



COMMERCIAL AGREEMENTS OPPOSED TO PUBLIC POLICY: THE MALAYSIAN INTERPRETATION



Kho Feng Ming^{1*}
Sakina Shaik Ahmad
Yusoff²

^{1,2}Faculty of Law, Universiti Kebangsaan Malaysia, Malaysia



(+ Corresponding author)

ABSTRACT

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Public policy as a ground for holding a contract illegal and thus void, in Malaysia, is a topic that not to be broached lightly. Although a contract is complete, in the sense that it contains the necessary elements of a valid contract, the contract may still be held void on grounds of illegality. However the knotty state of affairs which caused much debate among the judges in Malaysia is that the Contracts Act 1950 has failed to lay down a proper legal framework to regulate public policy matters since the enforcement of this Act. With the present laws being in limbo, judges have then acted at their discretions when adjudicating case laws, either by embracing the common law classification on public policy, or by adopting the approach of extending the scope beyond the common law classification. Hence this gives rise to inconsistencies in the law. Using the content analysis methodology of research, this paper seeks to propound that Malaysia should establish a proper legal framework on contracts against public policy so as to avoid any inconsistencies and uncertainties in the law of contract. Transposing principles of public policy from foreign jurisdictions may not be the ideal solution.

1. INTRODUCTION

If the authorities in developing countries aspire to inaugurate the legitimacy of public policy in addition to enhancing transparency, efficacy and quality of their policies, the participation of business and civil society groups such as citizens, consumers, employees, private entrepreneurs, community groups and NGOs are crucial in designing public policy (Do, 2013). The calibre of its policy structure, the decisions made, especially the series of steps taken connected with drawing up each decision affect the economic growth of a country. It is comprehensible that around the globe, predominantly developing countries, differ appreciably in their abilities, and feasibly their willingness to devise and implement policies that will bring about better development performances (Corkery *et al.*, 1995). The topic of public policy touches on the policy formulation. Indeed it is part of the pre-decision phase of policy making. The undertaking of policy formulation includes addressing the socio-economic dilemma by tailoring identification of a set of public policy alternatives. Then, the exercise of choosing as being the best and most suitable solution operates by way of circumscribing that set of solution as a preparation for the final policy solutions for the next stage (Do, 2013). With the world at an ever fast-changing phase, a policy framed by the authority will not work efficiently as it was. Rapid globalisation changes the operation of economy, and hence the way of how we think have to change. The antediluvian analytical framework and the 'archaic' rules of policy are neither sufficient nor adequate in a globalised world where in former times, factors such as geographic and political barriers which

served as obstacles to the development of economy are now no longer a hindrance to the progressive advancement of cross-border transaction. The phrase globalisation narrates the greater freedom across international borders on the movement of goods, services, intellectual property, people and ideas. It connotes greater competition, increased specialisation and significant markets expansion, which consequently escalate productivity and trigger innovation. Accordingly, it leads to higher living standards. When globalisation soared in past decades, income per capita and the freedom of economy have both surge for the world as a whole (World Bank and Fraser Institute). The biggest advances features global communication, where the proliferation of wireless internet, high-tech computers and smart phones accommodate global pluralism. In terms of public policy matters, globalisation raises the bar. Nevertheless there is a chicken-and-egg predicament: did globalisation polish up public policy, or countries with finer policies will be more victorious in the globalisation era. However it can be evident that when country becomes more globalised, these nations are more plausible to strive for policies that bestow successful market economies. They scarcely have barriers on international trades, and instead with fewer and better administered regulations. Better policies such as favourable corporate tax environment are often put in place to promote innovations, and they encourage more open capital markets. In other words, the greatest degree of globalisation comes together with policies which further reinforce, not only on the aspect of accountability in both private and public sectors, but to a greater extent, featuring courts which agnise property rights and act as an upholder of the rule of law. Such policies also hallmark governments which are administered more effectively with less corrupted practices, and government policies are tend to be more stable (Michael, 2006).

In the context of Malaysia, matters pertaining to public policy in the realm of commercial law is regulated by the Malaysian Contracts Act 1950. Unfortunately the provisions regulating public policy is unclear and is clouded with much uncertainties. No proper guidelines have been provided and the framework on this area is not properly structured. Furthermore, with no major amendments have arisen since the application of this Act in Malaysia, it can be deduced that Parliament has failed to carry out their responsibility in 'healing the fragility' in this area of law. The legislative had not made any initiative and progressive steps to cure this weakness in the Contracts Act. Such unusual failure is a rare phenomenon and as such, the task of shaping a model of legal principles regulating public policy in commercial law is then shifted to the judges. The judges are now entrusted with unique tasks, *viz* interpreting laws but doing so without a proper framework and guidelines found in statute. Under such circumstances, complications developed into stumbling blocks in common law legal system (the most outstanding attribute of common law system is that it caters for certainty in the law) particularly when judges have distinct schools of jurisprudential thoughts, *inter alia*, natural law school, the historical school, the positivist school and legal realism. Each school of thoughts has an eccentric perspective on the laws. However when different approaches on public policy matters are adopted, they will result in the legal principles on one case law differing from another, with distinct opinions being put forward by the judges. Each opinion is succinctly convincing, be that as it may, such inconsistencies somehow does not reflect the traits of common law system. For instance, the thoughts of natural law school surmise that universal moral principles which are inherent in nature established the law, rights and ethics, and they are discoverable through the human reasons. Naturalists uphold the idea that the eternal principles present from immemorial such as religious belief, moral philosophy, individual conscience, historical practice, and human reason are necessary to bind the law, and should remain independent of governmental recognition and influence. Friedman gives an account of natural law:

