the perpetrator of the crime. Therefore, DNA evidence needs to be read together with all other primary and secondary form of evidence and cannot be viewed in isolation in order to assist the prosecution to implicate the accused.

VI CONCLUSION

The use of DNA evidence is purely corroborative in nature and cannot replace the rules of evidence as prescribed in the Evidence Act 1950. Therefore, scholars have argued that DNA evidence is only a part of a prosecution case and does not provide a definitive solution to crime.[89] Although DNA evidence can be used to incriminate or exonerate a person, it cannot be solely used to convict or acquit a person without any other evidence to that effect. Suffice to say that DNA alone cannot link the accused to the crime nor secure a conviction. Despite foregoing privacy rights and legitimising the forceful collection of DNA by the authorities, DNA results cannot effectively prove beyond reasonable doubt that the donor is the perpetrator of the crime in question. This shows that the use of DNA evidence is not a 'rubber stamp' to secure conviction. On the contrary, the act of compelling a person to submit to DNA collection is clearly intrusive and infringes a person's fundamental rights.

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[89] Berson (n 57); Dan Frumkin et al. (n 64).

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DETERMINING THE JURISDICTION OF COURTS IN A MULTIMODAL TRANSPORT CARRIAGE UNDER NIGERIAN LAW – CARDINAL IN AN AFRICAN CONTINENTAL FREE TRADE AREA

DAMILOLA OSINUGA*

Abstract

The recent establishment of the African Continental Free Trade Area ('AfCFTA') was predicated on the belief that increased intra-African trade and market integration would benefit the continent. The pact is expected to increase intra-African trade by making Africa a single market, *harnessing its immense potential of over a billion persons* and the Gross Domestic Product of circa three trillion United States Dollars. Without access to markets and resources, growth and continued poverty in society will stagnate. Accordingly, transportation is essential to international trade and regional integration. Research shows that multimodal transportation could create a cheaper transportation option than unimodal transportation. According to statistics, multimodal transport can reduce transportation costs by circa 20%, help enhance effectiveness in transportation by 30%, reduce the risk of damage to cargo by 10%, and aid energy savings and emissions. The United Nations Economic Commission for Africa (UNECA), through its Regional Advisor on Trade, has advised that the establishment of Multimodal Transport Operators (MTOs) should be encouraged to ensure the non-interrupted flow of goods from the origin to the destination. This paper particularly focuses on the determination of the jurisdiction of multimodal transportation and the extent to which the current lack of a clear legal framework affects a predictable and foreseeable determination of the jurisdiction of courts. The research considers these issues at a time when African leaders have come together to sign an agreement for the establishment of the AfCFTA.

Keywords: Multimodal transport, AfCFTA, jurisdiction, Nigeria

I INTRODUCTION

The importance of trade in a global economy cannot be overemphasised. Global trade can create economic wealth on a global scale. Each country maximises its revenue and growth by focusing on trade. Global economies recognise that international trade can be more profitable and time-efficient if different countries take action to eliminate

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complex processes affecting the mobility of goods, people, customs insurance, standards, transaction cost and more generally, conformity with regulations.

Recently, African leaders came together to establish the African Continental Free Trade Area ('AfCFTA') to increase intra-African trade and cross-border trade in Africa. The agreement, which has a protocol on trade of goods, includes several provisions which will aid the elimination of trade barriers by improving trade facilitation and reducing the cost of doing business in Africa.[1] The establishment of the AfCFTA was based on the belief that:

> enhanced intra-African trade and deepened market integration can contribute significantly to sustainable economic growth, employment generation, poverty reduction, the inflow of foreign direct investment, industrial development, and better integration of the continent into the global economy.[2]

Trade and transport are inextricably linked. Efficient transport services are a requisite to successful trading. The adage that 'transportation is the life-blood of commerce' still rings true. Notably, modern international trade development requires goods to be transported from the seller to the buyer without delay. Therefore, effective transport must be 'just in time' and 'tailor-made' ('door-to-door').[3] Most of this door-to-door transportation is carried out exclusively under single carriage contracts. In most cases, more than one mode of transportation is used to carry out door-to-door transportation.[4] In practice, the use of more than one mode of transportation has been described with many expressions. These expressions include 'multimodal', 'intermodal', and 'combined' transport.[5]

Multimodal transport (also known as combined transport) is the transportation of goods under a single contract but performed with at least two different means of transport.[6] Traditionally, international trade entails a segmented transportation system whereby cargoes may, for instance, be transferred from seller to land carrier, from land carrier to independent sea carrier, from sea carrier to independent land carrier and the buyer.[7] This system is expensive because of the cost associated with loading and unloading individual parcels. In addition, this method is undesirable because of its documentation

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1 See the Protocol on Trade of Goods, Agreement Establishing The African Continental Free Trade Area, arts 10, 12, 15.

