JOURNAL OF MALAYSIAN AND COMPARATIVE LAW

JURNAL UNDANG-UNDANG

VOLUME 48 (ISSUE 2)

2021

Faculty of Law
Universiti Malaya
50603 Kuala Lumpur
MALAYSIA

THE ISSUE MAY BE CITED AS (2021) 48 (2) JMCL

The Journal adopts an open access policy. Articles published in the Journal from its first edition in 1974 to the present (subject to an embargo period of 1 year for the most recent edition) can be viewed and downloaded at https://ejournal.um.edu.my/index.php/JMCL.

TO PLACE A SUBSCRIPTION

Full details of subscription rates and back issues:

Journal	Issues per year	Location	Annual Subscription	Single Issue	Previous Issue*
Effective July 2019, the new price for JMCL	2	Local	RM 120	RM 65	RM 60
		Overseas	USD 50	USD 30	USD 25

To place a subscription, please contact:

The Administrative Assistant
Journal of Malaysian and Comparative Law
Faculty of Law
Universiti Malaya
50603 Kuala Lumpur
Malaysia

Tel: 03-7967 6509 / 7967 6575
Fax: 03- 7957 3239/7967 6573
Email: jmcl@um.edu.my

*only where available

© Copyright is vested in the Faculty of Law, Universiti Malaya. No part of this publication may be reproduced or transmitted in any form or by any means whatsoever, without prior permission from the Faculty. All enquiries seeking permission to reproduce any part of this publication should be addressed to the Managing Editor.

Contents

VOLUME 48 (ISSUE 2) DECEMBER 2021

ARTICLES

Howard Hunter	Should Malaysia Join the CISG?	1
Haezreena Begum binti Abdul Hamid	A Review of the Anti-Sex Trafficking Approach in Malaysia	17

SHORTER ARTICLES AND NOTES

Sharyn Wong	Lessons From Indian Law: Applying the New Principles in *Cubic Electronics*	35

Editorial Note

We end the year with three thought provoking articles.

In his piece “Should Malaysia join the CISG (UN Convention on the International Sale of Goods)”, Howard Hunter advocates for Malaysia acceding to the above UN Convention based primarily on two grounds; first the portions of the CISG which differ from the norms of the common law are relatively few in number and could be easily addressed. Secondly, the CISG is a neutral law that has been adopted and regularly used by both civil and common law states. Haezreena Begum Abdul Hamid’s article “A Review of the Anti Sex-Trafficking Approach in Malaysia” analyses the issues and problems surrounding sex trafficking involving migrant women in Malaysia. The author argues for the better protection of such women, and proposes, among others, for the amendment of the definition of “trafficking” to clarify any ambiguities and for the decriminalisation of sex work.

Last but not least, Sharyn Wong on her case note on the Federal Court judgment in *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd,* proposes that Malaysian law on liquidated damages clauses (LAD) could be further improved by adopting the Indian position of requiring actual proof of loss whenever possible in order to prove an innocent party’s legitimate interest.

Dr. Sharifah Suhanah Syed Ahmad
Executive Editor

SHOULD MALAYSIA JOIN THE CISG?

Howard Hunter*

Abstract

The United Nations Convention on the International Sale of Goods ('CISG') has been in effect since the early 1980s and some 94 member states of the United Nations have joined the Convention. These members account for close to 75% of world trade and include many of Malaysia's largest trading partners. This essay reviews the major objections that have been raised to the CISG among common law nations, such as the United Kingdom, and how those objections have been managed by substantial economies, such as the United States, Canada, Australia, and Singapore, which are within the common law family of nations. Many Malaysian traders already are subject to the CISG as a result of the operation of private international law, and the conclusion of the essay is that, on balance, Malaysia may find it beneficial to join the CISG. Those issues which may arise can be managed through careful drafting and negotiation.

Keywords: CISG, international sale of goods, contract

I INTRODUCTION

The United Nations Convention on the International Sale of Goods ('CISG') is a treaty which creates a uniform set of rules for sale of goods across national boundaries between commercial buyers and sellers. Malaysia is not a party to the Convention although Malaysian buyers and sellers regularly engage in transactions for the sale of goods (steel, chemicals, automotive vehicles, agricultural machinery and agricultural products, textiles, and so on) across national boundaries. Should Malaysia consider joining the CISG or would doing so, on balance, be of little practical assistance to the Malaysian economy? Is there a risk that joining the CISG would affect traditional domestic common law rules of contract law?

One answer, of course, is that the Malaysian economy, including sales of goods for export and purchases of goods for imports, has been performing reasonably well, on average, for years. Joining the CISG might have little or no appreciable effect on the growth of the Malaysian economy. The economy has been affected more by externalities such as the Covid-19 pandemic than by the details of sales law. Doing nothing may be the right choice in that the risks, to the extent they exist, of being outside the CISG are

* Emeritus Professor of Law and former President, Singapore Management University; Emeritus Professor of Law and former Dean, Emory University School of Law (USA); Recurrent Visiting Professor of Law, Central European University (Vienna and Budapest); author of *Modern Law of Contracts* (Thomson Reuters, 35th Anniversary Edition, 2 vols., 2021); *The Law of Sales in Singapore* (Academy Publishing, 2017).

known whereas the gains, if any, to be realised from joining the CISG are speculative. But joining the CISG would place Malaysia in the mainstream of international trade.

Currently, many Malaysian buyers and sellers are subject to the CISG now if the CISG is the governing law of their transactions whether by operation of a choice of law clause or by reasons of private international law. An examination of the possible objections to the CISG from common law lawyers are worth considering in order to strike a balance between the perceived risks and the possible rewards. Careful consideration might show that joining the CISG has certain advantages and that the risks can be minimised or avoided altogether as the Malaysian economy grows and becomes even more closely integrated with the economies of other countries around the globe. Foreign traders might appreciate having a uniform sales law. At present, traders must be aware of two slightly different regimes of sales law in that the states of Peninsula Malaysia are subject to the Malaysian Sale of Goods Act of 1957, as revised in 1990, whereas the states of Sabah and Sarawak in Borneo adhere to the United Kingdom Sale of Goods Act of 1979. All contracts are subject to the Contracts Act of 1950, although if there is a contradiction or inconsistency, the legislation on sales law prevails.[1] The differences in the applicable law between the States of Peninsula Malaysia and the States of Sabah and Sarawak are not great, and the underlying approaches to contract law are much the same, but a foreign trader might find it to be more convenient to rely on the internationally applied CISG.

Foreign trade is a substantial factor in the Malaysian economy. World Bank statistics from 2020 indicate that exports amounted to 68.76% of Malaysia's GDP, and imports were 61.75% of its GDP. Despite some downturn as a result of the Covid-19 pandemic, foreign trade in 2020 continued to be very important, and the trend for a number of years has been upward.[2]

Any outsider should be careful about making recommendations for a nation to adopt a particular law or policy. Someone who is not a member of the society may be unaware of the many different domestic interests and tensions and may, by ignorance, make suggestions that are unrealistic or, in some cases, even offensive. Nonetheless, an outsider may have the advantage of being neutral and without a connection to any particular interest group within the domestic society. With these thoughts and caveats in mind, it may not be inappropriate for someone who is from a different country, but who is a keen and sympathetic observer of economic and political developments in Malaysia, to offer a few thoughts on the CISG which is a subject of potential interest to international traders and lawyers. This particular observer is from a common law jurisdiction, has worked mostly in common law jurisdictions, and was engaged with the legal profession in neighbouring Singapore for fourteen years as a legal academic and consultant.

As of this writing, 94 nations are member states of the CISG, a Convention that has been in effect in some countries for more than three decades. The member states account for about 75% of world trade. Contracts for the sale of goods are commonplace, and the main issues generally revolve around questions of clarity, efficiency, and remedies. Sales

---

[1] See Lim Koon Huan and Manshan Singh, *Sales and Storage of Goods in Malaysia: Overview* (ThomsonReuters, 2021).

[2] See for a wide range of statistics: www.wits.worldbank.org; www.dosm.gov.my

contracts between international traders do not usually involve any great social, ethical, or moral issues that would create tensions between different cultures. The five largest economies of the world (United States, China, Japan, Germany, France) are member states as are most members of the European Union and a number of nations around the world which have large economies (Brazil, South Korea, Australia, Canada, Mexico, Russia, and others). Many of Malaysia's trading partners are member states. In order, the top five countries for Malaysian exports in 2019 and 2020 were: China, Singapore, USA, Hong Kong, and Japan.[3] All but Hong Kong are member states of the CISG. Of Malaysia's top fifteen trading partners (accounting for more than 81% of all trade), nine are member states of the CISG.[4]

If a nation's trading partners are split between member states and non-members, then is there any reason to consider becoming a member? Absent strong countervailing reasons, the answer is at least an equivocal 'yes'. When contracting parties are from member states, the CISG presumptively applies, but the parties are free to 'opt out' of the coverage of the CISG pursuant to Article 6 and to choose to apply the domestic law of one jurisdiction or the other.[5] A member state can file a reservation whereby the CISG applies only if *both* contracting parties are from member states regardless of what the rules of private international law may say about the applicable law.[6] As things now stand, a Malaysian company might be subject to the CISG if it has a contract of sale or purchase with a company from a member state and the rules of private international law would result in the application of the law of the member state to the transaction unless the agreement includes a negotiated and clear choice of law clause to the contrary. Careful attention to the details of the sales agreement is necessary to avoid the CISG.

---

[3] China was a member state of the CISG in 1997 when the British colony of Hong Kong became a part of China as the Hong Kong Special Administrative Region, but Hong Kong has continued to follow the English common law for contracts and other private law subjects. China did not include the CISG among the United Nations Treaties and Conventions to which it was a party and which it asked to be applicable to Hong Kong after the transfer from British control.

[4] For these and other statistics, see the sections on Malaysia in: www.worldstopexports.com; www.nordeatrade.com

[5] Some courts have concluded that an 'opt out' must be explicit. A reference to 'German law' does not satisfy Article 6 because the CISG is, in fact, 'German law' as a ratified and domesticated treaty of Germany: *Roser Technologies, Inc. v. Carl Schreiber GmbH*, 2013 WL 4852314 (W.D.Pa.) (United States). See also *Eastern Concrete Materials Limited*, 2019 WL 6734511 (D. N. J.) (United States). A choice of law clause that specified 'Australian law' and excluded 'UNCITRAL law' was sufficient to opt out of the CISG notwithstanding that the CISG is Australian law and that UNCITRAL is an organization and not a law-making state: *Olivaylle Pty Ltd v Flotweg GmbH Co.* [2009] FCA 522 (Australia). For a criticism of the somewhat casual attitude of Australian courts and lawyers to the CISG, see L. Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Cost of Ignoring the Vienna Sales Convention for Australian Lawyers'(2009) 10 *Melbourne J. Intl. L.* 141. See also Borisova, 'Remarks on the Manner in Which the UNIDROIT Principles May Be Used to Interpret or Supplement Article 6 of the CISG' (2005) *9 Vindobona J. Int'l. Com. L. & Arb.* 153. ; 'How to be or not to be: The United Nations Convention on the International Sale of Goods, Article 6' (1996) *4 Cardozo J. Int'l. & Comp. L.* 423. For a clear, straightforward and effective 'opt out' clause, see *Gea Systems North America LLC v. Golden State Foods Corp.*, 2020 WL 3047207 (Del.) (United States).

[6] At present, only six countries require that both parties be from member states, but three of Malaysia's significant trading partners, China, Singapore, and the United States, are among that small group. The other three are: Czech Republic, Slovakia, and the small Caribbean nation of St. Vincent and the Grenadines. Otherwise, the choice of law rules of private international law apply if the parties have not specified the applicable law in their contract with the result that the CISG may apply even if only one party is from a member state.

II SHOULD TRADERS FROM A COMMON LAW COUNTRY BE CONCERNED THAT THE CISG IS TOO MUCH LIKE A CIVIL LAW CODE?

One of the objections among English lawyers to the CISG is that it appears to be more closely aligned with various strands of the civil law than with the common law, especially on matters of construction (no parol evidence rule) and on the possible incorporation of a civil law notion of 'good faith' along with a command that deference be paid to international decisions in order to achieve uniformity.[7] There is some merit to these arguments, but the concerns are overstated.

A number of substantial common law countries already are member states. These include Australia, Canada, New Zealand, Singapore and the United States. Admittedly both Canada and the United States have some connections with the civil law (Quebec in Canada and Louisiana in the United States), and the domestic sales law in the United States, which is contained in Article 2 of the Uniform Commercial Code, includes a specific requirement of 'good faith' in sales transactions. Nevertheless, all these jurisdictions are members of the common law 'family' of nations and the law of contracts is based on English law.

International sales agreements for centuries have followed various customary law rules of the *lex mercatoria*. Traders dealing across national boundaries, especially those who are repeat players in a commodities market, want some degree of consistency and predictability in their transactions and do not want to be at the mercy of competing and conflicting domestic systems. Nor do they want to be overly concerned about problems of language or of cultural nuance. They prefer to have a reasonably efficient, predictable system for buying and selling goods that is much the same from place to place. For example, traders generally agree, regardless of domestic law, about the meaning of what are now called 'Incoterms', such as 'free on board' or 'free alongside ship' which are highly useful shorthand ways to establish passage of the risk of loss, to identify which insurer bears a risk at a given place or time, and to trigger various financing arrangements.[8]

The meaningful variations in the CISG from ordinary common law contract rules are relatively few in number. These variations often can be avoided. An obvious example has to do with remedies. The preferred remedy under the CISG is the civil law remedy of performance,[9] but Article 28 provides that a court need not order such performance if it would not be the normal remedy available for breach of contract in that jurisdiction. Other variations can be managed through careful drafting, although, in all candour, the

---

[7] See CISG art 7. See generally Cross, 'Evidence under the CISG: The "Homeward Trend" Reconsidered' (2007) *68 Ohio State L. J.* 133..

[8] See, eg, *In re World Imports, Ltd*, 549 B. R. 820 (E.D.Pa. 2016) (United States) (where CISG and 'incoterms' were used to determine the date of passage of property in a corporate bankruptcy proceeding). There is an interesting debate among academic commentators about the extent to which 'usage' and the terms representing various 'usages' are normative and which are based within separate contractual relationships. See, eg, Phillip Hellwege, 'Understanding Usage in International Contract Law Harmonization' (2018) *66 Am. J. of Comparative L.* 127.

[9] CISG art 46.

CISG does effectively exclude the parol evidence rule in construing terms of an agreement governed by the Convention.[10]

Why worry about modest variations in rules of contract law for international sales transactions? The general common law of contracts provides the background law for huge numbers of agreements, but every common law country already has in place a number of sub-categories of contracts that are governed slightly differently from the general background law and from other contracts. Insurance agreements are one example. Trust agreements are another. Maritime charters for vessels are yet another. Agreements between a publicly held corporation and members of its Board or its shareholders comprise yet another sub-set of contracts which are subject to specific rules and regulations. Some of these variations are the result of statutes and regulations promulgated pursuant to those statutes. Some have developed from the common law itself and from, for example, property law or fiduciary law. Where there is a domestic sale of goods law in place, whether derived from the 1893 United Kingdom Sale of Goods Act or otherwise, sales transactions already are subject to a slightly different regime of law. Another modest variation is unlikely to weaken the overall structure nor to cause any special concerns for the legal profession. That is especially the case when the proposed system (the CISG) is, for the most part, consistent with the domestic law of sales.