“... The history of natural law is a tale of the search of mankind for absolute justice and of its failure... with changing social and political conditions the notions about natural law have changed. The only thing that has remain constant is the appeal to something higher than positive law...”

Proponents of natural law insist that rules do not merely consist of those enacted by the government, but the integrated parts of the law shall include religion, individual conscience, moral philosophy, and human reason. Whereas the positivist school opined that law and morals are kept separated (Chand, 1994). Law is the command of

the State, applies only to the nationals of that State during that particular era. Therefore, it is law that is universal, not rights nor ethics. The morality of a law, or the notion of whether “it is a good law or bad law” is utterly irrelevant. In other words, the aid of extraneous matters is *in absentia* under such mode of jurisprudential analysis, and as such political reasons, social context, and psychological background are not considered (Zafer, 1994). Hart (1961) puts it in these words:

“... here we shall take legal positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so...”

Under legal positivism, even if the law isn't considered to be fair or just, there is no valid argument for contravening a law. For instance, there would be no valid just cause for breaking a law by tranquilly dissenting an issue. This is true even if the dissenter possessed high ethical and moral objections to the issue-though the protest would be justified under a natural law theory (Dugger, A, Schools of Jurisprudence: Theories & Definitions). On the other hand, the jurisprudential thoughts of historical school focus attention on the evolutionary development of law, and centralise on the inception of the legal system. For historicists, law that has withstood the test of time hence obtains its legitimacy and authority, thus such school of jurisprudential thought follows decisions of earlier cases. According to legal realism, the notion of law is associated with the social context, and the law changes when the context changes. In deciding cases, considerations such as economic and social realities should be taken into account. For realists, the cultural, economic and political values are to be weighed within the context of that particular society (Allen, 2009). In a lecture at Suffolk University Law School, Supreme Court Justice Sonia Sotomayor explained: *vis a vis*

“... the law that lawyers practice and judges declare is not a definitive, capital 'L' law that many would like to think exists. Instead, courts and lawyers are constantly overhauling the law and adapting it to the realities of ever-changing social, industrial, and political conditions (Schools of Jurisprudence: Theories & Definitions, n.d.)...”

This phenomenon contributed to the current problems faced by Malaysia, *inter alia*, judicial discretions and judicial creativity but without a control mechanism. Judges are at their discretions to develop legal principles in adjudication by adopting different school of thoughts on matters relating to public policy in commercial realm. Such occurrence posed the most worrying trend in the Malaysian common law system: inconsistencies in the law. Such situation contradicts the idea of common law system as the most outstanding features for practicing such system in a legal administration of a country is that it caters for certainty in the law. Expressing in a different way, discretion should not be left in the hands and responsibility of judges. In theory, this flexibility of the dogma of public policy could possibly furnish a judge with an excuse for nullifying any contract which he absolutely abhorred (Peel, 2015). Undoubtedly judicial creativity is a beauty of the common law system, laying down principles from a case law and uniquely possessing the persistent consistency. It has long-lasting basic law, rich in precedents and literature on the subject (Abdul, 2014). However such state of affairs are not achievable if a particular provision is vague or that it authorised judges to act in his discretion. When a particular legal issue is left to the creativity of judges without a control mechanism, this creates inconsistency. A principle laid down in a particular case may not be followed by future cases, and this distorted the doctrine of *stare decisis*. Therefore the legislative body is responsible for establishing a proper framework on public policy in a progressive society.

2. PUBLIC POLICY & THE JUDICIAL CREATIVITY

It can be observed that the phrase ‘public policy’ occurred only on one occasion in the Malaysian Contracts Act 1950. No definition had been provided to accompany the phrase, which has accordingly authorised the judges in Malaysia to act at their discretion to decide on the framework of policy which are in the interest of the public. Section 24 of the Act provides:

Section 24. What considerations and objects are lawful, and what are not.

The consideration or object of an agreement is lawful, unless-

...

(e) the court regards it as immoral, or opposed to *public policy*.

