# COMPARATIVE THEORY, JUDGES AND LEGAL TRANSPLANTS

## A Practical Lesson from Singapore and its Relevance to Transnational Convergence

Legal evolution in a hyper-connected world will increasingly come through, or otherwise be informed by, legal borrowing and transplants from without whether in the form of laws, techniques, concepts or simple inspiration. The pressures of globalisation and the resulting need for some form of operational, transnational convergence and harmonisation will require diverse legal systems to seek out the best rules and approaches regardless of provenance to address the demands of the modern legal and commercial environment. Judges, particularly in common law jurisdictions, will be at the forefront of this process of transnational legal selection fraught with both promise and peril. A "judiciously ecumenical" approach will be required to ensure that the best approaches are adopted while preserving the existing systemic balance of the "recipient" system. Comparative theory has a role to play in enlightening policymakers as to how best to proceed before the fact or, alternatively, in defining and explaining the parameters of the process in a *post hoc* manner. One such case in Singapore, *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193, provides a backdrop for examining the link between theory and practice.

Basil C **BITAS***
*Juris Doctor (JD) (Georgetown University Law Center, Washington, DC);*
*Member of the Bars of New York State and Washington, DC;*
*Associate Professor (Practice), School of Law,*
*Singapore Management University.*

### I. Introduction – Theory meets practice

1 It is sometimes thought and, indeed, even taken as an article of faith that comparative law in many of its iterations is an interesting gadget, nice to know, but hardly indispensable to legal practice. This view is changing under the pressure of globalisation and the ever increasing legal and commercial proximity in which modern lawyers

* The author wishes to acknowledge the valuable research assistance of Jens Carle, LLB degree candidate in law (2014), at the Singapore Management University.

operate, but scepticism remains. Even if comparative law may be relevant in some way, shape or form, how can it be rendered sufficiently coherent to be of practical use?

2 Within this ambient "ether" of doubt, promise and misconception, the concept of legal transplants has often come to the fore. It is here where one can observe the interaction of legal concepts and assess empirically the extent to which competing approaches are weighed, critiqued and sometimes adopted. Moreover, the issue of transplants also leads to focused discussions of what constitutes a successful transplant and, indeed, of those factors requiring consideration when engaging in such exercises.[1]

3 This discussion, too, can fall prey to an overly theoretical discourse, edifying for sure, but perhaps no more useful in practical terms than the critics of "comparative law" would have one believe. This commentary seeks to create an analytical nexus between theory and practice by highlighting some of the prevailing views and scholarship regarding transplants and then linking them to a recent judgment of the Singapore Court of Appeal, *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*[2] ("*Sembcorp*"), which more than any protestations of relevance or assertions to the contrary, validates the increasing importance of a comparative perspective in this ever-shrinking, albeit enduringly diverse, world.

4 To frame this short piece as a case study would be to overstate its ambitions. Rather it is offered as a practical tale on the importance of being "judiciously ecumenical" and "comparative" in the evolving international legal environment. Particularly in the commercial context, the hermetic effect of national borders is yielding to a more permeable membrane, which seeks to absorb useful concepts in a manner that facilitates the development of a common transnational grammar. This process is more subtle than that reflected in the adoption of overtly transnational instruments, such as the Vienna Convention for the International Sale of Goods[3] ("CISG") or the non-binding, private law UNIDROIT Principles.[4] Rather, it is playing out in the courts, where real "cases and controversies" are mandating a search for the best solutions. Such an exercise is hardly alien to the common law method. The new

1 Hideki Kanda & Curtis J Milhaupt, "Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law" (2003) 51(4) Am J Comp L 887.

2 [2013] 4 SLR 193.

3 United Nations Convention on Contracts for the International Sale of Goods (1489 UNTS 3) (11 April 1980; entry into force 1 January 1988).

4 UNIDROIT Principles of International Commercial Contracts 2010 (International Institute for the Unification of Private Law, Rome) <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> (accessed 1 November 2013).

dimension, however, is that courts will incrementally, but unabashedly look for the best solutions even if they reside outside their national borders. Moreover, as the gatekeepers of such doctrinal change, they will also mark out in practical and legal terms the promise and the pitfalls of such an approach.

5 In a speech entitled "Transnational Commercial Law: Realities, Challenge and a Call for Meaningful Convergence" made at the 15th Biennial Conference of Chief Justices of Asia and the Pacific held in October 2013, Sundaresh Menon CJ outlines the judicial role in this complex process of legal borrowing and transnational harmonisation propelled by the growing velocity and intensity of cross-border trade and commerce.[5] This commentary examines one such judicial exercise, involving the admissibility of extrinsic evidence in Singapore, *Sembcorp*, highlighted in the aforementioned speech and which in microcosm may in fact be a harbinger of the future.