The CISG applies only to commercial parties, and even then, some large areas of commercial activity are excluded.[11] Consumer sales transactions are unaffected, and a domestic concern for individual consumer welfare is unaffected by the CISG.[12] Commercial entities dealing internationally are, for the most part, sophisticated parties that can look after their own interests and contract around provisions that are undesirable while also enjoying the uniformity and predictability of the CISG.

The CISG is neutral law which is easily accessible and transparent. The Convention is effective in the official languages of the United Nations, and the most commonly used version is the one published in English. Many commercial sales agreements include arbitration clauses, and the CISG provides a straightforward structure for arbitrators to use no matter what jurisdictions may be involved. From all indications, the CISG has been employed regularly in sales agreements with Chinese traders. Doing so in an arbitration setting avoids the problems of dealing with a language that can be difficult for those not

---

[10] CISG art 8.

[11] Article 2 excludes from the CISG sales:

a. Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use.
b. By auction.
c. On execution or otherwise by operation of law.
d. Of stocks, shares, investment securities, negotiable instruments or money.
e. Of ships, vessels, hovercraft or aircraft
f. Of electricity

The exclusion of consumer contracts means that the CISG has no practical effect on domestic consumer protection laws and regulations. The consensus is that the CISG does not apply to distributorship contracts either. See, e g, *Reecon North America, LLC v. DuHope International Group*, 2019 WL 2542536 (W. D. Pa.) (United States).

[12] Thus the Consumer Protection Act 1999 of Malaysia would be unaffected by the CISG were Malaysia to join the Convention.

fluent in Chinese, and a legal system that is not as transparent as those in most common law countries. Because the CISG is 'neutral' there is much less concern about possibilities of domestic bias that may appear to be an issue when a court applies its own domestic law, most especially if the process is not open and transparent.

III THE SPECIAL PROBLEM OF PAROL EVIDENCE

One of the characteristics of contract interpretation under the common law is that the agreement itself sets the boundaries for considering the intentions of the parties. By comparison, the civil law allows a court to consider not only the context, which may be relevant in a common law case as well[13], but also the negotiations that took place prior to conclusion of the agreement and communications subsequent to formation of the agreement. The CISG follows the lead of the civil law. Article 8 (3) states:

> In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

The parol evidence rule is not a simple procedural rule. To the contrary it is a substantive rule of contract law and, as such, is deeply embedded in the common law notion of a contract as the final manifestation of an agreement. Lord Hoffmann, then a member of the House of Lords, clearly stated the common law position in a 2009 judgment:

> …the French philosophy of contractual interpretation…is altogether different from that of English law….French law regards the intention of the parties as a pure question of subjective fact, the *volont psychologique*, uninfluenced by any rules of law. It follows that any evidence of what they said or did, whether to each other or to third parties, may be relevant in establishing what their intentions actually were. There is in French law a sharp distinction between the ascertainment of their intentions and the application of legal rules which may, in the interests of fairness to other parties or otherwise, limit the extent to which those intentions are given effect. English law, on the other hand, mixes up the ascertainment of intention with the rules of law by depersonalizing the contracting parties and asking not what their intentions actually were, but what a reasonable outside observer would have taken them to be. One cannot in my opinion simply transform rules based on one philosophy of contractual interpretation to another, or assume the practical effect of admitting such evidence under the English system of civil procedure will be the same as that under a Continental system.[14]

---

[13] See, eg, *R1 International v. Lonstroff* [2014] SGCA 56 (Singapore).

[14] *Chartbrook Limited v. Persimmon Homes Limited* [2009] UKHL 38, 39 (United Kingdom). For a more general discussion of some of the fundamental differences in approach between English and French contract law, see S. Rowan, *Remedies for Breach of Contract*, (OUP: New York, 2012).

The consensus among courts that have considered Article 8 is that it supplants the parol evidence rule and that a court should be free to consider a wide range of extrinsic evidence in construing the terms of a contract that is governed by the CISG.[15] In his opinion for the court in a CISG case between an American company and an Italian company, Judge Stanley Birch of the United States Court of Appeals for the Eleventh Circuit stated:

> One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system should apply. Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying the directive to consider this type of parol evidence.[16]

If a party in a common law jurisdiction is concerned about the use of extrinsic evidence should a dispute arise in connection with a sales agreement under the CISG, what are the options to consider? One option, of course, is to negotiate a choice of law clause that opts out of the CISG and applies the domestic law of the party's home jurisdiction, although doing so may be difficult if the other party is not keen to be subject to that particular domestic law. Another option which is possible under Article 6 of the CISG is to exclude Article 8 but not the remainder of the CISG. This limited 'opt out' may be more palatable to the other side, but many parties might object to a piecemeal application of the CISG. If the parties cannot reach agreement about excluding Article 8, then it may be possible to negotiate a clear, unambiguous and definite 'whole agreement' clause that requires a judge or arbitrator in a subsequent dispute to restrict the boundaries of construction to the four corners of the document. Even so, there may be uncertainties or ambiguities that arise after formation and during performance which undercut the 'whole agreement' clause.[17]

If all else fails, a party may wind up being subject to a more extensive use of extrinsic evidence pursuant to Article 8, but, in all likelihood, there will be few major difficulties. Common law courts already take account of context (nature of the business, relationship of the parties, subject matter of the contract, customs of the trade, etc.), and there are exceptions to strict application of the parol evidence rule for explanations of

---

15 See generally CISG Advisory Council, 'CISG Advisory Council Opinion No. 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG' (2005) *17 Pace Int'l. L. Rev.* 61. See also, *Treibacher Industries AG v. Allegheny Technologies, Inc.,* 464 F 3d 1235 (11th Cir. 2006) (United States); *Shuttle Packaging Systems, LLC v. Tsonakis*, 2001 WL 34046276 (W.D. Mich. 2001) (United States).

16 *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A.*, 144 F 3d 1384, 1391 (11th Cir. 1998) (United States).

17 That was an issue in *Tee Vee Toons, Inc. v. Gerhard Schubert GmbH*, 2006 WL 2463537 (S.D.N.Y. 2006) (United States).

ambiguities and technical terms.[18] The performances of the parties may themselves have raised questions, especially if one side has performed in a non-conforming way and the other side has (or is said to have) acquiesced in the non-conforming performance. Certainly the trade context is important in ascertaining the meaning of the agreement.[19]

IV REMEDIES – ARE THE DIFFERENCES SIGNIFICANT?

The remedial issue is solved, for the most part, by the CISG itself. A common law court need not grant a remedy that it would not normally grant in a similar case under domestic law. In other words, civil law courts can go ahead and order performance pursuant to Article 46 as they would in a civil law proceeding, but common law courts may award damages as an economic substitute for performance as they would in an ordinary contracts case pursuant to Article 28.

The basic damage measures are the same under the CISG as under the common law, i.e., contract-market differential or the differential between the contract and a 'cover' contract (for the buyer) or a 'resale' contract (for the seller).[20] The principle of mitigation applies as it does in a standard common law case.[21]

There has been some discussion among commentators about whether Article 74 of the CISG expands upon the consequential damages recovery allowed in cases that meet the requirements established by the seminal decision in *Hadley v Baxendale*.[22] Article 74 of the CISG provides:

> Damages for breach of a contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

---

18 See generally *Carnival Cruise Lines, Inc. v Goodin,* 535 So. 2d 98 (Ala. 1988) (United States) (for the meaning of 'certain bathrooms' in release signed by wheelchair bound passenger on a cruise ship); *Berwick v. Riordan Protective Services, Inc.,* 185 Ga. App. 232, 363 S. E. 2d 864 (1987) (United States) (for the meaning of the phrase 'we are even on amount due'). Even the presence of a merger or integration or 'whole agreement' clause will not necessarily preclude the consideration of parol evidence to explain an ambiguous term or a clause that is inherently unclear: *PT Panasonic Gobel Indonesia v. Stratech Systems* [2009] 1 SLR(R) 470 (Singapore).

19 See, eg, *R1 International v. Lonstroff* [2014] SGCA 56 (Singapore). As the Singapore Court of Appeal noted in a 2016 judgment, the construction of a contractual term is 'not done in the abstract or in a vacuum, but is, instead, to be anchored in the express contractual language, the internal and external contexts of the contract, and, more broadly speaking, the contractual purpose': *Hewlett-Packard Singapore (Sales) Pte Ltd v. Chin Shu Hwa Corinna* [2016] SGCA 19 [53] (Singapore).

20 See generally CISG Advisory Council Opinion No. 6 (2006); Gotanda, 'Awarding Damages under the United Nations Convention on the International Sale of Goods: A Matter of Interpretation' (2005) *37 Georgetown J. Int'l. L.* 95; Comment (2005) *26 U. Penn. J. Int'l. Econ. L.* 601. For an application of CISG rules in a falling market situation, see *Kantonsgericht Zug* [A3 2001 34] (Switzerland 12/12/2002)..

21 CISG art 77.

22 (1854) 9 Ex 341 (United Kingdom).

The boundaries of recovery for consequential damages are not clear. The various judgments of members of the House of Lords in *The Achilleas*[23] a few years ago revived the long standing debate about the precise meaning of the *Hadley* decision.[24] After all the discussions what seems clear is that the determination of consequential damages remains a highly fact and context based issue. Chief Justice Sundaresh Menon of Singapore may have captured the essence of the issue as well as anyone in a 2013 judgment:

> [T]he law imposes limits on the extent of the contract breaker's liability by rules that help a court decide whether the particular type of damages claimed is too remote and hence irrecoverable. The rules as to remoteness of damage serve to impose a horizon on the extent of the contract breaker's liability. Losses that are within this notional boundary are in principle recoverable while those beyond it are not. But although this horizon is not illusory, equally it is not a rigid or empirically precise boundary. Rather, like the horizon of human experience, its range depends on the circumstances. For this purpose, the relevant circumstances include those in which the contract was entered into and what both parties knew or must be taken to have known about the venture they were about to undertake. According to these circumstances, the horizon may sometimes extend further than at other times.[25]

That is not to say that the determination of what are or are not recoverable consequential damages will always be easy. The New York Court of Appeal, a court that is well known for its expertise in matters of commercial law, divided 4-3 over the question whether lost profits on a resale by a distributor were 'general' damages under limb one of *Hadley* or were 'special' damages under limb two.[26]

A case from the State of Florida in the United States provides a good example of the application of Article 74 and an opportunity to compare it with the damages that would reasonably be recoverable under the common law. The seller agreed to sell a large quantity of equine quality hay to a buyer who intended to re-sell the hay to the Government of Abu Dhabi in the UAE. The CISG applied to the transaction. The buyer made a substantial advance payment to the seller and provided a performance bond to the Government of Abu Dhabi. The seller breached the contract and delivered no hay at all. The court ordered the defendant seller to return the advance payment, to pay the buyer an amount equivalent to the lost profits on resale of the hay to the Abu Dhabi Government, and to pay the cost of the performance bond. Return of the advance payment was a matter of simple justice. It was not a forfeitable 'deposit'. The seller reasonably knew or should have known that the buyer was not purchasing so much hay for its own use but was

---

23 *Transfield Shipping, Inc. v. Mercator Shipping, Inc.* [*The Achilleas*] [2008] UKHL 48; [2008] 3 WLR 345; [2009] 1 AC 61 (United Kingdom).

24 See, eg, Hunter, 'Has *The Achilleas* Sunk?' (2014) *31 J. C. L.* 120

25 *Out of the Box Pte. Ltd. v. Wanin Industries Pte. Ltd.* [2013] SGCA 15 (Singapore).

26 The characterisation was important because the contract included a negotiated clause that excluded recovery of consequential (limb two) damages. Based on the relationship between the parties and the seller's knowledge of the buyer's intended use (resale), the majority concluded that the lost resale profits were general damages and therefore not excluded, but it was certainly not an 'open and shut' case as the dissenters made clear: *Biotronik AG v. Conor Medsystems Ireland Ltd.* 22 N. Y. 3d 799, 11 N. E. 3d 676, 988 N. Y. S. 2d 527, 2014 WL 1237514 (N.Y.C.A. 2014) (United States).

buying as a distributor or wholesaler. Failure to deliver reasonably could be understood to lead to a loss of profits on resale, and, therefore, the seller could be held liable for the loss of profits. The cost of the performance bond was not quite as clearly identifiable as a damage item, but the court took into account the context and the known facts. The seller knew the hay was to be shipped to the UAE, and the seller knew, or reasonably should have known, that only a large equine enterprise would be interested in such a substantial quantity of hay. In the UAE, such enterprises are owned or controlled, most likely, by one or more of the Sheikdoms that comprise the UAE. Governments often require contracting parties to provide performance bonds, and the seller should reasonably have anticipated that one of the buyer's costs of doing business would be the cost of a performance bond which would be forfeited upon default. The court noted, in passing, that the same result would have been reached had the court applied the common law rules of the State of Florida (largely the same as those of England) or the rules of Article 2 of the Uniform Commercial Code, the sales article.

The CISG provides certain self-help remedies which can be useful and which may force the parties to communicate with one another in ways that could avoid further disputes and litigation. A buyer, for example, can notify the seller of non-conformities (e.g., quantity variations, quality problems, etc.) and give the seller an opportunity to cure the non-conformities without losing any right to claim damages if the non-conformities persist, but the buyer is required to give the seller a fair chance and cannot file suit until the seller fails or refuses to cure.[27] The seller can do the same if the buyer is delinquent in making payment – that is, provide reasonable time for a cure without losing any rights to claim for the payment in full.[28] The buyer also can reduce the amount of the payment for non-conforming goods with proper notice to the seller.[29] If the buyer makes a reasonable reduction, then the parties may be able to walk away from the deal without the need for further litigation or arbitration. One can see a pattern whereby the CISG attempts to provide the parties with opportunities for informal, private dispute resolution which is likely to reduce costs and which may result in satisfactory performance. In this sense the CISG appears to be consistent with what many commercial parties consider to be the better way to resolve disputes.[30]

---

[27] CISG art 47.

[28] CISG art 63.

[29] CISG art 50. See, eg, Court of Appeals Schleswig [11 U 40/01] (Germany 22/08/2002) (where an agreement on a price reduction for 400 sheep that were 'too thin' precluded a subsequent claim for damages).

[30] See generally T. Diehl, *Global Order Beyond Law* (Hart Publishing: Oxford and Portland, 2014). Professor Diehl conducted a study of the contractual relationships between a group of German companies and software development firms in India, Romania, and Bulgaria. The study concluded that the parties relied primarily upon informal communications, both between the contracting parties and among peers, for the successful realisation of the goals of the agreement and for the resolution of disputes. These informal mechanisms were of far greater importance than the formal, structural mechanisms of the positive law – although the positive law provided a helpful backdrop and matrix for the development of the informal relationships. The contracts studied were for services in the Information Technology industry, but the lessons learned from that study may well apply to other contractual relationships over time and distance, most especially among repeat players.

