TRACING THE INFLUENCE OF WESTERN JURISPRUDENCE IN ASIAN JURISDICTIONS

Panel presentation by Stuart Isaacs QC

The focus of this presentation will be on the influence of the English common law on Asian jurisdictions. My perspective on the subject is perhaps a little different from that of the other more distinguished speakers on this panel in that, while I practise foreign law in Singapore and have spent many years practising commercial law in the Asia-Pacific region, my "*home*" jurisdiction is England. In consequence, it is possible to consider the subject from both ends of the telescope. Or, as put in the programme for this session, from the viewpoints of both the "*colonial masters*" and the former colonies. The presentation is essentially concerned with the relationship between English common law and Singapore. Other Western jurisprudence will be addressed by other speakers. Much of what I say on English law is equally applicable to other common law jurisdictions in the region such as Malaysia and Hong Kong and in the Indian sub-continent.

In order to understand the influence of English law in Singapore and elsewhere in the world, one needs to place the subject in its broader historical context. The development of legal systems, both in England and in other European countries, was not something that was free-standing. The English common law itself developed primarily out of the unifying political tendencies of the Norman conquest of England in the 11th century. The expansion of the influence of French law and its derivatives flowed from the military conquests made by Napoleon. Dutch law, about which Tony Budidjaja will undoubtedly be speaking, which came with the Dutch to what is now Indonesia is another illustration. So, from the very beginning, and as with other systems of the civil law, there was a close interplay between the politics of the time and the reasons for the development and expansion of the legal system in the way that occurred.[1] Some countries such as Turkey and Japan adopted the systems of law of other nations as a matter of choice and not as the result of having that system of law imposed on them. One fascinating study concerns the extent to which the adoption of a colonial power's legal system and, in particular, the adoption of a common law, civil law or hybrid legal system, contributes to economic growth[2] but that is a whole area which falls outside the scope of today's presentation.

In relation to colonial legal systems, one benign explanation for their development is that the colony in question was willing to accept an external legal culture for the resolution of disputes. A less benign and probably more accurate explanation is the imposition by powerful colonial nations of their own culture on the colony in question for combinations of political, economic and military reasons. Bear in mind that the reasons for colonisation by the colonial powers was not always the same. Thus, Spain was

[1] For an excellent article on the subject, from which the brief historical part of this presentation is derived, see Schmidhauser, John R. "Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems." *International Political Science Review / Revue Internationale de Science Politique*, vol. 13, no. 3, 1992, pp. 321–34.

[2] See Klerman, Mahoney, Spamann and Weinstein "Legal Origin or Colonial History". *Journal of Legal Analysis*, Volume 3, Issue 2, Winter 2011, Pages 379–409.

largely motivated by the need to exploit the resources of the South American countries which they colonised whereas the British were motivated by the need to trade.

In this regard, the British, unlike perhaps the Spanish colonisers in South America, were careful not to impose fundamental changes to local laws, particularly those pertaining to basic cultural or religious matters, where to have done so would have threatened the stability of British rule. That was the case, for example, with the colonisation of French Canada and with the maintenance of aspects of Hindu and Islamic law in India.

Sir Stamford Raffles, regarded as the founder of Singapore, has been described as the product of a peculiar era in British history when men went away to faraway places convinced that by colonising and dominating the local people they could not only win great fortunes and title for themselves but bring the light of civilisation – justice, honest government, schools and hospitals – to less happy lands.[3] British colonial policy was to bring English values and culture to Singapore along with other British colonies in Asia, Africa and the Caribbean. Just as the sun never set on the British empire, so too it never set on the use of the English common law. For today's purposes, I shall ignore the comment of one Indian author and nationalist politician, Shashi Tharoor, who commented that the reason for the sun never setting on the British empire was that "*even God couldn't trust the Englishman in the dark*".[4]

The reception of English law in Singapore can be traced back to two Charters of Justice issued to the East India Company in 1786 and 1826 respectively.

