‘Regional Strategies on Labour Justice and Judicial Dispute Resolution in ASEAN (a Malaysian Perspective)’

A Paper

By

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Introduction

First and foremost I would like to take this opportunity to thank the organizers of this symposium, namely The ***Central Labour Court of Thailand***, for having kindly invited me to participate as a speaker.

This paper covers an overview of the jurisdiction of the ***Industrial Court of Malaysia*** and the crucial role that its plays in the concept of labour justice. The notion of labour justice in Malaysia however, is wide encompassing and involves severalstatutes which have a direct bearing on it. This includes the ***Employment Act 1955***for peninsular Malaysia & the ***Sabah Labour Ordinance*** and the ***Labour Ordinance (Sarawak CAP. 76)*** for those east Malaysian states. These laws govern employer-employee relations and legislate various basic or minimum terms and conditions of employment which every employer is obliged to comply with. The terms and conditions under those laws include provisions for the hours of work, wages, weekly rest days, public holidays, annual leave, sick leave & maternity leave and termination, layoff and maternity benefits. The provisions under those laws are enforced by administrative officers such as the Director General of Labour, Malaysia. Apart from those laws we also have the ***Employees' Social Security Act 1969***, administered by the Social Security Organization Board, generally known by its acronym 'SOCSO' ~ which primarily provides workers' protection in the form of social security insurance for Malaysian nationals; and the ***Workmen's' Compensation Act 1952*** which provides benevolent protection to all, including

foreign nationals employed in the country. Those areas of labour justice however, are outside the province of this paper and so will be left there.

The evolution of Industrial Law in Malaysia from its most rudimentary of beginnings to its present form has been derived from the progressive reforms introduced by the Parliament of Malaysia, juxtaposed with the judicious insight of industrial adjudication. This realm of the law saw its early beginnings in the ***Industrial Courts Enactment 1940***; culminating in the ***Industrial Relations Act 1967*** ~ a brilliant piece of social legislation that has the primary and noble aim of promoting and maintaining industrial harmony, dare I say ~ the bedrock of modern civil society; and of providing for the regulation of relations between its main stakeholders, *id est.* (*'i.e.'*) 'employers', 'workmen' and their 'trade unions'.

This piece of beneficent parliamentary legislation together with dynamic adjudication upon it has brought us to the current phase of the ongoing development of Malaysian Industrial Law.

The broad and liberal approach adopted by the early adjudicators have entrenched principles that are very much taken for granted today as part of our general industrial jurisprudence. These principles have been worked on and expanded and new ones established by the adjudicators that came after them; and the values and philosophy of Industrial Law continues to evolve from generation to generation of

adjudicators; the present set not being an exception. Having stated that, permit me to launch into the substantive aspect of the topic under discussion.

The Structure & Workings of the Court

A Short History

In 1967, the Malaysian Parliament acknowledging the need to enhance the concept of industrial harmony in the country enacted the ***Industrial Relations Act 1967***; which introduced the notion of **compulsory arbitration** to resolve trade disputes. Before that, the *Industrial Courts Ordinance 1948* established a Court where disputing parties could refer matters to it purely on a voluntary basis and which heard those disputes on an ***ad hoc*** basis. As it was purely a *'voluntary'* set-up, only 4 disputes were heard between the years 1948 and 1964, a period of 16 years. Hardly a roaring success, you might perceive!

The *Industrial Courts Enactment 1940*, which was even before the 1948 Ordinance, was a non-starter as it was rudely interrupted, shortly after its enactment, by the cascade of the Second World War into this part of the world.

Going forward to 1964/1965, a certain amount of executive tweaking through the promulgation of *Regulations* [*] were carried out under the *Emergency (Essential*

Powers) Act 1964 ~ which prohibited any *industrial action* in sectors which were classified as ***'essential services'*** both in the public service and in private enterprise. Trade disputes for such services being subject to compulsory arbitration by a body known as the *'Industrial Arbitration Tribunal'.* Trade disputes in non-essential services at that time continued to be under a voluntary system of arbitration until 1967.

[*] The *Regulations* concerned were:

(i) The Essential (Prohibition of Strikes and Proscribed Industrial Actions) Regulations 1965;

(ii) The Essential (Arbitration in the Essential Services) Regulations 1965; and

(iii) The Essential (Trade Disputes in the Essential Services) Regulations 1965;

All promulgated by His Majesty the King of Malaysia by the powers conferred under section 2 of the Emergency (Essential Powers) Act 1964 ~ which Act was legislated as a result of national security concerns stemming from communist terrorist insurgency and related activity in the country at that time.