V IMPLIED WARRANTIES OF PERFORMANCE AND QUALITY

The CISG adopts a 'perfect tender' rule in that the seller is expected to deliver goods that conform exactly to the description of the goods in the agreement or to samples provided to the buyer for inspection.[31] The common law and most statutes on sales of goods are not dissimilar. The CISG goes on to establish that the goods delivered are expected to be reasonably satisfactory – at least of ordinary quality. If the seller knows of the intended use, and especially if the buyer has asked the seller to provide goods suitable for a particular use, then the expectation is that the goods will be satisfactory for that use. These 'implied warranties' follow the goods unless the seller explicitly limits any warranty of quality by saying that the goods are sold 'as is' or 'with all faults' or unless it can be shown that the buyer was aware of any defects or limitations prior to agreeing to purchase the goods. The rules of the CISG are not so different from the usual rules and expectations in sales transactions governed by the common law. To the extent that a seller may be concerned about implied warranties of satisfactory quality or suitability for a particular purpose, the seller can negotiate a sale that identifies shortcomings or that excludes liability for defects of one kind or another. Inviting a buyer to inspect and test the goods also serves to protect the seller from a subsequent claim of defects if the goods delivered are consistent with those inspected and tested.[32]

There is some question whether the CISG's definition of 'fundamental breach' in Article 25[33] is the same as or different from the common law's notion of a breach that amounts to a failure of a condition which then justifies the non-breaching party in avoiding the contract. That uncertainty is likely to continue because the distinction between those breaches which amount to a failure of a condition and those which are of 'innominate' terms will vary from context to context. The expectation that a seller will deliver exactly what is identified in the contract as the goods (right quantity, right qualities, right timing, right place) is akin to a condition, the breach of which would justify avoidance. But on closer examination, there are opportunities to cure and 'reasonability' provisions that are related to context which suggest that an imperfect tender may not constitute a fundamental breach. In this regard, contracts governed by the CISG are not all that different from contracts subject to the common law.[34]

---

[31] CISG art 35.

[32] See, eg, CISG art 35(3). See also CISG art 40.

[33] For applications of Article 25, see, eg, *Diversitel Communications, Inc. v. Glacier Bay, Inc.* 03-CV-23776SR (Ontario SC, Canada, 06/10/2003); *Downs Investments v Perwaja Steel* (Queensland SC, Australia 17/11/2000); *Delchi Carrier, Spa v. Rotorex Corp*. 1994 WL 495787 (N.D.N.Y. 1994) (affirmed in part, reversed in part on other grounds) 71 F. 3d 1024 (2d Cir. 1996) (United States).

[34] For general discussions of the common law concept of fundamental breach, see *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kaisen Keisha Ltd.* [1962] 2 QB 26, 1 All ER 474 (United Kingdom); *RDC Concrete Pte Ltd v. Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 (Singapore).

VI DOES THE CISG CREATE A GENERAL OBLIGATION OF GOOD FAITH?

Article 7 of the CISG states:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

There are two substantive directions in Article 7. One is a requirement that courts (and arbitrators) take into account other CISG decisions in the interest of harmonising sales cases around the world. The other makes reference to the concept of 'good faith' in international trade.

The first requirement is sensible and straightforward. One of the main purposes of the CISG is to create a uniform, harmonious and predictable regime of law for international sales transactions among commercial parties. In this sense the CISG is a statutory form of the *lex mercatoria*. Sometimes courts may be hesitant to look beyond their national boundaries for guidance, but that is the charge of Article 7 which was enthusiastically followed by a New Zealand court:

> …the Convention must be applied and interpreted exclusively on its own terms, having regard to the principles of the Convention and Convention related decisions in overseas jurisdictions. Recourse to domestic law is to be avoided.[35]

In the context of sales agreements, common law courts already have some historical precedents for looking beyond their national boundaries. Common law courts regularly consider decisions from other common law jurisdictions. The most obvious examples involve judgments from the United Kingdom, but one can find examples that involve a wide range of common law jurisdictions. It is a step further to consider judgments from civil law courts, but, in the context of the CISG, doing so makes sense if the goal is to achieve a reasonable level of uniformity. It is also easy thanks to the excellent – and free – website maintained by the Pace University School of Law[36] as well as the website of UNCITRAL.[37] All the reported decisions of courts around the world are included. Major cases reported in languages other than English have, in many instances, been translated into English. A lawyer or a judge with access to the internet can review every reported CISG decision quickly and easily. The websites also include most of the academic

---

35 *Smallmon v. Transport sales Limited* [2010] NZHC 1367, [88], appeal dismissed [2011] NZCA 340. An Italian court cited decisions from nine different countries, both civil and common law, in its analysis of a case under the CISG. See *Al Palazzo Srl v. Bernardaud di Limoges, SA, Tribunale di Rimini* (Italy 26/11/2002).

36 www.cisg.law.pace.edu

37 www.uncitral.org

commentary on various aspects of the CISG. Thus, a court should have little difficulty in dealing with the first requirement of Article 7.

The second aspect – that of good faith – presents a few more questions.[38] Under the civil law there is an expectation of good faith in both the negotiation and the performance of a contract.[39] The scope of good faith varies among common law jurisdictions, but none imposes an affirmative duty of good faith during the negotiating process. 'Bad' faith can be a problem. A party has no right to be untruthful or misleading, especially in response to a query, but there is no affirmative obligation to be forthcoming. During the performance of a contract, the issue is not quite so clear. Some courts have suggested that there is an obligation to make an effort to have the contract become fulfilled and not just to sit on one's hands.[40]

In a typical sales transaction, performance is easy enough to identify. The seller either delivers the correct goods in the right quantity at the right place and time or does not. Failure to do so is a breach and not an issue of good faith. Likewise, the buyer either pays the right amount on time or does not and failure to do so is a breach. The performance issue arises more often in a situation of a continuing relationship.

For the common law lawyer who has some concern about the imputation of a civil law notion of good faith through Article 7, there are several ways to protect a client. One would be to negotiate, if possible, an exclusion of all or part of Article 7 pursuant to the provisions of Article 6. Another would be to negotiate a definition of 'good faith' within the context of the particular agreement. Yet another would be to define carefully the expectations of performance by the seller and the buyer so that there is little or no chance for misunderstanding in connection with the respective levels of performance.

All in all there is a good argument that the reference to good faith in Article 7 means nothing more than adherence to the general expectation of the CISG that sales transactions will be treated as uniformly as possible across jurisdictions. It does not necessarily suggest a substantive imputation of a general concept of good faith from the civil law tradition into sales agreements subject to the CISG. Care in drafting and reasonable management of mutual expectations between the parties should suffice.

VII EXCUSE BY FRUSTRATION

The common law doctrine of frustration of purpose provides an excuse for performance, but successful assertion of the frustration defence is difficult. Its origin is in the defence of impossibility, and performance generally must be close to impossible or completely

[38] Lord Hoffmann, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe' (2010) *22 Pace Int'l. L. Rev.* 145.

[39] See generally S. Rowan, *Remedies for Breach of Contract* (Oxford Press, 2012).

[40] One of the most famous comments was made by Judge Cardozo (later a Justice of the United States Supreme Court) of the New York Court of Appeal in a 1917 decision in which he said that every contract is 'instinct with an obligation, imperfectly expressed' of 'good faith': *Wood v. Lucy, Lady-Duff-Gordon*, 222 N.Y. 88, 118 N. E. 214 (1917) (United States). In the particular context, he meant that a retailer with an exclusive right to sell millinery produced by Lady Duff-Gordon, impliedly undertook to make a reasonable effort to do so. He did not have to be successful, but for the agreement to have any meaning at all, he was expected to make some efforts.

without purpose for the excuse to be available. Even a major disruptive event such as the Asian financial crisis of the late 1990s or the financial crisis of 2008-09 generally is not sufficient to provide an excuse by way of frustration under the common law.[41] Does the CISG provide a somewhat more lenient basis for asserting an excuse? Article 79(1) states:

> A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

The language of Article 79 is similar to the common law test for excuse by way of frustration, and, if anything, it is only slightly more lenient than the common law.[42] One could argue that it is essentially the same. The best way to avoid disputes about frustration is to draft a clear *force majeure* clause that is directly related to the facts and context of the contract. In the past several years, the Singapore Court of Appeal has published several judgments on the question of frustration which provide a useful guide not only for common law courts but for courts that may be dealing with CISG disputes. The Singapore cases arose as a result of a ban imposed by Indonesia in February 2007 on the export of sand to Singapore. The ban occurred in the middle of a construction boom and there were a number of substantial disruptions in the supply chain for ready mixed concrete (sand is a major component) from suppliers to building construction firms. The Indonesian sand came from the Riau Islands just a short distance across the Straits of Singapore. Sand was available from other sources but at substantially higher prices due to longer lines of transportation and higher acquisition costs. Each contract had to be examined carefully with particular attention to the relevant – if present – *force majeure* clause.[43]

Careful drafting is once again the answer to most concerns. A 'boilerplate' *force majeure* clause from a formbook may be insufficient, but one that is drafted with a clear eye on the details of the particular transaction may help avoid disputes about the availability of the frustration excuse whether the contract is governed by the common law, by a sale of goods act or by the CISG. In any event, Article 79 of the CISG is not an impediment to acceptance of the CISG by a common law jurisdiction. If there are issues surrounding the doctrine of frustration, those issues are more fundamental than any relatively minor differences between the language of Article 79(1) of the CISG and the common law test for frustration. As one commentator has noted:

---

41 See, eg, *Chinaya a/l Ganggaya v. Sendal Raya Sdn. Bhd.* [2008] 2 MLJ 468 (Malaysia); *Highseed Corp. Sdn. Bhd. v. Warisan Harta Sabah Bhd.* [2000] 5 MLY 337 (Malaysia); *Ner Tanrid Congregation of North Town v. Krivoruchko* 638 F. Supp. 2d 913 (N.D.Ill. 2009) (United States).

42 Reported decisions have been, for the most part, similar. Price fluctuations generally have not been accepted as excuses under Article 79 or other impediments that were known or could have been avoided. See, eg, *Commercial Court of Tongeren* [AR A/04/1960] (Finland 25/01/2005); *Arbitration Court of Budapest Chamber of Commerce and Industry* (Hungary 10/12/1996). But in a Belgian case a 70% price change was found to be an excusing contingency in the context of the particular agreement: *Seafoam International BV v. Lorraine Tubes, SA, Cour de Cassation* (Belgium 19/06/2009).

43 For an overall discussion of the series of cases, see *Alliance Concrete Singapore Pte Ltd v. Sato Kogyo (S) Pte Ltd* [2014] SGCA 35 (Singapore).

> Perhaps the time has come for a reconsideration of the frustration excuse. Indeed, it may be better to borrow language from the UCC [Uniform Commercial Code of the United States] and talk in terms of commercial practicality and to develop a rule that encourages re-negotiation with an attendant re-consideration of the risk allocation of the contract. The current default rule, which is very close to impossibility, is one that was derived from a seventeenth century case on impossibility and that was developed when trade and economic activity were not so closely intertwined among multiple jurisdictions around the world.[44]

VIII MISCELLANEOUS

There are a couple of other minor variations from the common law within the CISG, but none that cannot be avoided or otherwise managed.

For example, under the CISG an 'acceptance' is not effective until it has been received.[45] That is different from the rule of *Adams v Lindsell*[46] which established the general common law rule that an acceptance is effective upon dispatch – not receipt. Both are 'bright line' rules that, if known to the parties, can be managed easily. One rule allocates a risk to the offeror (who does not know that the offer has been accepted and a contract formed until receipt) and the other puts a risk on the offeree (the offer may be withdrawn after posting but before receipt). The original offeror can protect against risk by stating how the offer may be accepted. The offeree can protect against risk by using a fast, efficient and effective means of communicating an acceptance. With modern information technology the parties should be able to communicate rapidly and clearly, although time zones may create some issues. The parties can adopt the old fashioned 'belt and braces' approach as well by communicating through various mediums – email, facsimile, hard copies by courier, telephone, etc.

The CISG rule on non-conforming acceptances is essentially the same as the common law. Article 19(1) of the CISG states that a communication which purports to be an 'acceptance' but which contains 'additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.' Article 19(2) notes that minor variances which do not materially alter the offer do not turn the response into a rejection and counter-offer unless the offeror objects to the variances. Article 19(3) then goes on to identify a non-exclusive list of variances that would be material and the list includes just about any matter of substance (eg, time, payment terms, quantity, quality, place of delivery, dispute resolution). A common law lawyer should find little or nothing in Article 19 to be unexpected or difficult.[47]

---

44 H. Hunter, 'From Coronations to Sand Bans: Frustration and Force Majeure in the Twenty-first Century' (2011) *28 J. C. L. 61*, 77. The restrictions on trade that have resulted from the Covid-19 pandemic almost certainly will lead to litigation in which the issue of frustration will arise. The topic will continue to be discussed and debated. For a preliminary consideration, see Stephen Younger, Muhammad Faridi, and Timothy Smith, 'COVID-19's Impact on Commercial Transactions and Disputes' (2020) *92 N. Y. State Bar J.* 22.

45 CISG arts 15, 16 and 17 deal with offer, acceptance and timing issues.

46 106 ER 250 (KB 1818) (United Kingdom).

47 It is true that some courts have taken slightly different approaches to the aftermath of mis-matching offers and acceptances. Some follow the usual common law path. A non-conforming acceptance equals a rejection and counter-offer and then follow through to find the final offer and acceptance: see, eg, *Magellan International*

Article 16 of the CISG provides for 'firm offers', that is, offers which are irrevocable for the time stated or which an offeree could consider to have been intended to be irrevocable.[48] The notion of an offer being open without consideration for an indefinite period of time is consistent with the civil law in that consideration is not necessary to the formation of a bargain. Common law lawyers, of course, are not comfortable with the notion of an open ended offer unsupported by any consideration, but an offeror can easily avoid the possibility of being caught by an unexpected acceptance. The offer should state clearly that it is revocable, or, if the offeror so wishes, there can be a limited time stated for the offer to be held open. As 'master of the bargain', the offeror need not worry about Article 16, but should be aware of its presence in order to avoid an accidental 'acceptance'.

IX CONCLUSION

The question whether Malaysia should join the community of nations that have adopted the CISG may not be at the top of the list of priorities for the Government. There are undoubtedly many other more pressing issues, and Malaysian companies are managing successfully to engage with trading partners in many other countries, some of which are CISG member states and some of which are not. That being said, there are two points to consider in concluding this short essay.