2 African Union, *Boosting Intra-African Trade - Issues Affecting Intra-African Trade, Proposed Action Plan for Boosting Intra-African Trade and Framework for the Fast-Tracking of a Continental Free Trade Area* (30 January 2012). Retrieved from: https://au.int/sites/default/files/documents/32454-doc-declaration_english.pdf.

3 Jasenko Marin, '*The Harmonization of Liability Regimes Concerning Loss of Goods during Multimodal Transport*' (2013) (University of Zagreb, Zagreb, Croatia 2012) 1.

4 Marian Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International 2010) ('Marian Hoeks').

5 *Diana Faber, 'The Problems Arising From Multimodal Transport' (1996) Lloyd's Maritime and Commercial Law Quarterly* (Pt 4) 503.

6 *A. Odeleye Joshua, 'The Need For Multimodal Transport Development in Nigeria' (2015) 8(9) Journal of Geography and Regional Planning* 239.

7 J. R. Whittaker, *Containerization* (Hemisphere Publ. Corp. 1975) (2nd Edn).

costs. Sellers will be required to contract individually with each carrier in the chain and provide documents on cargoes at each stage of transport.[8]

Parties involved in international trade have long sought to make this system more continuous and thereby reduce its costs.[9] Research shows that multimodal transportation could create a cheaper option of transportation than unimodal transportation. According to statistics, the use of multimodal transport can reduce transportation costs by circa 20%, help enhance effectiveness in transportation by 30%, reduce the risk of damage to cargo by 10%, and also aid energy savings and reduce emissions.[10] This has led to the proliferation of multimodal transport contracts. One primary reason for the continued rise in multimodal transportation is that shippers and consignees are often interested in dealing with one party, usually called Multimodal Transport Operators ('MTO'). The MTO arranges for the transportation of goods from door to door and assumes contractual responsibility throughout, irrespective of the segment of carriage where the loss occurred.

Authors like Taylor believes that multimodal transport is a key factor to increasing the productivity and competitiveness of the freight transport industry.[11] Another major benefit of multimodal transport is that it saves time. As many as ten days can be saved by using multimodal transport for the carriage of cargo from the Far East to New York rather than using sea transport alone, which is unimodal.[12] Multimodal transport also saves cost, which is a major prospective benefit of AfCFTA.

Castro in his work stated that:[13]

> The competitiveness of multimodal transport operators is the result of financial liquidity, rather than unit price per segment (origin service, ocean voyage, and destination). Their pricing rules follow a 'risk management policy' based on customer profile (financial weight, payment habits, volume, origins/destinations, etc.) within the margins of regional competition. They try to secure the lowest possible rates from subcontractors based on volume, and can afford substantial rebates to users.

The use of containers[14] in transporting goods reduces handling and saves costs associated with labour, packaging and damage costs during transshipment. The risk of goods being

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8 James H Porter, 'Multimodal Transport, Containerization, and Risk of Loss' (1984) 25 *Va J Int'l L* 171.

9 Samuel A. Lawrence, *International Sea Transport: The Years Ahead* (Studies in Business, Technology, and Economics) (Lexington Books 1972).

10 M. Steadie Seifi et al, 'Multimodal Freight Transportation Planning: A Literature Review' (2014) 233(1) *European Journal of Operational Research* 1. Retrieved from: https://www.sciencedirect.com/science/article/pii/S0377221713005638.

11 John C. Taylor, 'Remove Barriers to Intermodal' (1993) 34(4) *Transportation & Distribution* 34.

12 Marian Hoeks (n 4); Richard W. Palmer and Frank P. DeGiulio, 'Terminal Operations and Multimodal Carriage: History and Prognosis' (1989) 64(2-3) *Tulane Law Review* 281.

13 De Castro, Carlos F. *Trade and Transport Facilitation: Review of Current Issues And Operational Experience: A Joint World Bank/UNCTAD Publication (English)*. Sub-Saharan Africa Transport Policy Program (SSATP) Working Paper Series; no. 27, Washington, DC: World Bank 1996.

14 In multimodal transport operations, the MTO makes use of some form of unitization. The most popular form of unitization among MTOs is containerization. The MTO is able to easily transfer the containers to different modes of transportation, which it intends to employ.

damaged is reduced when the number of times a cargo is discharged onto another mode of transportation is reduced. One other benefit that multimodal transport confers on the consignor is the fact that only one MTO takes responsibility for the entire process. Therefore, a shipper does not need to deal with all the sub-contractors. It is envisaged that there will be a proliferation of multimodal transport in the era of intra-African trade because it saves cost and can aid competitiveness by reducing transaction costs associated with transportation.