Then came that enlightened Act of 1967 which established the Industrial Court of Malaysia, as we know it now. The Court is thus a *creature of statute* which is subject to clearly defined principles which specify the legally acceptable ways of resolving employer/employee and/or employer/trade union differences or disputes.

The Act

The long title of the Industrial Relations Act 1967 (the 'IRA') reads as follows:

> *"An Act to promote and maintain industrial harmony and to provide for the regulation of the relations between employers and workmen and their trade unions*

and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom."

The Composition:

The Industrial Court is composed of a President (*the Head*) and 25 Divisional Chairmen (*all officially appointed by His Majesty the King of Malaysia*); and of two panels, one representing employers and the other representing employees, whose members are appointed by the Honourable Minister of Human Resources, Malaysia.

Of the 26 Courts, 19 are located in Kuala Lumpur, our federal capital (including that of the Court of the President); while 2 sit in the state of Penang in the north; 1 in Ipoh, Perak~ the central region; where I preside; 2 in Johor Baru, in the southern state of Johor in peninsular Malaysia; and one, in each of the Malaysian States of Sabah and Sarawak, east across that body of water known as the South China Sea.

Under normal circumstances, each individual Court is constituted of the President or a Chairman; sitting with two panel members ~ one from each panel. There are however specified cases (*e.g. in dismissal cases)* where the President or a Divisional Chairman adjudicates alone.

The Jurisdiction:

The Industrial Court has jurisdiction over trade disputes referred to it for arbitration by the Minister in-charge of this area of the law, ***to wit*** the Honourable Minister of Human Resources, Malaysia. Once the Minister refers a dispute to it, the Court is

immediately cloaked with the jurisdiction to hear and dispose of it. It cannot refuse the exercise of its jurisdiction nor call into question the exercise of the Minister's discretion to refer the dispute to it.

A *"trade dispute"* has been defined by the IRA as *"any dispute between an employer and his workman which is connected with the employment ..... or the terms of employment or the conditions of work of any such workman."* The Minister may, after conciliation has failed between the parties refer the dispute to the Court *either* on his own motion if he is satisfied that it is expedient to do so; or on the joint request of the employer and employee union who are parties to the dispute. There is however a caveat to this ministerial power in that the Minister cannot refer a trade dispute in the *public sector* to the Court for arbitration (*i.e.* of cases that concerns government employees & employees of statutory bodies, ***e.g.*** the Employees Provident Fund, Social Security Organization Board and such like bodies) without the express consent of His Majesty the King or the relevant State Authority as the case may require.

The Court has jurisdiction over all ***collective agreements*** concerning terms and conditions of service concluded between *employers* and *workers unions* ~ in that it can approve or reject them; require amendments or amend them itself; and interpret and enforce such agreements.

The Court also has the jurisdiction over complaints alleging *unfair labour practice* made by employers, employees and their unions, and over representations alleging *unjustified dismissal* made by a workman against his employer. The procedure for this last issue is as follows:

- The workman, being aggrieved by the circumstances surrounding the cessation of his employment, will have to make written representations (*i.e. a written complaint alleging unjust dismissal*) to the Director-General for Industrial Relations Malaysia, under section 20 (1) of the IRA 1967.

- The office of the Director-General will then take action to conciliate between the parties. If the conciliatory labours prove unproductive the Director-General will then refer the matter to the Honourable Minister of Human Resources under section 20 (2) of the Act; with a notification of the breakdown of the reconciliation process.

- The Honourable Minister, in turn and if it is found appropriate, will exercise those statutory powers found under section 20 (3) of the Act

to refer the matter to the Industrial Court of Malaysia for final resolution.

As a result, the workman's initial representations will be transformed into a ***ministerial reference*** conferring lawful jurisdiction upon the Industrial Court to hear and determine the complaint (*case*).

This conveniently leads to the next sub-heading on:

The Powers:

The Industrial Court has the power to summon, join, substitute or strike off parties, take evidence on oath or affirmation, compel the production before it of books, papers, documents and things, conduct proceedings in private, call in the aid of experts, and generally direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it (section 29 of the IRA). All this leads to that most important of powers ~ and that is to hand down its decision in a case which is typically called an **"Award"**. This is somewhat similar to what is referred to as a "judgement" in a regular Court of Law.