First, the portions of the CISG which differ from the norms of the common law are relatively few in number and may be addressed in several ways that would do no harm to the traditional common law structure. Second, the CISG is a neutral law that both civil and common law countries have adopted and use regularly for sales transactions between commercial enterprises. Arbitrators and judges in the member states have become familiar with the CISG, and its use generally avoids any concerns that a party might have about 'homeward bias' in a foreign forum. There are substantial economies which are not in the CISG (e.g., United Kingdom, Indonesia, Thailand), but the member states account for 75% or more of the total world economy and include some of Malaysia's most valuable trading partners. Acceding to the CISG would bring the Malaysian economy into partnership with the largest trading nations in the world and would help to maintain the presence of common law thinking and interests within the CISG community.

Corporation v. Salzgitter Handel GmbH 76 F. Supp. 2d 919 (ND Ill 1999) (United States). But at least one major judgment applied the 'knock-out' rule and found that the differences between the offer and acceptance cancelled each other and applied the default rules of the law to fill the gaps: Federal Supreme Court of Germany [VIII ZR 304/00] (09/01/2002). But *contra*, Appellate Court of Cologne [16W 25/06] (Germany 24/05/2006). See generally K. Wildner, 'Art. 19 CISG: The German Approach to the Battle of the Forms in International Contract Law' (2008) *20 Pace Int'l. L. Rev*. 1.

[48] CISG art 16(2)(a) and (b).

A REVIEW OF THE ANTI-SEX TRAFFICKING APPROACH IN MALAYSIA

Haezreena Begum binti Abdul Hamid*

Abstract

The term 'sex trafficking' is commonly used to describe activities which involve trafficking for the purpose of sexual exploitation. However, the term 'sex trafficking' has become a highly contested term because of the diverse views held by state officials, anti-trafficking scholars and non-governmental organisations on sex work. Hypothetical viewpoints range from abolitionism and neo-abolitionism to those that see trafficking on a continuum of movement, as a human rights issue, inside a pro-sex work/labour system, and an expansion of religious/faith-based convictions. Despite these differing hypothetical viewpoints, the definition of sex trafficking tends to be dominated by state officials and other powerful groups who commonly position trafficking as a product of neo-abolitionism, crime control, and sex work deterrence. This has resulted in punitive measures which further victimises trafficked women. Therefore, this article aims to review the key debates surrounding the term 'sex trafficking' and the policing practices carried out by enforcement officers in 'protecting' migrant women who have been sexually trafficked. The article will also examine the ongoing victim-protection policies during the pandemic and provide recommendations to improve the current anti-trafficking framework.

Keywords: Sex trafficking, sex work, sex work debates, shelter, policing.

I INTRODUCTION

In Malaysia, the criminalisation of sex work has failed to deter sex trafficking activities. Instead, the sex trade is operated discreetly by various quarters and is reported to generate multibillion-dollar profits. Given the lucrative profits reaped from the human trade, Malaysia has been categorised as a hub and destination for sex trafficking activities in Southeast Asia.[1] In response to such ranking, the state carries out various types of interventions such as raid and rescue of potential trafficked victims. While such practices may be successful in removing women from a trafficking situation, the process

---

* LL.B, International Islamic University of Malaysia; LLM (International Human Rights Law), University of Leicester, United Kingdom; PhD (Criminology), Victoria University of Wellington, New Zealand; Senior Lecturer, Faculty of Law, Universiti Malaya, Malaysia; Advocate and Solicitor, High Court in Malaya (non-practising).

1 United States Department of State, *Trafficking in Persons Report 2018 – Malaysia* (2018) <https://my.usembassy.gov/our-relationship/official-reports/report-trafficking-in-persons-062918/>; United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* in United Nations (ed) (United Nations Publications, 2020).

is carried out through punitive ways which are harmful to women. Women who have been rescued will be placed in government-run shelters, compelled to act as witnesses for the prosecution, and forcefully repatriated after the trial or deposition pursuant to section 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIP). Such practices have received wide criticisms from human rights advocates and non-governmental organisations across the globe. Therefore, this article intends to expose such practices with the aim of devising better strategies to protect women from the continuum of harm. In doing so, this article will explore how Malaysia carries out its anti-trafficking activities and victim protection policies.

This article will also delve into the key debates surrounding the term 'sex trafficking', the demand for sex work, and the policing practices carried out by enforcement officers in 'protecting' migrant women who have been trafficked for sexual exploitation. The final discussion in this article will revolve around the impact of the Covid-19 pandemic on trafficking activities and the rules and regulations carried out in shelters. Within this discussion, this article will demonstrate the punitive methods used to rescue and protect women and argue that the existing states practices are incongruous with the human rights approach recommended by the international community. This article will conclude by providing practical recommendations to improve the current anti-trafficking framework and minimise harms on trafficked women.

II DEBATES ON SEX TRAFFICKING

Sex trafficking is a complex type of crime that occurs within and across national borders.[2] Sex trafficking includes recruiting, transporting, harbouring and/or controlling a person with the aim of exploiting the person for the purpose of sex.[3] In most cases, the flow of movement is from rural areas to cities; from poor nations to relatively more affluent ones; and from less developed countries to developed countries.[4] In this context, human beings are treated as marketable commodities and exploited in the sex industry.[5]

Although the United Nations 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (the Palermo Protocol)[6] prohibits acts of trafficking and lays out certain guidelines on protection of victims, the identification of trafficked victims remains complicated and blurry. Hypothetical viewpoints run from abolitionism and neo-abolitionism to those that see trafficking on a continuum of movement, as a human rights issue, inside a pro-sex work/labour system, and an expansion

---

2 Marie Segrave, Sanja Milivojevic, and Sharon Pickering, *Sex Trafficking: International Context And Response* (Routledge, 2009).

3 Ibid.

4 Vidyamali Samarasinghe, *Female Sex Trafficking in Asia, The Resiliency of Patriarchy in a Changing World* (Routledge, 2008).

5 Gretchen Clark Hammond and Mandy McGlone, 'Entry, Progression, Exit, and Service Provision for Survivors of Sex Trafficking: Implications for Effective Interventions' (2014) 1(4) *Global Social Welfare*, 151.

6 United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (entered into force on 25 Dec 2003).

of religious/faith-based convictions.[7] Human trafficking is also viewed as a subset of illegal migration or smuggling as it often involves the breaching of immigration controls.[8] Due to such diverse understanding, human trafficking is sometimes conflated with illegal migration and smuggling which obscures and obstructs a clear definition of trafficking.[9] This has resulted in multiple, sometimes oppositional, and shifting understandings of sex trafficking.[10] There also seems to be a lack of consensus in determining the number of individuals trafficked each year, which makes the statistics unreliable.[11] Thus, Dunne argues that the different understandings of sex trafficking create confusion as attention is drawn away from the 'real victims of trafficking' towards voluntary sex workers.[12] It also allows trafficking activities to flourish because of the multiple understanding of sex trafficking.

In general, the term 'sex trafficking' is used to describe activities which involves trafficking for the purpose of sexual exploitation. Based on such description, sex trafficking in the Malaysian context would refer to all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing, or receiving a person for the purpose of sexual exploitation (see section 2 of the ATIP). Therefore, any person who traffics an individual for the purpose of exploitation can be punished with imprisonment for a term not exceeding 15 years (see section 12 of the ATIP) and shall also be liable to fine. For child victims of trafficking, section 14 of the ATIP provides a term of imprisonment or 20 years and fine if convicted. Further offences relating to trafficking is stipulated under Part III of the ATIP. Exploitation is defined in section 2 of the ATIP as all forms of sexual exploitation, forced labour or services, slavery, servitude, any illegal activity, or the removal of human organs. Although the term 'exploitation' is not specifically defined in the Palermo Protocol or the ATIP, the learned High Court Judge in the case of *Ng Yu Wah v Public Prosecutor*[13] decreed that a trafficking case under section 14 of the ATIP requires the *mens rea* or mental element of the accused to be established. Therefore, it is vital for the prosecution to state the mode of exploitation in the charge sheet to meet the requirements of a trafficking charge.

While women who are trafficked for non-sexual purposes are commonly referred to as trafficked victims, those who are exploited for their sexual labour are often referred to as 'sex trafficked victims.' Scholars argue that this form of labelling specifically singles

---

7 G Soderlund, 'Running From The Rescuers: New U.S Crusades Against Sex Trafficking And The Rhetoric Of Abolition' (2005) 17 (3) *Fem Form,* 70.

8 Frank Laczko and Marco A. Gramegna, 'Developing Better Indicators of Human Trafficking' (2002) 10 (1) *The Brown Journal of World Affairs,* 182.

9 Liz Kelly, 'You Can Find Anything You Want: A Critical Reflection On Research On Trafficking In Persons Within And Into Europe' (2005) 43 (1-2) *International Migration*, 258.

10 Maggy Lee, 'Contested Definitions of Human Trafficking' in Maggy Lee (ed), *Trafficking and Global Crime Control* (Sage Publications Ltd, 2011).

11 Kelly (n 10) 235.

12 Joseph L. Dunne, 'Hijacked: How Efforts to Redefine the International Definition of Human Trafficking Threaten Its Purpose' (2012) 48 *Willamette Law Review*, 410.

13 [2012] 9 MLJ 326.

out sexual labour from other forms of exploitative labour.[14] According to them, 'sex trafficking' should be considered a form of labour trafficking because women are exploited for their sexual labour. However, in order to attract attention and support from the public, the term 'sex trafficking' has been used by governments, media, and non-governmental organisations to increase ratings (particularly for media), encourage funding, and promote political support.[15] Debates on sex trafficking are further complicated by debates regarding migration and sex work.[16] While there is no single definition, a migrant sex worker is generally referred to a person who moves from one location to another; a person who crosses state borders or stays within them; a person who may have various legal statuses; and a person who engages in any kind of sexual or erotic service in exchange for money, food, shelter, and resources.[17] Conversely, a trafficked sex worker would include anyone who has been forced, coerced, deceived, and exploited in the commercial sex trade.[18]

Further, sex trafficking definitions have converged around differing viewpoints on sex labour, individual organisation, and consent.[19] Sex worker organisations in Spain, Thailand, and India, for example, have argued that human trafficking is a problem brought in (or imposed) from outside the sector, motivated by a moralistic agenda.[20] In this instance, anti-sex work advocates hope to raise public awareness about the issue of human trafficking and persuade government leaders to impose tougher measures on traffickers or criminalise commercial sex.[21] In response to such lobbying and advocacy, many countries have taken measures to criminalise human trafficking and illegal border crossings. This includes systematic monitoring of the sex industry as well as regular raids on premises that offers sexual services.[22]

However, such interventions have resulted in the conflation of human trafficking and the voluntary cross-border movement of women for sex work. In this respect, migrant women who work in the sex industry are often branded as 'victims of trafficking', despite the fact that they made conscious and reasonable decisions to migrate and work in the sex industry.[23] Therefore, the Global Network of Sex Work Projects (NSWP) contends that the conflation of sex work and trafficking is a systematic effort to eliminate sex work and discourage women from migrating for the purpose of sex work, rather

---

[14] Sex work is not trafficking, NSWP (2011). <https://www.nswp.org/sites/nswp.org/files/SW%20is%20Not%20Trafficking.pdf>.

[15] Ronald Weitzer, The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade (2007) *Politics and Society* 35 (3) 450.

[16] Haezreena Begum Abdul Hamid, Sex Trafficking in Malaysia: Repositioning the Trafficked Victim and Victim Protection Mechanism (2019) 4 (1) *Southeast Asian Social Science Review*, 138.

[17] Elene Lam, *Behind The Rescue: How Anti-Trafficking Investigations and Policies Harm Migrant Sex Workers* (2018, Butterfly Print) 26.

[18] Wendy Chapkis, 'Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants' (2003) 17 (6) *Gender & Society*, 930.

[19] Lee (n 11) 16.

[20] Annalee Lepp and Borislav Gerasimov, 'Editorial: Gains And Challenges In The Global Movement For Sex Workers' Rights (2019) 12 (1) *Anti Trafficking Review*, 1.

[21] Weitzer (n 11).

[22] The Impact of Criminalisation on Sex Workers' Vulnerability to HIV and Violence' (December 2017) https://www.nswp.org/sites/nswp.org/files/impact_of_criminalisation_pb_prf01.pdf,

[23] Ibid. See also L. M. Agustin, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry* (2007, Zed Books) 56.

than a misunderstanding of terms. This is evident through the anti-trafficking laws, policies, and interventions which specifically target sex workers. For example, raids that are conducted by the police are specifically aimed at 'rescuing' sex workers from establishments that provide sexual services. Similarly, in Malaysia, the government continues to target commercial sex establishments and conduct large-scale police raids instead of investigating other forms of forced labour such as domestic servitude, factory, and construction sites, which is said to be an even more serious problem in the region.[24]

Thus, sex workers' organisations criticise such form of 'rescue' and argue that raids on workplaces and establishments that offer sexual services are not carried out in the name of trafficking, but to eliminate sex work altogether.[25] It is argued that such forms of 'rescue' create fear among migrant sex workers and isolate them from the mainstream society and generates distrust towards authorities.[26] This compromises women's access to support and services. Thus, the sex worker rights movement (particularly in the global south) has consistently demanded for sexual labour to be recognised as any other form of labour. They also strive to challenge any form of stigma, sexism, threat, and abuse, aimed at sex workers including those perpetrated by law enforcement. Apart from providing peer-based support and services, the group also advocates for the decriminalisation of sex work, human rights and labour rights for sex workers and aims to improve sex workers working conditions.[27] According to them, any legislation aimed at combating sex trafficking must go beyond criminalising traffickers to strengthening immigrants' and workers' rights.[28]

Therefore, sex worker groups argue that it is important to demarcate sex work and sex trafficking clearly.[29] This is because equating sex work to sex trafficking infantilizes women and depicts them as helpless and powerless individuals who are incapable of exercising their agency.[30] It also hinders effective responses and accurate identification of trafficked victims.[31] In this instance, scholars argue that there is an absence of a systematic mechanism on victim identification and referral.[32] This shows that the policy and ideological contexts within which trafficking is considered are complex and

---

24 United States Department of State, *Trafficking in Persons Report 2020 - Malaysia* (Report, 2020) <https://my.usembassy.gov/our-relationship/official-reports/2020-trafficking-in-persons-malaysia/>.

25 Sex work is not trafficking (n 15).

26 Ibid.

27 Lepp & Gerasimov (n 21).

28 Barbara Ehrenreich and Arlie Russell Hochschild, *'Global Woman: Nannies, Maids and Sex Workers in the New Economy'* (2002, Granta Books).

29 Catherine Healy, Calum Bennachie, and Raewyn Marshall, 'Harm Reduction And Sex Workers: A New Zealand Response: Taking The Harm Out Of The Law' in Richard Pates and Diane Riley (eds), *Harm Reduction in Substance Use and High-Risk Behaviour* (Blackwell Publishing Ltd, 2012).

30 Neil Howard and Mumtaz Lalani, 'The Politics Of Human Trafficking' (2008) 4 (1) *St Antony's International Review*, 8.

31 Empower Foundation, Hit & Run: The Impact Of Anti-Trafficking Policy And Practice On Sex Worker's Human Rights In Thailand (November 2019) <http://www.empowerfoundation.org/sexy_file/Hit%20and%20Run%20%20RATSW%20Eng%20online.pdf>.