In... the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The principle of public policy is this; *ex dolo malo non oritur actio* (Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341, 343). Public policy in the simplest sense can be denoted as the philosophical blueprint, functioning as a set of systems, rules and regulations regulating the conduct society and its politics (Abella, 1986). It was the notion of 'unruly horse', not the expression of 'Pegasus', used to describe public policy (Winfield, 1928). In its statutory embodiment, it may be represented in two ways. It may either symbolise a Kantian acappella refrain, daringly searching for the social contract re-delineation without the accompaniment of the benefit of majority where the consensus is nowhere to be seen; or it may typify a Faustian bargain between the majority and the legislature swapping for persistence electoral success where such common consent is present. Put it in another way, the abstract idea of public policy is value-laden. In spite of that, it is an indefinite yet climacteric primogenitor of the rules we choose to live by Schneiderman (1969). A public policy often resembles certain values, morality or code of ethics. This code reflects our intention and expectation that most of the society shall abide with it. Based on the discernment of public, the importunings of constituents, the prevalent ideology in the society, collegial input, and the perceived electoral risk, it is the basic function of the legislature to reach a decision which values will be transcribed into statutory law, whether it does so consciously or unconsciously (Abella, 1989).

It can be perceived that the provisions in section 24(e) of the Contracts Act has provided an authoritative remark: *viz* the discretion is left to the court to decide on what amounts to immoral, or agreements which are opposed to public policy, but not the legislative body. Indistinguishable reflection was made by Wee Chong Jin CJ in *Cheng Swee Tiang v Public Prosecutor* [1964] MLJ 291:

"... the development of the law has generally been judicial; Parliamentary intervention is likely to be at best occasional and delayed; and the Law Commission do not appear to have taken cognizance of the problem..."

From the perspective of Malaysia, such provision is itself not suitable and needs to be reevaluate with critical appraisal. Leaving the courts to its' full discretion may in the context of separation of power, contradict to the concept that the court is not meant to play the role of legislating the law but to apply the law as it stands. Encroaching onto other branches such as the executive and the legislative body may create havoc resulting devastated catastrophe. Expressing it in a different way, the current state of affairs of leaving a policy related matters at the hand of judges yields unanticipated insidious menaces. A judge may then have its' discretion, although always interpreting and enforcing it within the reasonable boundary but this may not be always be welcomed and accepted by the other branches of government, *inter alia* the legislative or the executive arms of a State. For instance, dated back to the late 1980s, Malaysia has witnessed the Prime Minister during that era, manifesting his exasperation against the judiciary in Times Magazine on 24th November 1986:

"The Judiciary says. 'Although you passed a law with certain thing in mind, we think that your mind is wrong, and we want to give our interpretation.' If we disagree, the courts say, 'We will interpret your disagreement.' If we go along, we are going to lose our power of legislation. We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to interpret it our way. If we find that a court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish."

This is the reason as to why having a proper legal framework on public policy in commercial law is of great important value and in fact, pivotal as it ensures certainty and consistency.

3. MALAYSIAN JUDGES AND PUBLIC POLICY: THE NARROW INTERPRETATION

More often than not in the law of contract, it can be perceived that the judges in Malaysia adopted two dissimilar trends on adjudicating matters pertaining to agreements that are opposed to public policy. In some instances, the case laws suggested that they adopted the 'narrow view' on public policy while in other cases, the judges chose to depart from the former. The 'narrow view' on public policy is said to be based on the traditional classification under the common law, namely:

- (a) illegal by common law or legislation
- (b) injurious to good government, either in the field of domestic or foreign affairs
- (c) interfere with the proper working of the machinery of justice
- (d) injurious to family life
- (e) economically against the public interest

Such classification under the common law tradition on public policy, if chosen to be adopted and applied in the context of Malaysia in the law of contract, is regarded as the 'narrow view' on public policy. However it is ambiguous on whether the notion of 'public policy' as embodied in paragraph (e) of section 24 of Malaysian Contracts Act is co-extensive with the idea as perceived under the common law (Sinnadurai, 2011). By the virtue of section 3(1) of the Civil Law Act 1956, and with the ceaseless enforcement of this Civil Law Act, it accedes to the incorporation of English law principles into the Malaysian law in the event of *lacunae*. Based on this provision, the English common law and rules of equity are applicable in West Malaysia only to the extent of those as administered in England on the 7th day of April 1956, whereas both the English common law, the rules of equity together with the statutes of general application are applicable in Sabah and Sarawak on the 1st day of December 1951 and on the 12th day of December 1949 respectively. This provision further provides that any developments after the stated dates in the English common law, rules of equity and the statutes of general application do not automatically applied in Malaysia. It can be inferred that Malaysian courts has the liberty to adopt or reject new developments arising from English cases. Local laws and circumstances hence will take precedence over the English law and in limiting the wholesale application of English law, nothing more than those parts of the English law which are right and appropriate to local circumstances will be applied (Norchaya, 2010). Put it in another way, as a result of the Civil Law Act, judges in Malaysia are authorised to incorporate the common law model of classification on public policy.