## II. Transplant theory – Culturists *versus* Transferists

6 Prior to turning to *Sembcorp*, however, it is necessary to sketch out some of the seminal literature concerning "legal transplants" in order to define the analytical matrix in which these exercises are playing out. It is customary to mention Montesquieu's "Spirit of the Laws"[6] from 1748 as a starting point for one view of the transplant phenomenon subsequently defined as the culturist school. Montesquieu's oft-cited quotation holds that the geographical, cultural, climatic and environmental differences among countries would make it a huge coincidence (*un grand hasard*)[7] if laws could be transplanted from one country to another. The thrust of this culturist school has been picked up by more modern theorists, such as Pierre Legrand, who tend to assert that true transplants are impossible.[8] Such an approach may have to do as much with the notion of a transplant itself as with the idea of how to define success. Implicit in Legrand's culturist view is that for a transplant to be deemed successful, it must function in exactly the same manner in the recipient country as it did in the donor country.[9] As there are invariably differences in legal infrastructure and habits, not to

5 Sundaresh Menon CJ, "Transnational Commercial Law: Realities, Challenge and a Call for Meaningful Convergence" at the 15th Biennial Conference of Chief Justices of Asia and the Pacific (27–30 October 2013).

6 Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (France, 1748).

7 See Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (France, 1748) Book I, ch 3: "Les lois politiques et civiles de chaque nation … doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un grand hazard si celles d'une nation peuvent convenir à une autre."

8 Pierre Legrand, "The Impossibility of Legal Transplants" (1997) 4 MJECL 111.

9 Pierre Legrand, "The Impossibility of Legal Transplants" (1997) 4 MJECL 111 at 115–117.

mention legal and general culture, this criterion sets up a virtually unattainable threshold. It is in this interesting but somewhat dogmatic light that the modern culturist school can be understood.

7 In the opposite portico of the transplant edifice are the members of the transferist school led by Alan Watson, whose short tome entitled *Legal Transplants: An Approach to Comparative Law*[10] and other related writings sparked the culturist-transferist debate that continues in varying forms to this day. The transferist school in its most pared down form holds that law is a largely elite, free-standing phenomenon which makes its transferability or transplantability far easier than the culturists would have one believe.[11] Transferists point to the migration and implantation of the civil law and common law traditions across the world as empirical support for the transferist proposition. Watson, whose core expertise is in Roman law, points to the wide acceptance of the *Corpus Juris Civilis* throughout Europe, the so-called reception of Roman law, as one of the first but by no means last manifestations of the transplant phenomenon and the transferist thesis in action.[12]

8 Scholars who have analysed Watson's writings break them down into "strong Watson" and "weak Watson", with the former postulating law as an entirely free-standing, culturally independent phenomenon and the other seeing the same as dominantly free-standing albeit with a cultural dimension.[13] A number of scholars have tended to focus on weak Watson as the more reasonable and perhaps analytically robust of the two iterations, but common to both formulations is that a transplant and its related success must be evaluated and assessed with reference to the recipient country's legal context and needs.[14] The test is not whether the proposed transplant functions in a manner identical to that observed in the donor country. The test is simply whether the transplanted concept, law or institution functions in a manner that is socially useful in the recipient country. By using the recipient country as the frame of reference, Watson short-circuits the cultural and culturist inquiry.

10 Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974).

11 Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974); Alan Watson, "Legal Transplants and European Private Law" (2000) 4(4) *Electronic Journal of Comparative Law* at 4–5.

12 Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974).

13 William Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants" (1995) 43 Am J Comp L 489 at 491–492.

14 William Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants" (1995) 43 Am J Comp L 489 at 491 and 501.

9 Essential to the competing culturist view is the idea that law is somehow the "mirror image" of society.[15] Since no two societies are identical, it therefore becomes axiomatic that legal transplants are impossible. Watson's opposing view can be framed in one of two ways, each of which, if true, vitiates to some extent the culturist thesis: (a) Law is free-standing and can therefore be transplanted easily; or, and it is perhaps this one that resonates, (b) law is, indeed, or can become the mirror image of society, as the culturists assert, but the only mirror that counts is that of the recipient country. Stated less facetiously and more directly, law may have been borrowed, but if it blends into the societal fabric in a manner that yields social utility, then this constitutes a duly effected transplant without reference to any cultural dimension obtaining in the donor country. In a word, Watson largely strains the cultural dimension out of the mix by the manner in which he frames the question and sets the parameters for what constitutes a (successful) transplant.