32 Lee (n 11).

ambiguous.[33] As a result, state officials are given a wide discretion to assess and identify victims of trafficking. Within this, many voluntary sex workers are misidentified as being 'trafficked' and some women who are 'trafficked' have been misidentified as 'voluntary sex workers' because they do not display the image of a stereotypical victim.

According to Andrijasevic & Mai, the stereotypical imagery of a trafficked victim is of a young, naive foreign woman who was coerced into prostitution abroad.[34] While there have been instances of horrific violence,[35] many women are conscious of their decision to migrate and engage in sex work.[36] As Zimmerman and Watts note that 'not all women who have been trafficked are traumatised, consider themselves victims, detest their captors, or wish to escape or go home.'[37] On the contrary, women may view their 'traffickers' or 'recruiters' as employers or friends who have given them the opportunity to work abroad and earn an income. Therefore, this article argues that the 'rescue' practices can sometimes be problematic particularly for women who have willingly agreed to migrate and engage in sex work.

III MATERIAL AND METHODS

Given the nature of the study which focuses on sex trafficking and governmental policies, the use of secondary data analysis is thought to be a viable method for utilisation in the process of inquiry.[38] Secondary analysis is a structured approach with procedural and evaluative steps that explains how a researcher gathers, analyses, and interprets data in a report.[39] Hakim defines secondary analysis as 'any further analysis of an existing dataset which presents interpretations, conclusions or knowledge additional to, or different from, those presented in the first report on the inquiry as a whole and its main results.'[40] Most secondary method research starts with what is already known and investigated in the stated area of interest before moving on to what is still unknown about the subject. Therefore, secondary data processing is an analytical exercise that includes methodological and evaluative measures, much like gathering and analysing primary

---

[33] Thorburn Natalie, 'Practitioner Knowledge And Responsiveness To Victims of Sex Trafficking in Aotearoa/ New Zealand' (2017) 31 (2) *Women Studies Journal*, 81.

[34] Rutvica Andrijasevic, 'Beautiful Dead Bodies: Gender, Migration and Representation in Anti-Trafficking Campaigns' (2007) 86 (1) *Feminist Review*, 35.

[35] Liz Kelly, 'The Wrong Debate: Reflections On Why Force is Not the Only Issue with Respect to Trafficking in Women for Sexual Exploitation in the UK' (2003) 73 (1) *Feminist Review,* 141.

[36] Julie Cwikel and Elizabeth Hoban, 'Contentious Issues In Research On Trafficked Women Working In The Sex Industry: Study Design, Ethics, And Methodology' (2005) 42 (4) *The Journal of Sex Research,* 308.

[37] Cathy Zimmerman and Charlotte Watts, '*WHO Ethical And Safety Recommendations for Interviewing Trafficked Women' in World Health Organization*, (ed), World Health Organization (World Health Organization, 2003) 3.

[38] Melissa P. Johnston, 'Secondary Data Analysis: A Method of which the Time Has Come' (2014) 3 (1) *Qualitative and Quantitative Methods in Libraries*, 623.

[39] J. W. Creswell, *Research Design, 'Qualitative, Quantitative, and Mixed Methods Approaches* (Sage Publications, 3rd rev ed, 2009).

[40] C. Hakim, *Secondary Analysis In Social Research: A Guide To Data Sources And Method Examples* (George Allen & Uwin, 1982) 1.

data.[41] Even though criticisms have been directed towards the data obtained which is said to be out of date, inaccurate or lacking sufficient details, secondary data analysis offers methodological benefits and can contribute to the field of human trafficking through an alternate perspective. Furthermore, vast quantities of data are readily available through technological developments which allows data to be collected, compiled, and archived for the purpose of research.[42] Thus, utilizing existing data for research using secondary data analysis has become a viable method of research and it also allows data to be analysed through multiple readings and interpretations.

Given the viability of using secondary data analysis to examine data, interpretations, discourses and reports, this study uses a secondary method to conduct the study. The secondary data analysis is derived from primary and secondary sources. This includes books, journal articles, legislations, published reports, newspaper and magazine articles, websites of non-governmental organizations (NGOs) websites, and of governments, including the United States Department of State, covering the period from 1993 to 2021. Statistics are also taken from the United States Department of State website which provides a comprehensive report on countries annually and the data obtained is based on information given by the United States (US) embassy in Malaysia, state agencies and officials, NGOs and international organizations, fieldwork conducted in Malaysia, research, published reports, news and online articles, academic studies, and information submitted to their official email addresses. The most common keywords used for this analysis are terms and phrases which include: 'sex trafficking', 'sex work debates', 'migrant sex workers in Malaysia', 'prostitution', and 'shelter for trafficked victims', 'undocumented migrants', and 'demand for sex work'.

IV RESULTS AND DISCUSSION

Following a study of the literature, three main themes emerged. They are: the demand for sexual services in Malaysia, the protection of victims, and prosecution of traffickers.

A Demand

Although Malaysia criminalises sex work, the demand and supply of migrant women in the sex trade continue to escalate as the government did not make efforts to reduce the demand for commercial sex.[43] According to Cauduro, Nicola, Lombardi, & Ruspini[44] and Marmo & Forgia,[45] the sex industry depends on the volume of demand and the supply of women. The significance of demand as a 'pull factor' is contained in Article 9 of the

---

41 D. M. Doolan and E. S. Froelicher, 'Using An Existing Data Set To Answer New Research Questions: A Methodological Review' (2009) 23 (3) *Research and Theory for Nursing Practice*, 207.

42 Johnston (n 40).

43 United States Department of State (n 26).

44 Andrea Cauduro, 'Review Of The Research Studies On The Demand For Prostitution In The European Union And Beyond' in Andrea Cauduro et al. (ed), *Prostitution And Human Trafficking: Focus On Clients* (Springer, 2009).

45 Marinella Marmo and Rebecca La Forgia, 'Inclusive National Governance And Trafficked Women In Australia: Otherness And Local Demand' (2008) 3 (1) *Asian Criminology*, 184.

Palermo Protocol which calls upon nation states to reduce demand for trafficked labour.[46] The demand for women mainly comes from male clients as they come into direct contact with women.[47] This is echoed by Raymond who argues that demand is gendered and specifically fuelled by men. However, their identities remain concealed and kept with utmost secrecy.[48] Nevertheless, research shows that customers who purchase sexual services from females (for sexual gratification, entertainment, and violence) are men of all ages, ethnicities, nationalities, and socio-economic backgrounds.[49]

In this context, the demand for sex workers comes from men from wealthier countries while the supply comes from women from the poorer countries.[50] This situation reflects the current setting in Malaysia where the majority of sex workers (trafficked and voluntary) originate from countries such as Vietnam, Thailand, Indonesia, China, and the Philippines.[51] Many of them are faced with pressing issues such as poverty, unemployment, gender inequality, low-wages and are unable to access social welfare programmes. To them, sex work could generate far more income than other wage labour available to them back home. According to a newspaper report, sex workers could earn between RM450 (for 45 minutes) to RM7,000 (per night) per customer.[52] The worker would be entitled to 60 percent of the amount while the remaining 40 percent would be paid to the employer.[53] This amount is considered to be lucrative for women as it fulfils their expectations of themselves and as breadwinners for their families.

According to Aronowitz and Koning, there is a general consumer demand for sex workers which is sometimes met by trafficked women.[54] However, this does not mean that clients prefer to purchase the labour of trafficked women, but because trafficked women sometimes possess certain specific characteristics that are demanded by men.[55] The demand may be for women from certain countries, ethnic groups, or ages (particularly young children) or having a certain attribute (being a virgin).[56] In this regard, it is unclear if states are expected to criminalise the use of a trafficked victim's services. While this remains blurry, the European Trafficking Directive allows Member States to recognise

---

46 Erin O'Brien, Belinda Carpenter, and Sharon Hayes, 'Sex Trafficking and Moral Harm: Politicised Understandings and Depictions of the Trafficked Experience' (2013) 21 (4) *The Official Journal of the ASC Division on Critical Criminology and the ACJS Section on Critical Criminology,* 408.

47 B. Anderson and O'Connell Davidson, 'Is Trafficking In Human Beings Demand Driven? A Multi-Country Pilot Study' (2003, International Organisation for Migration).

48 Donna Hughes, 'The Demand For Victims Of Sex Trafficking' (2005) 26 (1) *Women's Studies Program,* 37; Janice G. Raymond, 'Legalizing the Buyers as Sexual Consumers' (2004) 10 (1) *Violence Against Women,* 1168.

49 R. B. Flowers, 'The Prostitution Of Women And Girls' (McFarland & Company, Inc, 1998); Teela Sanders, '*Paying for Pleasure: Men Who Buy Sex*' (Routledge, 2008).

50 Siddharth Kara, 'Sex Trafficking: An Overview' in Siddharth Kara (ed), *Sex Trafficking: Inside The Business Of Modern Slavery* (Columbia University Press, 2009).

51 Noraini Hassan Basri, 'Perangkap Seks Wanita Asing' *Kosmo* (online, 31 March 2018) <https://www.kosmo.com.my/jurnal/perangkap-seks-wanita-asing-1.638432>.

52 Ibid.

53 Ibid.

54 Alexis A. Aronowitz and Anneke Koning, 'Understanding Human Trafficking As A Market System: Addressing The Demand Side Of Trafficking For Sexual Exploitation' (2014) 85 (3/4) *Cairn.Info,* 672.

55 Ibid.

56 Ibid.

the possibility of enforcing sanctions on users of any service extracted from a victim, if they are aware that the person is trafficked.[57] The Directive's preamble states that further criminalization could include the behaviour of employers of lawfully staying third-country citizens, as well as those who purchase sexual services from a trafficked person regardless of their nationality.[58] In this regard, Sweden has introduced a sex purchase law or locally known as 'sexköpslagen' or the Swedish/Demand/Nordic Model since 1999[59] where paying for sex is defined as a form of 'sexual abuse'.[60]

The Nordic model seeks to eliminate sex labour by focusing on demand and decriminalising those who sell sex in order to protect sex workers.[61] The Nordic Model criminalises the purchase of commercial sex and provides an exit strategy for women and children from sex work.[62] The Nordic Model has also been passed in Norway in 2009, Iceland in 2009, Canada in 2014, Northern Ireland in 2015 and France in 2016.[63] However, the Nordic Model has been widely critiqued by scholars who argue that the Nordic model is merely a transfer of 'rhetoric and ideology'.[64] Based on a research conducted in Sweden, Levy & Jakobsson argue that since there is no credible evidence showing any overall reduction in people selling sex, the Nordic model law has failed to reduce levels of sex work.[65] Instead, the law has increased the risk of certain types of sex work (particularly street-based sex workers) by giving women less time to negotiate their transactions with clients before getting into a vehicle or leaving the street with the client to avoid police detection.[66] As a result, sex workers have less time to determine a client's potential risk, negotiate which services will be given, and negotiate payment.[67]

While Sweden, Norway, Iceland, Canada, and North Ireland continue to impose its sex purchase law, other countries such as Malaysia continue to criminalise sex workers, including those who have been trafficked. As a result of such actions, the United States has regularly criticised the Malaysian government for failing to uphold victim protection policies, and upholding victim's human rights and has placed Malaysia at Tier Three

---

57 Anne T Gallagher and Nicole Karlebach, *Prosecution Of Trafficking In Persons Cases: Integrating A Human Rights-Based Approach In The Administration Of Criminal Justice* (Bepress, 2011).

58 Ibid.

59 Jay Levy and Pye Jakobsson, 'Sweden's Abolitionist Discourse And Law: Effects On The Dynamics Of Swedish Sex Work And On The Lives Of Sweden's Sex Workers' (2014) 14 (5) *Criminology & Criminal Justice.* 599.

60 Carol Harrington, 'The Politics Of Rescue: Peacekeeping And Anti-Trafficking Programmes in Bosnia-Herzegovina and Kosovo' (2005) 17 (2) *International Feminist Journal of Politics*, 180.

61 Ibid.

62 Ivana Bacik, '#MeToo, Consent And Prostitution – The Irish Law Reform Experience' (2021) 86 (1) *Women's Studies International Forum, 102457*.

63 Laura McMenzie, Ian R Cook, and Mary Laing, 'Criminological Policy Mobilities And Sex Work: Understanding The Movement Of The 'Swedish Model' to Northern Ireland' (2019) 59 (5) *The British Journal of Criminology*, 1210.

64 Sarah Kingston and Terry Thomas, 'No Model In Practice: A "Nordic Model" To Respond To Prostitution?' (2018) 71(1) *Crime, Law and Social Change*, 423.

65 Levy and Jakobsson (n 63).

66 Ibid.

67 The Global Network of Sex Work Projects, *The Real Impact of the Swedish Model on Sex Workers: Impacts of The Sex Purchase Law: Street-Based Sex Work And Levels Of Sex Work* (November 2015) <https://www.nswp.org/sites/nswp.org/files/2.%20Impacts%20of%20the%20Sex%20Purchase%20Law%20-%20Street-Based%20Sex%20Work%20and%20Levels%20of%20Sex%20work%2C%20Swedish%20Model%20Advocacy%20Toolkit%2C%20NSWP%20-%20December%202014.pdf >.

in its 2021 Trafficking in Persons Report. This is despite the fact that the United States (except for some cities in state of Nevada) criminalises sex work and do not recognise the legal status of sex work. Criticisms have also been made on the number of prosecutions carried out by the Malaysian government and their failure to coordinate with foreign law enforcement to investigate or prosecute trafficking cases. As a result, the number of conviction remains low compared to the number of investigations and number victims 'rescued' by enforcement officers.

B 'Protection'

Migrant sex workers who are 'rescued' are compelled to live in 'shelters' while those who 'chose' to work in brothels or establishments that offers sexual services will be categorised as offenders and charged in court for two counts – as illegal immigrants and engaging with prostitution activities.[68] In this situation, many of them are faced with xenophobic slurs and sentiments due to the precarity of their immigration status. Other problems they face include the lack of access to health care, counselling, translation and legal services, vulnerability to abuse and violence, and the threat of detention and deportation.[69] Women who have been 'rescued' from their traffickers are detained in shelters, forced to undergo judicial processing, and are expected to adhere to all rules and regulations before they are repatriated. The act of 'rescue' and detaining women in shelters is thought to be the 'ideal' mode of protecting them. For example, a newspaper report considered 'shelter homes a temporary haven for sex-trafficking victims' (Malay Mail Online dated 18/04/2016).[70] In reality, these 'shelters' resemble a carceral institution which restricts women's mobility and communication and imposes punitive rules and regulations.[71]

The Ministry of Women, Family, and Community Development (Ministry) operates all the eight shelters for trafficked victims in Malaysia. These shelters are armed with high levels of security, including barbed wire fences and security guards, which are intended to prevent women from escaping rather than to protect them from harm.[72] According to the ATIP, trafficked women are given an initial 21-day interim protection order (for suspected trafficking victims) and/or a subsequent 90-day protection order (for certified trafficking victims) from the court. The period of detention may also be extended by the Court to facilitate the prosecution's case against the traffickers, since the prosecutors

---

68 Sani S. Ibrahim, Adlina Ab. Halim, and Zatul Himmah Adnan, 'A Review of Human Trafficking Issues in Malaysia and Nigeria' (2019) 27 (1) *Pertanika Journal Social Science and Humanities*, 15.