The manner of operation under the common law classification is such that if the object or the consideration of an agreement falls under any one of the stipulated rules, the agreement is said to be void on the grounds of illegality. In a similar fashion if the object or consideration of the agreement does not fall under any one of the heads as stipulated under the common law classification on public policy, the agreement is lawful and enforceable for the reason that it is not against the interest of the public. It neither inflicts hardship to the society, nor being antagonistic to the welfare of the society and thus the agreement is not unenforceable. Under such common law classification courts are not at liberty to invent any new heads of public policy (*Johnson v Driefontmein Consolidated Mines Ltd* [1902] AC 484 at 491). In the interest of certainty in the law the courts will, in general, decline to apply the doctrine of public policy to contracts of a kind to which the doctrine has never been applied (Peel, 2015) and *Printing & Numerical Registering Co v Sampson* (1875) LR 19 Eq 462). Courts are hence obliged to tread on the heels of the classification under the five heads, and their duty is to explain, and not to expand such a policy (*Fender v St. John-Mildmay* [1937] AC 1). This is commonly regarded as the 'narrow view' on public policy as if any consideration or object of the agreement falling outside these five rules does not make the agreement unlawful.

Pollock and Mulla, in a commentary on section 23 of the Indian Contract Act 1872 (in *pari materia* to section 24 of the Malaysian Contracts Act 1950), opined that courts are not free to invent any new heads of public policy: Nilima (2012).

“... The general head of public policy covers in English law, a wide range of topics. Agreement may offend against public policy by tending to the prejudice of the State in time of war (trading with enemies, etc.), by tending to the perversion or abuse of municipal justice (stifling prosecutions, champertous agreements and maintenance of law suits) or, in private life, by attempting to impose inconvenient and unreasonable restrictions on the free choice of individuals in marriage, or their liberty to exercise any lawful trade or calling... it is now understood that the doctrine of public policy will not be extended beyond the classes of cases already covered by it. No court can invent a new head of public policy...”

The ‘narrow view’ on public policy has in fact adopted and applied in Malaysia, evident via the case of *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253. The Malaysian court held that they are bound by the traditional heads of the common law and innovating any new heads of public policy is unacceptable. Gill CJ quoted:

“... The present contract does not fit into any of the traditional pigeon holes... the contract between the plaintiff and the defendant was [hence] not illegal...”

The decision of the Federal Court is significant in that it represents the narrow judicial viewpoint in respect of the concept of public policy. The heads of public policy are not open and that the Malaysian courts do not have the power, even under section 24 of the Contracts Act, to invent new heads. The *coup de grace* opinion by Sinnadurai offers invaluable thoughts:

“... The wisdom of the Malaysian courts in adopting such a narrow view is questionable ...” (2011, p. 656).

The subsequent cases such as *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621 and *Hopewell Construction Co Ltd v Eastern and Oriental Hotel (1951) Sdn Bhd* [1988] 2 MLJ 621 adopted similar approach towards public policy matters in contract. Furthermore in *Yap Chee Meng v Ajinomoto (M) Bhd* [1978] 2 MLJ 249, the judge declined to set aside a settlement negotiated by a solicitor on behalf of his client for the reason of public policy. The court highlighted that the approach of inventing new heads of public policy and deviating from the traditional common law classification will consequently give rise to ‘floodgates of litigation’.

With utmost respect, humourless doubts arise as if these *dicta* would be uniform with the history of Malaysian law or with great deal of modern decisions. Hence with the Civil Law Act itself still being in force in Malaysia, under such circumstances transposing case laws from other jurisdictions is an unexceptional occurrence. The Malaysian courts therefore have the license to assimilate and indeed have continuously incorporated existing English common law principles in adjudicating local cases, even on matters of public policy in the law of contract. Although adopting the common law view on public policy into the local context ensures certainty and consistency in the law, nonetheless such approach must not be prominently recognised because the incorporation of foreign jurisdictions’ principles into Malaysia may not be entirely suitable. A policy administered in England may differ from those administered in Malaysia. The richness of Malaysia begins with our people, and a policy should hence modelled and moulded into a manner reflecting the characteristics of local context. It must be borne in mind that when Malaysia secured Her Independence on 31st August 1957, departing from the long standing influence of the rulings of the British was one of the intention of the newly formed Malaysia during the era. This can be evident in several matters, *inter alia*

- (i) Firstly, Malaysia have chosen to adopt a written Federal Constitution as the highest law of the land to govern the people and the country rather than adopting the practice of the British who owns no written Constitution. This shows that Malaysia had intended to stand on Her own in terms of day-to-day administrations.

- (ii) Secondly, in year 1984 Malaysia had reconstructed the hierarchy of the court. The previous system which allowed further appeals being made to the Privy Council was since then abolished. Thereafter all cases arising in Malaysia have been adjudicated and decided by the highest court in Malaysia only.

