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ARTICLE

Media Arbitration Schemes: Addressing the Backlog of Defamation Cases in Malaysia

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Abstract

The rise in defamation claims in Malaysia has placed an onerous workload on the courts to deal with such matters. Against this backdrop, Hamid Sultan Abu Backer JC (as his Lordship then was) (Hamid Sultan JC) suggested in two separate High Court decisions that to alleviate the courts' burden, matters pertaining to libel and slander ought to be constrained to the criminal courts through appropriate statutory amendments, including to the Criminal Procedure Code (Malaysia). In this paper, the author cautions against the learned Hamid Sultan JC's recommendations and proffers an alternative proposal in the form of media arbitration schemes to handle the growing influx of defamation claims. In particular, the salient features of the IMPRESS and IPSO Schemes from the United Kingdom are scrutinized in detail and measured in terms of suitability for a potential arbitration scheme in the Malaysian jurisdiction.

Keywords: Arbitration; Defamation; Malaysia; Media Law

Defamation in Malaysia

Defamation, as a civil cause of action, is an umbrella term for the common law torts of libel and slander[1] as augmented by the Defamation Act 1957 (Malaysia), which codifies certain defences[2] and establishes certain privileges[3], amongst other provisions. In essence, this cause of action involves the publication of an untrue imputation[4] to a third party[5] that identifies the person impugned.[6] It is axiomatic that the imputation must be defamatory, which the courts have defined in a number of ways, such as whether the imputation would '*tend to lower the plaintiff in the estimation of right-thinking members of society generally*',[7] or '*tends to make the plaintiff be shunned*

[1]*Mak Khuin Weng v Melawangi Sdn Bhd* [2016] 5 MLJ 314 para 7 (Hamid Sultan Abu Backer JCA): 'Defamation is generic word and it consists of libel and slander, provided it satisfies the requirement developed by case laws'.

[2]Defamation Act 1957 (Malaysia), ss 8, 9.

[3]ibid ss 11, 12.

[4]*Roslan bin Ali v The New Straits Times (M) Bhd & Anor* [2017] MLJU 1385 at para 10, *per* Hayatul Akmal JC (as Her Ladyship then was): 'Defamation is committed when the defendant publishes to a third person words or matters containing untrue imputation against the reputation of the plaintiff'.

[5]*S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173, 176 (Wan Hamzah SCJ): 'In order to constitute publication, the defamatory matter must be published to a third party, and not simply to the plaintiff'; See also *Roslan bin Ali* (n 4).

[6]*Dato Annas Bin Khatib Jaafar v Sharifuddin Mohamed & Ors* [2014] MLJU 1770 para 160 (Su Geok Yiam J): 'The question is whether the words complained of can be understood by reasonable people who knew or knows the plaintiff, to refer to the plaintiff, no matter what the intention of the defendant may have been when the words complained of were used by the defendant'.

[7]*Sim v Stretch* [1936] All ER 1237, 1240, per Lord Atkin; *Utusan Melayu (M) Bhd v Lim Guan Eng* [2015] 6 MLJ 113 para 25 (Badariah Sahamid JCA): 'a defamatory statement is one which injures the reputation of another by exposing him to hatred, contempt or ridicule, or which tends to lower him in the esteem of right-thinking members of society'.

and avoided',[8] or would '*hold him up to contempt, scorn or ridicule or tend to exclude him from society*'.[9] Indeed, in the case of *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee*, the Federal Court succinctly explained that '[*t*]*he tort of defamation exists to protect, not the person or the pocket, but reputation of the person defamed*'.[10]

In Malaysia, it has been suggested that defamation cases, in particular those involving online defamation, are on the rise,[11] to the extent that the courts are purportedly struggling to handle the sheer volume of cases filed in the High Court.[12] In the Kuala Lumpur High Court alone, it has been reported that the number of cyber-related tort cases filed, of which the majority were related to online defamation, has been rising year by year.[13] From approximately 50 cases in 2017, to approximately 60 cases in 2018; the most recent figures were closer to 70 cases in 2019.[14]

The general increase in defamation cases has been attributed primarily to advances in technology, particularly with the increased accessibility to internet fora, messaging boards and social media[15] that can widely disseminate defamatory statements and can '*publish or post a statement instantly that can reach thousands of people*'.[16] Once published online, the content is '*normally accessible for an indefinite period of time and can be easily repeated or republished in the cyber world*'.[17] This can be true even if the statement has been deleted by the original uploader, as a result of re-blogging functions on certain social networking websites or web archiving services.

The issue of online libel is complicated by the fact that Malaysia has yet to abrogate the multiple publication rule. This rule finds its origins in the nineteenth century case of *Duke of Brunswick v Harmer*,[18] where the English courts held that each publication of a libel gives rise to a distinct and separate cause of action, with a correspondingly separate limitation period for each instance of publication. The multiple publication rule was first formulated, and was arguably more relevant, during an age of wet ink documents and scurrilous lampoons in privately-printed posters or pamphlets.[19] Notwithstanding, the rule was eventually adopted and applied to online publications in the English cases of *Godfrey v Demon Internet Ltd*[20] and *Loutchansky v Times*

[8] *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, 587 (Slesser LJ); *Kian Lup Construction v Hongkong Bank Malaysia Berhad* [2002] 7 CLJ 32, 41 (Ramly Ali J) (as His Lordship then was).

[9] *Berkoff v Burchill* [1996] 4 All ER 1008, 1013 (Neill LJ); *Ding Kuong Hiing v Wong Hua Seh* [2011] 1 LNS 453 para 44 (Yew Jen Kie J) (as Her Ladyship then was).

[10] *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor* [2017] 6 MLJ 133 para 76 (Ahmad Maarop CJ (Malaya)) (as His Lordship then was).

[11] Khairun-Nisaa Asari & Nazli Ismail Nawang, 'A Comparative Legal Analysis of Online Defamation in Malaysia, Singapore and the United Kingdom' (2015) 4 International Journal of Cyber-Security and Digital Forensics 314.

[12] *Chew Peng Cheng v Anthony Teo Tiao Gin* [2008] 5 MLJ 577, 602 (Hamid Sultan Abu Backer JC) (as his Lordship then was).

[13] Foong Cheng Leong 'Bread & Kaya 26: 2019 Malaysian Cyberlaw Cases, Part 1' (Digital News Asia, 14 Apr 2020) <https://www.digitalnewsasia.com/insights/bread-kaya-26-2019-malaysian-cyberlaw-cases-part-1> accessed 18 Aug 2020.

[14] ibid; Foong Cheng Leong 'Bread & Kaya: 2018 Malaysia Cyber-law and IT Cases PT2 – Cyber-defamation' (Digital News Asia, 26 Apr 2019) <https://www.digitalnewsasia.com/insights/bread-kaya-2018-malaysia-cyber-law-and-it-cases-pt2-%E2%80%93-cyber-defamation> accessed 18 Aug 2020.

[15] *Dominica Toyat Dominic v Peter Wee Teck Ho* [2008] 5 CLJ 679, 689 (Hamid Sultan Abu Backer JC) (as His Lordship then was): 'freedom to publish in internet is also likely to increase defamation action'.

[16] Shahin Alam & Md Zahidul Islam, 'Offensive Statements on Social Networking Platforms with the special reference to Cyber Defamation: A Comparative Analysis between Malaysia and Bangladesh' (2015) 1 Journal of Asian and African Social Science and Humanities 40.

[17] Khairun-Nisaa & Nazli (n 11).

[18] *Duke of Brunswick v Harmer* (1849) 14 QB 185.

[19] See *Sim v Stretch* (n 7), where the medium of the alleged defamation was by way of telegram; *Clay v Roberts* (1863) 8 LT 397, where the medium of the alleged defamation was by way of letters published in a medical journal; *Byrne v Deane* [1937] 1 KB 818, where the medium of the alleged defamation was by way of a typewritten poster put up on the golf club wall.

[20] *Godfrey v Demon Internet Ltd* [2001] QB 201, 208–209 (Morland J): 'In my judgment the defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing that posting. Thus, every time one of the defendants' customers accesses soc.culture.thai and sees that posting defamatory of the plaintiff there is a publication to that customer'

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Newspapers Ltd,[21] as well as the Australian High Court case of *Dow Jones & Co Inc v Gutnick*.[22] This meant that every time a new user accessed the webpage containing the defamatory content, it would constitute a new cause of action, effectively resetting the clock for the computation for any applicable limitation period. As such, for the purposes of establishing the date of publication and thus the accrual of the limitation period, '*a post can be republished endlessly and exists until it is removed*'[23] and would continue to attract liability '*however long after the initial publication the material is accessed, and whether or not proceedings have already been brought in relation to the initial publication*'.[24] Although England and Wales eventually abolished the multiple publication rule by way of statute,[25] the rule appears to still apply in Malaysia[26] and would render online publishers '*gravely exposed to unlimited liability*'.[27]

The number of cases may potentially rise even further after the Malaysian Federal Court ruled in the recent case of *Chong Chieng Jen v Government of the State of Sarawak & Anor*[28] (*Chong Chieng Jen*) that the *Derbyshire*[29] principle, which would ordinarily limit the right of public authorities to sue for defamation, did not apply to state governments in Malaysia. In its interpretation of the Government Proceedings Act 1956 (Malaysia),[30] the Malaysian apex court ruled that federal and state governments have the capacity to sue individuals for defamatory imputations. Carrying this ruling to the extreme, federal and state governments may theoretically sue each other for libellous statements. However, this has yet to be definitively tested in the Malaysian courts. It should be further noted that, close on the heels of the decision in *Chong Chieng Jen*, a municipal council has since initiated defamation proceedings against a member of the public.[31]

Addressing the court's difficulty in handling such an enormous caseload of defamation claims, Hamid Sultan JC vented his grievances in the High Court case of *Chew Peng Cheng v Anthony Teo Tiao Gin*, where he stated that:

> In many Commonwealth countries such as India and Malaysia, this tort has been statutorily codified, as a penal offence. Arguably it can be said that after it being codified courts should

[21] *Loutchansky v Times Newspapers Ltd (Nos 2 – 5)* [2001] EWCA Civ 1805 para 76 (Lord Phillips): 'The change in the law of defamation for which the defendants contend is a radical one. In our judgment they have failed to make out their case that such a change is required. The Internet single publication appeal is therefore dismissed'.

[22] *Dow Jones & Co Inc v Gutnick* [2002] HCA 56 para 138 (Gaudron J): 'I, like the other members of this Court, do not think that a single publication rule should be adopted in terms of the place of uploading as the place of publication of allegedly defamatory material on the Internet, which would also govern the choice of applicable law'.

[23] Mohamed Zaini bin Mazlan, 'Cyber Defamation in Malaysia: An Overview' [2018] Journal of the Malaysian Judiciary 124, para 48.

