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Creating access to quality legal representation – The queen's counsel (re)appears in Singapore

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Litigants coming up against a large banking institution or corporation in Singapore have not always been able to procure quality legal representation. The larger law firms there, with their established dispute resolution practices and stables of Senior Counsel, are often unable or unwilling to act in litigation against their institutional clients. This article investigates the extent of the problem and the Ministry of Law's solution of easing the criteria for ad hoc admission of Queen's Counsel in Singapore. The author then looks, in some detail, at the factors a court might consider in any foreign lawyer's application for admission. Finally, it is argued that while the Ministry's solution is a bold one, it is not perfect, and other measures should be considered to ameliorate the litigant's predicament against the large bank or corporation. Six suggestions are therefore proffered for future discussion.

Introduction

Some may know of the real-life story of Erin Brockovich: a single mother doggedly leading the fight against a toxin-spilling corporation, with a triumphant nine-figure settlement at the end. The tale is absorbing not only as a stark demonstration of the US class action at work, but also because it epitomises the ideals of righteousness and fairness—if you have a legitimate case crying out loud to see the ends of Justice be done, the fact that you are diminutive David facing giant Goliath should never matter.

Unfortunately the real world is more sub-utopian. It should come as no surprise that a muscular corporate or financial institution squaring off in court against almost anybody (except another powerful institution or person) is in a hugely advantageous position simply because of its financial clout. It will be able to hire the top lawyers, who in turn will often marshal the best arguments. In jurisdictions with a fused legal profession, such an institution may even have left the largest law firms unable to act

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in litigation against it, due to the conflicts of interests arising from the institution's prior extensive dealings with these law firms.

This article attempts to unravel the issue and show that the inequality of arms in commercial and banking disputes in the Singapore courts is not a discrete problem with a quick-fix solution. Seen in this light, the Ministry of Law's recent attempt to remedy this by allowing more Queen's Counsel and foreign Senior Counsel to plead in Singapore is laudable but incomplete. The author proceeds to comment on the newly amended legislation on *ad hoc* admission of these foreign counsel, and concludes this article by looking at some possible alternative solutions.

The Problem

It is often difficult (at least in Singapore) when a dispute arises between a large financial or corporate institution and the ordinary person for the latter to engage legal representation of similar quality and expertise as the former may have. This may be due to two reasons: *cost* and *unavailability*. The first cannot be helped in light of the capitalist society in which we live. It is inevitable in a market economy that better lawyers will charge more than their less talented counterparts, so that people in more straitened circumstances will ordinarily not be able to afford the services of a top lawyer. The Rajah Committee acknowledged that litigation costs in Singapore were sometimes prohibitively high, and its Final Report contains a discussion on the feasibility of class actions and contingency fee arrangements there.[1] But cost may not be the only limiting factor. Take Mrs Smith, a fictitious rich person who wishes to sue her bank for breach of contract in Singapore. She may be surprised to find that, even with her ample means, not one of the bigger law firms is willing to take on her case. The second reason, unavailability, is another reason why one is often unable to procure top-notch legal representation against the corporate and financial giants.

What does unavailability mean, and why would the bigger law firms in Singapore not take on Mrs Smith's case against the bank? The answers lie in an examination of the structure of the legal profession there. Singapore has what is commonly called a fused profession, meaning that there is no formal distinction between those lawyers who plead in court

[1] Singapore, "Report of the Committee to Develop the Singapore Legal Sector" (Sept 2007) at paras 3.15–3.28.

(barristers or advocates) and other non-pleading lawyers (solicitors).[2] In other words, most law firms in a fused jurisdiction will employ *both* advocates and solicitors. This gives rise to a curious situation: a bank that parcels out its everyday legal affairs to the bigger law firms will have swiftly and silently prevented all those firms from acting against it in any future litigation. Such an effect is down to the operation of the cardinal rule regulating intra-firm conflicts of interests:

> "A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation."[3]

A similar prohibition is set out in the Singapore Legal Profession (Professional Conduct) Rules.[4]

One begins to see the problems faced by Mrs Smith. A shrewd bank, for example, motivated by ordinary business cunning, can use the rule to effectively "conflict" out all those bigger law firms with established litigation practices from acting against it in a future lawsuit. It is therefore worth noting that almost every bank appoints a panel of law firms to act as its legal advisers, and many firms do actually covet a seat on those panels.[5] Some banks even create these panels with the intention of triggering the operation of the no-conflict rule; it was reported in 2004 that UK banks Barclays, HSBC and the Royal Bank of Scotland all had clauses in their panel agreements effectively prohibiting firms from litigating against them.[6]

It is not just the risk of an immediate real conflict which hangs over law firms, however. Even if banks were willing to waive the legal conflict

[2] Legal Profession Act (Cap 161, 2009 Rev Ed) s 12.

[3] *Bolkiah v KPMG* [1999] 2 AC 222, 234.

[4] Legal Profession (Professional Conduct) Rules (Cap 161, R 1) r 30(1). *See* also Jeffrey Pinsler, *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor* (Singapore: Academy Publishing, 2007) at para 16-007.