Different countries have distinct public policies and thus the system of laws administered in one country may be appropriate but may not necessarily work as efficient and coherent as in another nation and *vice versa*. Therefore it is evident that Malaysia had moved forward and advanced to a nation repelling the silhouette of British, regardless of in the realm of politics, administrations, the machinery of justice or securities of a country. Malaysia has shown Her tenacious determination to grow and compete with the other countries in the international stage without further shadows from the British rulings. Likewise when composing the framework for policy matters, it must be sketched, outlined, designed and then delineated to fit into the context of Malaysia. The laws regulating public policy in commercial area similarly should not be discounted. The judges in Malaysia must be critical when incorporating case laws from other jurisdictions. Departure from common law counterparts is necessary and obligatory when those principles are not suitable to the local context. Hence when the Contracts Act provides discretion to the judges to decide on what agreements are opposed to public policy, judges should then formulate a policy that is suitable and appropriate to the Malaysian context or the framework of “Malaysian style” public interest matters. Cross references to other jurisdictions’ counterpart are no longer relevant. Sinnadurai made indistinguishable argument that Malaysian courts are neither bound nor shackled by the so-called established common law ‘heads’ of public policy. The judges have the power to ‘invent’ new heads when the state of affairs of a particular case warrants it. Furthermore he made a stand that such egression from the common law classification is critically necessary, and the court should take a more liberal attitude rather than fetter its powers under section 24(e):

“... two main arguments may be put forward in support of this view... (i) certain common law heads of public policy are already provided under the Act: contracts in restraint of trade, contracts in restraint of marriage and contracts which oust the jurisdiction of the courts. These sections would be superfluous if section 24 (e) is interpreted so as to confine its application to the corresponding heads of public policy as articulated by English courts... (ii) the very concept of public policy must vary with the times and with different communities. The Malaysian courts should not feel constrained to slavishly follow the common law decisions: cases may arise in Malaysia which need not necessarily fall within any established ‘heads’ of the common law. The Malaysian courts should have the necessary power to strike down such agreements as being opposed to the public policy of the country...” (2011, p. 649)

As a concluding remark, since public policy reflects the morals and fundamentals suppositions of the people, the intrinsic nature of the rules should diversify and differ from one country to another, from one era to another. The laws relating to public policy must change with the passages of time and it cannot remain immutable (*Nagle v Feilden and Others* [1966] 1 All ER 689 at 696). In the words of Cheshire and Fifoot: [Furmston \(2001\)](#)

“... There is high authority for the view that in matters of public policy the courts should adopt a broader approach than they usually do to the use of precedents. Such flexibility may manifest itself in two ways:

- (i) by the closing down of existing heads of public policy; and
- (ii) by the opening of new heads.

There is no doubt that an existing head of public policy may be declared redundant...”

In the context of Malaysia, the judges should be more critical towards the principles laid down by English counterparts, particularly when the Contracts Act itself provides discretion to the judges but not on the Parliament to regulate public policy matters in commercial area. Be that as it may, with the power to make amendments on any statute vested in Parliament via the Malaysian Federal Constitution, perhaps the legislative body should act swiftly and be more proactive to make necessary amendments to the Contracts Act 1950. Revision and modification must be done by the Parliament by laying down certain guiding principles on public policy matters.

4. MALAYSIAN JUDGES AND PUBLIC POLICY: THE WIDER INTERPRETATION

On the contrary, when judges opted to depart from the common law classification on public policy, such approach is regarded as adopting the ‘wider view’ on public policy. Such circumstances witnessed the judges broaden the scope of public policy to a larger circle. It signified that although an agreement does not fall under any one of the head of classifications under the common law classification on public policy, the agreement does not necessarily become lawful. The rewarding advantage of this approach on public policy is that it makes certain that the autonomy of parties to a contract is not without restrictions. Fortunately the courts have not hesitated in the past to apply the doctrine whenever the facts demanded its application (*Naylor, Benzon & Co Ltd v Krainische Industrie Gesellschaft* [1918] 1 KB 331). Agreements which were held to be against public policy and unenforceable under section 24(e) of the Contracts Act 1950 are such as those in contravention of foreign law, bribery, defrauding public authorities, touting, defrauding creditors and non compliance of Guidelines. LC Vohrah J in *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 CLJ 44 further elaborated:

“... The primary duty of a Court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts into which the parties have an unfettered right to enter provided they are not opposed to public policy or are not hit by any provision of the law of the land...”

The table below illustrates the case laws which depicted the courts in Malaysia have utilised the power to ‘invent’ the new heads of public policy, extending beyond the scope laid down under the traditional common law classification when adjudicating disputes which arose in the context of Malaysia.