[24] 'Defamation and the internet: the multiple publication rule', Consultation Paper CP20/09 (Ministry of Justice (United Kingdom), 16 Sep 2009) para 3.

[25] Defamation Act 2013 (United Kingdom), s 8.

[26] Mohamed Zaini (n 23) para 52, referring to the case of *YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham & Anor* [2012] 7 MLJ 301: 'The multiple publication rule seems to still apply in Malaysia … Although the court did not discuss the multiple publication rule, it found the defendants liable for defamation for the republication'.

[27] Khairun-Nisaa Asari and Nazli Ismail Nawang (n 11).

[28] *Chong Chieng Jen v Government of State of Sarawak & Anor* [2019] 3 MLJ 300 para 45 (Ahmad Maarop PCA); See also George Varughese, 'Federal Court Decision Creates Chilling Effect on Public Disclosure' (Bar Council Malaysia, 2 Oct 2018).

[29] *Derbyshire County Council v Times Newspapers Ltd* [1993] 1 AII ER 1011; *Utusan Melayu (Malaysia) Berhad v Dato Sri Diraja Haji Adnan bin Haji Yaakob* [2016] 5 MLJ 56 para 18 (Idrus Harun JCA) (as His Lordship then was); *Kerajaan Negeri Terengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors (No 1)* [2013] 7 MLJ 52 para 29 (Yeoh Wee Siam J) (as Her Ladyship then was).

[30] Government Proceedings Act 1956 (Malaysia), s 3: 'Subject to this Act and of any written law where the Government has a claim against any person which would, if such claim had arisen between subject and subject, afford ground for civil proceedings, the claim may be enforced by proceedings taken by or on behalf of the Government for that purpose in accordance with this Act'.

[31] *Majlis Perbandaran Subang Jaya v Koh Tat Meng*, unreported; see also Abdul Fareed Abdul Gafoor, 'Government Should Cease the Use of Defamation Suits and Respond to Allegations with Appropriate Evidence' (Bar Council Malaysia, 21 Feb 2020).

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> not have followed the common law remedy of defamation. Failing to do so, has promoted too many number of cases filed in a time and era where court has been inundated with much work … In fact, I will go to the extent of saying that time has come for Parliament to make defamation purely a criminal offence and make provisions for the criminal courts to order compensation, providing for a statutory maximum limit and/or alternatively to have all defamation matters heard before a magistrate or sessions judge, giving them the jurisdiction to hear and award damages to a defined maximum limit.[32]

The learned Hamid Sultan JC elaborated on this observation in the subsequent High Court case of *Dominica Toyat Dominic v Peter Wee Teck Ho*, adding that '*[i]t is time that Parliament amends the law for all defamation suits to be dealt with by criminal courts*'.[33]

Some of Hamid Sultan JC's recommendations were eventually passed by the legislature to holistically address the High Court's backlog of cases[34] by the enactment of the Subordinate Courts (Amendment) Act 2010 (Malaysia). This, amongst other provisions, increased the monetary jurisdiction of the Sessions Courts from RM 250,000 to RM 1,000,000[35] in addition to conferring the Sessions Courts with the power to grant injunctions[36] and make declarations.[37] Crucially, however, the common law tort of defamation was not subsequently subsumed into a purely criminal offence as had been suggested, and neither the Malaysian Parliament nor the Malaysian Federal Court has made any discernible movement toward that end. This paper argues against denuding the tort of its civil status and proffers a different way of alleviating the Malaysian High Court's burden through alternative forms of dispute resolution.

The Case Against Criminal Defamation

Under Malaysian law, criminal defamation is an offence under section 499 of the Penal Code (Malaysia), which provides that:

> Whoever, by words either spoken or intended to be read or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.[38]

This offence is punishable under section 500 of the Penal Code with imprisonment for a term up to two years, or a fine, or both.[39] The Malaysian High Court case of *Pendakwa Raya v Ab Latif Muda* is of some assistance where Amelia Tee Hong Geok Abdullah J listed out the ingredients as follows:

i. The imputation in question consisted of words, spoken or intended to be read, or of signs etc;
ii. The imputation concerned the complainant;
iii. Such imputation emanated from the accused;

[32] *Chew Peng Cheng* (n 12).
[33] *Dominica Toyat Dominic* (n 15).
[34] Dewan Rakyat, Penyata Rasmi Parlimen (Hansard), Parlimen Kedua Belas, Penggal Ketiga, Mesyuarat Kedua (6 Jul 2010), 68–70.
[35] Subordinate Courts Act 1948 (Malaysia), s 65(1)(b).
[36] ibid s 65(5)(a).
[37] ibid s 65(5)(b).
[38] Penal Code (Malaysia), s 499.
[39] ibid s 500.

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iv. The accused made or published it; and
v. The accused intended thereby to harm the reputation of the complainant, or that he knew or had reason to believe that it would do so.[40]

The problem identified in *Chew Peng Cheng*[41] and *Dominica Toyat Dominic*[42] warrants serious attention. Indeed, many modern civil defamation claims appear to be rather frivolous ventures,[43] oftentimes resulting from '*the most ridiculous and strained interpretation of words which a person can conceive*',[44] which are filed at the expense of the Malaysian High Court's limited resources. However, the proposed solution to confine the resolution of defamation matters to the criminal jurisdiction would be an exceptionally unattractive and retrograde step which would likely offend the freedom of expression enshrined under Article 10(1)(a) of the Malaysian *Federal Constitution*.[45] After all, if every instance of proven defamation were to result in a criminal conviction, it is not difficult to anticipate a corresponding chilling effect on the right to freedom of expression,[46] especially in light of the fact that Hamid Sultan JC had opined that '*the elements required to prove* [*criminal*] *defamation, have been made much easier in contrast to a civil action*'.[47] Certainly, such a proposed legislative framework is likely to fail the '*proportionality test*', laid down by the Malaysian Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*,[48] to determine whether a given law is consistent with the Malaysian Federal Constitution.

In fact, the general trend around the globe appears to be towards applying a moratorium on criminal defamation[49] or abolishing it entirely,[50] instead of privileging it as the primary relief for reputational loss. In the House of Lords case of *Gleaves v Deakin*, Lord Diplock expressed his doubts over whether the offence of criminal defamation under the Libel Act 1843 (United Kingdom), in which the truth of the defamatory statement could only amount to a defence if it could be demonstrated that the publication of the libel was for the '*public benefit*',[51] could comport with the right to freedom of expression under Article 10 of the *European Convention on Human Rights*[52] (ECHR),

[40] *Pendakwa Raya v Ab Latif Muda* [2014] 1 LNS 1450 para 5.

[41] *Chew Peng Cheng* (n 12).

[42] *Dominica Toyat Dominic* (n 15).

[43] See, for example: *Lim Boo Chang v Ng Wei Aik* [2015] 10 MLJ 577, where the claimant sued after being called a frog; See also: *Sun Media Corp Sdn Bhd (formerly known as Sun Media Group Sdn Bhd) v The Nielsen Co (M) Sdn Bhd (formerly known as AC Nielsen (M) Sdn Bhd)* [2018] 9 MLJ 604, where the claimant sued after it complained that the publication of a survey about its readership numbers made them appear unpopular.

[44] *Jamilee bin Jamil v Lillian Tay Wai Fun* [2006] MLJU 212 (Noor Azian bt Shaari JC) (as Her Ladyship then was).

[45] Federal Constitution (Malaysia), art 10(1)(a): 'every citizen has the right to freedom of speech and expression'.

[46] 'Report by the Commissioner for Human Rights, Mr Thomas Hammarberg, On His Visit to Azerbaijan 3–7 September 2007', CommDH(2008)2, Council of Europe, para 72: 'The criminalisation of defamation has a chilling effect on freedom of expression' – referred to in *Fatullayev v Azerbaijan* (App No 40984/07) (2010) 52 EHRR 58, [2010] ECHR 40984/07, 58.

[47] *Dominica Toyat Dominic* (n 15) 684.

[48] *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507 para 30 (Gopal Sri Ram FCJ): 'all forms of state action – whether legislative or executive – that infringe a fundamental right must (i) have an objective that is sufficiently important to justify limiting the right in question; (ii) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (iii) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve'.

[49] Hammarberg (n 46).

[50] See for example Defamation Act 2009 (Ireland), s 35: 'The common law offences of defamatory libel, seditious libel and obscene libel are abolished'.

[51] Libel Act 1843 (United Kingdom), s 6: 'the Truth of the Matters charged may be inquired into, but shall not amount to a Defence, unless it was for the Public Benefit that the said Matters charged should be published'. Although the term 'public good' is used rather than 'public benefit', section 6 of the Libel Act 1843 (United Kingdom) is largely analogous to the First Exception under section 499 of the Penal Code (Malaysia), which states that: 'It is not defamation to impute anything which is true concerning any person, if it is for the public good that the imputation should be made or published'.

[52] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Rome, 4 Nov 1950; TS 71 (1953); Cmd 8969.

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stating that '*Art*[*icle*] *10 requires that freedom of expression shall be untrammelled by public authority except where its interference to repress a particular exercise of the freedom is necessary for the protection of the public interest.*'[53]

The *Gleaves v Daekin* judgment, amongst other findings, had been influential enough to galvanize British Parliament into enacting the Coroners and Justice Act 2009 (United Kingdom) which effectively decriminalized libel by virtue of sections 73[54] and 178[55] of that Act. However, whilst the ECHR does not appear to treat criminal defamation as a disproportionate violation of Article 10 of the ECHR in and of itself,[56] the imposition of a term of imprisonment – as is permitted under both section 5 of the Libel Act 1843 (United Kingdom) and section 500 of the Penal Code (Malaysia) – was held to be incompatible with the right to freedom of expression. The only exception was in rare cases where another fundamental human right had been seriously impaired.[57]

Indeed, courts in other common law jurisdictions where criminal defamation had been codified have since declared the offence of criminal defamation to be unconstitutional. In Kenya, this can be seen in *Jacqueline Okuta & another v Attorney General & 2 others*;[58] in Zimbabwe, the case of *Nevanji Madanhire & Anor v Attorney General*;[59] and in Lesotho, the case of *Basildon Peta v The Minister of Law, Constitutional Affairs and Human Rights & Ors*.[60] One of the common jurisprudential threads interwoven through all three of these judgments was that civil defamation was appropriate and more than sufficient to protect reputational loss. The conclusions reached in these judgments are deeply compelling and cognisant of the chilling effect that criminal defamation laws may have on the right of freedom of expression. Admittedly, however, there are decisions in other jurisdictions where criminal defamation was held to be consistent with the relevant constitution, such as the Indian case of *Subramanian Swamy v Union of India, Ministry of Law*.[61] The Indian Supreme Court approached the issue by applying the doctrine of balancing fundamental

[53]*Gleaves v Deakin and others* [1979] 2 All ER 497, 498, 499.