II AN OVERVIEW OF THE LEGAL FRAMEWORK OF MULTIMODAL TRANSPORTATION

The first international legal instrument to reach fruition on multimodal transport was the United Nations Convention on International Multimodal Transport of Goods of 24 May 1980 ('Multimodal Convention'). However, the Convention has not yet entered into force, and after forty years, it is safe to say it is doubtful that it will ever enter into force. The lack of international legislation is one of the challenges that face multimodal transport globally. This challenge glides down to Nigeria, as there are no national laws or statutory instruments dealing with multimodal transportation in Nigeria.

The Multimodal Convention defines international multimodal transport as:

> International multimodal transport means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country.[15]

Similar to this definition, Vogel defines multimodal transport as the transport of goods by at least two different modes of transport based on a single multimodal transport contract.[16]

From the above definitions, it is essential to note that, in multimodal transport, there is a prerequisite for at least two different modes of transportation. In addition, such carriage must be carried under one single international contract with one carrier being responsible for the entire transportation and must assume responsibility as principal in such contracts.[17] The carrier who assumes responsibility as principal is usually called an MTO. MTOs must voluntarily assume the responsibility of the goods as principal making them personally liable for any loss or damage to the goods throughout the transport to the final destination. However, the MTO as the principal may, on his own volition, decide how to effect carriage or subcontract to other carriers.[18]

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15 The United Nations Convention on International Multimodal Transport of Goods, Geneva (24 May 1980).

16 R. Vogel, 'Multimodal Transport: Impact on Developing Countries' 6(1) *Ocean Yearbook Online* 139. Retreived from: http://booksandjournals.brillonline.com/content/journals/10.1163/221160086x00103.

17 Ibid.

18 Besong, C, *Towards a modern role for liability in multimodal transport law* (ProQuest Dissertations Publishing 2007). Retrieved from: https://search.proquest.com/docview/899715990.

III UNDERLYING THEORIES OF MULTIMODAL CONTRACTS

One of the questions that can arise is whether a multimodal transport contract can be considered '*sui generis'* (ie constituting a class of its own) or a form of mixed contract, which is a chain of different unimodal transport segments whose regimes are, therefore, still applicable.[19] The proponents of the *sui generis* theory believe that a multimodal transport contract is a contract of its kind and should not be considered as a contract for a particular mode or fall within rules directed towards contracts for a single mode. The conceptual idea is that a multimodal transport contract is a contract *sui generis, which* is not made up of a series of unimodal contracts.[20] This theory approaches multimodal transport as a new type of contract formed by several contracts. The implication is that once different modes are combined in a contractual framework, the contract can no longer be seen as a contract of unimodal contracts. The approach considers a multimodal carriage contract as a contract with additional services such as storage, transhipment and other services included under the logistics head and as such a complete transport chain.

The *sui generis* approach stipulates that although the MTO performs various services that could all be the subject of separate contracts, his obligations are connected so that they form one undividable whole.[21]

On the other hand, the proponents of the mixed contract theory see multimodal contracts as nothing more than a chain of unimodal contracts. A mixed contract is a contract that incorporates the characteristic features of more than one special type of agreement designated by written or unwritten law. The implication is that different stages of transport are governed by national or international conventions, which regulates those stages of transport in the country. This is the English position on multimodal transport contract.[22] The English Court of Appeal in *Quantum Corporation Inc. and Others v Plane Trucking Ltd. and Another*[23] overruled the judgment at first instance and held that the Convention on the Carriage of Goods by Road ('CMR') applied to the road leg of an international contract for multimodal carriage.[24] The Court in showing its disinterest in the *sui generis* theory noted that opening up 'a prospect of metaphysical arguments about the essence of a multimodal contract' is best avoided. It is however important to note that a mixed contract theory is susceptible to its challenges. Seeing a multimodal transport contract as a mixed contract will lead to challenges because there is no uniform regime for governing multimodal transport. As such, a network system will be used (each leg of the transport would be governed by the rules applicable to that particular mode).

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19 Haedong Jeon, *Coping With Muddles And Uncertainty In The Field Of Multimodal Transport Liability*' (University of Southampton 2013). Retrieved from: https://search.proquest.com/docview/1775429723 ('Haedong Jeon').

20 David Glass, *Freight Forwarding And Multimodal Transport Contracts* (Maritime and Transport Law Library, 2013).

21 Marian Hoeks (n 4).

22 [2002] 2 Lloyd's Rep. 25, 535-560 [62].

