

# **Beyond the rule of law: Malaysia a legal hub for Asia**

**Presentation at CCI Paris Ile de France  
10th October 2017**

**Philippe GIRARD-FOLEY**  
Avocat à la Cour, MCI Arb, LL.M. (Penn)  
Representative in France (legal and tax  
affairs) CCI FRANCE MALAYSIA

# Speaker's Bios

**Name:** Philippe Girard-Foley  
**Firm:** GIRARD-FOLEY & Associates  
**Location:** Malaysia / France  
**Email:** [philippe@girard-foley.asia](mailto:philippe@girard-foley.asia)



Philippe landed on the shores of Malaysia in 1997, his country of choice after seven years of residence and work in Hong Kong following five of the same in London. Well versed in the intricacies of the common law, first in the US, then England, then Hong Kong, then Malaysia and the laws of its close sister jurisdictions (Hong Kong, Singapore, Australia/New Zealand) as well as the civil law in force in mainland China, he takes a global approach to those five Asia-Pacific jurisdictions and regards Malaysia as a central player in the search for quality legal environment in Asia.

Which is what he will try and demonstrate...

# Why Malaysia ?

The Rule of Law inspires confidence

But it does not stop there as Malaysia provides

a learning

curve for Asia



10 October 2017

Copyright © 2017 Philippe Girard-Foley, Esq.  
All rights reserved.

# “The message”

- 1. Malaysia is a country where the rule of law is recognised, respected and enforced:**
  - Malaysia belongs to the world of “common law”, with independence but interdependence.
  - This shows in the structure of the laws (“Acts”)
  - It shows in the way the judiciary works, both on substance and procedural matters
- 2. It is also a country open to the world and to Asia**
- 3. The other benefits of Malaysia (first rate infrastructure, value for money) apply to legal aspects as well**
- 4. The legal environment adds to other reasons to choose Malaysia**
- 5. Conclusion: come to Malaysia in confidence, what you will find will exceed your expectations**

10 October 2017

Copyright © 2017 Philippe Girard-Foley, Esq.

All rights reserved.

# The rule of law

- Many definitions, one consensus: means that a country is governed in accordance with legal principles instead of arbitrary decisions. Arbitrary means discretionary. The law means preset rules that apply to everyone
- Malaysia, even if its government decided to do so (hypothetically!), simply could not turn its back to the rule of law: it would be a change of regime, from democracy to dictatorship and the price to pay internationally would be too high
- Malaysia is part of the Commonwealth and would be isolated
- Malaysia is governed by common law, a concept that extends beyond its geographical boundaries

10 October 2017

Copyright © 2017 Philippe Girard-Foley, Esq.

All rights reserved.

# Why would it be impossible?

## The Institutions

- based on a Western model: Great-Britain
- A constitution, separation of powers
- lawmaking process follows the British system

## The legal system

- common law does not operate in isolation
- judiciary process embedded in the Constitution and adheres to due process principles



# Links with the world are multiple, strong and cannot be severed but at a huge cost

## Starting with the Commonwealth...

### Commonwealth reciprocity (in the Constitution)

**155.** (1) Where the law in force in any other part of the Commonwealth confers upon citizens of the Federation any right or privilege it shall be lawful, notwithstanding anything in this Constitution, for Parliament to confer a similar right or privilege upon citizens of that part of the Commonwealth who are not citizens of the Federation.

# Further links with the world are strong and protect further stability in the law

## **International Organisations membership**

Malaysia is an ASEAN member, an APEC member

It is also a FAO (Food and Agriculture Organisation) member, UNESCO member, Interpol member, WHO (World Health Organisation) member, WIPO (World Intellectual Property Organisation) member, WTO (World Trade Organisation) member, and of course a UN (United Nations Member) and at this moment a temporary member of its Security Council. In total, Malaysia participates in one capacity or the other in nearly 60 international organisations [Source: the CIA World Factbook]

Malaysia has been the **first** TPP country to ratify the Trans-Pacific Partnership Treaty by a vote of its Parliament on 28<sup>th</sup> January 2016.



# ...not just that: international conventions

Malaysia is a signatory of 169 international conventions, covering many diverse areas e.g.

- the Paris Convention for the Protection of Industrial Property of 1883
- The Constitution of ILO (International Labour Organisation) signed in Versailles in 1901 (and many other conventions on the protection of workers' rights)
- The International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto 1973)...and many others

10 October 2017

Copyright © 2017 Philippe Girard-Foley, Esq.

All rights reserved.

# The basic institutions



Guaranteed by the Constitution, the supreme law of the Federation since 1957

“This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.” [Article 4.1.]

“There shall be a Supreme Head of the Federation” [Article 32.(1)] elected for five years by the Conference of Rulers [Article 33(2)] who “shall act in accordance with the advice of the Cabinet or of a Minister” [Article 40(1)] and appoints a Prime Minister, “a member of the House of Representatives who in his judgment is likely to command the confidence of the majority of the members of that House” [Article 43(1)] and “shall on the advice of the Prime Minister appoint other ...(Ministers) from among the members of either House of Parliament” [Article 43(2)]

“The legislative authority of the Federation shall be vested in a Parliament” [Article 44] comprising a Senate and House of Representatives.