[54]Coroners and Justice Act 2009 (United Kingdom), s 73: 'The following offences under the common law of England and Wales and the common law of Northern Ireland are abolished— (a) the offences of sedition and seditious libel; (b) the offence of defamatory libel; (c) the offence of obscene libel'.

[55]ibid s 178: This section repealed, amongst others, sections 4 through 6 of the Libel Act 1843.

[56]*Radio France v France* (App No 53984/00) (2004) 40 EHRR 706, 40: 'in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued'.

[57]*Mariapori v Finland* (App No 37751/07) [2010] ECHR 37751/07, 67: 'Although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a defamation offence will be compatible with an applicant's right to freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence'.

[58]*Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR (Mativo J): 'Another very compelling reason for eschewing resort to criminal defamation is the availability of an alternative civil remedy under the *actio injuriandum* in the form of damages for defamation. To my mind, this affords ample compensatory redress for injury to one's reputation. Thus, the invocation of criminal defamation to protect one's reputation is in my view unnecessary, disproportionate, and therefore excessive and not reasonably justifiable in an open democratic society based on human dignity, equality and freedom'.

[59]*Nevanji Madanhire & Anor v Attorney General*, Judgment No CCZ 2/14 (Patel JA): 'I take the view that the harmful and undesirable consequences of criminalising defamation, *viz.* the chilling possibilities of arrest, detention and two years' imprisonment, are manifestly excessive in their effect. Moreover, there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting the reputations, rights, and freedoms of other persons. In short, it is not necessary to criminalise defamatory statements'.

[60]*Basildon Peta v The Minister of Law, Constitutional Affairs and Human Rights & Ors* CC 11/2016 para 24 (Mokhesi AJ): '[H]aving concluded that criminal defamation laws have a chilling effects on the freedom of expression, and that, civil remedies for reputational encroachment are more suited to redressing such reputational harm, I have come to the conclusion that the extent of the above-mentioned sections' encroachment of the freedom of expression is "not reasonable and demonstrably justified in a free and democratic society." … the crime of defamation has no place in our current Constitutional dispensation'

[61]*Subramanian Swamy v Union of India, Ministry of Law & Ors*. Writ Petition (Criminal) No 184 of 2014, 149 (Dipak Misra J): 'in the ultimate conclusion, we come to hold that applying the doctrine of balancing of fundamental rights, existence

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rights. However, this Indian judgment has been subjected to criticism[62] and appears to not be aligned with the Indian Supreme Court's other recent determinations on the same issue of freedom of expression.[63]

As a further consideration, by placing greater reliance on criminal defamation, there may be an unintended increase in defamation cases as, unlike civil defamation cases, section 499 of the Penal Code (Malaysia) allows for the dead to be defamed. However, concordant with Stephen J's judgment in *R v Ensor*, '*a mere vilifying of the deceased is not enough … There must be a vilifying of the dead with a view to injure his posterity*'.[64] In this regard, Explanation 1 of the offence under the Penal Code (Malaysia) states that: '*It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.*'[65] In *PP v Mohamad Sabu*, the Malaysian High Court held that historical events were justiciable in criminal defamation cases regarding deceased victims.[66] Therefore, this may also result in the court preferring one academic narrative on events which may have occurred in the distant past over others, which should not be the function of the courts.

Consistent with the *rationes decidendi* in *Jacqueline Okuta*, *Nevanji Madanhire* and *Basildon Peta* above,[67] the civil remedy is undoubtedly more suitable than criminal sanctions in addressing reputational loss. Indeed, legislating to abolish the tort of defamation in favour of the criminal offence under section 499 of the Penal Code (Malaysia) would be a superfluous solution to address an administrative problem when it could be sufficiently alleviated by a more measured method, as detailed in this paper. To that end, an alternative strategy involving introducing arbitration schemes is proposed which is postulated to have a similar outcome of reducing the caseload of the courts without the need to drastically restructure the existing statutory framework.

Are Defamation Claims Arbitrable Under Malaysian Law?

The primary benefits of arbitration over litigation for plaintiffs are '*lower cost*[*s*] *and faster results*'.[68] Additionally, arbitration of defamation claims may result in '*awards that would not be available in a traditional trial, such as printing a retraction, or even giving the opposing party the chance to tell their side of the story*'.[69] Separately, whilst the power to issue an injunction for an apology is available through the Malaysian legal system, the judicial attitudes are noticeably restrained in ordering this remedy, especially in cases where the defendant is recalcitrant and shows no remorse.[70]

of defamation as a criminal offence is not beyond the boundary of Article 19(2) of the Constitution, especially when the word "defamation" has been used in the Constitution'.

[62]Shishir Tripathi, 'Criminal defamation law: As MJ Akbar files case against Priya Ramani, it's time to re-examine this instrument' (FirstPost, 30 Aug 2016, republished 16 Oct 2018) <https://www.firstpost.com/india/criminal-defamation-law-as-mj-akbar-files-case-against-priya-ramani-its-time-to-re-examine-this-instrument-2982338.html> accessed 28 Jan 2020: 'The judgment attracted sharp criticism from different quarters'.

[63]See *Singhal v Union of India* [2015] INSC 251.

[64]*R v Ensor* (1887) 3 TLR 366.

[65]Penal Code (Malaysia), s 499, Explanation 1.

[66]*Mohamad Sabu lwn PP* [2013] 2 CLJ 168; See also *PP v Mohamad Sabu* [2017] 7 CLJ 214 para 38 (Lim Chong Fong J): 'Now moving next to the history of the Bukit Kepong incident which has been earlier ruled by Mohd Amin Firdaus JC (as he then was) in *Mohamad Sabu lwn. PP* [2013] 2 CLJ 168 to be justiciable'.

[67]*Jacqueline Okuta* (n 58); *Nevanji Madanhire* (n 59); *Basildon Peta* (n 60).

[68]Emma Altheide, 'Arbitration for the Afflicted – The Viability of Arbitrating Defamation and Libel Claims considering IPSO's Pilot Program' (2017) 13 Journal of Dispute Resolution 165.

[69]ibid.

[70]*Credit Guarantee Corp Malaysia Bhd v SSN Medical Products Sdn Bhd* [2017] 2 MLJ 629 para 71 (Harmindar Singh Dhaliwal JCA) (as His Lordship then was): 'the apology was ordered by the court despite the defendant's unwillingness to do so. Such an apology is really useless. An order for apology ought to have been considered only in the case where the offending party was willing. … we take the view that the order for an apology ought not to have been granted by the learned JC'.

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However, whilst the benefits of arbitrating media disputes cannot be overstated, a question arises over whether arbitration is a convenient and permissible method to resolve defamation claims under Malaysian law. The arbitrability of subject matter is addressed under section 4 of the Arbitration Act 2005 (Malaysia), which states that:

> (1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy.
> (2) The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, by itself, indicate that a dispute about that matter is not capable of determination by arbitration.

Traditionally, non-arbitrable subject-matter '*would include criminal prosecutions, determination of status such as bankruptcy, divorce, and the winding up of corporations in insolvency, and certain types of dispute concerning intellectual property such as whether or not a patent or trademark should be granted. These matters are plainly for the public authorities of the state*'.[71] Civil defamation does not fall under any of these categories and there does not appear to be any compelling reason as to why arbitration of defamation claims would be contrary to public policy. Even though defamation is a claim in tort, it is unlikely that this would represent an inherent bar to arbitrability as evinced by the fact that the Malaysian Court of Appeal has previously reviewed arbitral awards that made determinations on the tort of negligence without raising the tribunal's subject matter jurisdiction.[72]

Incidentally, in the Malaysian High Court case of *Daniel KC Tan & Associates Sdn Bhd v Progressive Insurance Sdn Bhd*,[73] which involved proposed arbitration for a defamation matter, Kamalanathan Ratnam J did not specifically rule on the issue of arbitrability for a defamation claim. Although the plaintiff was eventually estopped from enforcing the arbitration clause as a result of approbating and reprobating, there was no suggestion from the learned judge that a defamation claim could not be arbitrated.

When examining persuasive common law authority in other jurisdictions, the issue of whether defamation claims are arbitrable appears to be largely settled.[74] In the English Court of Appeal case of *Ecobank Transnational Incorporated v Tanoh*,[75] Clarke LJ held that '*there is … a high probability that the defamation claim falls within the* [*arbitration*] *clause*', indicating that defamation constitutes arbitrable subject matter under English law. In the New Zealand High Court case of *Tamihere v Mediaworks Radio Ltd*,[76] Simon France J was more direct in concluding that '*a claim of defamation is capable of resolution through arbitration*'.

In this regard, Nambuye J helpfully provided a four-step test to determine whether defamation fell within the arbitration clause in *Achells Kenya Limited v Philips Medical Systems Nederland BV & Another*:

> [T]he ingredients that this court must look for … whether the defamation claim falls within the arbitration clause are:
>
> (1) There must be an arbitration clause.
> (2) It must be widely drafted.

[71] *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 268 para 64 (Hammerschlag J).

[72] See for example *Safege Consulting Engineers v Ranhill Bersekutu Sdn Bhd* [2005] 1 MLJ 689; *SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd* [2014] MLJU 29.

[73] *Daniel KC Tan & Associates Sdn Bhd v Progressive Insurance Sdn Bhd* [2001] 5 MLJ 642.

[74] See: *Gossip Daily Ltd v Next Media Magazines Ltd and others* [2018] HKCU 2952 para 24. See also 9302-7654 *Quebec Inc. carrying on business as Team Productions v Justin Bieber* (2017) QCCS 1100 paras 74, 75.

[75] *Ecobank Transnational Incorporated v Tanoh* [2015] EWCA Civ 1309 paras 75 and 77.

[76] *Tamihere v Mediaworks Radio Ltd* [2014] NZHC 2082 para 49.

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(3) The defamation claim must be in relation to something done or not done arising from the contract.
(4) There must be a close connection between what is complained about and the contract.[77]

The above test appears to comport with the broad latitude approach to construing arbitration clauses adopted in Malaysian cases such as *Press Metal Sarawak v Etiqa Takaful*[78] and the application of the *Fiona Trust*[79] principle. The general judicial position to allow arbitration insofar as the laws do not limit arbitrability was echoed in the judgment of T Selventhiranathan JCA in *Albilt Resources v Casaris Construction* where His Lordship held that:

> The passing of the [Arbitration Act 2005] evinced Malaysia's intention and determination to join the ranks of those countries where parties are wont to submit differences or disputes to arbitration and the courts have to give effect to that postulation of the Legislature by interpreting the Act in accordance with the intention of the Legislature.[80]

It is therefore highly likely that the Malaysian courts will hold that defamation claims are arbitrable in this jurisdiction, both as a matter of judicial attitude and even as a matter of public policy.