The Awards (section 30 of the IRA):

The Industrial Court is required to make its Awards without delay, and if at all possible within 30 days of the date a dispute is referred to it (section 30 (3) of the IRA). In this day and age that would be a tall order and is observed more in the breach than in the compliance. This is mainly because of the tremendously increased workload that confronts the Court and the augmented complexity of the cases before it. However, we as adjudicators make every effort to expeditiously complete all our cases in the shortest possible time; and in any case we strive to bring closure of the trial of a dismissal case and of other trade disputes within 16 months of the date of initial reference; with full written Awards being handed down within 6 months of the last date of hearing; and for Collective Agreements ~ to give cognizance (judicial recognition) within 6 weeks of the agreement being deposited with the Court.

The law (section 16 of the IRA) requires that all Collective Agreements between employers and trade unions be deposited with the Court within 1 month of it being signed by the parties.

In making an Award, the Court is required to act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal form (section 30 (5) of the IRA). The Court is also required to consider public interest, the financial implications and the effect of the Award on the national economy and on the particular industry concerned; and the probable effect of the

Award on similar or related industries in the country at large (section 30 (4) of the IRA).

Awards of the Industrial Court shall be final and conclusive and shall not be challenged, appealed against, reviewed, quashed or called into question in any court (*more on this later*).

An Award is binding on all parties to the proceedings before the Court and on their successors, assignees or transferees. It also **supersedes** any *employment contracts* that exist between employers and their employees ~ in short, the Court can take an employment contract and rewrite it as it sees fit! This power goes way beyond those of an ordinary court of law, which in the norm only interprets clauses in a contract to ascertain if a breach has occurred. They (the courts of law) cannot rework it (the contract) for any reason.

Why, you may ask, is this special power given to the Industrial Court?

The answer is this ~ and I invite you to look back to the opening words of the long title of the IRA:

*"**An Act to promote and maintain industrial harmony**...."*

It has thus been said that the Industrial Court is a court of ***social justice*** that exists

under a piece of beneficent social legislation (i.e. the IRA).

In the case of **PATCO MALAYSIA Bhd. v. SARIP bin HAMID** (Award No. 89 of 1992) it was held:

> *"It is clear that this court is not strictly confined to the administration of justice in accordance to the law, but is an instrument for the dispensation of social justice according to equity and good conscience. Now,* social justice *and* legal justice *are two different concepts, although their common object is to ensure that justice is done. It is to free workmen from contracts and obligations that are unfair and inequitable that the concept of social justice has been evolved."*

In the case of **NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES UNION & OTHERS v. SOUTH EAST ASIA FIRE BRICKS Sdn. Bhd.** [1976] 2 MLJ 67 His Lordship the Chief Justice Raja Azlan Shah (as ***His Royal Highness The Sultan of Perak*** then was ~ the Ruler of the state that I preside in now) speaking for the Federal Court ruled: -

> *"The employer's freedom of contract has frequently been raised in industrial adjudication; and it has consistently been held that the said right is now subject to certain principles which have been evolved by industrial adjudication in advancing the cause of social justice ..... The doctrine of the absolute freedom of contract has thus to yield to the higher claim for social justice."*

In the Indian case, which has powerfully persuasive authority in Malaysia, of **BHARAT BANK v. EMPLOYEES OF BHARAT BANK** [1950] SCR 459 (*Supreme Court of India*), Mukherjee J. said:

> *"In settling disputes between employers and workmen, the function of the Industrial Tribunal is not confined to the administration of justice in accordance with the law. It can confer rights and privileges on either party which it considers reasonable and proper, although they may not be within the terms of any existing agreement. It acts not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace."*

In the book "Industrial Jurisprudence" by Mahesh Chandra he states:

> *"On the other hand, social justice goes much further than merely adjudicating upon the rights of the contending parties on the basis of contract; the tribunals administering social justice are not restricted merely to interpreting the contract; they can revise old contracts and make new contracts for the contending parties. These tribunals not only are not bound by the contracts of the parties, but also are not restricted by the ordinary law of master and servant, because if they were to be so bound and restricted, there would be no point or purpose in creating such separate tribunals and resorting to a different forum. It is to enable workmen to free*

themselves from contracts and obligations which are unfair and inequitable to them that the concept of social justice has been devised, and new forums have been founded. These new forums have to do justice unrestricted by the contract between the parties or the law of master and servant, and unhampered by purely technical and legalistic considerations which lead to rigidity or inflexibility."