23 Ibid.

24 This case was in respect of a carriage by air from Singapore to Paris and from there by road and roll-on/ roll-off ferry to Dublin. Accordingly, Air France's conditions to the extent that it would limit its liability were overridden. The claimants were allowed to show, under CMR art 29, that there was wilful misconduct or equivalent default, disentitling Air France to limit its liability under the Montreal Convention.

Further, applying international or national unimodal legal regimes could lead to conflict of unimodal conventions; for example, where the place of loss is not ascertainable, which law will prevail? Also, some conventions extend to other modes of transportation, such as the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (Appendix B to the CMR). Finally, the legal regimes applicable to the unimodal transport segment are not directly applicable to a multimodal contract. Issues such as whether the Hague or Hague-Visby Rules[25] could be mandatorily applicable to a multimodal bill of lading or whether a carriage from an airport warehouse to the airport is governed by the Montreal convention or CMR may lead to undesirable uncertainty.

The *sui generis* approach, although the most desirable approach, is complex in practice because of its complete avoidance of mandatory unimodal carriage law. Furthermore, it clashes with the provisions of international conventions on unimodal carriage that explicitly states that they are applicable to a particular mode of carriage, even if it is performed based on a contract that also includes other modes of transport.[26]

The *sui generis* approach was adopted in the Multimodal Convention, however, the inability of the Multimodal Convention to attract enough support and in the absence of an international mandatory convention governing multimodal transport, the *sui generis* approach has been losing its popularity and consequently, the mixed contract approach has become more popular.

IV DETERMINING THE COURTS WITH JURISDICTION FOR MULTIMODAL TRANSPORT CLAIMS

As stated above, there is no legislation on multimodal transport in Nigeria. However, a clear principle of law is '*ubi jus ibi remedium*', meaning: 'where there is a wrong there is a remedy'.[27] Accordingly, the Nigerian courts, like its English counterparts, will treat a multimodal contract as a mixed contract. This is because there are existing unimodal transport law frameworks. The court's jurisdiction will be determined by the stage of transport, which occasioned the claim brought before a competent court of law.

A *Carriage of Goods by Sea*

Under Nigerian law, section 251 of the Constitution of the Federal Republic of Nigeria 1999 ('the Nigerian Constitution') confers jurisdiction on the Federal High Court to exclusively deal with matters pertaining to carriage of goods by sea and admiralty law. The Admiralty Jurisdiction Act 1991 ('AJA') further itemises the extent of the jurisdiction of admiralty matters at the Federal High Court. Section 1 of the AJA deals extensively with the issue of admiralty jurisdiction of the Federal High Court.

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[25] These are international rules relating to the carriage of goods by sea. They are constituted by original rules known as the Hague Rules, agreed in 1924.

[26] See for eg, the Warsaw Convention art 31; the Montreal Convention art 38 which appears to extend its application to multimodal transport contracts by stating that 'Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air'.

[27] *University Of Calabar Teaching Hospital & Anor v Bassey* (2008) LPELR-8553 (CA).

The AJA and the Constitution give the Federal High Court jurisdiction over matters related to carriage of goods by sea. Accordingly, any claim in respect of a multimodal transport claim where the loss can be localised to matters pertaining to carriage of goods by sea and admiralty law will be heard by the Federal High Court.

B *Carriage of Goods by Air*

Section 251(1)(K) of the Nigerian Constitution confers the Federal High Court exclusive jurisdiction over civil causes and matters of aviation and safety of aircraft.

Furthermore, Section 7(1)(k) of the Federal High Court Act 2004 provides that:

> The Court shall to the exclusion of any other Court have original jurisdiction to try civil causes and matters relating to aviation and safety of aircraft.

By Section 7(3) of the Federal High Court Act 2004, it is further provided thus:

> Where jurisdiction is conferred upon the Court under Subsection (1), (2) and (3) of this section, such jurisdiction shall be construed to include jurisdiction to hear and determine all issues relating to, arising from and ancillary to such subject matter.

Section 7(5) of the Federal High Court Act 2004 provides that:

> Notwithstanding anything to the contrary contained in any other enactment or rule of law, any power conferred on a State High Court or any other Court of similar jurisdiction to hear and determine any civil matter or proceedings shall not extend to any matter in respect of which jurisdiction conferred on the Court the provisions of this section.

Pursuant to the AJA, aviation matters are under the admiralty jurisdiction of the Federal High Court.[28] The above clearly shows that any civil matter which relates to aviation falls under the jurisdiction of the Federal High Court.