69 Lepp and Gerasimov (n 21).

70 Jonathan Edward, 'Shelter Homes A Temporary Haven For Sex-Trafficking Victims' *Malaymail* (Online, 18 April 2016) <http://www.themalaymailonline.com/malaysia/article/shelter-homes-a-temporary-haven-for-sex-trafficking-victims#32uFbAVU4Euol1yQ.97>.

71 Anne Gallagher and Elaine Pearson, 'The High Cost Of Freedom: A Legal And Policy Analysis Of Shelter Detention For Victims Of Trafficking' (2010) 32(1) *Human Rights Quarterly*, 14.

72 United Nations Human Rights Council, *Report of the Special Rapporteur On Trafficking In Persons, Especially Women And Children* (June, 2015) <https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fwww.ohchr.org%2FEN%2FHRBodies%2FHRC%2FRegularSessions%2FSession29%2FDocuments%2FA_HRC_29_38_Add.1_AUV.doc>; United States Department of State, *Trafficking in Persons Report 2012 – Malaysia* (2012) <https://www.state.gov/documents/organization/192596.pdf>.

mainly rely on the cooperation and testimonies of the women.[73] Gallagher[74] and Lee[75] describe these shelters as resembling immigration detention centres and not complying with the guidelines contained in the 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (2002) (the Guidelines).

Guideline 1(6) states that all anti-trafficking measures should protect the trafficked victim's freedom of movement and should not infringe upon the victim's rights. Guideline 6 guarantees that victims' access to refuge is not conditional on their ability to testify in criminal proceedings, and that victims are not held in immigrant detention centres, other detention facilities, or vagrant houses. However, the Malaysian government does not seem to abide by this guideline because trafficked women are forced to live in shelters. The Malaysian government however claims that victims of human trafficking have agreed to limit their own freedom of movement and therefore, their stay in the shelter should not be regarded as detention.[76] Such assertion however is not supported by any written document or law which gives an option for victims to reject shelter and shelter conditions. In this regard, state authorities often claim that the detention of victims is necessary to secure their presence and cooperation in the criminal prosecution of their traffickers.[77] This shows how shelters are being forced upon trafficked women and being made contingent upon women testifying in court, which contravenes Guideline 6 (see above).

Sheltered women are forced to wear uniforms, required to undergo multiple interviews or interrogation with government officials, held under strict surveillance, prohibited from communicating with anyone outside the shelter, and are deprived of medical, legal, translation and psychological services.[78] As a result, women feel victimised and stressed having to live in these shelters. In response to the repressive treatments accorded to trafficked women, non-governmental organisations such as The Human Rights Commission of Malaysia[79] (SUHAKAM) and Tenaganita[80] have taken on the difficult role of tracking human rights abuses and violence against migrants that occur in shelters or of similar settings.

Over the years, NGOs have raised concerns about overcrowding, poor living conditions, restriction of movement, and physical and verbal abuse towards migrants detained in the shelters.[81] They have continuously imposed pressure on the Malaysian government to adopt non-punitive practices and to improve treatments and conditions. The Human Rights Commission of Malaysia (SUHAKAM) also urged the government to discuss the limited rights of human trafficking victims in order to protect victims and

---

73 United States Department of State, *Trafficking in Persons Report 2016 – Malaysia* (2016) <https://www.state.gov/documents/organization/258880.pdf>.

74 Gallagher and Pearson (n 75).

75 Lee (n 11).

76 Gallagher and Pearson (n 75).

77 Ibid.

78 United States Department of State, *Trafficking in Persons Report 2014 – Malaysia* (2014) <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226770.htm>.

79 'Human Trafficking', *Suhakam*, (2013) <http://www.suhakam.org.my/human-trafficking/>.

80 'Tenaganita: The Truth About Migrants in Malaysia', *Women's Aid Organisation* (May 2012) <http://www.wao.org.my/news_details.php?nid=243&ntitle=TENAGANITA:+The+Truth+About+Migrants+in+Malaysia>.

81 Ibid.

prevent trafficking with the help of civil society organisations, diplomatic missions, and other related stakeholders.[82] In response, the Malaysian government has appointed a few local NGOs known as Suka Society,[83] Good Shepherd, Persatuan Salimah, and Tenaganita to conduct various sports activities, counselling, and religious programmes in the shelters.[84] These NGOs are given a funding allocation by the government to organise activities for trafficked women, but they cannot offer any legal advice nor advise the shelter on improving its human rights standards.[85]

To improve victim protection policies, the Malaysian government introduced new laws in 2015, allowing trafficked persons to work (section 51A (1) (b) of the ATIP) or move freely (section 51A (1) (a) of the ATIP) after they have been rescued.[86] The right to work allows trafficked persons to work and reside outside of the shelter. However, they are required to undergo a stringent risk assessment process, which involves security and medical examinations, and approval by the 'Council of Anti-Trafficking in Persons and Migrant Smuggling' (MAPO) (section 51A (2) of the ATIP).[87] Even though such laws have provided some flexibility to the existing rules, only a small percentage of trafficked women have been given the right to work. This is due to the bureaucratic delays (including a shortage of counsellors willing to complete necessary mental health evaluations), risk-averse and paternalistic attitudes toward victims, and a lack of victim participation in available job opportunities due to low wages.[88] In 2017, only two people were issued with work visas out of 721 identified victims, because the majority of the victims declined to participate in the programme and preferred to return home.[89] Special immigration passes which allows freedom of movement were only issued to 91 individuals in 2017,[90] 68 passes in 2019 for 97 confirmed victims and 45 passes for 82 confirmed victims.[91]

In practice, officials have restricted travel outside the shelter to two to three times a month with a chaperone (United States Department of State, 2017).[92] The government is also reluctant to issue special passes to female victims of trafficking (United States Department of State, 2020).[93] This shows how the state authorities control women's mobility, even though they are entitled to their freedom of movement under Article 13 of the Universal Declaration of Human Rights (UDHR). It also demonstrates the enhanced

---

82 Akil Yunus, 'Suhakam: Significant Improvement Needed After Malaysia Sinks To Lowest Ever Ranking In Human Trafficking Report' *The Star* (online, 22 June 2014) <https://www.thestar.com.my/news/nation/2014/06/22/suhakam-anti-trafficking-report/>.

83 Suka Society, Protecting Trafficked Survivors (2015) <http://www.sukasociety.org/protecting-trafficked-survivors/>.

84 United States Department of State, *Trafficking in Persons Report 2017 – Malaysia* (2017) <https://www.state.gov/j/tip/rls/tiprpt/countries/2017/271235.htm>.

85 Ibid.

86 United States Department of State, *Trafficking in Persons Report 2016 – Malaysia* (2016) <https://www.state.gov/documents/organization/258880.pdf>.

87 United States Department of State (n 89).

88 Ibid.

89 United States Department of State (n1).

90 Ibid.

91 United States Department of State (n 26).

92 United States Department of State (n 89).

93 United States Department of State (n 26).

security imposed on female sex trafficked victims. The complexities associated with obtaining freedom of movement suggest that legislation and policing are not protecting women,[94] but are being used to control women. This is because the police focus on prosecuting traffickers, and women's testimony is vital to prove the prosecution's case and convict the traffickers.[95] This raises the question of whether trafficked women are really seen as 'true victims' and viewed as such, or whether they are simply used as a tool to assist the government in their fight against sex trafficking.

Although supporters of shelter detention commonly justify detention with the need to protect victims of trafficking, detention of trafficking victims is not a universal practice.[96] The right of victims of human trafficking to freedom of movement is upheld in many countries, and assistance and protection are given based on genuinely informed consent.[97] However, this is not the case in Malaysia as the provision of living in a shelter is compulsory for women who have been classified as trafficked (section 51 (3) of the ATIP). Therefore, shelter detention has become one of the most problematic practices that is justified by the anti-trafficking imperative. Such situation has worsened since the emergence of Covid-19 where women have been forced to stay in shelters for a long period of time due to the closure of countries' borders, cancelled flights, minimum hours of operation in courts and government agencies.

C Prosecution

Malaysia adopts the 3P approach (prosecute, protect, and prevent). However, the focus is on prosecution of traffickers while victim protection and prevention of trafficking remains secondary.[98] While prosecuting traffickers is a significant move towards eliminating sex trafficking, it does not always help to mitigate or relieve the pain and suffering of those who have been trafficked. In some cases, women do not wish to go through the court process, or to witness their traffickers being tried in court.[99] This often happens when women are detained in a shelter for a long period of time awaiting trial, as they tend to become emotionally unstable and stressed in those conditions.[100] In this instance, their credibility is easily challenged by the defence counsel and their testimonies are not always useful in court.[101] In some cases, women fear the consequences that may occur following the prosecution of their traffickers. Such risks include the danger of being beaten, kidnapped, raped, or killed by other members of the syndicate.[102] They may fear for the safety of their families and worry about being re-trafficked. Given that the

[94] Deborah Brock et al., 'Migrant Sex Work: A Roundtable Analysis' (2000) 2(1) *Canadian Women Studies,* 44.
[95] Zuraini Ab Hamid, Norjihan Ab Aziz, and Noorshuhadawati Mohamad Amin, 'Challenges Encountered By Malaysian Prosecutors In Human Trafficking' (2018) 1 (1) *International Journal of Asian Social Science,* 21.
[96] Gallagher and Pearson (n 75).
[97] Ibid.
[98] Mohamed Y. Mattar, 'Human Security Of State Security - The Overriding Threat In Trafficking In Persons' (2006) 1 *Intercultural Human Rights Law Review*, 249.
[99] Segrave, Milivojevic and Pickering (n 3).
[100] Hamid, Aziz, and Amin (n 100).
[101] Ibid.
[102] Segrave, Milivojevic and Pickering (n 3).

victim's evidence is vital in a trafficking trial, women's reluctance to testify against their traffickers could jeopardise the prosecution's case.

In addition, technical defects on trafficking charges, poor quality of investigation, the lack of will, and the failure to prove exploitation are among the reasons for acquittal in trafficking offences. For example, in the High Court appeal case of *Public Prosecutor v Hwong Yu Hee & Ors,*[103] the respondents complained that the deputy public prosecutor ('DPP') was not only absent from court, but seemed uninterested in prosecuting the appeal as the submissions were filed at the last minute. The prosecution's notice of appeal also failed to state the grounds the prosecution was appealing against. Therefore, the learned Judge was of the view that the prosecution failed to establish a link or a nexus between the traffickers (accused) and the victims based on the prevailing evidence. In this case, three accused were jointly charged[104] for trafficking five women from Indonesia for sexual exploitation pursuant to section 12 of the ATIP but were acquitted based on the lack of evidence. The prosecution's appeal was struck out and the acquittals were affirmed because of the lack of evidence, lackadaisical attitude of the DPP, and the failure to prove common intention among the accused.

Because of these obstacles, the number of prosecutions for sex trafficking offences has been low in comparison to the number of victims reported by the enforcement agencies.[105] This is particularly noticeable in 2020 and 2021 where the number of cases has reduced considerably due to the outbreak of Covid-19. For example, from April 2020 to March 2021, the government only conducted 118 human trafficking investigations, initiated 79 prosecutions, and secured 25 convictions.[106] The number of investigations was also relatively low from the second half of 2019 to February 2020. During this period, the government only conducted 277 investigations, initiated 20 prosecutions, and convicted 20 individuals, compared to 281 investigations, 50 prosecutions, and 50 convictions in 2019.[107] The decrease in the number of cases is attributed to the restricted court operations and reduced investigations of potential trafficking crimes. It is also attributed to the failure on the part of the authorities to identify trafficking victims during the series of raids conducted on undocumented migrants in order to control the spread of the pandemic. As a result, many trafficked victims may have been misidentified as immigration violators and charged in court for immigration offences. This impedes anti-trafficking law enforcement and victim identification efforts.

---

[103] [2015] 11 MLJ 138.

[104] See s. 34 of the Penal Code on common intention.

[105] Human Rights Commission of Malaysia, *Annual Report* (2016) <https://drive.google.com/file/d/0B6FQ7SONa3PRLVFYOHoyODc0eDg/view?resourcekey=0-al4Umwx6V-5Lr6SdsGJFjw>; United Nations Human Rights Office of the High Commisioner, *Human rights and human trafficking: Fact Sheet No. 36* (2014) <http://www.ohchr.org/Documents/Publications/FS36_en.pdf>.

[106] United States Department of State, *Trafficking in Persons Report 2021 – Malaysia* (2021) <https://www.state.gov/wp-content/uploads/2021/07/TIP_Report_Final_20210701.pdf>.

[107] United States Department of State (n 26).

V THE COVID-19 PANDEMIC

The number of trafficked people identified and rescued in 2020 had dropped considerably given the rise of Covid-19. From April 2020 to March 2021, the government identified and confirmed 119 trafficking victims among 487 potential victims. Of the confirmed victims, 72 were adult women and 47 were men or children. According to The Royal Malaysian Police, only 6,142 migrant sex workers and 988 local sex workers were arrested in 2020 compared to 12,023 migrant sex workers and 1,106 local sex workers in 2019.[108] From 2019 to February 2020, the Malaysian government identified 2,229 potential victims and confirmed 82 victims of trafficking, an increase compared to 1,305 potential victims and confirmed 97 victims in 2019.[109] Of the 82 confirmed victims, 55 were adult women.[110]

The multiple restrictions imposed by the government during the pandemic has pushed trafficking activities further underground.[111] Despite the fact that imposed quarantine, curfews and lockdowns, travel bans, and restrictions on economic activity and public life can seem to deter crime, the United Nations reports that online sexual harassment by online content and pornography has increased, making it harder to track and detect.[112] In Malaysia, sexual services are now being offered by syndicates using chat platforms such as Telegram and We Chat.[113] Given the present economic turmoil as a result of the prolonged lockdown and the need to recuperate from financial losses, many traffickers offer attractive sex packages to clients. For example, a complete package of sexual services which includes sexual arousement, intercourse, and oral sex are available between the price range of RM180 to RM225 which is much cheaper than what was normally offered.[114] There are also syndicates that offers packages known as '6 for 1'.[115] For this package, customers are required to make a one-time payment of RM235, and are given a 'loyalty' card. Those cards will be stamped during each visit and the customer will be entitled to a free service on the seventh visit.

These practices indicate lack of caution and concern on the spread of the pandemic and puts trafficked victims at risk of contracting the virus. To worsen the situation, trafficked women are less equipped to protect themselves, and have less access to

---

108 Nurfarahin Hussin, 'Pelacur Musim PKP Tak Laku' *Utusan* (online, 24 January 2021) <https://www.utusan.com.my/berita/2021/01/pelacur-musim-pkp-tak-laku/>.