C.P. Mills in his book "Industrial Disputes Law in Malaysia" made this noteworthy observation:

"Just as the Court of Chancery [a type of English Court that dealt with equitable principles] *developed to mitigate the harshness of* [English] *common law rules in certain areas, with power to create* ***rules of equity*** *which prevailed over* ***common law*** *rules where the two were in conflict, so an industrial court is designed to create in its field new rules that will displace the accepted rules of common law. A court of equity will avoid a contract which has been procured by the undue influence of one party over the judgement of the other, and similarly an industrial court may, so far as its remedies allow it, override a contract which is incompatible with what it sees as the* ***principles of industrial equity****. More than that, an industrial court, which is an arbitral tribunal, has as its principal function not so much the determination of existing rights and obligations between contesting parties, but rather with adjusting those rights and obligations and creating new ones by making awards which will govern the relationship between the parties in the future. Its role is essentially legislative. Accordingly, in the industrial jurisdiction, where it is claimed that the*

agreement is inequitable, it is no answer to say that the parties have so agreed; that would merely be saying that no agreement could ever be inequitable unless there was fraud or overreaching. If that were the position, an industrial court would have no function to perform, for all the issues that might arise between employers and employees could be settled by the ordinary law courts according to the terms of the contract of employment.

It is clear that the Industrial Court in making its awards is freed from the tyranny of formal legalism and the rigours of the ***common law****. It has a creative function and impulse of its own, which flows from the juxtaposition of 'equity' and 'good conscience' in section 30 (5) of the IRA, and the injunction to eschew 'technicalities' and 'legal form' in the same subsection.*

Following from the above the Industrial Court has held that it is not bound by *technical principles* or *legal doctrines*, especially in cases where such principles and doctrines are invoked either by way of 'preliminary objections' or to defeat claims which are 'just and proper'.

In the case of **NADARAJAH & ANOTHER v. GOLF RESORT Bhd.** [1992] 1 MLJ 506; the High Court stated:

"Under ***section 30 (5)*** *of the IRA, the Industrial Court must act according to* ***equity, good conscience and the substantial merits of the case****, without*

regard to

technicalities and legal form. Technical legal rules such as ***estoppels****,* ***limitation****,*

laches*,* ***acquiescence*** *etc. have no place in industrial adjudication, and they should not be allowed to be invoked for defeating claims which are just and proper."* (emphasis added)

In **GUEST KEEN WILLIAMS Pte. Ltd. v. P. J. STERLING & OTHERS** [1959] AIR SC 1279 the Indian Supreme Court held that in dealing with industrial disputes, the application of technical legal principles should as far as reasonably possible be avoided. An industrial tribunal should be slow and circumspect in applying such principles in the adjudication of industrial disputes. In other words, a case should not be thrown out merely upon a technical objection [or upon legal technicalities].

One such technicality is the concept of ***"termination simpliciter"~*** *i.e.* where the termination of employment is by ***contractual notice*** only (*i.e. without any reasons appended thereto*). There are jurisdictions that recognize this form of dismissal as a prerogative of management in their right to hire and fire. This notion however, does not hold traction in Malaysian industrial jurisprudence by virtue of section 20 IRA which requires that every termination (*even that of a probationer*) can only be for ***"just cause or excuse"***. Examples of such legitimate termination would be under proved circumstances, to the standard of a ***"balance of probabilities"***, of misconduct, incompetence and such like employment transgressions.

In the case of **GOON KWEE PHOY v J & P COATS (M) Bhd.** [1981] 1 LNS 30 Raja Azlan Shah *CJ(Malaya)*(as ***His Royal Highness*** then was) speaking for the Federal Court ruled: -

> *"We do not see any material difference between a termination of the contract by due notice and a unilateral dismissal of a summary nature. The effect is the same, and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason or excuse for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by the employer, and that court or the High Court cannot go into another reason not relied on by the employer, or find one for it."*

And in **STEVEDORE EMPLOYERS ASSOCIATION v. G RAYMOND** (Award No: 48 of 1987) the Industrial Court of Malaysia quoted with approval from the Indian Supreme Court case of **U B DUTT & Co. Pte Ltd v. Its WORKMAN** AIR 1963 SC 411,which held as follows:

> *"An employer cannot any longer base his right to discharge an employee purely on the contract, and he cannot be allowed to say that under the contract he has an*

unfettered right to hire and fire his employees. That right is now subject to industrial adjudication, and the power to terminate an employee without assigning any reason and merely by giving notice or by paying wages in lieu of such notice, is now subject to the scrutiny of the Industrial Tribunal ..... The employer can no longer rest his case merely on the contract of service, and he cannot be allowed to say that, having taken action under the powers so conferred upon him, there is nothing more to be said by him to justify his action."