Lessons from The Leveson Report – Existing Arbitration Schemes

On 29 November 2012, the Leveson Report,[81] an exhaustive 2,000-page review into the culture, practice, and ethics of the British Press,[82] was published. Amongst its many recommendations, the one relevant to this paper is the provision of an arbitration service:

> … the Board [of an independent self-regulatory body] should provide an arbitral process in relation to civil legal claims against subscribers, drawing on independent legal experts of high reputation and ability on a cost-only basis to the subscribing member … The process should be fair, quick and inexpensive, inquisitorial and free for complainants to use (save for a power to make an adverse order for the costs of the arbitrator if proceedings are frivolous or vexatious). The arbitrator must have the power to hold hearings where necessary but, equally, to dispense with them where it is not necessary. The process must have a system to allow frivolous or vexatious claims to be struck out at an early stage.[83]

Following the recommendations of the Leveson Report, two arbitration schemes have since been established in the United Kingdom: the Independent Monitor for the Press (IMPRESS) Scheme and the Independent Press Standards Organisation (IPSO) Scheme. Although both schemes are fundamentally similar in the sense that they are designed for arbitration of media

[77] *Achells Kenya Limited v Philips Medical Systems Nederland BV & another* [2007] eKLR.
[78] *Press Metal Sarawak Sdn. Bhd. v Etiqa Takaful Bhd* [2016] 9 CLJ 1 para 91 (Ramly Ali FCJ): 'In determining what is the dispute or difference the parties intended to submit to arbitration, the arbitration clause ought to be interpreted widely, based on its express terms and the intention of the parties, taking into consideration the commercial reality and the purpose for which the contract or agreement was made. A proper approach to construction requires the court to give effect, so far as the language used by the parties in the arbitration clause will permit, to the commercial purpose of the arbitration clause. This principle was adopted in *Fiona Trust & Holding Corporation & Ors v Privalov & Ors* [2007] 4 All ER 951'.
[79] *Fiona Trust & Holding Corporation & Ors v Privalov & Ors* [2007] 4 All ER 951.
[80] *Albilt Resources Sdn Bhd v Casaris Construction Sdn Bhd* [2010] 3 MLJ 656 para 69.
[81] Rt Hon Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press, Report* (The Stationery Office, 29 Nov 2012).
[82] Altheide (n 68).
[83] Leveson (n 81) 1768.

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disputes involving their publisher members, including defamation claims, there are some crucial differences between them that this paper seeks to highlight.

The IMPRESS Scheme

The first of two media law arbitration schemes discussed in this paper is run by IMPRESS, described on its webpage as '*a regulator designed for the future of media, building on the core principles of the past, protecting journalism, while innovating to deal with the challenges of a digital age*'.[84] Their membership is made up of '*more than 100 regulated publications*'[85] (136 publications are listed as of 28 January 2020).[86]

This arbitration scheme has been co-developed by both IMPRESS and the Chartered Institute of Arbitrators (CIArb), who have jointly released a set of procedural rules called the CIArb/IMPRESS Arbitration Scheme Rules. These procedural rules limit the scope of this scheme to cover only civil claims by individuals or organisations against any of the publishers that are regulated by IMPRESS for defamation, breach of confidence, misuse of private information, malicious falsehood, harassment and breach of the Data Protection Act 2018 (United Kingdom).[87] Once a request for arbitration has been filed, IMPRESS makes an administrative assessment as to whether the dispute is suitable for arbitration under the IMPRESS Scheme.[88] If in the affirmative, the parties shall proceed to sign an arbitration agreement which is then submitted through IMPRESS to CIArb.[89] CIArb will then appoint an arbitrator from its panel who will determine the matter in accordance with rules.[90] The arbitration proceedings are expected to conclude within three months from the date of appointment of the arbitrator in cases where there is no oral hearing, and six months in all other cases.[91] This emphasis on expedient settlement is certainly attractive to complainants, especially when compared against defamation cases in the civil courts such as *Gary Flood v Times Newspaper*[92] (29 months) and *Berezovsky v Russian Television and Radio Broadcasting Company and Terluk*[93] (34 months). In *McDonald's Corporation & McDonald's Restaurants Ltd v Steel and Morris*,[94] the trial itself took 313 days, which at the time had been one of the longest trials in English legal history.[95] Indeed, according to an analysis made by Crossley of libel judgments between 2008 and the end of 2010, the average time from date of claim to date of final determination was just over 17 months.[96]

The costs-saving provisions also make the IMPRESS Scheme rather attractive for potential litigants since IMPRESS is obligated to pay all the arbitrator's costs;[97] no order of costs can be made against the claimant, even if the claimant is the losing party or acts in a manner that

[84]'About us' (IMPRESS) <https://www.impress.press/about-us> accessed 28 Jan 2020.

[85]ibid.

[86]'Regulated Publishers' (IMPRESS) <https://www.impress.press/complaints/regulated-publishers.html> accessed 28 Jan 2020.

[87]CIArb/IMPRESS Arbitration Scheme Rules (10 Jul 2018) (IMPRESS Rules), Rule 1.

[88]ibid Rule 4.

[89]ibid Rule 5.

[90]ibid Rule 6.

[91]ibid Rule 17.

[92]*Gary Flood v Times Newspaper* [2009] EWHC 2375 (QB).

[93]*Berezovsky v Russian Television and Radio Broadcasting Company and Terluk* [2010] EWHC 476 (QB).

[94]*McDonald's Corporation & McDonald's Restaurants Ltd v Steel and Morris* [2000] 1 WLR 618.

[95]'McLibel: Longest case in English history' (BBC News, 15 Feb 2005) <http://news.bbc.co.uk/2/hi/uk_news/4266741.stm.> accessed 28 Jan 2020.

[96]Dominic Crossley, 'Reframing the time it takes to get a libel trial' (The International Forum for Responsible Media Blog, 11 Nov 2010) <https://inforrm.org/2010/11/11/%E2%80%9Creframing-the-time-it-takes-to-get-to-a-libel-trial%E2%80%9D-dominic-crossley.> accessed 28 Jan 2020.

[97]IMPRESS Rules (n 87) Rule 10: 'The fees of the arbitrator, which shall be paid by IMPRESS'; IMPRESS CIArb Arbitration Scheme Guidance (IMPRESS Guidance), 'What is the IMPRESS/CIArb Arbitration Scheme?' (IMPRESS/

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would ordinarily attract adverse costs consequences.[98] However, whilst a claimant is shielded from an adverse costs order, the respondent is not. The IMPRESS Scheme allows for an order of costs to be made against the publisher for up to £3,000.[99] Indeed, other than a non-refundable filing fee of £75,[100] a claimant's financial exposure appears to be minimized.[101] One commentator candidly observed that: '[*IMPRESS*] *caps arbitrators' fees at £3,500 win or lose, and no legal costs if you win the case. The plaintiff can't lose financially; binding participation in arbitration is nil problem there. No wonder the local press don't like the sound of that*'.[102]

One rather peculiar aspect of the IMPRESS Scheme is that all awards are to be made public,[103] with the proviso that parties can apply to redact certain parts of the award in order to protect confidential information.[104] This is particularly interesting because, typically, arbitration proceedings and the award thereof are both private and confidential to the parties.[105] This is also reflected in the Malaysian jurisdiction by the recent addition[106] of section 41A(1) to the Arbitration Act 2005 (Malaysia).[107]

Currently, there are two awards published by IMPRESS: *Jonny Gould v Evolve Media Limited* (*Jonny Gould*),[108] and *Dennis Rice v Byline Media*,[109], with at least three other live applications.[110] The need for vindication militates that the awards ought to be made public in order to provide adequate redress.[111] As a result, it is likely that a positive award under the IMPRESS Scheme that is accessible to the public would attain a far more attractive level of vindication compared to an anonymized judgment[112] or a confidential damages settlement.[113]

The IPSO Scheme

The other media arbitration scheme conducted in the United Kingdom is conducted by IPSO, the '*independent regulator for the newspaper and magazine industry in the UK*';[114] it was created as a

CIArb, 10 Jul 2018): 'It is also free to access for both claimants and publishers because IMPRESS pays the fees of the arbitrator'.

[98]ibid Rule 9: 'No award of costs shall be made against the Claimant under any circumstances'.

[99]ibid Rule 11.

[100]IMPRESS Guidance (n 97), 'If I have a dispute, how do I use the IMPRESS/CIArb Arbitration Scheme?': 'The claimant shall make payment of a £75 non-returnable filing fee to IMPRESS'.

[101]ibid 'How much will it cost?': 'The claimant will not be liable for any of the costs of the arbitration, other than payment of an administrative filing fee'.

[102]Peter Preston, 'Orthodox Impress or loftier Ipso? Maybe an arbitrator should decide' *The Guardian* (26 Feb 2017) <https://www.theguardian.com/media/2017/feb/26/impress-ipso-arbitration-local-newspapers-costs.> accessed 28 Jan 2020.

[103]IMPRESS Rules (n 87) Rule 23.

[104]ibid.

[105]*Webb v Lewis Silkin LLP* [2015] EWHC 687 (Ch) para 24 (Proudman J): 'It is trite law that arbitration proceedings take place in private and are both private and confidential to the parties, whether or not they involve confidential matters. This is a rule of substantive law'.

[106]Arbitration (Amendment) (No 2) Act 2018 (Malaysia), s 11.

[107]Arbitration Act 2005 (Malaysia), s 41A(1): 'Unless agreed by the parties, no party may publish, disclose or communicate any information relating to – (a) the arbitral proceedings under the arbitration agreement; or (b) an award made in those arbitral proceedings'. *cf.* Australia, where confidentiality in arbitration is not automatic and must be an express term in the agreement. See *Esso Australia Resources Ltd & Ors v Plowman (Minister for Energy and Minerals) & Ors* (1995) 128 ALR 391, 401, 402 (Mason CJ).

[108]*Jonny Gould v Evolve Media Limited*, IMPRESS Case No 132130205.

[109]*Dennis Rice v Byline Media*, IMPRESS Case No 132130163.

[110]Sam Forsdick, 'Press regulator Impress extends arbitration scheme to cover data protection claims' (Press Gazette, 24 Jul 2018) <https://www.pressgazette.co.uk/impress-extends-arbitration-scheme-to-cover-data-protection-claims> accessed 28 Jan 2020: 'So far the regulatory body has received five applications for arbitration and has published two arbitration awards'.

[111]David Rolph, 'Anonymity and Defamation' (Sydney Law School Research Paper No 16/04, 5 Jan 2016).

[112]ibid.

[113]Dario Milo, *Defamation and Freedom of Speech* (Oxford University Press 2008) 262.

[114]'What is IPSO?' (IPSO) <https://www.ipso.co.uk/what-we-do/#WhatIsIPSO.> accessed 28 Jan 2020.