Moving on from the distant and purely historical context, and before looking at some of the interesting substantive issues related to the development of Singapore law in the post-colonial era, the first question which arises is the extent to which the colonial imposition of an external legal culture on what were parts of the British empire continued after the countries in question achieved independence from British rule – events which took place during the post- World War II era.

Following what was essentially the colonial imposition of English law, what has been striking is the continuing influence in Singapore of the English legal system. I say the English legal system because it is not only substantive English law which has continued to influence the development of the law in Singapore but also the approach towards legal training and education and the application of English court procedures.

Post-independence and for some time afterwards, the training of Singaporean advocates and solicitors was undertaken in England. English law degrees were accepted as qualifications in Singapore. The requirement for a period of practical training, or pupillage as it is called at the Bar, was met by pupillage having been completed in England. It was therefore unsurprising that English law and the high

[3] *A Salute to Singapore* (1984), p. 19.

[4] In *An Era of Darkness: The British Empire in India*.

standards of the English legal profession should continue to influence the way the legal profession operated in Singapore. Over time, with the development of its own legal education facilities, reliance on the "*home*" country has quite rightly and properly diminished. I suspect that far more law students obtain their degrees from the National University of Singapore and the Singapore Management University than from English universities. A decreasing proportion of the legal profession in Singapore trained in England, including the judiciary.

But the legal training which is provided in Singapore remains similar to that for English barristers and solicitors. In many instances, my personal view is that the legal training surpasses that of English universities, since courses are offered in subjects which have much more practical application for the international business community than the staid black letter law courses offered in England.

The English universities "*approved*" for Singaporean law students became smaller and smaller. The period of pupillage which counted towards pupillage in Singapore gradually decreased to zero. Yet still, a number of Singapore qualified lawyers go to England to obtain post-graduate qualifications at the prestigious universities such as Oxford, Cambridge and London.

English court procedure broadly continues to be followed in Singapore, along with the hierarchy of courts and the appellate procedures.[5] One major way in which the United Kingdom is no longer involved in the resolution of disputes in Singapore was the abolition of the right to appeal to the Judicial Committee of the Privy Council. Until 1989, the Privy Council was Singapore's final court of appeal. In 1989, a constitutional amendment was made to restrict appeals to the Privy Council. In 1993, Supreme Court of Judicature Act constituted a permanent Court of Appeal for both civil and criminal appeals with the Chief Justice as the President of the Court of Appeal. The enactment of the Judicial Committee (Repeal) Act eventually abolished all appeals to the Privy Council with effect from 8 April 1994. At that point in time, the Singapore court system moved away from the last vestiges of its colonial links.

A further innovation in Singapore was the creation in 2015 of the Singapore International Commercial Court (SICC) to grow the legal services sector and to expand the scope for the internationalisation and export of Singapore law. The SICC builds on Singapore's reputation as a trustworthy regional arbitration hub for the resolution of international commercial disputes.

The streamlining of court procedures in Singapore was something picked up subsequently in England when the Woolf reforms of civil procedure were implemented in England in 1999.

[5] For a history of the development of the Singapore court system generally, see https://www.sal.org.sg/Resources-Tools/Legal-Heritage/The-Development-of-the-Court-System published by the Singapore Academy of Law.

Turning to the substantive law, the influence of the English common law on the development of Singapore law has generally been more evident in traditional common law areas, such as contract and tort, than in other statute-based areas, such as the criminal law and company law.[6]

There are three aspects on which I want to touch. The first is the move away from reliance on English law precedents. The second is the impact of the United Kingdom's membership of and then departure from the European Union via Brexit on the relevance of English law in Singapore. The third – perhaps not to be expected - is the reliance by the English courts on Singapore law precedents. The emphasis is on the commercial law field, which is my area of practice.