So, at the end of the day, the Industrial Court is enjoined to construe the IRA in a broad and flexible way so that legalistic tendencies do not take precedence over industrial realities; and more to the point ~ of providing a fair go all round to the parties before it.

The workman's right to work, when it is there to be done and has been taken away through no fault of his own, will be protected by the Court; whilst at the same time, the Court balances that *workers right* against the legitimate interests of an employer to run its business within its lawful *managerial prerogatives*. However, without putting too fine a point on it, no comfort will be found from the Court by an *unreasonable employer* who insists on strict ostensible *"legal rights"*, such as a standard contractual termination clause, without more.

The final and conclusive nature of an Award

In the case of **HOTEL MALAYA Sdn. Bhd. v. NATIONAL UNION of HOTEL, BAR & RESTAURANT WORKERS & Anor.** [1982] 1 CLJ 640; [1982] 2 MLJ 237 @ 240; His Lordship the Chief Justice Raja Azlan Shah (as ***His Royal Highness*** then was) described the function of the Industrial Court as follows:

> *"It exercises a quasi-judicial function. It gives full reasoned judgement in the nature of an Award (section 30 IRA). Its functions comprise an investigation of the facts, an analysis of the facts, findings upon those facts and lastly, the application of the law to those findings."*

Section 33 A of the IRA provides that:

> *"(1) Where the Court has made an award under section 30 (1) it may,* ***in its discretion****, on the application of any party to the proceedings in which the award was made, refer to the High Court a* ***question of law*** *–*
>
> - *which arose in the course of the proceedings;*
> - *the determination of which by the Court has affected the award;*
> - *which, in the opinion of the Court, is of sufficient importance to merit such reference; and*
> - *the determination of which by the Court raises, in the opinion of the Court, sufficient doubt to merit such reference."*
>
> (emphasis added)

And section 33 B of the IRA provides:

> *"(1) Subject to this Act and the provisions of section 33 A, an* ***award****, decision or order of the Court under this Act ..... shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court."*
>
> (emphasis added)

The IRA has thus seemingly made the decisions of the Industrial Court *final by law*. This however, does not take into account the ***"writ jurisdiction"*** of the superior courts of Malaysia over its lower courts and inferior tribunals, of which the Industrial Court counts as one of its numbers.

The superior courts of the country, in hierarchy, consists of the Federal Court (*which is the apex court*), the Court of Appeal, and below that, the High Courts, of which there are two jurisdictions in Malaysia, ***to wit*** the High Court of Malaya in the peninsular; and the High Court of Sabah & Sarawak, located in East Malaysia. These superior courts have ***supervisory jurisdiction*** over the Industrial Court in its capacity as an administrative and quasi-judicial body. In that, the superior courts in exercising its function does not entertain *an appeal,* in the usual sense of the word, from the Industrial Court but acts in a supervisory capacity, whenever required, to ensure that the Industrial Court has *properly* exercised the powers conferred upon it by statute.

In **HARPERS TRADING (M) Sdn. Bhd. v. NATIONAL UNION of COMMERCIAL WORKERS** [1991] 1 MLJ 419, the then Supreme Court of Malaysia observed:

> *"It seems to us that it should be treated as trite law that **judicial review** is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled, on an application for judicial review, to consider whether the decision itself, on the merits of the facts, was fair and reasonable."*
>
> (emphasis added)

So when a superior court exercises its powers of judicial review in its *supervisory jurisdiction*, it is not concerned with the ***decision***, in itself; but with the ***decision making process***.