C *Carriage of Goods by Rail*

As of today in Nigeria, the Nigerian Railway Corporation Act 2004 ('NRCA') governs the carriage of goods by rail in Nigeria. The NRCA does not state the court that has jurisdiction in matters of carriage of goods by rail.

In the event that the MTO is an independent carrier, the position is simple and straightforward. The court that will have jurisdiction is the State High Court. The claim will be founded on simple contract law or law of bailment where there is no contract. Where the Nigerian Railway Corporation ('NRC') is the MTO, this can raise a possibility of two options. It can be argued that the NRC is a federal agency and pursuant to section

[28] AJA s 1.

251(1) of the Nigerian Constitution, the Federal High Court has exclusive jurisdiction in matters relating to:

> (p) the administration or the management and control of the Federal Government or any of its agencies;
> (q) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;
> (r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies.

There is a slim possibility to argue that the carriage of goods by rail falls under the NRC's management and administrative functions. However, the possibility of succeeding with such a reasoning is very slim. A review of the above provision shows that the carriage of goods by rail does not fall under any of the actions stated above, consequently giving the Federal High Court exclusive jurisdiction over matters related to the carriage of goods by rail.

Further, the Court of Appeal in *Ademola v. Attorney General of the Federation & Anor*[29] had clearly stated that not all actions against a Federal agency is under the exclusive jurisdiction of the Federal High Court. The court, in affirming this, noted that:

> Generally, where the Federal Government or any of its agencies is a party in a matter, the question of jurisdiction is two dimensional, the court in the case of *The Government Of Kwara State & Ors v Irepodun Block Manufacturing Company & Ors* (2012) LPELR - 8532 (CA) held as follows: 'The jurisdiction of a court to entertain a matter in which a Federal Government agency is a party, has two dimensional facts. In this issue, where a Federal Government agency is a party to a proceeding a court is mandated to look at both party and subject matter jurisdictional aspects to it. That is to say, a court has to, in addition to a party being a Federal Government or agency, examine the facts of a matter with a view to determining the subject matter of it. If the res comes within the jurisdictional provisions under Section 251 of the 1999 Constitution as amended, then the Federal High Court will have exclusive jurisdiction. Where, however, the subject matter falls outside the precincts of those provisions, then a State High Court will be vested with jurisdiction notwithstanding that the party involved is a Federal Government agency. The Supreme Court has set a seal on this grey and naggling area in the case of *Obiuweubi v. Central Bank Of Nigeria* (2011) 7 NWLR (Pt.1247) 465. The rationale behind this cardinal principle of law is underpinned by the fact that one of the triumvirate ingredients of jurisdiction is that the subject matter of a case must come within the jurisdiction of adjudicating court and there is no feature therein which will prevent it, the court, from exercising its jurisdiction'. The settled position therefore is that where the Federal Government or its agencies is a party, the court

[29] (2015) LPELR-24784 (CA).

> must examine further the subject matter along the party to determine if the court has jurisdiction. The era of using Federal Government or its agencies as a blanket cover to give Federal High Court jurisdiction on matters which are clearly outside Section 251 of the 1999 Constitution and where it has no jurisdiction is over. It is a court with exclusive jurisdiction on specified matters unlike the High Court which has a general jurisdiction, see *Agbaso v Iwunze* (2014) LPELR-24108 (CA) relying on *Adetayo v Ademola* (2010) NWLR (Pt.1215) 169.

Any matter that does not fall within the purview of the items listed in Section 251(1) of the Constitution is certainly not under the exclusive jurisdiction of the Federal High Court. Accordingly, a dispute arising from the carriage of goods by rail will be treated as a dispute in relation to a simple contract between the NRC and the shipper and accordingly, the State High Court, being the court that has jurisdiction over a simple contract,[30] will have jurisdiction over matters arising as it relates to the carriage of goods by rail.

D *Carriage of Goods by Road*

The Nigerian Constitution does not exclusively confer the jurisdiction of carriage of goods by road to any court. The Federal High Court is created by the Nigerian Constitution and accordingly, its jurisdiction is governed by the Nigerian Constitution. Correspondingly, since the Federal High Court does not have jurisdiction, the State High Court will have jurisdiction is such matters as it relates to a contract of carriage of goods by road. This is supported by section 272 of the Nigerian Constitution, which stipulates that:

> Subject to the provisions of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

The High Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings or matter in which the existence or extent of any legal right, power, duty or privilege is in issue.[31] Therefore, in cases of carriage of goods by road, which jurisdiction is not conferred on any other court, the State High Court shall have jurisdiction over matters.