In these contexts, it must be remembered by way of background that the practice of law generally has become more internationalist in recent years – something of which IBA members cannot fail to be aware. The explosive growth in world trade has meant that cross-border transactions and cross-border insolvencies are ever the subject of commercial disputes, involving parties from several jurisdictions and different governing laws across the globe. Also, technology such as the growth in communications and online databases of legal precedents such as the British and Irish Legal Information Institute and the LawNet service provided by the Singapore Academy of Law has given access to a wealth of legal material which would not have been available to practitioners even 20 years ago. This has meant that, unrelated to colonial imperialism, a vast array of Western jurisprudence and not just English jurisprudence has become available in Asian jurisdictions; and, correspondingly, that English jurisprudence is no longer the only jurisprudence which the Singapore courts will take into account.

Dealing then, *first*, with the move away from reliance on English law precedents. I have just referred to the internationalism of law and the exposure of Singapore to a wider range of precedents. The Singapore courts have made significant departures from the decisions of the English courts, even in the traditional common law areas. Having said that, the move away from reliance on English law precedents is very far from absolute. The judicial approach of the Singapore courts to English common law precedents is based on two main factors: (1) the logic and reasoning underlying the case precedents; and (2) the need for adaptability to local circumstances and conditions. Hence, the courts, in their judgements, examine closely both the legal principles as well as public policy considerations that may vary from one jurisdiction to another.

For the historical reasons which have already been mentioned, Singapore courts and tribunals continue to treat English jurisprudence as persuasive, particularly in circumstances where there is no Singapore authority directly in point. A very recent illustration, one amongst many, is the Singapore Court of Appeal's decision in *VEW v VEV*[7] of 14 April 2022. This was a matrimonial dispute where one of the

[6] See Singapore Law Watch's overview of the Singapore legal system, sections C, paragraphs 1.3.4 to 1.3.6, at https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-01-the-singapore-legal-system#:~:text=C.&text=1.3.,and%20the%20Law%20of%20Evidence).

[7] [2022] SGCA 34.

issues was whether an anti-suit injunction should be granted to restrain the pursuit of foreign proceedings. In determining the issue, the Court of Appeal considered a number of the English law authorities on the subject in arriving at its decision that the first instance judge had been wrong to grant the injunction.

However, reliance on English authority is diminished in at least three respects.

First, Singapore has an increasingly sophisticated commercial jurisprudence of its own, which means that there is less need to rely on English jurisprudence because Singapore authority on the subject in question already exists, albeit that such authority may in its own turn have been based on a consideration of English jurisprudence. In short, there has been a greater recognition of local jurisprudence in the development of the common law in Singapore.

Second, the growth of jurisprudence in other developed common law jurisdictions in the Asia-Pacific region such as Australia and New Zealand has meant that there is a growing corpus of law from those jurisdictions to which Singapore courts and tribunals will also have regard. This is particularly but by no means exclusively the case in areas such as company law, where the Singapore legislation is modelled on the Australian legislation. In that situation, it makes perfect sense for Singapore to turn to the jurisprudence of the Australian courts rather than that of the English courts.

Third, judicial attitudes are such that there is a greater willingness not to follow English jurisprudence than would previously have been the case, due to the increasing distance year-on-year from Singapore's colonial past, the changing educational background of the Singapore judiciary as with other lawyers and, with those considerations, the increased confidence of Singapore in its own legal system.

One example concerns the law relating to the implication of terms into a contract. In *Attorney General of Belize and others v Belize Telecom Ltd* decided in 2009[8], Lord Hoffmann had introduced some uncertainty into the applicable test for the implication of a term. Certain academics and judges had interpreted *Belize* as having diluted the requirements for the implication of a term so that a term can be implied into a contract, provided that it would be reasonable to do so. In *Sembcorp Marine v PPL Holdings Pte Ltd* in 2013[9], the Singapore Court of Appeal categorically rejected the approach taken in *Belize* to the extent that it purported to impose this standard of reasonableness to implied terms, following previous decisions in two earlier cases.[10]

[8] [2009] UKPC 10.