For industrial matters the relevant *"writ jurisdiction"* of the High Court conferred under paragraph 1 of the *Schedule* to the Courts of Judicature Act 1964, are the Writs of ***Certiorari*, *Prohibition, Mandamus and Quo Warranto***. Each writ has a distinctive purpose and application which I will briefly describe as follows:

The Writ of ***Certiorari*** is usually sought to quash a quasi-judicial order that is tainted by *jurisdictional error* or that has violated the ***"Rules of Natural Justice"*** (*simply put ~ a fair and proper administration of laws*), or has been

vitiated by errors of law that is apparent on the face of the record from the court below. It is applied to ensure that the jurisdiction of the inferior tribunal has been properly exercised;

A Writ of ***Prohibition*** is sought in circumstances to prevent an inferior tribunal from exceeding its proper jurisdiction. Its effect is to direct proceedings that have been commenced at an inferior tribunal to be conditionally stayed or peremptorily stopped;

{The difference between ***Certiorari*** and ***Prohibition*** is in the circumstances in which they are sought, i.e. ***Prohibition*** is used at an early stage ~ before the authority of the inferior tribunal has been exercised or exercised in full; while ***Certiorari*** is invoked after the authority has been wrongly exercised. Oftentimes, both writs are applied for simultaneously ~ one to quash the impugned order [***Certiorari***] & the other [***Prohibition***] to prevent that body from continuing to exceed its jurisdiction}

The Writ of ***Mandamus*** is invoked to enforce public duties. It, in effect, is a command to an inferior tribunal requiring it to do some such thing as it ought to do under a statute, but which it has refused, omitted and/or neglected to do; and

The Writ of ***Quo Warranto*** is a writ that requires a quasi-judicial body to show by what authorization or warrant that it is exercising its authority. This writ would normally be raised where it is alleged that the inferior tribunal is improperly constituted or improperly instituted, and hence acting without jurisdiction.

Thus the ***ouster clause***, if I may be permitted to call section 33 B of the IRA that, will only be *effective* if the **decision** of the Industrial Court falls squarely within its defined jurisdiction. If, on the other hand, that decision is challenged and is found to be outside its defined statutory dominion, that decision will be struck down by the superior court for being null and void; as it will not be afforded any protection by the said ouster clause in the statute.

Under usual circumstances the superior court, if it is minded to grant injunctive relief under its *"writ jurisdiction"* would merely quash the Award concerned and send the matter back to the Industrial Court to be decided in the proper way.

However, in the Federal Court case of **R RAMA CHANDRAN v. INDUSTRIAL COURT of MALAYSIA & Anor.** [1997] 1 CLJ 147, that court not only quashed the decision of the Industrial Court but went further in granting consequential relief to the litigant/claimant as he was getting on in age, had been jobless for the last past seven years while his case had wound round the system to reach that apex court;

and would in all probability suffer the grave injustice of further delay if the matter were remitted back to the Industrial Court for final resolution. In the circumstances, that Honourable Court decided that justice demanded that to avoid further delay and expense, that Court should determine the consequential relief rather than remitting the case to the Industrial Court for that purpose.

Extra-Territorial Jurisdiction

The Industrial Court of Malaysia is a court that has been designed strictly for domestic dominion. Nevertheless, circumstances have on occasion thrown up situations of cross-border employment issues. A classic example of such a scenario arose in the case of **KATHIRAVELU GANESAN & Anor. v. KOJASA HOLDINGS Bhd.** [1997] 3 CLJ 777. This was an appeal against an order of ***Prohibition*** which the High Court had issued against the Industrial Court to prevent the latter Court from adjudicating on a dispute between the first appellant ('the appellant') and Kojasa Holdings Bhd. ('the respondent').

The facts of that case are as follows:

The appellant, a citizen of Sri Lanka, was employed by the respondent, a Malaysian company based in the state of Sabah, Malaysia.

In 1988 the respondent seconded the appellant to Singapore to serve a related

company there; and while working in that Republic, the appellant had paid its taxes and had contributed to the Singapore Central Provident Fund (*a retirement savings scheme*).

In 1989 the appellant was terminated from his service with the respondent.

The appellant duly lodged a written complaint of unfair dismissal under section 20 of the IRA with the Director General of Industrial Relations, Malaysia: who escalated it to the Honourable Minister, who in turn found it fit to refer the complaint to the Industrial Court for final resolution.

The respondent did not challenge this Ministerial reference in the first instance.

When this matter came up for trial before the Industrial Court however, the respondent took a preliminary objection on the ostensive grounds that the Industrial Court had no jurisdiction to hear and determine the dispute. The Industrial Court overruled the objection.

The respondent being dissatisfied with this ruling applied to the High Court for an order of ***Prohibition***. The High Court ruled that Malaysian Industrial Court could not entertain and adjudicate upon the dispute as it (the Industrial Court) did not have extra-territorial jurisdiction ~ given that the appellant was a foreign national and

working in Singapore at the material time of his dismissal. Hence, an order of ***Prohibition*** was issued preventing the Industrial Court from acting on the complaint.