10 Within this binary structure of the culturist and transferist schools, it is perhaps useful to examine certain intermediate positions that inform the transplant debate. Otto Kahn-Freund[16] in a response to Watson postulates a continuum of law and legal concepts that may be easier or harder to transplant depending on how deeply rooted they may be in the donor's soil. Using the metaphor of a carburettor and a kidney, Kahn-Freund suggests that some transplants are more mechanical and therefore easier to effect than others, which may be more organic in nature and therefore more difficult to transplant.[17] His continuum runs from certain types of commercial law that may in some way lie on the periphery of a system involving the acquiescence of only a few key stakeholders in order to become effective to public or constitutional law which may require broader acceptance from the public at large in order to take root in the soil of the recipient country.[18] Again, whether the success of the transplant would require detailed knowledge of the donor country's legal system and political economy is open to question. Kahn-Freund suggests that this is not required for "mechanical" transplants but is highly relevant for more "organic" laws.[19] Legrand would answer in the affirmative for all cases.[20] Finally, Watson would answer in the negative for all cases as his inquiry tends to be bounded by the reality

15 William Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants" (1995) 43 Am J Comp L 489 at 491.

16 Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 MLR 1.

17 Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 MLR 1 at 5–6.

18 Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 MLR 1 at 7–8 and 13.

19 Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 MLR 1 at 6.

20 Pierre Legrand, "The Impossibility of Legal Transplants" (1997) 4 MJECL111.

and experience of the recipient state and the proposed transplant in that context without reference to the donor state.[21]

## III. Procedural law and transplants

11 Of particular interest to lawyers and law reformers is Kahn-Freund's assertion that "procedural law" is particularly difficult to transplant.[22] Although such law constitutes an elite phenomenon important to lawyers and those administering the legal system, thereby suggesting a relatively limited group of stakeholders from which "buy-in" is required, Kahn-Freund sees such law as the veritable spinal column of the legal system and thus something that is difficult to displace. Procedural law therefore constitutes in his view a highly organic species of law, whose enduring force results not from a broad constituency among the population, but from a highly committed, albeit relatively small, elite group of stakeholders comprised of judges and lawyers.[23]

12 Since so-called procedural law can encompass a number of different dimensions, it may be useful to delimit the area for the purposes of this analysis. In its broadest sense, procedural law can be deemed to encompass the matrix of "secondary" rules in H L A Hart's taxonomy[24] that allows the legal system to give meaning and effect to substantive or primary rules defining rights and obligations in areas such as contract or tort. Picking up on Hart's taxonomy with regard to legal systems, John Merryman has described procedural and so-called secondary rules as those that underpin the functioning of the "law machine" of a given jurisdiction.[25] Substantive tort law may provide for liability for fault, but the panoply of procedural rules, including, *inter alia*, those governing the access to justice, the making of pleadings, the adducing of evidence, the scope or lack thereof for discovery and the rules governing the interpretation of the scope and effect of substantive rights, will in large part condition and determine the legal result.[26]

21 Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974).

22 Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 MLR 1 at 17 and 20.

23 Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 MLR 1 at 17–20.

24 H L A Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) at pp 77–96.

25 John Henry Merryman, "Comparative Law Scholarship" (1997–1998) 21 Hastings Int'l & Comp L Rev 771 at 777–779.

26 John Henry Merryman, "Comparative Law Scholarship" (1997–1998) 21 Hastings Int'l & Comp L Rev 771 at 777–778.

The process whereby a substantive right is transformed by the legal system into a legal result is described by Merryman as "conversion".[27]

13 If one looks at the above list of procedural dimensions, it is clear that more than a few of them relate to the nature of evidence. Who has it? What right does one have to enlist the other party's co-operation in acquiring it and, more broadly, once one has acquired what purports to be evidence, what are the rules governing its admissibility? This analysis will focus on the evidentiary dimension of procedural law and, specifically, the issue of admissibility and its relationship to the rules governing contractual interpretation and construction.

14 Placing this question within the "transplant matrix" outlined above, the question is essentially as follows: Assuming a jurisdiction wishes to look out over the international horizon with a view to improving or refining its rules concerning the adducing and admitting of evidence, how should it go about making the inquiry? What are the practical constraints in importing such techniques and how should they be identified and factored into the decision to modify an existing procedural law? Moreover, short of a formal transplant, so to speak, is it possible for courts to be ecumenical in outlook, but conservative in the importation and application of external rules, even as they acknowledge and to some extent endorse alternative approaches? Such a useful and complicated balancing act was recently carried out by the Court of Appeal in *Sembcorp* and merits discussion here as an example of the modern judiciary's role in weighing opportunities for legal borrowing from outside while safeguarding the integrity of the existing, domestic legal ecosystem.