109 United States Department of State (n 26).

110 Ibid.

111 Gerald Flynn and Andreas Schloenhardt, 'COVID-19 Pandemic Creating Conditions Ripe For Human Trafficking, Experts Fear' *Globe* (online, 5 June 2020) <https://southeastasiaglobe.com/human-trafficking-southeast-asia-covid/>; United Nations Office of Drugs and Crime (n 2).

112 Adriana Zehbrauskas, 'Social Media-Based Trafficking On The Rise During Coronavirus Pandemic' *UN News* (online, 11 November 2020) <https://news.un.org/en/story/2020/11/1077402>.

113 Thasha Jayamanogaran, 'In Fighting Covid-19, Malaysia Goes All Out Against Human Traffickers' *Malay Mail* (online, 29 June 2020) <https://www.malaymail.com/news/malaysia/2020/06/29/in-fighting-covid-19-malaysia-goes-all-out-against-human-traffickers/1879670>.

114 Muhammad Aminnuraliff, 'Pusat Urut Tawar Khidmat Seks Ketika PKP Diserbu' *Sinar Harian* (online, 11 February 2011) <https://www.sinarharian.com.my/article/123530/BERITA/Semasa/Pusat-urut-tawar-khidmat-seks-ketika-PKP-diserbu>.

115 Nor Azizah Mokhtar, 'Sindiket Pelacuran '6 Kali Bayar, 1 Kali Percuma' Diserbu' *BH Online* (online, 31 December 2020) <https://www.bharian.com.my/berita/kes/2020/12/770579/sindiket-pelacuran-6-kali-bayar-1-kali-percuma-diserbu>.

healthcare.[116] Thus, there have been concerns that the regulations imposed during the pandemic could obstruct victims of trafficking from being identified and reaching out for assistance.[117] Although Malaysia's Communications and Multimedia Act 1988 (CAMA), and the Personal Data Protection Act 2010 (PDPA)' are used to monitor and prevent criminal and commercial sexual activities over the internet, the sex industry continues to thrive, and traffickers advertise and exploit women with impunity using these platforms.[118] In this context, the United Nations Office on Drugs and Crime (UNODC) suggests that human traffickers are adapting their business models to the pandemic's 'new normal', especially through the use of modern communication technologies.[119]

In response to such abuse, the government launched a series of immigration raids on undocumented migrants and refugees in various cities. An example can be seen on the eve of May 1, 2020, where hundreds of undocumented migrant workers and refugees were detained in a major raid near Jalan Masjid India in Kuala Lumpur.[120] The raid was launched despite the government's assurances that undocumented migrant workers and refugees would have little to fear if they came forward to be screened for COVID-19.[121] It is also worth noting that the government did not properly test asylum seekers and refugees for signs of human trafficking, and they were not provided with interpreters to ensure prompt and effective contact with possible victims.[122] Thousands of undocumented workers and refugees, including women and children, were rounded up and detained in immigration detention centres in several areas in the Klang Valley, including the Kuala Lumpur Wholesale Market, Selayang, and Gombak.[123]

Such form of practices has only pushed trafficked persons into hiding and trafficking activities further underground. Thus, migrant activists and non-governmental organisations (NGOs) such as Tenaganita and Refuge for Refugees have criticised the government for arresting and detaining undocumented workers and refugees, arguing that the government had broken its promise that there would be no repercussions if marginalised undocumented migrants and refugees came forward to be checked.[124] Furthermore, migrants, especially those with an irregular legal status, are often excluded from social security initiatives implemented by governments to assist those impacted by job losses and economic

---

116 United Nations Office Of Drugs and Crime, *Impact Of The Covid-19 Pandemic On Trafficking In Persons: Preliminary Findings And Messaging Based On Rapid Stocktaking* (2020) <https://www.un.org/ruleoflaw/wp-content/uploads/2020/05/Thematic-Brief-on-COVID-19-EN-ver.21.pdf>.

117 Ibid.

118 Athira Nortajuddin, 'Social Media-Based Traffickers On The Rise' *The Asean Post* (online, 7 February 2020) <https://theaseanpost.com/article/social-media-based-traffickers-rise>.

119 Flynn and Schloenhardt (n 116).

120 'Malaysia Rounds Up Migrants To Contain Coronavirus, U.N. Warns Of Detention Risks' *Reuters* (online, 2 May 2020) <https://www.reuters.com/article/us-health-coronavirus-malaysia-migrants/malaysia-rounding-up-migrants-to-contain-coronavirus-spread-police-say-idUSKBN22E04A?il=0>.

121 Andika Wahab, 'The Outbreak Of Covid-19 In Malaysia: Pushing Migrant Workers At The Margin' (2020) 2(1) *Social Science & Humanities*, 1.

122 United States Department of State (n 26).

123 'Immigration Dept Nabs 1,368 Undocumented Migrants In Selayang Market, Including 98 Kids' *Malay Mail* (online, 12 May 2020) <https://www.malaymail.com/news/malaysia/2020/05/12/immigration-dept-nabs-1368-undocumented-migrants-in-selayang-market-includi/1865505>.

124 Wahab (127).

downturn.[125] Therefore, migrant activists and NGOs have imposed pressure on the government to improve its treatment towards trafficked women by addressing issues of discrimination and unequal treatment and adhering to the guidelines contained in the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking. Yet, unless there is an ideological shift in Malaysian politics and media, the pressure from NGOs may remain unsuccessful.

VI RECOMMENDATIONS

It is imperative to acknowledge the fact that trafficked women are not offenders and should not be treated as criminals or processed as offenders. Although the Malaysian government has incorporated the Palermo Protocol into the ATIP, it has not adhered to most of the guidelines stated in the Recommended Principles and Guidelines on Human Rights and Human Trafficking. Incorporating and enforcing these guidelines could provide better support and assistance to women. This includes providing interpretation and translation services, counselling, medical care, legal advice, and the option for women to choose if they want to live in a shelter or otherwise. Efforts should also be made to raise awareness among women about their rights while in state custody. Therefore, state authorities need to develop a comprehensive human rights approach when dealing with women. Courses on human trafficking and handling victims should be provided to first responders and officials who are in contact with migrant women. These courses should include the participation of NGOs, as their involvement could assist the state officials in understanding women's needs.

Second, the definition of trafficking needs to be amended to clarify any ambiguities and uncertainty of the meaning of trafficking. This has given the police and immigration wide discretionary powers to identify trafficked victims. Given this, state officials often conflate voluntary sex work and trafficked sex work. Such conflation not only victimises the women but may also affect the prosecution's case in court because misidentification of victims may harm victims and they may be reluctant to testify in court. Furthermore, identifying all migrant sex workers as victims of trafficking inhibits sex workers from taking a constructive role in fighting human trafficking in the sex industry.[126] In this instance, all sex workers will be at risk of being 'detained' or 'rescued'.

Third, to consider granting women temporary visas and the right to work and reside outside a shelter without any bureaucratic delay or supervision. This would not only reduce the overcrowding in the shelter but also give the opportunity for women to work and support their families. The granting of T-visas, for example, has been implemented in New Zealand, Australia, and the United States. This type of visa provides relief to immigrant victims of human trafficking by allowing them to reside and work in the country.[127]

---

[125] Flynn and Schloenhardt (116).

[126] Empower Foundation (n 33).

[127] Parliament of Australia, *People Trafficking: An Update on Australia's Response* (2008) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0809/09rp05>.

Fourth, to decriminalise sex work. This would, however, be difficult to achieve given the sentiment and religious beliefs towards sex work in Malaysia. However, the decriminalisation of sex work allows sex workers to work more safely, thereby reducing marginalisation and vulnerability.[128] By framing sex work as an issue of crime, with migrant sex workers being both the perpetrators of crime and the potential victims of exploitative crime, the state is able to legitimise its actions against migrant sex workers, while ignoring the harm done to migrant sex workers by the state.[129] Therefore, decriminalisation of sex work is important in ensuring that women are given the rights to work in safer conditions. Although the suggestion to decriminalise sex work is bound to be resisted by politicians and the larger public, efforts can be made to study how decriminalisation of sex work has worked in other countries so that steps can be taken to remove laws that criminalise sex work in Malaysia.

VII CONCLUSION

The UN Human Rights Council stressed that it is the obligation of States to protect the human rights of migrants, regardless of their status.[130] Despite such recommendations, trafficked women continue to be policed and victimised through state practices. This is because the Malaysian government appears to be more focused on imposing stringent punishment on migrant sex workers and has retained immigration laws which criminalise foreign sex workers. As a result, women fear the authorities, and many feel victimised during state custody. Women who are deemed to be trafficked often occupy dual identities: of victims and offenders. On the one hand, state officials often associate women's involvement in sex work with their victimisation, their lack of agency and helplessness. As a result, attempts will be made by state officials to rescue women in the name of 'protection'. On the other hand, state authorities also regard trafficked women as 'immoral' individuals who pose a risk to the state and society, and who require secure containment, punishment, and expulsion.

---

[128] Erin Albright and Kate D'Adamo, 'Decreasing Human Trafficking Through Sex Work Decriminalization' (2017) 19 (1) *AMA Journal of Ethics*, 122.

[129] Laura Graham, 'Governing Sex Work Through Crime: Creating The Context For Violence And Exploitation' (2017) 81 (3) *The Journal of Criminal Law,* 201.

[130] Global Migration Group, *Exploitation and Abuse of International Migrants, Particularly those in an Irregular Situation: A Human Rights Approach* (Webpage, 2013) https://www.unodc.org/documents/human-trafficking/2013/2013_GMG_Thematic_Paper.pdf.

LESSONS FROM INDIAN LAW: APPLYING THE NEW PRINCIPLES IN *CUBIC ELECTRONICS*

Sharyn Wong*

Abstract

The Federal Court's judgment in *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* has been seen as a watershed moment for the treatment of liquidated damages clauses ('LAD clauses') in Malaysia. The long-held notion that the party who is claiming damages under a LAD clause must prove the actual damage incurred in accordance with the ordinary principles to calculate damages laid down in *Hadley v Baxendale* was shattered. In its place, the Federal Court opted to incorporate the concepts of 'legitimate interest' and 'proportionality' into Malaysian law on LAD clauses, principles which were first expounded in English cases. Unfortunately, these concepts have not been expanded on in later Malaysian cases. This article proposes that Malaysian law on LAD clauses and its newly introduced concepts can be finessed further, specifically by adopting the Indian position of requiring actual proof of loss, whenever possible, in order to prove an innocent party's 'legitimate interest'. This approach also mirrors the reality of the court's considerations in practice, as demonstrated in a recent Malaysian case cited in the article.

Keywords: Contract, liquidated damages, legitimate interest, proportionality, actual proof of loss

I INTRODUCTION

Much ink has been spilled over the repercussions of the unanimous Federal Court decision in *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd ('Cubic Electronics')*[1] on the treatment of liquidated damages clauses ('LAD clauses') in Malaysia. While the decision has been lauded as bringing 'the application of the penalty rule as embodied in section 75 [Contracts Act 1950 ("CA 1950")] up to date with modern commercial practices',[2] this article views that the reasoning in the judgment can be finessed further by reconciling the judgment with Indian law on LAD clauses, specifically by adopting the Indian position of requiring actual proof of loss, whenever possible, in order to prove an innocent party's 'legitimate interest'.

---

* BA (Hons) Cantab, CLP. The author is grateful for the helpful comments of the anonymous reviewer.

1 [2019] 6 MLJ 15.

2 Choong Shaw Mei, 'Cubic Electronics v Mars Telecommunications – Revisited or Misunderstood?', *University of Malaya Law Review* (Online Supplement, 4 April 2020) <https://www.umlawreview.com/lex-in-breve/cubic-electronics-v-mars-telecommunications-revisited-or-misunderstood>.

For reference, the law on LAD clauses in Malaysia as stipulated in section 75 of the CA 1950 is repeated here:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Before the decision in *Cubic Electronics*, Malaysian law on LAD clauses was beholden to the decision in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy ('Selva Kumar'),*[3] where it was held that the party who is claiming damages must prove the actual damage incurred in accordance with the principles laid down in *Hadley v Baxendale,*[4] except when it is difficult to assess the actual damage incurred. The Federal Court, agreeing with the reasoning of the Indian Supreme Court in *Maula Bux v Union of India,*[5] held that the words 'whether or not actual loss or damage was proved to have been caused thereby' in section 75 of the CA 1950 should only be restricted to those cases where the court would find it difficult to assess damages for the actual damage or loss suffered.[6] This position was subsequently reaffirmed by the Federal Court again in *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd ('Johor Coastal')*.[7]

The effect of the *Selva Kumar* and *Johor Coastal* decisions meant that parties which had incorporated LAD clauses in their contracts ultimately could not rely on the figure of damages stipulated in the said LAD clause as they still had to prove the actual *amount* of losses to claim a corresponding amount of damages, if such losses can be assessed. This rendered LAD clauses redundant, as without the presence of LAD clauses in a contract, the innocent party can already claim damages for breach if it can prove its losses in accordance with section 74 of the CA 1950.[8]

II THE DECISION IN *CUBIC ELECTRONICS*

With two previous Federal Court decisions making the same assertion before it, the Federal Court in *Cubic Electronics* acted boldly in choosing to diverge from the past. In doing so, it breathed life into the purpose of section 75 of the CA 1950 again by

---

3 [1995] 1 MLJ 817.

4 *Hadley & Anor v Baxendale & Ors* (1854) 9 Exch 341; [1843-60] All ER Rep 461.

5 [1970] 1 SCR 928.

6 *Selva Kumar* (n3) 827 [E].

7 [2009] 4 CLJ 569.

8 Section 74(1) of the CA 1950 reads:

> When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

stating that section 75 allows reasonable compensation to be awarded by the court *irrespective of whether actual loss or damage is proven.* As explained in paragraph 74 of the judgment, the initial onus lies on the party seeking to enforce a damages clause under section 75 of the CA 1950 to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party *is entitled to receive a sum not exceeding the amount stipulated in the contract* irrespective of whether actual damage or loss is proven, subject to the defaulting party proving the unreasonableness of the damages clause including the amount stipulated therein, if any.[9] If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the amount stipulated in the damages clause is unreasonable.

The effect of the *Cubic Electronics* decision is that once a LAD clause is present in the contract, the party claiming damages only needs to prove that a breach has occurred, and not necessarily its own losses. The court will then, at its discretion, award a sum not higher than that stipulated in the LAD clause, at which point the defaulting party may adduce evidence which shows that the amount stipulated in the LAD clause is unreasonable. A curious aspect about this judgment is that while the need to prove the actual amount of losses (which rendered LAD clauses redundant) has been removed, it also appears to have removed the need to prove the existence of loss in the first place. Instead, the court stated that the 'proof of actual loss is not the sole conclusive determinant of *reasonable compensation* although evidence of that may be a useful starting point.'[10]

It is unclear how this new approach will work in practice. What we can derive from this is that when an innocent party shows that a breach has occurred but does not furnish proof that he has suffered losses, the court may still award an amount of damages at its discretion (subject to the amount stipulated in the LAD clause as the maximum) without considering the presence of actual loss. Thus, two questions arise: when will the court decide that the innocent party deserves an award of damages and how will the court determine the amount of 'reasonable compensation' without any proof of the actual loss suffered by the innocent party?