The appellant appealed.

Before the learned appellate Judges two primal questions arose for determination:

- whether having regard to the facts, the Industrial Court had jurisdiction to adjudicate upon the dispute referred to it by the Minister; and
- whether it was open to the respondent to challenge the jurisdiction of the Industrial Court without having attacked the Minister's act of referring the dispute to that Court in the first place.

Held:

Per Gopal Sri Ram JCA

[1] The learned High Court Judge was wrong in holding that the Industrial Court lacked jurisdiction to hear and decide upon the dispute properly referred to it by the Minister.

[1a] The fact that a workman who is engaged within Malaysia is required by his

employer, who is also within the jurisdiction, to carry out his duties in a foreign country will not by itself place his subsequent dismissal in the category of extra-territorial disputes. This is so irrespective of whether he was required to pay taxes levied by that country or to contribute towards any savings scheme there.

[1b] The facts of this case do not give rise to the exercise of any extra-territorial jurisdiction. The fact that the appellant was engaged within the jurisdiction by an employer within the jurisdiction must conclude the issue of extra-territoriality against the respondent. It ought also to be noted that in this case the power to dismiss the appellant was at all times vested in the respondent who was well within the territorial jurisdiction of the Industrial Court.

[2] ….

[2a] ….

[2b] The Industrial Court, unlike the ordinary Courts, is not available for direct approach by an aggrieved party and access to it may only be had through the three levels provided by s.20 of the IRA. The Industrial Court is therefore empowered to take cognizance of a trade dispute and adjudicate upon it only when the Minister makes a reference. In other words, it is the reference that

constitutes threshold jurisdiction.

[3] ….

[4] The crucial question here is the point at which the challenge ought to be taken, specifically, whether it should be taken at the point at which the Minister makes the reference or at the point at which the Industrial Court is seized of the dispute.

[4a] The threshold jurisdiction of the Industrial Court may only be questioned by challenging the Minister's reference. It follows that a party to a dispute who wishes to contend that the Industrial Court does not have jurisdiction to enter upon the inquiry, e.g. because the dispute is extra-territorial in nature, must do so by seeking to quash the Minister's reference, and, in the same application ask for an order of *prohibition*against the Court. The threshold jurisdiction of the Industrial Court cannot be challenged without joining the Minister and seeking relief against him.

[4b] Having regard to the general scheme of the IRA, Parliament did not intend a threshold jurisdiction challenge before the Industrial Court by way of a preliminary objection. The legislature's paramount concern in passing the Act is to ensure speedy disposal of industrial disputes, and permitting preliminary

objections to the threshold jurisdiction being taken will only delay industrial adjudication.

[5] ….

[5a] It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, …., he must do so by seeking to quash, by *certiorari*, the Minister's reference and, in the same proceedings, seek an order for *prohibition* against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication.

[5b] Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion, and in the process deal with the jurisdictional question e.g. whether the claimant is a workman or not or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be dealt with as preliminary objections.

The operation of the principles just illustrated above have been consistently followed by the Industrial Court of Malaysia in similar situations. An example of one is a case over which I presided; and which coincidently concerned a dispute that arose in Thailand, with roots and consequences that stretched back to Malaysia.

The case is that of **JEFFREY RONALD PEARCE v. NACAP ASIA PACIFIC Sdn. Bhd.** [2008] 4 ILR 260.

The brief facts are as follows:

> The Claimant, an Australian national, was employed by a company incorporated in Malaysia ('the Malaysian Company') as a manager; to undertake his duties for and at an engineering project located in Thailand. The project itself was carried out by companies related to the Malaysian Company and which were themselves incorporated in Thailand. The Claimant's employment agreement was executed in Kuala Lumpur upon the Malaysian Company's letterhead. Kuala Lumpur happened to be the Asia Pacific Operational Centre of the 'NACAP group of companies', which was headquartered in the Netherlands. Pursuant to the employment agreement, the Claimant proceeded to Thailand from Malaysia to assume his duties. Roughly after about a year into his contract of employment, he was dismissed by the Company upon certain allegations made by an officer of the Thai based entities. Being aggrieved by his dismissal he lodged his complaint to the Director General of Industrial Relations, Malaysia ~ which eventually transformed into a Ministerial Reference before the Industrial Court.