## IV. *Sembcorp* and evidentiary transplants

15 *Sembcorp* dealt with a complex set of circumstances involving a joint venture that had taken a turn for the worse thereby inviting the judiciary to investigate the appropriate means for constructing the founding documents and to assess the extent to which extrinsic evidence and a contextual approach could be used in such exercise. Of corresponding importance to the specific business result in the case is the due deference the court showed to the Singapore systemic context in assessing the extent to which evidentiary techniques could be imported from other jurisdictions, notably from those in the civil law orbit. The analysis is replete with references to the manner in which any such importation of civil law technique would impact the existing systemic

27 John Henry Merryman, "Comparative Law Scholarship" (1997–1998) 21 Hastings Int'l & Comp L Rev 771 at 779–781.

balance and in so doing require consideration of the existing procedural context as further described below.[28]

16 The court's analysis bears out some of Kahn-Freund's insight concerning the difficulty of transplanting procedural law. Viewed as an internally closed sub-system within the broader legal system, the rules of procedure and particularly those governing the admissibility of evidence form part of a complex web of relationships that, for the most part, cannot be changed in a surgical or discreet manner. With regard to issues of contract law, the court went to great pains to distinguish between the substantive rules of contract and those governing the admissibility of evidence, explaining how the latter were constrained by the pre-existing Evidence Act[29] ("EA"), common law doctrine, and the emphasis in common law systems on adversarial procedure.[30] The court's sensitivity to this pre-existing ecosystem in assessing the extent to which techniques from alien legal systems could inform the current exercise is what makes this case noteworthy from both a theoretical and operational perspective concerning the notion of transplants and legal borrowing.

17 The court undertook a detailed recitation of the civil law tradition's receptivity to the use of extrinsic evidence reflected in specific provisions of the French and German codes and their "progeny" both within and outside the region, including in Russia and China.[31] Describing this open-textured approach as the "robust approach"[32] to contextual interpretation and the admissibility of extrinsic evidence, the court further alluded to the recent generation of international instruments, such as the CISG and UNIDROIT Principles, noting that they, too, reflected a drift toward this broader or more robust approach.[33] The court's discussion of these issues was open-minded and ecumenical, manifesting a desire to seek out the best and most operational approach for the Singapore context while remaining mindful of the domestic procedural ecosystem framed by the EA. The detailed discussion of civil law techniques in an established, albeit evolving, common law jurisdiction of growing commercial heft and significance is a further manifestation of evolving commercial realities, developing global best practices, and the increasing scope and need for some form of legal convergence.

28 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [38]–[39].
29 Evidence Act (Cap 97, 2012 Rev Ed).
30 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [38].
31 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [37].
32 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [37]–[38].
33 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [37].

18 Many of these same considerations arise in international arbitral *fora* throughout the world, involving parties from diverse jurisdictions and legal traditions, thereby promoting the development of hybrid procedures to accommodate the parties' respective expectations.[34] What sets the instant situation apart is the Court of Appeal's willingness to examine alternative approaches and their potential efficacy for possible incorporation into formal, judicial procedure within a common law context. The analysis was not centred on rendering a private arbitration tribunal more flexible, but rather on assessing whether and to what extent formal court procedure could or should accommodate these alternative approaches:[35]

> The fact that the robust approach is prevalent in the civil law legal systems and transnational conventions is of course not a reason for a common law system such as ours to eschew it. Indeed, at a conceptual level, harmonisation and convergence in commercial laws is generally to be welcomed. But at the practical level of implementation, this must be assessed in the round taking into account how this dovetails with our legal system and our laws on admissibility of evidence and the litigation process in general.

19 The court demonstrated an open, yet duly cautious awareness of the potential of alternative approaches to fortify existing court procedure and interpretive techniques. Equally as important, the court showed a sensitivity to the pitfalls of incorporating alternative approaches wholesale without reference to the existing context. It is to this issue that we now turn.

## V. Evidentiary transplants – A systemic approach

20 The thesis of this commentary is that domestic courts will play an increasingly important role in facilitating transnational legal borrowing and resulting legal convergence. Such exercises will not be carried out with the fanfare surrounding the ratification of international instruments or the formal adherence to international groupings. Rather this type of legal development will take place as part of the normal business of modern domestic courts. Particularly in regions of commercial dynamism and mixed civil law-common law membership the necessity of paying due deference to alternative approaches will become manifest. The European Union ("EU") is undergoing such a process as directives with a substantially civil law feel are impacting the domestic jurisprudence and, to some extent, the procedure of common

34 Pierre Karrer, "The Civil Law and Common Law Divide: An International Arbitrator Tells It Like He Sees It" (2008) 63(1) *Dispute Resolution Journal* 72 at 72–77; Siegfried Elsing & John Townsend, "Bridging the Common Law Civil Law Divide in Arbitration" (2002) 18 Arb Int'l 1 at 7.