[9] [2013] 4 SLR 193, [2013] SGCA 43 at [77] and [82].

[10] *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267 at [31], [36]; and *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150.

The second aspect on which I want to touch is the impact of the United Kingdom's membership of and then departure from the European Union on the relevance of English law in Singapore. In the period of the United Kingdom's membership of the European Union, there were divergences in some areas between English law and the law in Singapore and other common law jurisdictions such as Australia in consequence of the European Communities Act 1972 which gave effect in the United Kingdom to European Community legislation and jurisprudence. This led to a perception in Singapore and elsewhere that the English common law had in some way been tainted by European law and was therefore of less relevance than in the past. In my view, that perception was exaggerated. Section 2 of the 1972 Act was very carefully drafted. It provided that all European Community laws were "*without further enactment to be given legal effect or used in the United Kingdom*". It did *not* make European law part of United Kingdom law. Undoubtedly there were some areas where the common law was supplanted by the need to apply EU law. But in many areas EU law had no impact on the common law and yet the perception, encouraged in some instances by the other common law jurisdictions in the region, resulted in less weight being attributed to English law.

What, then, flows from Brexit? The United Kingdom left the European Union on 31 January 2020. It is not to be anticipated that this will result in a sudden or indeed any return to the past. Singapore has grown accustomed to look at a range of precedents from other common law jurisdictions and this is not something which can be expected to change or which indeed it would be a good idea to change.

This brings me, *third*, to the reliance by the English courts on Singapore law precedents. I referred earlier to the growing internationalism of law, particularly in the commercial law field. There was a time, from my own experience, when reliance on Singapore authority in an English court would have been laughed out of court, however courteous the laughter may have been. The joke now would be on the English court. Allow me to give just one example.

There has been an ongoing debate, now resolved, in English law on whether the issue of compliance with pre-conditions to the start of arbitration proceedings is a matter of the arbitral tribunal's jurisdiction or else admissibility. Put simply, the concept of jurisdiction in the arbitration context refers to the authority of an arbitral tribunal to determine a case; whereas admissibility refers to the appropriateness of an arbitral tribunal exercising its jurisdiction. The distinction between the two concepts was the subject of extensive academic writings but of less analysis in English cases.

The distinction matters because section 30 of the English Arbitration Act 1996, which is concerned with the competence of a tribunal to rule of its own jurisdiction, identifies three areas where the issue of the tribunal's substantive jurisdiction comes into play: it relates to issues (i) whether there is a valid arbitration agreement, (ii) whether the tribunal is properly constituted and (iii) of what matters have been submitted to arbitration in accordance with the arbitration agreement. Those three issues are the only ones that can be relied on in a challenge under section 67 of the Act to any award of a tribunal as to its substantive jurisdiction.

The issue arose in a case called *Republic of Sierra Leone v SL Mining*.[11] Without going into the details of the case, the point here is that Singapore had recognised this distinction between admissibility and jurisdiction for longer than had the English courts. The Commercial Court relied on two decisions of the Singapore Court of Appeal (*BBA v BAZ*[12] and *BTN v BTP*[13]) in support of the conclusion that alleged prematurity was a matter of admissibility and not jurisdiction.

Conclusion

In conclusion, Singapore has both broken free of English legal imperialism and gone on to develop its own sophisticated commercial (and indeed other) jurisprudence. At the same time, Singapore has been sufficiently and characteristically pragmatic not to abandon reliance on English jurisprudence for dogmatic reasons. Leaving colonialism aside, the historical connection with England both politically and culturally means that English jurisprudence continues to influence the development of the law in Singapore along side the jurisprudence of other common law jurisdictions in the Asia-Pacific region and elsewhere.

[11] [2021] EWHC 286 (Comm).

[12] [2020] 2 SLR 453.

[13] [2020] SGCA 105.