# Many familiar concepts

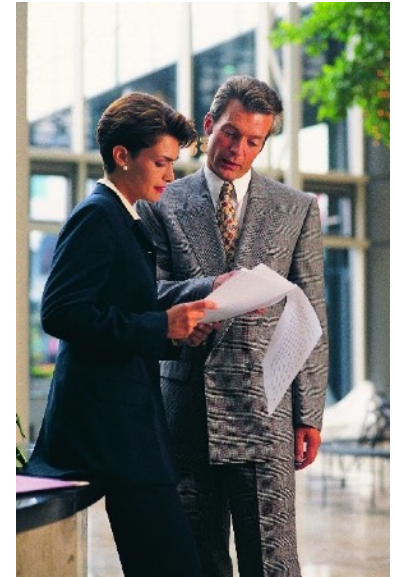
- Basic corporate entities common with UK, Hong Kong, Singapore
- Sdn Bhd (Sindirian Berhad) = Ltd Company (UK)
- Bhd (Berhad) = PLC (Public Limited Company)
- But also with neighbouring countries run by common law in Asia Pacific
- the structure of Statutes
- “Act” = “Act” (UK) = Ordinance (Hong Kong and Singapore)



# The common law: an interactive relation with other countries

- A realistic approach: “Although nearly every British colony has adopted the English common law system, each country has developed its common law” [Datuk Ambiga Sreenevasan, Chairman Malaysian Bar 2007]
- But the Judges have discretion to determine which rule extracted from U.K laws must be relied on or rejected [Act 67 Civil Law Act 1956, Part II, Section 3 (1): “Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject such qualifications as local circumstances render necessary”].

Or English law may be expressly excluded e.g. Civil Act 1956 “Nothing in this Part shall be taken to introduce to Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein



10 October 2017

Copyright © 2017 Philippe Girard-Foley, Esq.

All rights reserved.

# The doctrine of precedent



**Precedents from other common law jurisdictions are to be relied on**

“if case now before the court has facts and raises issues similar to those of a previously decided case, then the present case must be decided in the same way as the earlier one [G.Bird The Process of Law in Australia 1988]

**Precedents are persuasive but not binding if not originating from Malaysian courts - but this includes such jurisdictions as England, Hong Kong, Australia or Singapore**

**Which in turn creates interchange of thoughts, legal reasoning and stability** “It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs” [Lord Gardiner Re London Tramways Co. v London City Council [1898] AC 375]

10 October 2017

Copyright © 2017 Philippe Girard-Foley, Esq.

All rights reserved.

# Similarities of legislation

- Several laws are inspired by their matching English counterpart, which does not mean copycat but a structure familiar to outsiders
- For instance, the basic structure of the Malaysian Trade Marks Act 2004 is broadly similar to the Trademarks Act 2004 of the UK, and the Patents Act 1993 to the Patents Act 1997 of the UK
- But the “inspirational model” is not always UK: for instance, the latest version of the Companies Act 2016 Act, Act 777 is inspired by the Corporations Act 2001 of Australia
- Unlike the “Ordinance” in Hong Kong and Singapore it does not provide for a mandatory set of Articles but for an optional “Constitution”
- But common rules remain e.g. the ultra vires doctrine is eliminated in the UK, Hong Kong, Singapore and Malaysia (section 39 Companies Act)

10 October 2017

Copyright © 2017 Philippe Girard-Foley, Esq.  
All rights reserved.

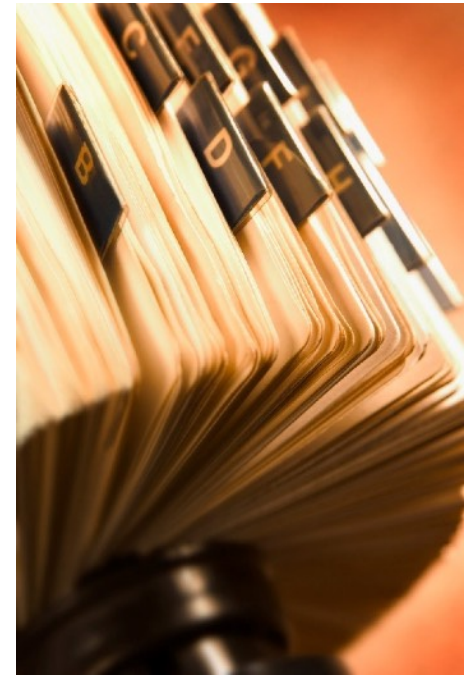
# The “Acts”

- whether they are called Acts of Parliament in the UK (and Malaysia) or Acts of Congress in the USA (or called “Ordinance” in Hong Kong and Singapore) they are drafted differently from laws in a civil law system
- they are based on bills prepared by professional drafters (in the UK “a team of lawyers in the Parliamentary Counsel Office (PCO), a part of the Cabinet Office, on the instructions of the Government Department concerned” [Parliamentary Stages of a Government Bill © Parliamentary Copyright (House of Commons) 2008])
- are very expertly drafted and comprehensive: example the 577 pages (official publication), 620 articles and 13 schedules of the Companies Act 2016 (Act 777) of Malaysia

10 October 2017

Copyright © 2017 Philippe Girard-Foley, Esq.  
All rights reserved.

# The Judiciary



## Three levels of jurisdiction:

- High Courts (one in Malaya, one in Sabah and Sarawak) and their “inferior courts”
- Court of Appeal
- Federal Court

## Procedural rules strictly defined:

- Rules of the High Court 1980
- Courts of Judicature Act 1964
- Subordinate Courts Act 1955
- Rules of the Court of Appeal (Amendment) and Rules of the Federal Court (Amendment) 2012



# ...in summary: take away points



- a legal system relying on the institutions of a western democracy
- in symbiosis with other legal systems via the common law
- which provides a degree of security at par with other respected jurisdictions
- a built-in stability in the lawmaking and its enforcement by the Judges
- and which may also the value of a learning curve: what is learnt in Malaysia may also be useful (with care) in Hong Kong, Singapore, Australia and even India !