35 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [38].

law member states and, indeed, *vice versa*. Lord Denning's famous quotation concerning the effect of substantive EU law on member states, that "[w]hen we come to matters with a European element, the Treaty [of Rome] is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back"[36] continues to echo ever more loudly as the years and ever greater EU integration progress. More recently and in a manner more germane to this commentary, Lord Hoffmann has sought to assess how non-binding, transnational instruments or compendia, such as the Principles of European Contract Law[37] can be used to underpin or otherwise inspire evolution in English common law thinking on the use of extrinsic evidence and contextual contractual interpretation and construction.[38] Such exercises are framed by the requirements of the EU and the stated objectives of harmonisation, which arguably provide a type of rough road map or at least a context for making such judgments.

21 Similar assessments left to judges where the requirements and contours of convergence are not so clearly manifest present unique challenges. The judge's discretion in these contexts is constrained by his or her sense of what is required by the parties in particular and by the systemic context in general. With regard to the use of extrinsic evidence for contractual interpretation and construction, the court in *Sembcorp* sought to set out a road map for the manner in which Singapore courts could absorb influences from other jurisdictions without upsetting the foundations of their own system.

## VI. The court's framework – Setting the scene for comparative analysis

22 The scope of the discussion was delimited in several ways. First the court undertook an important and highly operational analysis of the terms "interpretation", "implication" and "construction", explaining that the first is giving meaning to what has been written,[39] the second is filling gaps with what perhaps should have been written,[40] and that the final term "construction" can encompass each of these prior two exercises:

36 *H P Bulmer Ltd v J Bollinger SA* [1974] Ch 401 at 418.

37 The Principles of European Contract Law 2002 <http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002> (accessed 2 November 2013).

38 *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, in particular at [60] and [64]; *Jumbo King Ltd v Faithful Properties Ltd* [1999] 3 HKLRD 757; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101. See also *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [25].

39 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [27].

40 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [29].

"Construction, in this sense, encompasses both the interpretation of express terms as well as the implication of terms to fill gaps."[41]

23 With regard to the specific issue of contractual interpretation and the use of extrinsic evidence, the defining parameters are set by the "robust" approach in civil law systems and by Lord Hoffmann's leading judgments on the subject on the one side[42] and by the existing and evolving Singapore context on the other. With the terms of reference thus laid out, it becomes possible for the court to explain in specific terms where Singapore is on the spectrum as reflected in the EA and in *Zurich Insurance v B-Gold Interior Design & Construction Pte Ltd*[43] ("*Zurich Insurance*") and where it could conceivably move to, and, moreover, what specific constraints and considerations would be relevant in effecting such additional change. It is in this manner that the court's approach is "judiciously ecumenical", looking out over the horizon for best or evolving practices, even from civil law jurisdictions, while remaining vigilant about its own domestic, systemic equilibrium and related concerns. Moreover, it is submitted that such an approach will increasingly become the hallmark of enlightened, modern courts, particularly with regard to commercial matters.

24 In parsing the issue, the court highlighted Lord Hoffmann's endorsement of the use of extrinsic evidence and expanded contextual interpretation, noting that such an approach could be used to discover and thereby realise the parties' true intentions:[44]

> The philosophy that underlies the contextual approach is one that seeks the common intention of the parties, even if, occasionally, this might yield an understanding that departs from the literal meaning of the words used in the contract.

Implicit in the subsequent analysis was the recognition that one of the world's oldest formal legal traditions had adopted the extreme or robust variant of the contextual approach and that there must therefore be a number of practical criteria to recommend it:[45]

> The robust approach towards the admissibility of extrinsic evidence bears a strong resemblance to the civil law approach which allows contracts to be proven by 'any means' … and this includes the examination of 'all the corresponding circumstances', including

41 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [31].

42 *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988; *Jumbo King Ltd v Faithful Properties Ltd* [1999] 3 HKLRD 757; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101.

43 *Zurich Insurance v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029.

44 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [34].

45 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [37].

> pre-contractual negotiations and correspondence, business practices and customs, and subsequent conduct.