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result of the Leveson Report.[115] Much like the IMPRESS Scheme, the IPSO Scheme covers claims relating to defamation, malicious falsehood, breach of confidence, misuse of private information, data protection, and harassment.[116] However, the IPSO Scheme differs insofar as it does not oblige subscription to the arbitration scheme by virtue of membership with the body. Instead, its members may choose one of the three following options:

(1) becomes members of the voluntary scheme, where requests to arbitrate may be made by complainants, but the publisher is not obliged to engage in the arbitral process;
(2) become a member of the compulsory scheme, whereby the publisher must accept any genuine arbitration claim; or
(3) not subscribe to either arbitration scheme.

Whilst this does preserve the autonomy of its members and emphasizes the voluntary nature of arbitration (as provided for in the Leveson Report),[117] it does limit the potential use of such a scheme. The options give the IPSO members broad discretion to reject arbitration as a method of resolution, even if it subscribes to the voluntary scheme.[118] To some degree, this defeats the purpose of the scheme as the media company would be able to dictate whether the potential claimant can proceed under the cost-saving scheme to vindicate their reputation. Indeed, with respect to the voluntary scheme, it was reported that'[*a*]*n IPSO member will therefore be able to deny low cost arbitration to an ordinary member of the public, knowing that s/he cannot afford to go to the High Court*'[119] and that '[*t*]*he regulator's existing arbitration scheme, which is not compulsory, allows publishers to essentially cherry pick the cases they agree to arbitrate.*'[120] As a result of effectively delegating the decision to arbitrate with the publishers, IPSO '*has not carried out any arbitrations under the voluntary scheme since it was established in 2016*',[121] and that '*no cases were arbitrated in the time since the arbitration was first launched in 2016, an IPSO spokesperson told iMediaEthics*'.[122]

If a member does end up accepting the invitation to arbitrate, or is compelled to by virtue of its subscription to the compulsory scheme, the claimant must first undergo a referral stage in which the parties can consider early resolution of the dispute.[123] If the parties agree to proceed to arbitration, the respondent then provides a signed arbitration agreement to IPSO[124] and the dispute gets transferred to the Centre for Effective Dispute Resolution (CEDR) to appoint an arbitrator to preside over the matter.[125]

[115]Altheide (n 68): 'From this proposal, IPSO was born'.

[116]'What claims can I make?' (IPSO) <https://www.ipso.co.uk/arbitration/what-claims-can-i-make> accessed 28 Jan 2020; 'Further things to think about when considering an arbitration claim' (IPSO) <https://www.ipso.co.uk/media/1319/further-things-to-think-about-when-considering-an-arbitration-claim.pdf> accessed 28 Jan 2020.

[117]Leveson (n 81) 1768: 'Of course, no one can be forced to give up their right to go to court in pursuit, or for the protection, of their rights'.

[118]Martin Moore, 'The Risks of Abandoning Leveson' (LSE Media Policy Project, 20 Jun 2017) <https://blogs.lse.ac.uk/medialse/2017/01/06/the-risks-of-abandoning-leveson> accessed 28 Jan 2020.

[119]ibid.

[120]Freddy Mayhew, 'UK's largest press watchdog creating compulsory arbitration scheme for newspapers that offers alternative to court action for press victims' (Press Gazette, 1 May 2018) <https://www.pressgazette.co.uk/uks-largest-press-watchdog-creating-compulsory-arbitration-scheme-for-newspapers-offering-alternative-to-court-action-for-press-victims> accessed 28 Jan 2020.

[121]ibid.

[122]Sydney Smith, 'No one voluntarily used IPSO's arbitration scheme, now it is compulsory' (iMediaEthics, 29 Aug 2018) <https://www.imediaethics.org/no-one-voluntarily-used-ipsos-arbitration-scheme-now-it-is-compulsory> accessed 28 Jan 2020.

[123]Independent Press Standards Organisation Arbitration Scheme Rules (31 July 2018) ('IPSO Rules'), r 8.2.

[124]ibid Rule 9.1.

[125]ibid Rule 11.1.

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The arbitrator is generally expected to complete the claim within 90 days of their appointment,[126] potentially twice the duration under the IMPRESS Scheme.

In contrast with the IMPRESS Scheme, which only involves a £75 filing fee paid by the claimant to initiate the proceedings,[127] the IPSO Scheme imposes an administrative fee of £500 for respondents[128] and £100 for claimants to be paid in two tranches: the first £50 is to be paid prior to the appointment of an arbitrator, and the second £50 is to be paid upon a final ruling.[129] Typically, a cost order cannot be made against the claimant under the IPSO Scheme, even if the claimant is unsuccessful.[130] However, in the event the claim is struck out, the arbitrator may require the claimant to pay the respondent's costs.[131] This may only occur in four situations: where the claim is wholly unmeritorious, where the claim is trivial with the time and cost of pursuing the claim being wholly disproportionate to the potential award, where the claimant's conduct has frustrated the arbitration process and caused the respondent to incur unnecessary costs, and/or where the claim is otherwise frivolous or vexatious.[132] If the claim is struck out, the claimant may be subject to an order of costs up to £10,000, ratcheting down to £1,000 if the claimant is a litigant in person.[133] Under the compulsory scheme, the costs order can even be raised to £25,000, subject to parties' agreement.[134] Whilst a potential cost order may act as a deterrent to claims that are vexatious, frivolous, or totally without merit,[135] the risk of being exposed to such costs, even after taking into account the lower limit in the case of a litigant in person, would be highly unattractive to a potential claimant, particularly if they are of limited means. This would also appear to depart somewhat from the Leveson Report's recommendation that any arbitration scheme should be '*inexpensive … and free for complainants to use*'.[136]

Furthermore, rather than the arbitrator's fees being borne by the administering body, the IPSO Scheme obliges the respondent to pay.[137] However, whilst the arbitrator's fees for the IMPRESS Scheme is capped at £3,500 (absent any agreement to the contrary),[138] the arbitrator's fees under the IPSO Scheme can reach as high as £8,500 if the claim reaches a final ruling.[139] One commentator described this as such: '[*IPSO*] *is rather loftier in its costings and more flexible in its obligations, but you know what, and who, you're getting*.'[140]

However, whilst the respondent under the IPSO Scheme is expected to pay an administrative fee and may be exposed to paying higher arbitrator's fees, it obtains the benefit of a damages cap of £50,000 under the voluntary scheme[141] or £60,000 under the compulsory scheme,[142] unless both

[126]'FAQs' (IPSO) <https://www.ipso.co.uk/faqs/arbitration/#how-long-will-a-claim-take.> accessed 28 Jan 2020.

[127]IMPRESS Guidance (n 97; n 100; n 101).

[128]IPSO Rules (n 123) Rule 21.3.

[129]ibid Rule 21.4.

[130]ibid Rule 25.7: 'The Claimant will not be required to reimburse Fees or pay Legal Costs to the Respondent in the event that the Claim is unsuccessful'.

[131]ibid Rule 29.4.

[132]ibid Rule 19.1.

[133]ibid Rule 22.2 read with the definition of Cost Cap under the Glossary of Terms.

[134]ibid Rule 9.3(f) read with the definition of Cost Cap under the Glossary of Terms.

[135]*Abraham and another v Thompson and others* [1997] 4 All ER 362, 377 (Millett LJ): 'The risk of an adverse order for costs and consequent bankruptcy has always been regarded as a sufficient deterrent to the bringing of proceedings which are likely to fail'; *Child & Family Agency (formerly Health Service Executive) v OA* [2015] IESC 52 para 46 (MacMenamin J): 'the risk of an adverse costs award in such cases as the situation arises may, on occasion, have the effect of deterring litigants from pursuing unmeritorious claims'.

[136]Leveson (n 81) 1768.

[137]IPSO Rules (n 123) Rule 21.5.

[138]IMPRESS Rules (n 87) Rule 10: 'The fees of the arbitrator, which shall be paid by IMPRESS, shall be set at no more than £3,500 unless IMPRESS agrees to the payment of a higher fee'.

[139]IPSO Rules (n 123) Rule 21.5.

[140]Peter Preston, 'Orthodox Impress or loftier Ipso? Maybe an arbitrator should decide' *The Guardian* (26 Feb 2017) <https://www.theguardian.com/media/2017/feb/26/impress-ipso-arbitration-local-newspapers-costs.> accessed 28 Jan 2020.

[141]IPSO Rules (n 123) Rule 31.3.

[142]ibid.

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parties agree to waive the damages cap.[143] Objectively, this damages cap is rather low, and this may deter potential claimants from engaging in the process, especially since the recommended limit for damages in defamation cases in the United Kingdom was held to be £275,000. This can be seen in the case of English Court of Appeal case of *Cairns v Modi*, where Lord Neuberger MR (as his Lordship then was) held that '[*t*]*he present equivalent, allowing for inflation, and without taking account of any uplift consequential on what are usually described as the Jackson reforms taking effect in April 2013, would be of the order of £275,000*'.[144]

The reasoning behind the damages cap appears to be based on complainant demands, as Matt Tee, the chief executive of IPSO, elaborated: '[*m*]*ost complainants are not seeking compensation, they just want the record set straight. They believe an article is inaccurate, discriminatory or otherwise in breach of the Editors' Code of Practice. They usually want the story removed or corrected and an apology issued where appropriate*.'[145] Arguably, however, the record is only properly set straight with a meaningful award for damages. This is in line with the principle that the '*damages must be sufficient to demonstrate to the public that the plaintiff's reputation has been vindicated*'[146] and that the claimant '*must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge*'.[147]

A question then arises as to whether the IPSO Scheme's damages cap is sufficient to convince a bystander of the baselessness of the charge. According to the official statistics published by the United Kingdom's Ministry of Justice on 7 June 2018, of the 156 defamation cases filed in London in the year 2017, the value of the claim in 113 of those cases exceeded £50,000.[148] Indeed, a cap of £50,000 may be wholly insufficient to vindicate serious imputations such as false allegations of terrorism[149] or systematic sexual abuse.[150] An extreme example is the case of *Garfoot v Walker*, where a claimant falsely accused of rape was awarded a sum of £400,000 in damages.[151]

In light of the preceding cases, this damages cap may potentially explain why complainants are hesitant to resolve their dispute under the IPSO Scheme since much higher awards are available under the traditional litigation framework. Damages caps generally favour the respondent at the expense of the *bona fide* claimant, who may be denied the full fruits of his claim despite being exposed to its risks and the certainty of legal fees. The new damages cap under the compulsory scheme introduced this year has been raised to £60,000,[152] but it remains to be seen if this cap is high enough to convince complainants to make use of the scheme.

Furthermore, unlike the IMPRESS Scheme, the awards issued by the arbitral tribunals under the IPSO Scheme are not necessarily made public. The decision to publish the final ruling via IPSO is at the discretion of the arbitrator.[153] Since '*any confidential damages settlement will fail to vindicate the*

[143]ibid Rule 31.4.