E *Claims Arising from Storage*

Where a claim arises during the storage of goods which succeeds a carriage of goods by sea or carriage of goods by air, such claim will fall under the admiralty jurisdiction of the

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[30] See eg, *P & C.H.S. Company Limited v. Migfo Nigeria Limited* (2012) 18 NWLR (Pt. 1333) 555; *Oliver v Dangote Industries Limited* (2010) All FWLR (506) 1858; *Okoro v Egbuoh* (2006) 15 NWLR (1001) 1; *Unachukwu v Ajuzie* (2009) 4 NWLR (1131) 336.

[31] *Fagbemi v Omonigbehin & Ors* (2012) LPELR-15359 (CA).

Federal High Court.[32] Claims arising from storage which does not fall within the provision of Section 1(1)(g) of the AJA will fall within the jurisdiction of the State High Court.

V INCONSISTENCY OF THE JURISDICTION OF MULTIMODAL TRANSPORT CLAIMS IN NIGERIA

Despite the jurisdiction of courts for each chain of transport, there is a challenge as to the exact jurisdiction of multimodal transport claims. As stated above, multimodal transport is a single contract, the responsibility of a single carrier, multiple modes of transportation and sometimes-unspecified modes of transportation.

This means that a multimodal transport contract is the head contract, which would regulate the relationship between the multimodal carrier and the consignor or consignee.[33] The MTO is a principal who takes responsibility for the entire carriage of the goods. It is not an agent of the consignor just because it sub-contracts the other unimodal legs of transportation, neither is it an agent of the successive carriers which it employs. Accordingly, the consignor has a right of action only against the MTO and against no other carrier. The MTO may choose to employ third parties in fulfilling the terms of the multimodal transport contract.[34] In other words, a claim arising in a multimodal transport contract is a claim between the consignor or consignee and the MTO.

The determination of jurisdiction through the mode of transportation employed by the MTO, as in the case of *UPS (Nig) Ltd v Umukoro*,[35] is undesirable. In that case, the respondent delivered his documents to the appellant for onward delivery or dispatch to the consignee in Winnipeg, Manitoba, Canada. The documents were lost and the respondent sued at the High Court of Rivers State for general damages for the negligent loss of his confidential documents. The Court of Appeal held that the Federal High Court had jurisdiction because the goods were sent by air. Of course, the reasoning for the decision is questionable, considering that there is no airway bill to show that the respondent entered a contract for a carriage of goods by air. The contract between the parties in this case is very similar to a multimodal transport contract. Although the contract does not stipulate that it is a multimodal contract, the shipper left the decision of mode of carriage with UPS which may qualify as an MTO. The MTO carried the parcel from Nigeria to Canada by air, and further from the landing city in Canada to the place of delivery (which could be by road or air). An in-depth look at this position is not the intention of this paper. What is clear from this decision is that the Nigerian courts will opt to consider the mode of transportation in determining jurisdiction rather than the contract of transportation.

Multimodal transport contracts are sometimes entered into without the consignor specifying the mode of transportation which an MTO may employ in fulfilling the terms of the contract. Even where the consignor is aware of the mode of transportation to be employed by the MTO, such a consignor should not be subjected to a jurisdiction based

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32 Section 1(1)(g) of the AJA.

33 Haedong Jeon (n 20).

34 Raja Siddharth, 'Multimodal Transportation of Goods Act 1993 (India)' (1995) 7 *Student Advoc* 66. Retrieved from: https://search.proquest.com/docview/1303907786.

35 (2016) LPELR-45188 (CA).

on the leg of transportation. Documents obtained by the consignor from the MTO are multimodal transport documents. It is not an airway bill, a sea bill of lading or a document specific to any mode of transportation. As such, subjecting the jurisdiction of a particular mode of transportation is clearly unjustifiable.

A further complication may arise in instances where the damage is gradual and the loss occurred over unimodal carriages, a consignor's claim may fall within the jurisdiction of two courts. Such consignor may be compelled to bring an action in multiple courts thus leading to the increased cost of litigation and legal costs. The implication of the possibility of the increased costs of litigation leads to high transportation costs.

In addition to the challenges facing the determination of the jurisdiction of multimodal transport contract by the leg of transportation employed, is the challenge that the territorial jurisdiction of the admiralty jurisdiction poses. Section 1(1)(g) and 1(2) of the AJA extends the territorial limits of admiralty jurisdiction.[36]

Section 1(1)(g) provides thus:

> Any matter arising within a Federal Port or national airport and its precincts, including claims for loss of or damage to goods occurring between the off-loading of goods across the space from a ship or an aircraft and their delivery at the consignee's premises, or during storage or transportation before delivery to the consignee.