Further, from the standpoint of legal convergence on an international level, it is useful to recognise that the civil law in terms of numbers remains by far the dominant legal tradition throughout the world. The court is by implication acknowledging that the robust approach has resulted in manifest efficacy in one of the world's great legal traditions and that it may in fact be a harbinger of the future: "As we shall later see, the adoption of the contextual approach to interpretation might entail a migration towards the principles adopted in civil law jurisdictions."[46]

## VII. Operational decision-making – Refining and using the comparative inquiry

25 After sketching out the parameters of the debate, it was necessary for the court to relate the robust approach to the Singapore systemic context. Here the court had to ask the following: (a) whether the greater use of contextual interpretation could be traced to general common law doctrine; (b) whether and, more specifically, to what extent do statutory enactments, such as the EA, constitute a limiting factor on the adoption of the robust approach; and finally, (c) whether, and if so, to what extent would the robust approach be consistent with the fundamental dynamic of common law adversarial practice.

26 With regard to the general consistency of the contextual approach with common law doctrine, the court finds support for this proposition in the history and evolution of the EA, which, as is the case with many statutory enactments in the common law system, sought to consolidate and refine the basic principles of the case law. In sum, the court concludes that a broader contextual approach to contractual construction can be detected in the doctrinal lineage of the common law and its subsequent codification in the EA.[47]

> Our view that the common law at that time permitted the admission of extrinsic evidence of surrounding circumstances to aid in the interpretation of words used in a contract is confirmed by both contract and evidence law textbooks of that time … There is therefore no doubt in our minds that the EA, which codified the common law position at that time, also permits the admissibility of extrinsic evidence of surrounding circumstances.

27 The next and really fundamental question is whether and to what extent the robust approach comports with the Singapore-specific

46 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [34].
47 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [63].

EA. The court points out that countries from the common law orbit, such as the UK, Hong Kong and New Zealand do not have an analogous act and therefore do not face the additional challenge of measuring any importation of the robust approach against this standard.[48] In this manner the court transposes the general inquiry of whether the robust approach is broadly consistent with common law evidentiary principles into an appropriately Singapore-specific inquiry of whether the existing statutory structure will support this approach.[49]

28 The court finds that s 94(*f*) of the EA supports the general use of extrinsic evidence, subject to the caveats in sub-ss 95 and 96.[50] Such an inquiry essentially asks to what extent the robust approach prevalent in civil law systems and the related contextual approach authorised by general common law doctrine must be customised for use in Singapore pursuant to the constraints of the EA. This sensitivity to evidentiary techniques outside of Singapore, their reflection in the body of general, common law doctrine and their suitability for the specific Singapore statutory context is what sets this case out as a piece of modern, comparative jurisprudence and a road map for legal borrowing or at a minimum for appropriate judicial ecumenism. The inquiry is not simply theoretical, but operational. Can our techniques be improved or refined with inspiration or techniques from outside and if so, how and to what extent?

## VIII. The Singapore approach and the requirements of the common law adversarial litigation context

29 As noted above, the court lays out the parameters of the analysis, with the expansive or robust approach reflected in civil law evidentiary practice and a number of Lord Hoffmann's leading judgments on one side and the evolving Singapore approach on the other. The court establishes that s 94(*f*) of the EA as further refined by *Zurich Insurance*[51] has embedded the contextual approach in Singapore law and that in some respects the aforementioned judgment pushes the bounds of Lord Hoffmann's expansive limits:[52]

> This court hinted of a possible willingness to venture further than Lord Hoffmann in *Jumbo King*[53] and *Chartbrook*[54] by observing in *Zurich Insurance* (at [132(d)]) that 'there should be no absolute or

48 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [39].
49 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [39].
50 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [63]–[65].
51 *Zurich Insurance v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [73].
52 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [36].
53 *Jumbo King Ltd v Faithful Properties Ltd* [1999] 3 HKLRD 757 at 773.
54 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [30].

> rigid prohibition against evidence of previous negotiations or subsequent conduct, although in a normal case such evidence is likely to be inadmissible'.

What the court is searching for are some clear guidelines for the implementation of *Zurich Insurance*. This is what necessitated the review of the civil law approach juxtaposed against common law doctrine and the EA. The court is suggesting that *Zurich Insurance* has opened up a useful breach in what has often been perceived as the common law reluctance to admitting extrinsic evidence. Indeed, the court suggests that this idea of a "new" breach is more fictional than real to the extent that the EA codifies elements of past common law practice in this regard.[55] It has "always" been there, but its scope and contours have been ill-defined. Thus the inquiry and analysis became one of the best manner of couching the formal recognition of the admissibility of extrinsic evidence in the EA and the related scope of application. What do we mean by extrinsic evidence and surrounding circumstances? The court recognises that defining these limits in the abstract is problematic,[56] so it uses the expansive civil law approach as the outer bound for enunciating its narrower but still flexible window. Consistent with common law practice, the parameters of the principles regarding the admissibility and scope for using extrinsic evidence will be fleshed out by case law,[57] but in no way will the court adopt wholesale the evidentiary techniques reflected in the civil law approach. The court is essentially using comparative analysis to establish what it is and is not doing even as it allows future circumstances to take their course. The court reaffirms the criteria of *Zurich Insurance*[58] that evidence must be "relevant, reasonably, available to all contracting parties and [must relate] to a clear or obvious context"[59] and sets out four additional guidelines.[60]

---

55 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [63].