Table-1. Table of cases illustrating wider view of public policy in Malaysia

Cases	Brief facts	Judgment
<i>Koid Hong Keat v Rhina Bhar</i> [1989] 3 MLJ 238	the agreement between the parties amounted to touting under the Legal Profession Act 1976 (Act 166)	It was contrary to public policy under section 24(e) of Contracts Act 1950
<i>Fusing Construction Sdn Bhd v EON Finance Bhd</i> [2000] 3 MLJ 95	a transaction which was intended to deceive Bank Negara Malaysia	illegal and void under section 24(e) of the Contracts Act 1950
<i>Lim Yoke Kian v Castle Development Sdn Bhd</i> [2000] 4 MLJ 443	a scheme whereby the shareholders agreed to defer the winding up of the company so as to minimise the payment of income tax	illegal on the ground of contrary to public policy
<i>Thong Foo Ching v Shigenori Ono</i> [1998] 4 MLJ 585	an agreement to circumvent the provisions of the Stamp Act 1949 (Act 378) and the Real Property Gains Tax Act 1976	unenforceable as being opposed to public policy under section 24(e) of the Contracts Act 1950
<i>B-Trak Sdn Bhd v Bingkul Timber Agencies Sdn Bhd</i> [1989] 1 MLJ 124	agreements has the effect of misleading the revenue, for example breaching the Income Tax Act 1967 (Act 53)	unenforceable under section 24(e) of Contracts Act 1950
<i>Amalgamated Steel Mills Bhd v Ingeback (Malaysia) Sdn Bhd</i> [1990] 2 MLJ 374, <i>Harun bin Taib v Khor Peng Song</i> [1991] 3 CLJ 248 and <i>Lim Kar Bee v Duofortis Properties (M) Sdn Bhd</i> [1992] 2 MLJ 281	an agreement to avoid the payment of stamp duty or estate duty is said to be defrauding public authorities and hence	illegal and void for contravening public policy
<i>PT International Nickel Indonesia v General Trading Corp (M) Sdn Bhd</i> [1978] 1 MLJ 1	a contract between a briber and recipient of a bribe	It is an illegal contract and cannot form the basis of a claim before the courts on the grounds of public policy.
<i>Amman Singh v Vasudevan</i> [1973] 1 MLJ 210	agreement entered into between the parties with the intention to defraud creditors in winding up petition of a company	void as the agreement was unlawful

Besides it can be further evident that the courts have held that an agreement is void being contradictory to public policy due to the non-compliance of Guideline, where the court in *David Hey v New Kok Ann Realty Sdn Bhd* [1985] 1 MLJ 167, opined as followed:

“... We have studied the ‘Guidelines for the Regulation of Acquisition of Assets, Mergers and Take-overs’, a document which was referred to by the learned trial judge in his notes of proceedings. It would seem to

us that it is more than mere political policy, reflecting as it does a national economic policy, the New Economic Policy of which we could properly take judicial notice...”

In recent years, the case such as *China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1, illustrates a visible progressive development in this area of law. The judges have not been afraid of striking down agreements which are against the public policy in the local circumstances. They have opted for roaming far beyond the common law classification of public policy, and has in fact limited the transposing of case laws from other jurisdictions into Malaysia. Hamid Sultan JCA observed:

“... We must say illustration (f) of section 24 of the Contracts Act 1950 is very significant to arrest any form of impropriety by touts, ‘self confessed peddler’, as in the instant case in the affairs of government. It is the duty of the court to be vigilant. It is for the court to consider whether the consideration or object of an agreement is void on the grounds of public policy irrespective of whether parties have pleaded it or not or the issue was taken at the trial court. Though courts are slow in creating ‘new heads’ of public policy, it cannot fail to recognise the ‘heads’ which stand as illustrations in particular (f) in the instant case...”

The contemporary development in this area of law witnessed the similar trend laid down by the courts, where the case of *Anthony Lawrence Bourke and Alison Deborah Essex Bourke v CIMB Bank Berhad* (30th June 2017) further reinforced the current judicial viewpoint in Malaysia on adopting wider view on public policy. The judges have played important role in creating new heads of public policy. In this case, the appellants purchased a piece of property from developer, Crest Worldwide Resources Sdn Bhd in year 2008. In the same year, the appellants took a term loan from the defendant bank to finance the purchase, where the former would service the monthly instalments and the latter would essentially make payments to the developer by progress payments whenever they were due. However, when CIMB failed to make remittance on one of the invoices, the developer brought the entire sale and purchase agreement with the appellants to an end, resulting the appellants to lost their property. In 2015, the Bourkes initiated a legal action against the bank for negligence and breach of contract. Counsel for the appellants put forward the argument that the exemption clause 12 in the agreement is illegal, void under section 29 of the Contracts Act 1950 and as such contrary to public policy. Hence it is not an absolute exemption on the liability of the bank. On the other hand, counsel for the bank however contended that the exemption clause which is clearly susceptible of one meaning only, must be enforced however unreasonable the court may think. Clause 12 of the Loan Agreement is an exclusion clause which excludes liability not only in respect of the bank’s primary obligation but also the general secondary obligation (*CIMB Bank Bhd v Maybank Trustees Berhad and other appeals* [2014] 3 MLJ 168 and *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556). However the three-man bench composed of Rohana Yusuf J, Vernon Ong Lam Kiat J concurring with Hasnah Mohammed Hashim J in an unanimous decision held that a bank is responsible and liable for breaches, both in contract and in tort for the act of refusing to make a housing loan progress payment to the developer. The inclusion of clause on the exclusion of liability in the agreement can neither sustained nor absolved the liability of the bank:

“... [55] In the circumstances we are of the considered view that Clause 12 contravenes section 29 of the Contracts Act, because in its true effect it is a clause that has effectively restrained any form of legal proceedings by the appellants against the bank. It can be clearly demonstrated by the current appeal that despite our findings on the breach by the bank in this case if Clause 12 is allowed to stay it would be an exercise in futility for the appellants to file any suit against the respondent bank... [57] We find the bank was in breach of the fundamental term of the Loan Agreement in failing to pay the Invoice in accordance to its term which had directly caused the termination of the SPA causing the appellants to suffer loss and damage... We further find Clause 12 in effect is a clause that absolutely restrains legal proceedings and [hence] it is void under section 29 of the Contracts Act...”