For the purposes of this paper the issues that arose for determination (***et al***) at the Industrial Court were:

- whether the employment agreement was void due to illegality; and

- whether the Industrial Court had the jurisdiction to hear the case:
    - on a mere referral by the Minister;
    - on the propriety of the Ministerial reference; and
    - on the question of extra-territoriality in this case.

Held: ***for the Claimant***

- ***"whether the Service (Employment) Agreement concerned was void due to illegality"***

  "Learned Counsel for the Company has espoused that the said Agreement is against public policy by virtue of the provisions of section 5 of the EMPLOYMENT (RESTRICTIONS) ACT 1968 [ACT 353]. In essence this Act prohibits the employment of foreigners by Malaysian companies unless there has been issued to such a person a valid employment permit by the relevant authority. A careful reading of the

provisions brings out with clarity that the Act is intended to have application in instances of Malaysian companies hiring or employing persons who are not Malaysian citizens in any business ***in Malaysia***. There are no provisions therein as regards a situation of a Malaysian company employing a non-citizen to work wholly (that is, in every respect from commencement of employment until eventual termination) in a business that the company is interested in ***abroad***. The Company called one Encik Nazman Bin Yahya, a Malaysian Immigration Department Officer who took the Court briefly through the provisions of the EMPLOYMENT (RESTRICTIONS) ACT 1968. His evidence did not however shed any light on the Claimant's lawful capacity, or the lack of it, and that of the Company's to execute the Service Agreement concerned. Without more, it just remains for me to rule that the EMPLOYMENT (RESTRICTIONS) ACT 1968 has no application in the scenario before the Court."

(ii a) ***"mere referral does not confer jurisdiction"***

"Let me first disabuse learned Counsel on the last point by reference to the following passage in the case of **KATHIRAVELU GANESAN & Anor. V. KOJASA HOLDINGS BHD.**[1997] 3 CLJ 777 ('**KATHIRAVELU'S CASE**'):

"Fourth and last, the adjudicatory level. It is important to observe

that, save in very exceptional cases which are not relevant to the present discussion, the Industrial Court, unlike ordinary courts, is not available for direct approach by an aggrieved party. Access to it may only be had through the three levels earlier adverted to [i.e. the conciliatory level, the reporting level and the referral level]. ***The Industrial Court is therefore empowered to take cognisance of a trade dispute and adjudicate upon it only when the Minister makes a reference. In other words, it is the reference that constitutes threshold jurisdiction."*** (emphasis added)

(ii b) ***"correctness of the Ministerial reference"***

"As regards the propriety of the Ministerial reference I only have to refer to the dictum in **KATHIRAVELU'S CASE** where the Court when describing the correct approach to be taken in a threshold jurisdiction challenge of the Industrial Court had this to say at page 796: -

"*It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s. 20 (1) were made out of time, he must do so by seeking to quash, by* certiorari, *the Minister's reference, and, in the same proceedings, seek an order of*

prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, …".

(ii c) ***"question of extra-territoriality"***

In answer to the question of extra-territoriality ***viz***, the jurisdiction of this Court I need go no further than to refer yet again to the locus classicus, **KATHIRAVELU'S CASE** where at page 692 it was said: -

"The fact that the appellant was engaged within the jurisdiction by an employer within the jurisdiction concludes the issue of extra-territoriality against the respondent. That the appellant was required to perform his contract of employment in another company in a foreign country and was required to pay taxes levied by the country or to make payments towards any compulsory saving scheme that was in operation in that country cannot, in our judgement, make the dispute extra-territorial in nature. Further, one should not lose sight of the fact that the power to dismiss the appellant was at all times vested in the

respondent who was well within the territorial jurisdiction of the Industrial Court."

And further along on the same page it was held: -

"The fact that a workman who is engaged within Malaysia is required by his employer, who is within jurisdiction, to carry out his duties in a foreign country will not by itself place his subsequent dismissal in the category of extra-territorial disputes."

The Conclusion

I come to the end of this paper with earnest hopefulness that what I have shared with you today has more or less shed some light upon the structure, jurisdiction & workings (*including some of the strategies*) of the Industrial Court of Malaysia. It must be said however, that this paper is by no means and certainly does not pretend to be, an exhaustive treatise on the subject. My intention was to draw, with broad strokes, a picture to give a general sense of the characteristics that constitute its main features. I do hope that I have met my purpose with reasonable clarity.

With that, I would like to record my sincere gratitude for your kind patience and the undivided attention with which you have obliged me here today.

Thank you.

Dated this 29th day of August 2013

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