56 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [64], stating that "[o]f course, the line between these two types of evidence may not always be clear, but that is an issue that can be developed through case law".

57 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [64].

58 *Zurich Insurance v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132(d)].

59 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [74].

60 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [73], stating that:

> … the imposition of four requirements of civil procedure are, in our view, timely and essential:
>
> (a) first, parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract;
>
> (b) second, the factual circumstances in which the facts in (a) were known to both or all the relevant parties must also be pleaded with sufficient particularity;

(*cont'd on the next page*)

30 The court completes its comparative analysis by assessing the extent to which a contextual approach would be consistent with common law adversarial procedure. Noting that the robust approach in civil law systems takes place in a situation where discovery is limited or virtually non-existent, the court underscores that an expanded scope for the admissibility of extrinsic evidence in a common law system that authorises discovery could distort the adversarial process.[61] The latter places emphasis on the *ex ante* lawyering skills involved in the negotiation and elaboration of the contract. Were extensive use of extrinsic evidence in the form of pre-contractual writings and internal correspondence of one of the parties allowed, this could shift the locus of the dispute away from the contract to all manner of surrounding circumstances and writings fuelled by extensive discovery and culminating in excessive costs and loss of time.[62] Such risks are minimal in civil law countries where, as noted, discovery is highly limited.[63] Accordingly, the court emphasises that the surrounding facts in the factual matrix on which the claimant intends to rely must be pleaded with specificity and that any request for document disclosure must be narrowly tailored to such pleadings.[64] Mindful of the potential for abuse, the court is seeking narrowly to circumscribe and tailor its sanctioning of the use of extrinsic evidence to fit the existing procedural context, not to upset it: "The key point is that parties should be clear about the specific aspects and purpose of the factual matrix which they intend to rely on."[65] Moreover, the court reserves its opinion as to whether evidence of the history of prior negotiations should be admissible, again recognising the potential for abuse in an adversarial procedure allowing liberal discovery, while also reaffirming that any such extension, if allowed, will be subject to the guidelines and procedural safeguards established for other forms of extrinsic evidence.[66] The court takes inspiration from outside, but fashions a Singapore solution for a common law context informed by a uniquely Singaporean statutory and

(c) third, parties should in their pleadings specify the effect which such facts will have on their contended construction; and

(d) fourth, the obligation of parties to disclose evidence would be limited by the extent to which the evidence are relevant to the facts pleaded in (a) and (b).

61 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [67]–[68]; Sundaresh Menon CJ, "Transnational Commercial Law: Realities, Challenge and a Call for Meaningful Convergence" at the 15th Biennial Conference of Chief Justices of Asia and the Pacific (27–30 October 2013) at paras 47–49.

62 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [67].

63 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [68]–[70]; Sundaresh Menon CJ, "Transnational Commercial Law: Realities, Challenge and a Call for Meaningful Convergence" at the 15th Biennial Conference of Chief Justices of Asia and the Pacific (27–30 October 2013) at paras 47–49.

64 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [74].

65 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [74].

66 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [75].

procedural context. In so doing, it demonstrates "judicious ecumenism" and leads us back to the topic of legal transplants with which we opened this discussion.

## IX. Legal transplants and convergence – Some final thoughts and reflections

31 The Watson and Legrand debate centring on the extent to which law is culturally specific or free-standing highlights in macro terms the parameters of the debate. The Kahn-Freund view that there is a continuum in this regard with procedural law perhaps being particularly difficult to transplant puts a gloss on these general parameters. What conclusions can be drawn from this theoretical writing in light of *Sembcorp*? First, in situations where transplants or inspirations for transplants are volitional, not imposed, it will be up to the those doing the transplanting or who are otherwise seeking inspiration from outside to assess the suitability of such endeavours for their system. Second, how much of the donor's history and background one might need to master in order to make an informed decision is not entirely clear though Watson's view that the proposed transplant must be primarily measured against the recipient system's needs and not the donor's history appears to resonate. In making judgments about the efficacy of the robust approach, the court needed to focus on Singapore's procedural and statutory context and not on French or German history *per se* as Legrand's hyper-cultural emphasis would suggest. What did appear relevant, however, was an assessment of the competing procedural contexts to assess whether and to what extent a drift toward the contextual approach prevalent in civil law systems and the new generation of international instruments, such as the CISG and UNIDROIT Principles, would be consistent with Singapore's existing systemic equilibrium. Assessing in comparative terms the effect of the EA and the surrounding absence or existence of lawyer-driven discovery on such a procedural evolution in the field of evidence appeared to be both relevant and appropriate, thereby validating the view that some targeted reference to the donor's context was conducive to informed decision-making. Accordingly, some type of referential look at the donor's system, if not history, appears to be in order.