[144]*Cairns v Modi; KC v MGN Ltd* [2012] EWCA Civ 1382 para 25.

[145]Matt Tee, 'Will IPSO's arbitration scheme bankrupt newspaper publishers?' (Press Gazette, 21 Aug 2018) <https://pressgazette.co.uk/will-ipsos-arbitration-scheme-bankrupt-newspaper-publishers.> accessed 28 Jan 2020.

[146]*The Gleaner Co Ltd and another v Abrahams* [2003] UKPC 55 para 55, per Lord Hoffman.

[147]*Cassell & Co Ltd v Broome and another* [1972] AC 1027, 1071, per Lord Hailsham LC.

[148]'Royal Courts of Justice Annual Tables – 2017' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738615/2017_RCJ_tables.xlsx.> accessed 28 Jan 2020.

[149]*Veliu v Mazrekaj and another* [2006] All ER (D) 129 (Jul) para 53 (Eady J): 'I have come to the conclusion that the overall compensation, for which the second Defendant is liable, and in respect of which the first Defendant is jointly and severally liable (subject to the statutory maximum), should be set at £175,000'.

[150]*Lillie and another v Newcastle City Council* [2002] All ER (D) 465 (Jul) para 1559 (Eady J): 'each Claimant was entitled to what is now generally recognised to be the maximum amount for compensatory damages in libel proceedings. I award each of them £200,000'.

[151]*Garfoot v Walker*, unreported; See also: *Kinsella v Kenmare Resources plc & Anor* [2019] IECA 54 para 150 (Irvine J): '*Garfoot v Walker* (The Times, 8 Feb 2000) where an award of damages in the sum of GBP £400,000 was made'.

[152]IPSO Rules (n 123) Rule 31.3.

[153]ibid Rule 32.7.

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claimant's reputation',[154] the exercise of any such power to keep the final ruling confidential may only be prudent in cases where the claimant is particularly vulnerable and the defamatory imputation against him is not revived in the public domain through the publication of the award. Such was the consideration before the Supreme Court of Canada case in *AB v Bragg Communications*[155] where the plaintiff was a fifteen-year-old girl who had been defamed. The Canadian Supreme Court allowed the plaintiff to proceed anonymously, chiefly on the grounds that there was '*the right of children to protect themselves from bullying, cyber or otherwise*', that '*young victims of sexualized bullying are particularly vulnerable to the harms of revictimization upon publication*', and that '*the right to protection will disappear for most children without the further protection of anonymity*'.[156] However, vulnerable claimants at risk of having the defamatory imputation revived by a public ruling are few and far between. When weighed against the necessity of vindication as an essential feature of redress for reputational loss, the decision to not make a ruling public should only be made under extraordinary circumstances. In any case, it remains to be seen how arbitrators would exercise their discretion to publish the final ruling or keep it confidential since there have been no reported arbitrations under the IPSO Scheme thus far (Table 1).

Could Similar Media Arbitration Schemes be Implemented in Malaysia?

Types of Claims

With reference to the list of arbitrable claims under the IMPRESS and IPSO Schemes, defamation,[157] malicious falsehood[158] and breach of confidence[159] are all recognized causes of action in the Malaysian jurisdiction. Whilst Malaysia does not have a statutory cause of action of harassment like the Protection from Harassment Act 1997 (United Kingdom),[160] the Malaysian Federal Court has imported the tort of harassment into Malaysian common law through the case of the *Mohd Ridzwan Abdul Razak v Asmah Hj Mohd Nor*.[161] Furthermore, although the Malaysian apex court has not confirmed the actionability of privacy-related torts, the Malaysian High Court has previously recognized the tort of misuse of private information[162] as well as the tort of breach of privacy,[163] albeit the latter is somewhat more controversial.[164] However, there is currently no Malaysian equivalent to the civil claim for a statutory breach under the Data Protection Act 2018 (United Kingdom),[165] so disputes flowing from a breach of the Personal Data Protection Act 2010 (Malaysia) will remain under the competence of the criminal courts.[166] Nonetheless, the other aforementioned causes of action may be well-suited for dispute resolution under a Malaysian arbitration scheme similar to the IMPRESS or IPSO Schemes.

[154]Milo (n 113).

[155]*AB v Bragg Communications Inc* [2012] SCC 46 (Abella J).

[156]ibid para 27.

[157]See generally Defamation Act 1957 (Malaysia); *S B Palmer v A S Rajah & Ors* [1949] 15 MLJ 6.

[158]*SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (Malaysia) Sdn Bhd* [2008] 4 CLJ 20.

[159]*Dynacast (Melaka) Sdn Bhd & Ors v Vision Cast Sdn Bhd & Anor* [2016] 3 MLJ 417.

[160]Protection from Harassment Act 1997 (United Kingdom), s 3.

[161]*Mohd Ridzwan Abdul Razak v Asmah Hj Mohd Nor* [2016] 6 CLJ 246 para 39.

[162]*Dato Aishaf Falina binti Ibrahim v Ismail bin Othman & Ors* [2017] MLJU 2257.

[163]*Maslinda Ishak v Mohd Tahir Osman & Ors* [2009] 6 CLJ 653; *Lee Ewe Poh v Dr Lim Teik Man & Anor* [2011] 4 CLJ 397; *Sherinna Nur Elena bt Abdullah v KentWell Edar Sdn Bhd* [2011] 1 LNS 1928; *Lew Cher Phow v Pua Yong* [2011] 1 LNS 1528; *M Mohandas Gandhi v Ambank (M) Berhad* [2014] 1 LNS 1025.

[164]See *Ultra Dimension Sdn Bhd v Kook Wei Kuan* [2001] MLJU 751; *Lew Cher Phow @ Lew Cha Paw & 11 Yang Lain lwn Pua Yong & Satu Lagi* [2009] 1 LNS 1256; *Dr Bernadine Malini Martin v MPH Magazine Sdn Bhd* [2010] 7 CLJ 525; *John Dadit v Bong Meng Chiat & Ors* [2015] 1 LNS 1465; *Mohamad Izaham bin Mohamed Yatim v Norina Binti Zainol Abidin & Ors* [2015] MLJU 372.

[165]Data Protection Act 2018 (United Kingdom), s 168.

[166]Personal Data Protection Act 2010 (Malaysia), ss 5(2), 108(8).

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Table 1: Key differences between the IMPRESS Scheme and the IPSO Scheme

	IMPRESS Scheme	IPSO Scheme
Administrative Fees for Claimant	£75	Up to £100
Administrative Fees for Publisher	None	£500
Arbitrator's Fees	Up to £3,500	Up to £8,500
Payment of Arbitrator's Fees	Paid by administering body	Paid by respondent
Order for Costs Against Claimant	None	Only where claim is struck out
Costs Cap	£3,000	Typically, £10,000 £1,000 (if the claimant is a litigant in person) £25,000 (compulsory scheme, subject to parties' agreement)
Damages Cap	None	£50,000 (voluntary scheme) £60,000 (compulsory scheme)

The Appointing Authority

Typically, where parties are unable to agree on an arbitrator, section 13 of the Arbitration Act 2005 (Malaysia)[167] empowers the Director of the Asian International Arbitration Centre (previously known as the Kuala Lumpur Regional Centre for Arbitration)[168] to make appointments upon application. The Asian International Arbitration Centre could be a potential candidate to act as the appointing authority, given the extensive and diverse panel of arbitrators available[169] as well as the pre-existing machinery for carrying out the necessary appointment procedures. Alternatively, much like the IMPRESS Scheme which appoints arbitrators from the CIArb panel, Malaysia has its own local CIArb branch that could appoint arbitrators under a similar scheme. There are also several other reputable arbitration bodies based in this jurisdiction such as the Malaysian Institute of Arbitrators (MIArb) that could conceivably take on the role of empanelling a tribunal for the purposes of the scheme.

Recently, the Malaysian government has also established a *pro tempore* committee for a prospective Malaysian Media Council (MMC),[170] a '*self-regulatory body that could set high standards for the media community to help build and maintain trust in the industry and act as an arbitration body between the public and the media in the interests of all Malaysians*'.[171] Given the MMC's purported arbitral functions, this may present a timely opportunity for the MMC to curate and maintain their own panel of arbitrators with specialist knowledge of media law to resolve disputes involving those they regulate and aggrieved members of the public.

Damages Cap

While a damages cap would not be advisable for the same reasons traversed above in relation to the damages cap under the IPSO Scheme, on the other hand, such a mechanism may prove to be useful with respect to consistency and predictability, especially from the viewpoint of the media

[167]Arbitration Act 2005 (Malaysia), s 13.

[168]Arbitration (Amendment) Act 2018 (Malaysia), s 3.

[169]Asian International Arbitration Centre (Malaysia), 'Panellist Search' <https://www.aiac.world/panellist/view/all.> accessed 28 Jan 2020.

[170]'Pro tem committee of Media Council established' (Bernama, 16 Jan 2020) <http://www.bernama.com/en/news.php?id=1807196.> accessed 28 January 2020.

[171]'Media council: government to play a role of listening, accepting proposals and assisting media players' (Bernama, 7 Mar 2019) <http://bernama.com/en/news.php?id=1702381.> accessed 28 Jan 2020.

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stakeholders and publishers that would be signed up to a potential scheme. Indeed, the inability to meaningfully or precisely quantify reputational loss has, on occasion, led to astronomically high awards against which teeter perilously on the brink of what would be punitive rather than restorative. In the English Court of Appeal case of *Nail v News Group Newspapers Ltd*, May LJ held that '*the level of damages should not be so disproportionately high that freedom of expression is unduly curtailed*'.[172] Similarly, the oft-cited European Court of Human Rights case of *Tolstoy Miloslavsky v United Kingdom* held that an excessively large award of £1,500,000 was so disproportionate to the defamatory statement that it impinged the right to freedom of expression[173] under Article 10(1) of the ECHR. This has been acknowledged by the Malaysian Court of Appeal to be largely analogous to Article 10(1)(a) of the Malaysian Federal Constitution.[174]

It seems clear that jurists in the common law world recognize the potential for defamation awards to unjustly oppress a defaming defendant, or inappropriately enrich a successful claimant. In the Malaysian jurisdiction, the perils of the latter reached its pinnacle in the case of *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun*,[175] where the Malaysian Court of Appeal upheld a RM 10 million award for damages (which was subsequently affirmed by the Federal Court).[176] However, in the aftermath of such a judgment, the Malaysian courts appeared to have eschewed from awarding such crushing damages. Gopal Sri Ram JCA (as his Lordship then was), the same judge from the *MGG Pillai* case, observed in *Liew Yew Tiam v Cheah Cheng Hoc* that:

> In the process of making our assessment we have not overlooked the recent trend in this country of claims and awards in defamation cases running into several million ringgit. No doubt that trend was set by the decision of this Court in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun* … we think the time has come when we should check the trend set by that case. This is to ensure that an action for defamation is not used as an engine of oppression. Otherwise, the constitutional guarantee of freedom of expression will be rendered illusory.[177]

This was echoed by a different quorum of the Malaysian Court of Appeal in *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors*, where Anantham Kasinather JCA held that:

> In our judgment, the award of a sum running into millions of dollars in the case of *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun* was made during a period of unrestrained excesses by the judiciary and consequently not one which we are inclined to follow.[178]

However, despite the brakes imposed by the Malaysian Court of Appeal,[179] the Malaysian first instance courts below have not demonstrated universal restraint when awarding damages, with recent cases still running into the millions such as the case of *Nurul Izzah binti Anwar v Tan*

[172] *Nail v News Group Newspapers Ltd and others; Nail v Jones and another* [2004] EWCA Civ 1708 para 39.