Section 1(2) provides that:

> the admiralty jurisdiction of the Court in respect of carriage and delivery of goods extends from the time the goods are placed on board a ship for the purpose of shipping to the time the goods are delivered to the consignee or whoever is to receive them whether the goods are transported on land during the process or not.

A literal interpretation of section 1(2) will imply that the performance of a carriage of goods by sea or carriage of goods by air as one of the modes of carriage in a multimodal transport carriage will invoke the admiralty jurisdiction of the court. The AJA extends the admiralty jurisdiction[37] of the court from the time the goods are placed on ship until the time the goods are delivered to the consignee or whoever is to receive them *whether the goods are transported on land* during the process or not. Therefore, if there is a multimodal carriage from Togo to the Niger Republic, and the goods were carried by sea from Togo to the port in Port Harcourt and consequently moved by road to the Niger Republic, in the event of a claim, such claim, if brought to a Nigerian court,[38] will fall under the admiralty jurisdiction of the Federal High Court of Nigeria.

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[36] Adewale Adedamola Olawoyin, *Introduction to Maritime Law and Admiralty Jurisdiction* (13th Maritime Seminar for Judge Nigeria Shippers Council, 10-14 June 2014).

[37] Admiralty jurisdiction in this context includes carriage of goods by sea and carriage of goods by air.

[38] Under Nigerian law, the factors to be considered in determining the appropriate venue or Court with jurisdiction to entertain matters relating to contract are: (a) where the contract in question was made, (b) where the contract is to be performed, and/or (c) where the defendant resides. See eg, *International Tobacco Co. Ltd & Anor v Sea Mountain Co. (Nig) Ltd* (2017) LPELR-43570 (CA).

The courts' decisions on the extent of the territorial limit of the admiralty jurisdiction further complicates the already difficult position. The position of law remains unsettled as to the jurisdiction of courts concerning the extension of the territorial limits of admiralty jurisdiction. Prior to the enactment of the AJA, the statute that was applicable to admiralty jurisdiction was the Administration of Justice Act 1956. The Administration of Justice Act 1956 did not deal with the territorial scope of admiralty jurisdiction. The Federal High Court was called upon in *Aluminium Manufacturing Company (Nigeria) Limited v Nigeria Ports Authority*[39] to decide on the limit of the admiralty jurisdiction of the Federal High Court.

There the claim was for ₦198,872.99 in general and special damages for breach of a contract of bailment and/or for breach of duty as a bailee in the custody of 47 packages of aluminium sheets delivered on board the vessel MV Aboine. The pleadings filed by the parties showed that the exact consignment of wooden plates carried on board the vessel MV Abione were delivered to the Nigerian Ports Authority. The claim was therefore not one against the shipowner/ship in respect of goods carried on a ship. The Federal High Court and the Court of Appeal found that the suit was not within the admiralty jurisdiction of the Federal High Court. In the words of Ademola JCA, 'to do so would be saying that the admiralty jurisdiction of the court covers everything that happens in all the ports in Nigeria, a proposition that is yet to get legislative approval'. The Supreme Court held that the cause of action as then constituted did not come within the admiralty jurisdiction of the Federal High Court. Obaseki JSC again stated that:

> It will amount to ridiculous interpretation to say that because the goods had been carried in a ship any claim for damage or loss occurring after the completion of the journey by sea to Apapa occurring anywhere on land falls within the paragraph.

The Supreme Court was right in stating the position of the law before the enactment of the AJA that the admiralty jurisdiction ended when the goods left the ship. The enactment of the AJA, particularly the inclusion of sections 1(1) (g) and 1(2) gave the admiralty jurisdiction a new twist. The enactment appears to have extended the admiralty jurisdiction of the courts to carriage of goods by land. The implication of this enactment is that it overrules the decision of the Supreme Court in *Aluminium Manufacturing Company*. However, the courts, albeit wrongly, continue to follow the decision of the court in *Aluminium Manufacturing Company.*

In *Texaco Overseas (Nig) Petroleum Company Unlimited v Pedmar Nigeria Limited*,[40] the Supreme Court held that 'In any event, for a claim in admiralty to arise, the cargo or goods must still be in the vessel'. The same position was held in *Nomsal Marketing & Supplies Ltd & Anor v Joasy Pen Enterprises Ltd*.[41]

The above decisions are desirable for the interpretation of admiralty jurisdiction as it relates to multimodal transport. These decisions are less fraught with complexities as it

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[39] (1987) 1 NWLR (Pt. 51) 475.

[40] (2002) 45 WRN 1.