32 If we characterise the discussion in *Sembcorp* as involving a potential "evidentiary transplant", it is perhaps Mirjan Damaska's statement in a piece entitled "The Uncertain Fate of Evidentiary

Transplants: Anglo-American and Continental Experiments"[67] that provides the most relevant insight on the instant case:[68]

> In seeking inspiration for change, it is perhaps natural for lawyers to go browsing in the foreign law boutique. But it is an illusion to think that this is a boutique in which one is always free to purchase some items and reject others. An arrangement stemming from a partial purchase – a legal pastiche – can produce a far less satisfactory fact-finding result in practice than under either continental or Anglo-American evidentiary arrangements in their unadulterated form.

33 Discussing the potential for "mixing and matching" continental, judge-driven inquisitorial fact-finding with common law, adversarial, lawyer-driven proceedings, Damaska was cautioning against making discreet transplants without due care and deference to the existing context, lest such exercises have the larger effect of upsetting the equilibrium of a given system with regard to such ancillary issues as the training of judges and lawyers, the adducing of proof, and the preparing and cross-examining of witnesses.[69] It is precisely to these types of broader systemic relationships that the court in *Sembcorp* demonstrated the requisite sensitivity thereby allowing them to import "inspiration" without creating undue "perturbation" of the existing procedural dynamic. The court's deep deference to existing systemic relationships is reflected throughout the judgement and is perhaps best captured by the following language:[70]

> As was observed by Lord Hoffmann in *Chartbrook* (at [39]), courts should be careful about transporting rules formulated by and for a particular legal system operating under a particular philosophy into another legal system premised on another philosophy.

34 Similarly, Menon CJ in the aforementioned speech at the Biennial Conference of Chief Justices frames the point in more macro and pointedly transnational terms, cautioning against illusory or ill-conceived attempts at harmonisation:[71]

> … even where harmonisation is desirable and practicable, the exercise must be approached with sensitivity towards the national legal systems which will have to implement these laws. Harmonisation without due regard to the idiosyncrasies of national legal systems will produce

67 Mirjan Damaska, "The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments" (1997) 45 Am J Comp L 839.

68 Mirjan Damaska, "The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments" (1997) 45 Am J Comp L 839 at 852.

69 Mirjan Damaska, "The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments" (1997) 45 Am J Comp L 839 at 851–852.

70 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [39].

71 Sundaresh Menon CJ, "Transnational Commercial Law: Realities, Challenge and a Call for Meaningful Convergence" at the 15th Biennial Conference of Chief Justices of Asia and the Pacific (27–30 October 2013) at para 46.

> superficially uniform laws which leave fundamentally unchanged the undulating legal terrain that results from differences in the national legal systems underpinning these laws.

35 The evolving international legal environment will offer increasing opportunities for legal borrowing both in the field of procedure and elsewhere. The forces of globalisation and the developing needs of cross-border commerce may further render these opportunities functionally attractive and even necessary. The overriding focus for assessing the efficacy and appropriateness of these opportunities should centre on the capacity of the proposed solution to address the perceived legal and societal needs at issue and the feasibility of integrating these legal borrowings into the existing systemic context in a viable manner. The subtle task of assessing, balancing and selecting among the myriad of transnational and international options on offer will increasingly be made by the courts, and particularly by those courts situated in commercially dynamic and legally diverse regions. The approach of the court in *Sembcorp* provides a singular object lesson as to how such exercises should be carried out to combine an "ecumenical" perspective with controlled legal evolution. The implications of this approach will not be without import for other like-minded courts in the region and for the lawyers appearing and arguing before them. Courts in Singapore will be open-minded, but not open-ended, favouring "evolution" over "revolution". Foreign models and techniques are "fair game", provided that they can be reasonably related to, and by extension, integrated into the existing doctrinal framework to advance consensus policy goals in the domestic context and to facilitate the establishment of a legally and commercially flexible space for diverse parties in the growing sector of cross-border commerce and dispute resolution. Indeed, those responsible for shaping future initiatives, such as the establishment of a Singapore International Commercial Court, with transnational reach and appeal, will doubtless seek inspiration and intellectual grounding from the practical, targeted and measured approach reflected in *Sembcorp*.