[173] *Tolstoy Miloslavsky v United Kingdom* [1995] 18139/91 para 51, considered in *Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385, 395.

[174] *Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385, 395 (Gopal Sri Ram JCA) (as His Lordship then was): 'the freedom of expression guaranteed by Art. 10(1) of the European Convention of Human Rights. That article, though more elaborate in terms than the right enumerated in Art. 10(1)(a) of the Federal Constitution, in essence houses the same principle'.

[175] *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493; [1995] 2 CLJ 912.

[176] *Liew Yew Tiam* (n 174) 395 (Gopal Sri Ram JCA) (as His Lordship then was): 'We would add that we do not regard the affirmation by the Federal Court of the decision in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun* … as an insurmountable hurdle of binding precedent to our decision in the present case'.

[177] ibid.

[178] *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors* [2012] 4 MLJ 191, 204.

[179] See also: *Datuk Yong Teck Lee & Anor v Datuk Harris Mohd Salleh*, Civil Appeal No. S-02-691-03/2012 para 25 (Anantham Kasinather JCA): 'We have had occasion in the case of *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors*

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Sri Khalid bin Abu Bakar & Anor[180] where Faizah Jamaludin JC (as Her Ladyship then was) awarded RM 1 million in damages. In *Melawangi Sdn Bhd v Yeo Ing King*, an award of RM 5 million was made,[181] although the court rationalized awarding the extravagant quantum of damages on the basis that that the defendant in that case never challenged the wholly exorbitant claim. Azimah Omar JC (as he Her Ladyship then was) stated that '*having no benefit of the Defendant's contention, challenge and evidence of quantum, the Court is left with no alternative but to allow the Plaintiff's claim to its full extent*'.[182] These recent judgments appear to run entirely against the grain of the Malaysian Court of Appeal's pronouncements that such exorbitant damages are reflective of a bygone age of '*unrestrained excesses by the judiciary*'.[183] If the aforementioned cases are of any indication, unrestrained excesses are likely to continue unabated. As such, if the public perception is that it is entirely possible to recover millions in damages for a defamation claim, as evinced by astronomical claims in damages,[184] a damages cap for any potential arbitration scheme, whilst effectively introducing a hard stop on extreme fluctuations in awards, may also drastically deter plaintiff participation if the threshold is too modest.

Notwithstanding, the Malaysian Court of Appeal has continued to reiterate its position on excessive damages for defamation. In the Malaysian Court of Appeal case of *Syed Nadri Syed Harun & Anor v Lim Guan Eng and other appeals* (*Syed Nadri Syed Harun*), the plaintiff was awarded RM 550,000 in damages by the Malaysian High Court for an imputation of that the plaintiff had compromised his loyalty to Malaysia.[185] The plaintiff cross-appealed on the quantum on the basis that the damages awarded were too low after taking into account the plaintiff's status as an elected Member of Parliament, an elected member of the Penang State Assembly, as well as the Chief Minister of Penang.[186] The Malaysian Court of Appeal dismissed the plaintiff's cross-appeal and reduced the award of damages to RM 150,000, stating that '[*t*]*he days of million Ringgit award for defamation has long gone and consigned to history*'[187] and that award was '*excessive and not in line with the trend of cases*'.[188]

Typically, to determine the quantum of damages for defamation, the court is obliged to consider the conduct of the plaintiff, the plaintiff's position and standing in society, the nature of the libel, the mode and extent of publication, the absence or refusal of a retraction or apology and the whole conduct of the defendant from the time the libel was published down to the very moment of the verdict.[189] However, it had entered judicial reasoning to compare reputational loss with physical injury as a method of determining the reasonableness of the quantum. In the English Court of Appeal case of *John v MGN Ltd*, Lord Bingham MR held that:

[2012] 1 LNS 1359 to caution judges of the High Court against placing too much emphasis on this award since it was an award made during a period of unrestrained excesses on the part of the judiciary'.

[180]*Nurul Izzah binti Anwar v Tan Sri Khalid bin Abu Bakar & Anor* [2018] 1 LNS 528 para 140.

[181]*Melawangi Sdn Bhd v Yeo Ing King* [2015] MLJU 1978 para 91.

[182]ibid.

[183]*Harry Isaacs* (n 178); *Datuk Yong Teck Lee* (n 179).

[184]See *Dato Seri Anwar Ibrahim v The New Strait Times Press (M) Sdn Bhd & Anor* [2010] 5 CLJ 301 where the plaintiff claimed RM 100 million in damages. Harmindar Singh Dhaliwal JC (as His Lordship then was) held at 330 that 'the claim of RM 100 million is a gross exaggeration' and only awarded RM 100,000 in compensatory damages.

[185]*Syed Nadri Syed Harun & Anor v Lim Guan Eng and other appeals* [2019] 4 MLJ 259 para 29 (Rohana Yusof JCA) (as Her Ladyship then was): 'The learned trial judge did not award exemplary damages but had awarded a global award of damages in the sum of RM550,000 to the plaintiff. The damages awarded constitutes general and aggravated damages'.

[186]ibid.

[187]ibid para 32.

[188]ibid para 33.

[189]*Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat* [2012] 2 MLJ 807 para 44 (Zabariah Mohd Yusof J) (as Her Ladyship then was), cited with approval in the Court of Appeal case of *Raub Australian Gold Mining Sdn Bhd v Mkini Dotcom Sdn Bhd & Ors* [2018] 4 MLJ 209 para 81 (Suraya Othman JCA).

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> It is in our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable.[190]

This view was echoed in the English Court of Appeal case of *Jones v Pollard*, where Hirst LJ stated that '*save possible in the most exceptional case, I find it difficult to imagine any defamation action where even the most severe damage to reputation, accompanied by maximum aggravation, would be comparable to such appalling physical injuries* [*such as quadriplegia*]'.[191]

The Malaysian courts have curiously held that the quantum for defamation claims ought to not be compared with awards for physical injury.[192] However, there have been judgments where a putative threshold for damages was canvassed. In the Malaysian High Court case of *Dato Seri Anwar Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor*, in a similar vein to Hirst LJ's view in *Jones v Pollard*, Harmindar Singh Dhaliwal JC (as his Lordship then was) (Harmindar Singh JC) held that '[*e*]*ven in the most serious cases of defamation in respect of integrity and honour, I cannot imagine general damages to exceed the quantum that is usually awarded in personal injury claims to a claimant who is fully disabled*'.[193] The learned Harmindar Singh JC explained that '*a man who has been defamed cannot be said to be in a worse position than one who has lost the use of vital parts of his or her anatomy*',[194] citing the case of *McCarey v Associated Newspapers Ltd (No 2)*.[195]

Whilst it is true that damages for defamation are typically '*at large*'[196] and '[*t*]*he amount to be awarded in each case depends on the facts and circumstances of the case*',[197] the quantum of damages in personal injury cases is no better a bellwether for the appropriateness of damages to be awarded for defamation. This especially since the '[*l*]*oss of life and limb are equally serious and in terms of hierarchy should be placed on the same level as defamation suits*'.[198] It should be stressed that the comparison with damages in personal injury would not be for the purposes of computing the actual quantum, but rather to act as '*as a check on the reasonableness of a proposed award of damages for defamation*'.[199]

Naturally, for a comparison to be relevant to defamation awards in the Malaysian jurisdiction, such an exercise will need to be carried out against awards for personal injury in Malaysia to determine the reasonableness of an award.[200] Indeed, by assessing personal injury cases involving quadriplegia, which was one of the medical conditions identified by Hirst LJ[201] and alluded to by

[190] *John v MGN Ltd* [1996] 2 All ER 35, 54.

[191] *Jones v Pollard* [1997] EMLR 233, 257.

[192] *Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato Vincent Tan Chee Yioun* [2000] 4 MLJ 77, 83 (Eusoff Chin CJ): 'The awards in personal injury cases for pain and suffering cannot and should not be used to provide any guidance when considering what is a reasonable award of damages in a defamation case'; *MBf Capital Bhd & Anor v Tommy Thomas & Anor (No 2)* [1997] 3 MLJ 403, 412 (Kamalanathan Ratnam JC): 'it is not necessarily fair to compare awards of damages in this field with damages for personal injuries'.

[193] *Dato Seri Anwar Ibrahim* (n 184) para 81.

[194] ibid.

[195] *McCarey v Associated Newspapers Ltd. and others* (No. 2) [1965] 2 QB 86, 109 (Diplock LJ) (as His Lordship then was): 'I do not believe that the law today is more jealous of a man's reputation than of his life and limb'.

[196] *Dato Seri Anwar Ibrahim* (n 184) para 87; see also *Cassell & Co Ltd* (n 147) 1071 (Lord Hailsham LC): 'What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being "at large"'.

[197] *Karpal Singh a/l Ram Singh v DP Vijandran* [2001] 4 MLJ 161, 185.

[198] *Chu Kim Sing & Anor v Abdul Razak Bin Amin* [1999] 6 MLJ 433, 480.

[199] *John* (n 190); see also *O'Rawe v William Trimble Ltd* [2010] NIQB 135 para 117 (Gillen J): 'following the decision of the Court of Appeal in *John*, it is permissible to remind myself of conventional levels of award for personal injuries not by way of precise correlation but as a check upon the reasonableness of a proposed award of damages for defamation'.

[200] See *Elliot v Flanagan* [2016] NIQB 8 para 35 (Stephens J): 'In Northern Ireland that check should be with personal injury awards in Northern Ireland'.

[201] *Jones* (n 191).