This recent decision has once more manifested as astonishing and astounding authority which had materially bring a new head of public policy into existence. For that reason, the veracity of the subject appears to be that

public policy is a 'see-saw' affair. It shall vary with the passage of time, not steady but fluctuating. Hence over-dependence on resolutions of foreign counterpart courts is not encouraged. Although embracing the principles of foreign jurisdictions is not objectionable, it should be done with discretions. The prevailing circumstances in this country must be considered and pondered on seriously. However it is similarly not advisable to embrace a specific ruling to be applicable all the time in the country that a specific affair is opposed to the public policy at that particular point of time under the circumstances then prevailing in that country as a point of law. The public policy applied and operated in one State, though at the same moment of time, may as well be poles apart from another. In a similar fashion, the public policy within the State may have contrasting effect at different era. Even on the same occasion, the ethical values in one State may as well be incompatible from another. The stages of economic and education growth of one State may be non-identical from another. Civilisations, evolutions, politics, social problems, religion and culture development tend to be in divergent character. The vision of a State may be non-identical from that of another, so as the attitude of the general public. The policy of the State may change from individual civil and political rights to collective economic and cultural rights. It must be borne in mind that foreign courts only consider the relevant circumstances in their respective States when resolving on the question of public policy arise before them. Whether a matter is or is not against public policy is decided in the light of the public policy in their respective countries, certainly not Malaysia. Hence, when a Malaysian court decides on the issue of public policy in Malaysia, it should scrutinise the local laws, the local government policies, the local moral, ethical and cultural values of multifaceted races taking into considerations of all other relevant factors then prevailing in Malaysia (Abdul Hamid Mohamad J in *Banque Nasionale De Paris v Wuan Swee May & Anor* [2000] 3 MLJ 587).

It can be inferred that when judges have chosen to depart from so-called established common law 'heads' of public policy, to the smallest extent it has shown that the Malaysian courts have finally avail oneself of the power to 'invent' new heads when the situations of a particular case warrants it. Even so one problem arises, that is inconsistencies in the law. Particularly in Malaysia with no proper guidelines being established in the Contracts Act to regulate public policy matters, it signified that no control mechanisms are imposed on the discretions of judges. When judges are permitted to adopt the approach of 'wider view' on public policy, it denotes that the courts will play the role in formulating or re-designing the existing principles on public policy which may be out-of-date to accommodate the onward movement of the society. For the best interest of the society, the judges will establish new legal principles fitting suitably to the community as he thinks appropriate. Accordingly the legal principles on numerous occasions differed greatly due to varying opinions from one judges to another. This is when judicial creativity is at its worst in common law system. The *coup de grace* on the need of having a proper framework on public policy working suitably in the context of Malaysia rather than leaving it to the discretion of judges can be referred to the aptly phrased thoughts of Abdul Hamid Mohamad, the former Chief Justice of Malaysia:

"... Imagine leaving it to lawyers and judges alone to decide and to develop on case to case basis. The lawyer is paid to represent his client, [advocate on behalf of his client]. He will certainly try to influence the court to state the law in a way that is beneficial to his client. He has a vested interest and he may be a very persuasive lawyer. A weak judge, especially at lower level, may be persuaded by him. Multiply by the scenario and you will see the law going haywire. The same may happen at higher level too, especially where some judges think that they are or want to be 'the Lord Denning' of Malaysia..." (2014, p. 2)

To conclude, when there is no proper legal framework in regulating the public policy in the law of contract, uncovering the current legal principles based upon case laws will be a final resort to rely on. As the society makes progressive advancement, judges will continue to play the role of shaping a legal principles suited to the community. Equipping with the notion of 'for the best interest of the society' in their mind, the judges then holds different opinions on this matter. As evident, judges often has distinct school of jurisprudential thoughts. The principles formulated by naturalist may not be accepted by the positivist, who has his own opinion. Juristic opinions raised by legal realist often enough being counter-argued by a formalist. Consequently this may affect the common

law legal system which in substance operates in a manner caters for consistency and certainty in the law. *Stare decisis et non quieta movere*: to abide by the precedents and not to “disturb settled points”. These points refer to principles which shall no longer be given thought to perusal, nor to a new ruling, by the same tribunal or those which are bound to tread on the heels of its adjudications, especially when a point of law has been once solemnly and necessarily settled by the decision of a competent court. (1886, p. 745) Apart from providing the idea of justice and fairness, this doctrine further brings forth the desirability of stability and certainty in the law. Paul (1987) Benjamin Cardozo in his treatise, *The Nature of the Judicial Process* stated:

“... It will not do to decide the same question one way between one set of litigants and the opposite way between another. ‘If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was a defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights.’ Miller (1980) Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts...” (1921, p. 33)

In *Sweney v The Department of Highways* [1933] OWN 783, Middleton JA for the Ontario Court of Appeal stated:

“... But, in my view, liberty to decide each case as you think right, without regard to principles laid down in previous similar cases, would only result in a completely uncertain law in which no citizen would know his rights or liabilities until he knew before what Judge his case would come and could guess what view that Judge would take on a consideration of the matter, without any regard to previous decisions...”