A *'Legitimate Interest' and 'Proportionality'*

It appears that in the absence of proof of actual loss, the courts will deign to *award the sum stipulated in the LAD clause* as status quo unless it is plain that the innocent party does not deserve damages or deserves a lesser amount of damages, either in the court's judgment or demonstrated with evidence from the defaulting party. This is evinced by the Federal Court's interpretation of the English cases quoted in the judgment:

---

9 A breaching party may refute the applicability of the LAD clause in the particular context of the breach, or dispute the interpretation of the LAD clause in view of the circumstances of the case, among others. See, eg, *View Esteem Sdn Bhd v Vitalmont Development Sdn Bhd* [2014] 1 LNS 1402. See also *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60.

10 *Cubic Electronics* (n1) [74] (Emphasis added).

> The restatement of the principles of law on damages clause [in English law] represents a clear shift in judicial attitude where courts are reluctant to interfere with parties' freedom of contract, especially if the contracting parties have comparable bargaining power and are properly advised.[11]

However, caution must be exercised in celebrating this shift in judicial attitude towards upholding parties' freedom to contract as the retention of the courts' discretion in the matter means that the award of the sum stipulated in the LAD clause is still not a given. Pursuant to such judicial discretion, parties to a contract will be most concerned as to when and how the court exercises its broad discretion to award or deny an innocent party damages, the amount of which may be lesser than that stipulated in the LAD clause. Two principles were thus introduced by the Federal Court from English law: 'legitimate interest' and 'proportionality'. First, the Federal Court quoted the English case of *ParkingEye Ltd v Beavis ('ParkingEye'),*[12] stating that in the absence of actual loss or damage, an impugned LAD clause may be upheld 'by applying the concepts of legitimate interest and proportionality'.[13] Second, the Federal Court quoted the English case of *Cavendish Square Holding BV v Talal El Makdessi ('Cavendish'),*[14] which was decided together with *ParkingEye*. In quoting the *Cavendish* decision, the Federal Court opined that courts will take into account the concepts of 'legitimate interest' and 'proportionality' in deciding what amounts to 'reasonable compensation'.[15]

Reviewing the context of the Federal Court's quotation of *Cavendish* and *ParkingEye* in the judgment, both cases appear to enunciate two separate principles which concern 'legitimate interest and proportionality'. *Via* its quotation of *ParkingEye*, there is an indication that 'legitimate interest and proportionality' are to be considered when deciding *whether to award any amount of damages at all* (capped by the sum stipulated in the LAD clause) *when no evidence of actual loss is presented by the innocent party*. In addition, *via* its quotation of *Cavendish*, 'legitimate interest and proportionality' shall be considered again in *deciding the amount of 'reasonable compensation' once the court has decided that the innocent party should be awarded an amount of damages*, despite the lack of evidence of actual loss. It is unclear if the Federal Court actually intended for 'legitimate interest and proportionality' to be considered twice, though it may be possible that the Court only meant to consider 'legitimate interest' at the stage of considering whether to award damages, and 'proportionality' only at the stage of assessing reasonable compensation, as we shall see in further analysis of the Court's wordings below.

As is obvious, the considerations of 'legitimate interest and proportionality' are subjective and not quantifiable. This leaves a rather wide discretion to the court, as was the case in *ParkingEye*, where it was held that the car park operator was justified in charging extra for overstaying the two-hour parking period as 'It provided a valuable service in

---

[11] *Cubic Electronics* (n1) [58].
[12] [2015] UKSC 67.
[13] *Cubic Electronics* (n1) [67].
[14] [2015] UKSC 67.
[15] *Cubic Electronics* (n1) [66].

maximising the use of car park spaces which benefited the landowner'.[16] Based on the Federal Court's citation of the *ParkingEye* case, we know that one possible criteria for an innocent party to be considered as having a 'legitimate interest' in order to be awarded damages (where there is no proof of loss, only a LAD clause) is where it is providing 'a valuable service'. No other refinements of the criteria of 'legitimate interest' were given by the Court, concluding with an exhortation to take a 'common sense approach by taking into account the legitimate interest which an innocent party may have'.[17]

The Federal Court then considered 'the proportionality of a damages clause in determining reasonable compensation'.[18] It is unclear if the 'proportionality of the damages clause' refers to the proportionality of the innocent party's interest in the LAD clause (which would be akin to the concept of 'legitimate interest'), or the proportionality of the figure stipulated in the LAD clause in relation to the actual damage suffered. However, we have reason to believe that the Court meant the latter, as it went on to state that:

> … in a straightforward case, reasonable compensation can be deduced by comparing the *amount* that would be payable on breach with the *loss* that might be sustained if indeed the breach occurred. (Emphasis added.)[19]

Therefore, the Federal Court appears to have set out a proportionality test in assessing the amount of reasonable compensation to be awarded to the innocent party once it decides to award damages, with the LAD clause acting as a cap on the amount of compensation which can be awarded to the innocent party.

To summarise the above, the Federal Court in *Cubic Electronics* appears to have substituted the requirement to prove actual loss in *Selva Kumar*, with the requirement to have a 'legitimate interest' in being awarded damages. Furthermore, the requirement to prove the actual *amount* of losses as was the case in *Selva Kumar* has been replaced with the court's discretion to award any amount of damages, capped by the sum stipulated in the LAD clause.

B *'Legitimate Interest' vs Proof of Actual Loss*

In terms of what can be classified as a 'legitimate interest', the only pointer offered by the Federal Court in determining an innocent party's 'legitimate interest' was to take a 'common sense approach', aside from the example of 'a valuable service' from *ParkingEye*. Given the lack of other guidance, it is probable that an innocent party will still be compelled to lead proof of actual loss when claiming for damages under a LAD clause in order to convince the presiding judge, despite the decision in *Cubic Electronics* that such proof is no longer necessary. Indeed, this reality of requiring parties to provide proof in order to advance their case, including proof of actual loss where possible, has been reflected in Indian contract law.

---

[16] *Cubic Electronics* (n1) [67].
[17] *Cubic Electronics* (n1) [68].
[18] Ibid.
[19] Ibid.

III THE POSITION OF LAD CLAUSES IN INDIAN CONTRACT LAW

Section 74 of the Indian Contract Act 1872 provides the following:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

The similarity between section 75 of the CA 1950 and section 74 of the Indian Contract Act 1872 is not coincidental; the Malaysian statute is based on its Indian counterpart. It is instructive, therefore, to review how the Indian courts have interpreted this corresponding section.

In *Fateh Chand v Balkishan Dass ('Fateh Chand'),*[20] which was also cited by the Federal Court in *Cubic Electronics*, the Supreme Court of India held, *inter alia*, that section 74:

> .... merely dispenses with proof of actual loss or damage; it does not justify the award of compensation when in consequence of the breach no legal injury at all had resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.[21]

As emulated by the Federal Court in *Cubic Electronics*, *Fateh Chand* acknowledged that proof of actual loss or damage may not be necessary, though the Supreme Court pointed out that no compensation should be awarded to the innocent party when no legal injury (i.e. no loss) has been suffered due to the breach. In relation to the latter, it may be pointed out that the Court did not specifically state that the duty to prove that the innocent party has not suffered losses falls to the defaulting party, which leads us to the inevitable conclusion that an innocent party claiming damages must first prove its own case with proof. Indeed, in *Fateh Chand* itself, the Supreme Court of India held that in the absence of any proof of damage suffered by the plaintiff arising from the defendant's breach of contract, the additional 13 per cent of the price which had been awarded by the High Court 'as reasonable compensation in relation to the value of the contract as a whole' must be set aside as it had been 'assessed on an arbitrary assumption'.[22]

This notion that proof of damage must be furnished to the court by the innocent party in order to derive reasonable compensation has been further strengthened in subsequent

[20] AIR 1963 SC 1405 : LNIND 1963 SC 20.
[21] *Fateh Chand* (n20) [10].
[22] *Fateh Chand* (n20) [16].

Indian cases. In *M S Kailash Nath Associates v Delhi Development Authority and Another,*[23] the Supreme Court of India reiterated in paragraph 43.6 of the judgment that:

> The expression whether or not actual damage or loss is proved to have been caused thereby means that *where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove* that the liquidated amount named in the contract, *if a genuine pre-estimate of damage or loss, can be awarded.* (Emphasis added)

While not stated explicitly, it is intuitive that the party claiming for damages will have to lead proof of the actual damage or loss (unless the damage or loss is difficult or impossible to prove). Therefore, it suffices to conclude that Indian jurisprudence has not done away with the innocent party's need to prove actual loss where a LAD clause is present. Rather, Indian jurisprudence mandates the need to prove the existence of actual loss or damage but sheds the requirement only for cases where it is difficult or impossible to prove the damage or loss. The latter innovation is where the Indian courts have created an exception broad enough to encompass cases where it is difficult or impossible to prove the damage or loss, but justice requires that the innocent party is awarded a reasonable sum to compensate for the hardship suffered as a direct result of the breach of contract.

IV APPLICATION OF THE INDIAN POSITION TO MALAYSIAN CONTRACT LAW

It is respectfully submitted that the Indian approach to the requirement of proof in cases concerning LAD clauses is clear and flexible enough to be adopted by the Malaysian courts as well when interpreting section 75 of the CA 1950, which mirrors section 74 of the Indian Contract Act 1872. There is no doubt that the Federal Court in *Cubic Electronics* attempted to incorporate some flexibility into the Court's discretion to award reasonable compensation by introducing the concepts of 'legitimate interest' and 'proportionality'. However, as the Supreme Court of India in *Fateh Chand* has saliently warned, over-reliance on discretion may open the door to arbitrary assumptions in the absence of the requirement for any kind of proof. The Federal Court's acknowledgment in *Cubic Electronics* that 'proof of actual loss is not the sole conclusive determinant of reasonable compensation although evidence of that may be a useful starting point'[24] overlooks the reality that any court, in meting out justice, will insist on evidence to substantiate its decision if such evidence can be provided. The statement may mislead parties into believing that evidence of actual loss or damage is no longer required, whereas in practice the failure to furnish evidence of actual loss or damage should only be acceptable in very rare circumstances where it is difficult or impossible to do so but justice can only be served by upholding the LAD clause.

---

[23] AIR 2015 SC (Supp) 780 : (2015) 4 SCC 136 : LNIND 2015 SC 12.

[24] *Cubic Electronics* (n1) [74].

Given the current lack of clarity on the concepts of 'legitimate interest' and 'proportionality', introducing the requirement to provide proof of actual damage or loss would supplement, rather than contradict, the Federal Court's adoption of these concepts. In order for the innocent party to prove that it has a 'legitimate interest' in the contract which should be protected by the court in the form of reasonable compensation, an innocent party should provide evidence of such 'legitimate interest' in the form of actual damage or loss, if possible. There is no need to prove the exact amount of loss as was previously required in the case of *Selva Kumar* as the court will make the assessment of damages in proportion to the sum already stipulated in the LAD clause. The innocent party only needs to prove that it would suffer some kind of loss stemming from the defaulting party's breach, which is not a difficult threshold to cross in most cases. It should be pointed out that even in the case of *ParkingEye*, Lord Neuberger and Lord Sumption (with whom Lord Carnwath agreed) at paragraph 99 of their judgment opined that:

> It is an interest of ParkingEye [to charge the £85 fee for overstaying], because it sells its services as the managers of such schemes and *meets the costs of doing so* from charges for breach of the terms… (Emphasis added)

While the true amount of loss suffered by the parking operator if any number of cars overstayed the two-hour parking limit may have been too speculative to prove, it would not have been impossible if the parking operator had wished to lead evidence that it would incur actual losses if the cars were allowed to park for an unlimited period of time without any deterrent.

Notwithstanding the above, in the unlikely situation where evidence of actual loss or damage cannot be provided but the court views that the LAD clause should be upheld in the interest of justice, the court can still establish a 'legitimate interest' by adopting the exception in Indian jurisprudence where evidence of actual loss or damage is not required if it is difficult or impossible to prove.

The practical need to prove actual damage or loss by the innocent party in order to claim damages where a LAD clause is present has been reiterated by Malaysian courts time and again, even after the *Cubic Electronics* decision. For example, the High Court in *MPM Project Management Sdn Bhd v Kin Keong Electric Engineering Sdn Bhd ('MPM Project Management')*[25] held that 'there has to be evidence proffered by the defendant to prove actual loss or damage that has arisen from the alleged delay caused by the plaintiff in completing the electrical works'.[26] The High Court rebuffed the defendant's attempt to rely on *Cubic Electronics* in claiming damages not exceeding the sum stipulated in the LAD clause as there was no evidence of any loss suffered by the defendant as a result of the alleged delay in the plaintiff's completion of electrical works.

The High Court's judgment in *MPM Project Management* is also worthy of note as it proceeded to cite this particular paragraph from the case of *Selva Kumar* with approval:

[25] [2021] MLJU 219.

[26] *MPM Project Management* (n25) [29].

> *Where there is inherently any actual loss or damage* from the evidence or nature of the claim, and *damage for such actual loss is not too remote and could be assessed by settled rules,* any *failure to bring in further evidence or to prove damages for such actual loss or damage, will result in the refusal of the Court to award such damages,* despite the words "whether or not actual damage was proved to have been caused thereby" in s. 75 of the Contracts Act.[27]

Once again, the High Court reiterated that proof of actual loss or damage must be furnished whenever possible in order to claim a sum not exceeding the sum stipulated in the LAD clause of a contract. While the Court did not apply the concepts of 'legitimate interest' and 'proportionality' in *MPM Project Management*, it is testament to the reality that these concepts must be backed by proof if an innocent party wishes to avail itself of the benefits of a LAD clause. By formalizing the need for proof of actual damage or loss as indicators of 'legitimate interest' and 'proportionality' (the court may also use the proof of actual damage or loss to determine the proportionality of the amount stipulated in the LAD clause relative to the breach in question), judicial practice can be married with legal certainty on the meaning of these concepts.

V CONCLUSION

To conclude, while the Federal Court in *Cubic Electronics* succeeded in introducing some flexibility into the enforcement of LAD clauses by doing away with the need to prove the exact *amount* of actual loss, the fact that actual proof of loss must still be furnished whenever possible may have been inadvertently glossed over. This has resulted in cases where parties have attempted to rely on *Cubic Electronics* in order to uphold a LAD clause without furnishing adequate proof of actual loss, as was the case as decided by the court in *MPM Project Management*. Future judicial decisions involving LAD clauses may wish to finesse the law further, by providing more elaboration on the criteria involved in the concepts of 'legitimate interest' and 'proportionality', as well as emphasizing the need for actual proof of loss whenever possible in order to prove an innocent party's 'legitimate interest', in line with the position adopted in Indian jurisprudence.

---

27 Ibid (Emphasis added).