[41] (2006) 12 WRN 125. See also the Federal High Court decision in *Pacific International Line (PTE) Ltd v Eeuason Nig. Ltd & Anor* (2010) 4 CLRN 219.

will simply allow the application of the law of contract. Notwithstanding its desirability, it does not in any way reflect the intent of the draftsmen of the AJA. The drafters intended to extend the jurisdiction of admiralty matters to goods carried by land after discharged by a ship.

The Court of Appeal in *Panalpina World Transport (Nigeria) Limited v Glenyork Nigeria Limited & Anor*[42] gave the section its clear intended meaning. In that case, the appellant, who is a carrier of goods and a clearing agent, was contracted by the respondent to clear its goods from customs at Port Harcourt wharf and to transport the same by road to the premises of the consignee in Calabar. While the goods were being transported by the appellants, one of the goods, a Ruston engine fell off the trailer and was delivered damaged to the respondent. A suit was instituted at the Lagos High Court and there was a preliminary objection. The Lagos High Court dismissed the objection on the ground that it was a simple contract of bailment.

However, the Court of Appeal sustained the objection by applying the ordinary grammatical meaning of section 1(2) of the AJA. Salami JCA (as he then was) in explaining why the Court of Appeal was not bound by *Aluminium Manufacturing Company* stated:

> The innovation, the Admiralty Jurisdiction Act, Cap A5 introduced after the goods had been discharged from the ship includes – (i) delivery at the consignee's premises, or (ii) during storage or warehousing or (iii) transportation before delivery to the consignee….clearly the provisions of Administration of Justice Act, 1956 are narrower or more restrictive when compared with those of Admiralty Jurisdiction Act, A5...The principle is inapplicable in the circumstance of the present appeal because the decisions which the learned trial judge thought and believed bound him were decided under an entirely different legislation. If the learned trial judge had cared to compare the provisions of the two enactments he would have found that they are not in pari material. This decision exposes the state of the law at the material time. But now respectfully they are moribund… ..it is the extension of admiralty jurisdiction by section 1(2) from where it previously ended when goods were off loaded from a ship to a position to include claims for damages to goods occurring between offloading the goods from a ship and delivery at consignee's premises that took cognisance of goods going to places like Niger Republic, Chad and hinterland Nigeria from Lagos, Port Harcourt or Calabar Ports. The subsection informed the current concept of dry ports in Ibadan, Kano, Aba, Bauchi, Katsina, Gombe and Jos. Indeed damage to goods off loaded from ships in transit to the consignee on camels still qualify as matter within the admiralty jurisdiction of the Federal High Court!

While the decision in *Panalpina World Transport* is right having regard to the provisions of section 1 of the AJA, however, it leaves many unanswered questions about the limits of the jurisdiction of the Federal High Court in multimodal transport matters, which involves the carriage of goods by sea or air. Where the court adopts the position in *Panalpina World*

[42] (2007) 12 CLRN 68.

Transport in multimodal transport cases, this decision seems to suggest that if there is a sea leg of transportation or an air leg of transportation, irrespective of whether there is a land carriage of the goods after discharge of the goods from a ship or an aircraft, it falls within the admiralty jurisdiction of the court. The implication of this is that a loss during the land carriage, which follows a carriage by sea, or a loss during the land carriage which follows a carriage by air will fall under the admiralty jurisdiction and will be heard by the Federal High Court rather than the State High Court. However, where the land carriage precedes the sea carriage or a land carriage precedes an air carriage, and a loss occurs during the land carriage, the State High Court will have jurisdiction pursuant to section 272 of the Nigerian Constitution.

VI CONCLUSION

While viewing multimodal transport as a chain of several unimodal transportation, the courts in Nigeria will determine the jurisdiction of each case according to the mode of transportation that gave rise to a cause of action in the matter. The only exception to this is in the case of land carriage, which succeeds a carriage of goods by sea or a land carriage which succeeds a carriage of goods by air. Such land carriage will fall under the admiralty jurisdiction, and such action may be commenced at the Federal High Court. There is also an unanswered question as to which court will have jurisdiction in the event of unlocalised losses.

In an era when African economies recognise that international trade can be more cost-effective and time-efficient and there is a need to ensure competitiveness of trade, different countries must take steps to remove complex processes or challenges that will affect market access of goods and the mobility of goods. It is essential to have a predictable legal framework and avoid a situation wherein there is high litigation costs as a result of the lack of a predictable legal system. Accordingly, it might be important that Nigeria enacts a legal framework on multimodal transport through its legislature. The envisaged legal framework will deal with the adopted theory and will probably arrogate the jurisdiction of multimodal transport contracts to a single court. It is also suggested that a unimodal legal framework on road and rail carriage should be considered by the legislature.

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