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Harmindar Singh JC,[202] it can be observed that this figure is, in actuality, much more conservative than the RM 10 million in damages upheld in *MGG Pillai*.[203]

In *Marappan v Siti Rahmah bte Ibrahim*,[204] the Malaysian Supreme Court upheld an assessment of RM 180,000 as general damages for pain, suffering, and loss of amenities as a result of the complete paralysis in all four limbs. Similarly, in *Wong Fook v Abdul Shukur bin Abdul Halim (Wong Piang Loy, Third Party)*,[205] the Malaysian High Court awarded RM 180,000 in general damages for quadriplegia. However, as these cases were decided several decades ago, they would naturally have to be adjusted for inflation, which in today's currency would be closer to RM 400,000.[206] This is supported by the Revised Compendium of Personal Injury Awards,[207] which provides that the award for the quadriplegia should be between RM 300,000 to 420,000.[208]

If a cap for damages is necessary for a media arbitration scheme to operate in Malaysia, a RM 300,000 limit for damages would present a workable figure. This is because it falls comfortably short of the maximum amount which could be awarded for the most debilitating lifelong physical injury. At same time, the amount is not so derisory that plaintiffs may be deterred from pursuing a claim through arbitration. Indeed, the appropriateness of this figure is buttressed by *Syed Nadri Syed Harun*, where the Malaysian Court of Appeal identified three awards of RM 300,000,[209] RM 150,000,[210] and RM 200,000[211] to exemplify the '*trend of damages awarded by the court in a suit of defamation*'.[212] Of course, any Malaysian media arbitration scheme's rules framework should also allow for appropriate mechanisms that enable the relevant appointing authority or scheme's organizer to amend the cap from time to time to take into account variables such as inflation.

Defences under the Defamation Act 1957

There is some uncertainty whether the defences codified in the Defamation Act 1957 (Malaysia) would be available to claimants under the Malaysian arbitration scheme. This is because the applicability of these defences is specifically with respect to an '*action for libel or slander*'.[213] The word '*action*' is defined under the Courts of Judicature Act 1964 (Malaysia) as '*a civil proceeding commenced by writ or in such other manner as is prescribed by rules of court, but does not include a*

[202] *Dato Seri Anwar Ibrahim* (n 184).

[203] *MGG Pillai* (n 175).

[204] *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99; See also: *Siti Rahmah bte Ibrahim v Marappan s/o Nallan Koundar & Anor* [1989] 1 CLJ 252.

[205] *Wong Fook & Anor v Abdul Shukur bin Abdul Halim (Wong Piang Loy, Third Party)* [1991] 1 MLJ 46.

[206] FXTOP, 'Inflation Calculator (based on existing Consumer Price Indices)' <http://fxtop.com/en/inflation-calculator.php> accessed 14 Jun 2019.

[207] 'Revised Compendium of Personal Injury Awards' (Bar Council Malaysia, 6 Jul 2018); See: *Abdul Waffiy bin Wahubbi & Anor v A K Nazaruddin bin Ahmad* [2017] MLJU 761 para 39 (Nantha Balan J): 'It is axiomatic and imperative that when awarding damages for pain and suffering for personal injuries, the court must endeavour to ensure that the sum awarded falls within the range as stipulated in the Compendium and it would be wrong for trial courts to ignore the range of damages as recommended in the Compendium and to pluck a quantum from the air and make an award for a particular injury which does not resonate with the range in the Compendium'.

[208] ibid.

[209] *Datuk Seri Utama Dr Rais bin Yatim* (n 189) para 76.

[210] *Dato Dr Tan Chee Khuan v Chin Choong Seng @ Victor Chin* [2011] 8 MLJ 608 para 42 (Chew Soo Ho JC) (as His Lordship then was).

[211] *Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 394 para 64 (Varghese George J) (as His Lordship then was)

[212] *Syed Nadri Syed Harun* (n 185) para 32.

[213] Defamation Act 1957 (Malaysia), s 8: 'In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff'; Defamation Act 1957 (Malaysia), s 9: 'In an action for libel or slander in respect of words consisting of partly allegations of fact and partly of expression of opinion'.

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criminal proceeding'.[214] Crucially, however, arbitral proceedings do not appear to fall within the ambit of '*action*' under this definition.

Indeed, the Limitation Act 1953 (Malaysia) acknowledges '*arbitrations*' to be an entirely separate species from '*actions*', stating that '[*the Limitation Act 1953*] *and any other written law relating to the limitation of actions shall apply to arbitrations as they apply to actions*'.[215] As such, since the law appears to distinguish '*arbitrations*' from '*actions*', on a strict interpretation of the word '*action*' under the Defamation Act 1957 (Malaysia), these defences would seemingly not apply to a defamation claim being resolved by way of arbitration.

Nonetheless, this does not represent a significant hurdle to overcome. Firstly, many of these codified defences have already been bred in the bone of the common law, which has been given the force of law under the Civil Law Act 1956 (Malaysia).[216] The apparent concurrency of the statutory and common law defences has been alluded to by the courts on several occasions. For example, in the case of *Dato Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor*,[217] the Malaysian Court of Appeal explained that justification was a complete defence, both '*at common law, as well as under our very own statutory regime*'. In *Dato Dr Tan Chee Khuan*, the Malaysian High Court described the defence of fair comment, whether '*pursuant to s 9 of the Defamation Act 1957 or the common law*'.[218] Furthermore, unlike its current counterpart in the United Kingdom, the Defamation Act 1957 (Malaysia) does not purport to abolish any of the common law defences.[219] As such, even if the defences under the Defamation Act 1957 (Malaysia) were not available, respondents could theoretically still rely on the common law defences to defamation.

Notwithstanding the literal meaning of '*action*', it is likely that an arbitral tribunal will still refer to the Defamation Act 1957 (Malaysia) for guidance. Indeed, the Defamation Act 1952 (United Kingdom) also contain provisions that apply to an '*action*' for libel and slander,[220] which has been defined by the Senior Courts Act 1981 (United Kingdom) as '*any civil proceedings commenced by writ or in any other manner prescribed by rules of court*',[221] similarly excluding arbitral proceedings from that definition. Despite this, the arbitral tribunal in *Jonny Gould*[222] still took cognisance of section 12 of the Defamation Act 1952 (United Kingdom), notwithstanding that the section applies to an '*action*' for libel or slander. Admittedly, this was only one case; it remains to be

[214]Courts of Judicature Act 1964 (Malaysia), s 3. This definition was adopted by the Federal Court in the cases of *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee binti Abdullah* [2018] MLJU 50 and *Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Anor* [2020] MLJU 54.

[215]Limitation Act 1953 (Malaysia), s 30(1).

[216]Civil Law Act 1956 (Malaysia), s 3(1); See also: *Lau Yeong Nan v Life Publisher Berhad & Ors* [2004] 7 MLJ 7 para 10 (Suriyadi J) (as Her Ladyship then was): 'The Civil Law Act 1956 later confirmed statutorily that the common law of defamation in England, with certain modifications, is to be applicable to Malaysia'.

[217]*Dato Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor* [2018] 3 MLJ 726 para 49 (Abang Iskandar JCA) (as His Lordship then was): '[B]oth at common law, as well as under our very own statutory regime, justification, if successfully erected, provides a complete defence for the defendant in a defamation suit'.

[218]*Dato Dr Tan Chee Khuan* (n 210) para 27 (Chew Soo Ho JC) (as His Lordship then was): 'Whether pursuant to s 9 of the Defamation Act 1957 or the common law, to constitute fair comment, a distinction must first be drawn between an expression of opinion which if given fairly or constructively, comes within the ambit of fair comment and an assertion of facts which the defendant must prove or establish sufficiently to substantiate his comment basing on them to render it to be fair comment'.

[219]cf Defamation Act 2013 (United Kingdom), s 2(4): 'The common law defence of justification is abolished'; Defamation Act 2013 (United Kingdom), s 3(8): 'The common law defence of fair comment is abolished'; Defamation Act 2013 (United Kingdom), section 4(6): 'The common law defence known as the Reynolds defence is abolished'.

[220]Defamation Act 1952 (United Kingdom), s 12: 'In any action for libel or slander the defendant may give evidence in mitigation of damages that the plaintiff has recovered damages, or has brought actions for damages, for libel or slander in respect of the publication of words to the same effect as the words on which the action is founded, or has received or agreed to receive compensation in respect of any such publication'.

[221]Senior Courts Act 1981 (United Kingdom), s 151(1).

[222]*Jonny Gould* (n 108), per Ian Ridd: 'In addition, I must consider the impact, if any, of 12 section 12 Defamation Act 1952, which provides that a defendant to libel proceedings'.

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seen whether future tribunals will follow this approach. However, given that the purpose of the media arbitration scheme is to be an alternative to litigation, it would be perverse if the respondent could not avail itself to the same defences as it would have had in a court of law. As such, as in *Jonny Gould*, it is expected that Malaysian tribunals will similarly apply the local defamation statutes to any arbitral proceedings for defamation.

In any case, as arbitration is a creature of contract,[223] the parties would have the ability to apply or disapply the Defamation Act 1957 (Malaysia) through an arbitration agreement. As such, a term applying the relevant statute should be included into the *pro forma* arbitration agreement under any Malaysian media arbitration scheme, or alternatively, the available defences should be listed in the applicable media arbitration rules, in which the parties would have agreed to apply in the *pro forma* agreement.

Conclusion

The issues identified by the Hamid Sultan JC are certainly worth addressing. However, the alleviation of the courts' heavy caseload of defamation claims should be by way of alternative dispute resolution such as arbitration, instead of legislative reform to convert the tort of defamation into a purely criminal offence. Indeed, given that criminal prosecutions are likely to fall outside the ambit of arbitrability under section 4 of the Arbitration Act 2005 (Malaysia),[224] subsuming civil defamation into the offence of criminal defamation would effectively render it non-arbitrable; the two solutions are diametrically-opposed to each other.

On the basis that publisher adoption is actively encouraged and managed, whether through the nascent MMC or otherwise, a media arbitration scheme has the potential to significantly reduce the number of defamation cases appearing before the civil courts in Malaysia. However, for it to be attractive to parties, in particular the complainants, it is imperative that any scheme adheres closely to the recommendations in the Leveson Report: an arbitration scheme should be '*fair, quick and inexpensive, inquisitorial and free for complainants to use*'.[225] If there is sufficient stakeholder motivation, there would certainly be enough local players and arbitrators to make such a scheme a viable and popular alternative to traditional litigation in Malaysia, thereby obviating the need to inundate the court with defamation claims.

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[223] *Astoria Medical Group v Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (N.Y. 1962) (Fuld J): 'Arbitration is essentially a creature of contract, a contract in which the parties themselves charter a private tribunal for the resolution of their disputes. The law does no more than lend its sanction to the agreement of the parties, the court's role being limited to the enforcement of the terms of the contract'; *M S Archer Power Systems Private Limited v Kohli Ventures Limited And Others* LNIND 2017 MAD 4006 para 49 (M Sundar J): 'At the risk of repetition, we reiterate that arbitration being a creature of contract, intention of the parties is extremely sanctus'.

[224] *Larkden* (n 71).

[225] Leveson (n 81) 1768.

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