Associating justice and fairness with the doctrine of *stare decisis* may be appreciated by bearing in mind the observation of American philosopher William K. Frankena as to what amounts to injustice:

“... The paradigm case of injustice is that in which there are two similar individuals in similar circumstances and one of them is treated better or worse than the other. In this case, the cry of injustice rightly goes up against the responsible agent or group; and unless that agent or group can establish that there is some relevant dissimilarity after all between the individuals concerned and their circumstances, he or they will be guilty as charged...” (1973, p. 49)

Put it in another way, in light of the current circumstances on the law relating to public policy in Malaysia, judges hence will play the role of laying down certain principles based on the statutes and it binds all future cases if similar disputes arise. However with such grave inconsistencies on the view of public policy among the judges in Malaysia, perhaps there is an urgency or the need to establish a proper framework on ‘what amounts to agreements that is against public policy’. To curb this problem from arising continuously, such inconsistencies can be deterred by laying down the general principles in this area by the Parliament. Such general principles will then be able to serve as a guideline to the judiciary. In other words, leaving it entirely to the hands of judges on deciding the scope of public policy without a proper control mechanism should not be authorised. As a concluding remark, perchance the speech of John Orth offers invaluable thoughts:

“... Much of a judge's day-to-day work, of course, involves matters more mundane than constitutional adjudication. Statutes must be construed, which involves more than reading plain language. Anyone who has ever tried to puzzle his way through a statute knows that the meaning is often far from plain. But statutes in the modern world of regulation must be fitted into the complicated machinery of the modern state. Since a statute is produced in the political give-and-take of legislative bargaining, many gaps and inconsistencies may be left for the courts to deal with, as best they may. Charged with the duty of carrying out the will of the legislature, the modern judge must read the statutes in such a way that public policy will be effectuated, not stymied...The common law is, by definition, non-statutory law: law made by past

judicial decisions in keeping with the then current views of public policy. As society changes, so does the common law in order to conform to changed conditions. Should the judges fail to update the common law, the legislature will be forced to act..." (p. 14)

5. PUBLIC POLICY IN CONTRACTS: THE WAY FORWARD FOR MALAYSIA

Contemporaneously Malaysia is a nation that is advancing progressively in all aspects. English laws and English courts' of justice had always been given the utmost respect. Malaysia has inherited the common law system in the legal fraternity from the British, which brings positive outlook as it caters certainty in the law. However Malaysia has never intended to live under the silhouette of British counterparts in an endless manner. Malaysia has desire to be a holistic centre for Islamic banking and finance (Abdul, 2014). This has been strongly advocated by Abdul Hamid Mohammad on the aspect of reviewing the Malaysian Contracts Act 1950 so as to bring it in accord with the growth of Islamic finance and commercial law. Daring to be different is the ultimate goal and that sets us apart and being distinctive from others. Hence when amending the Contracts Act, do not alter it just for the sake of altering, nor for the reason that it has existed for a lengthy period. The fundamental principle of the Act should not be disrupted but remained, and this includes the terms which had been used and reaffirmed by the courts (Abdul, 2014). It must be borne in mind that the urgency to make amendments remains on the basis that such modifications should accommodate a provision as to what object or consideration of an agreement amounts to opposing the interest of public. Therefore a useful starting point to bring the Malaysian Contracts Act so as to be in accord with the Islamic principles begins with matters pertaining to public policy. With the ambition of revolutionising Malaysia to become a hub for Islamic banking and finance, perhaps establishing a proper framework on public policy with reference to the Shari'ah principles will be a useful starting point. All object or consideration of an agreement should reflect the core values of the Islamic principles, *viz* the *maqasid al-Shari'ah* (upholding the value of dignity or lineage, protecting the *al-Din*, the life, the intellect and the property of the mankind). There should be Malaysian law, and it should be interpreted according to Malaysian terms and this is connected with the ideas of national pride and identity Mohd *et al.* (2016).

6. CONCLUSION

Presently Malaysia still does not own a proper framework on what constitutes object or consideration of an agreement that are opposed to public policy. Adoption and incorporation of principles from other jurisdiction often occurred. Although it is not suitable to the local context, but serious questions arise as to the sense national pride and the status of Malaysian law. As Malaysia is emerging towards a holistic hub for Islamic banking and finance, the approach of embracing Shari'ah principle as the guideline in regulating public policy in commercial law will be a meaningful starting point. It does not only serve consistencies in the law, yet it reduces the discretion or the creativity of judges to a reasonable boundary. Malaysia will then not only be proud of being in possession of a proper and established structure on regulating public policy in the law of contract, yet Malaysia are no longer living under the shadow of external influence.

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