[5] Sofia Lind & Friederike Heine, *Paying the Piper – Can Law Firms' Love Affair with Banks Survive a Series of Tough Panel Reviews?*, Available at http://www.legalweek.com/legal-week/analysis/2036365/paying-piper-law-firms-love-affair-banks-survive-series-tough-panel-reviews.

[6] Helen Power & Joanne O'Connor, *Wanted: Law Firm to Sue the UK's Big Five Banks*, Available at http://www.thelawyer.com/wanted-law-firm-to-sue-the-uks-big-five-banks/112203.article. The article cites, for example, cl 8 of the "General Requirements" section of the Royal Bank of Scotland's panel tender document: "Due to the close nature of our relationship and the fact that you are, or will become, privy to much confidential information concerning the Group, we would be unable to continue instructing you if you were to commence or threaten to commence litigation against any member of the Group".

arising from a panel firm litigating against them, the latter would likely still think seriously before acting, for fear of jeopardising the business relationship. The risk of *commercial* conflict means that bank panels have therefore become a sort of "defensive tactic".[7] As the Chief Justice of Singapore, Chan Sek Keong, waspishly remarked:

> "Of course, our litigation Bar is not very large and is rendered smaller by the existence of large firms with large litigation practices. These firms together employ the greater majority of the good litigation lawyers. What this means is that 30 to 60 advocates can end up acting for only one client. *This is made worse by the informal retainer system adopted by big business, especially the big financial houses. If two or more large law firms are on their panel of lawyers, 100 advocates could be 'conflicted' out by one client.* I am not sure what we can do about this."[8]

The term "conflict of interests" in this article will therefore be taken generally to refer to both real and commercial conflicts, unless stated otherwise.

The Extent of the Problem

Singapore is not the only jurisdiction bedevilled by the problems caused by this aspect of the panel system; they are a persistent occurrence in the United Kingdom too. It was already noted in 2004 the acute difficulty of finding a top solicitor firm willing to take on a case against the five biggest UK clearing banks:

> "Of the top 30 firms in *The Lawyer 100*, only four ... would not have to turn down instructions [against] at least one of the big five clearing banks. Most of the top 20 have big or growing banking practices and are actively targeting work from several or all of the banks. It is therefore highly unlikely that they

[7] Catrin Griffiths, *The Panel System as a Defence Tactic*, Available at http://www.thelawyer.com/the-panel-system-as-a-defence-tactic/112196.article.

[8] Interview of Chan Sek Keong, Chief Justice of Singapore, by Kwek Mean Luck in *Inter Se: Singapore Academy of Law* (May–June 2006) 10 at 14 (emphasis added). Younger lawyers may also be interested to know that, up until at least the early 1990s, there was difficulty in finding adequate legal representation in Singapore even for *non-contentious* banking and finance matters, owing to the conflict of interests problem arising from the concentration of experienced lawyers in a small number of firms (Chris Darbyshire, "Time to Reform and Rethink for Singapore's Lawyers" (1991) 10 *International Financial Law Review* 17).

would even accept instructions to act against banks they do not currently work with."[9]

Is the top-end of the Singapore legal market as heavily beholden to the banks as that in the United Kingdom? The past five years (2007–2011) have thrown up conflicting evidence on this point. On the one hand, Singapore's biggest law firms have shown themselves willing to take on High Court cases against some banks. Rajah & Tann (Singapore's largest firm by fee earner count) acted against Deutsche Bank and RBS Coutts Bank, while WongPartnership recently took on cases against DBS Bank and Rabobank. During that same period, Drew & Napier acted in litigation against Banque Cantonale de Genève, BNP Paribas, CIMB Bank, DBS Bank and Deutsche Bank. On the other hand, these law firms were mostly acting against non-Singapore-based banks; little transactional work might have previously passed between them. In fact, if one focuses just on the law firms which *have* acted in litigation against the three biggest Singapore-based banks, then only a handful of them have more than 20 lawyers.[10] This snapshot of the Singapore legal market seems to suggest that Mrs Smith may stand a better chance of engaging a bigger law firm to act for her if she is going up against an international, rather than a Singapore-based, bank.

To better gauge the extent of the problem, a brief survey was conducted of all recent Singapore High Court cases (reported and unreported) involving at least one bank as an adverse party.[11] For this study, a small

[9] Helen Power & Joanne O'Connor, *Wanted: Law Firm to Sue the UK's Big Five Banks*, Available at http://www.thelawyer.com/wanted-law-firm-to-sue-the-uks-big-five-banks/112203.article. Chris Perrin, executive partner at Clifford Chance, was acutely aware of the business realities when he said: "If we [i.e. Clifford Chance] think a major client of the firm would want to instruct us and they have not phoned us yet, we would probably avoid taking on a small role for a new client that will get in the way of the other relationship" (Mary Mullally, *Client Relationships: Left on the Scrapheap*, Available at http://www.legalweek.com/legal-week/news/1161501/client-relationships-left-scrapheap). And the risks here are not hypothetical. To note some recent instances when clients have blacklisted UK law firms for acting against them: JP Morgan dropped Linklaters in 2008 because the latter had advised Barclays in litigation against Bear Stearns (which JP Morgan had acquired). Also in 2008, Nestlé evicted Freshfields Bruckhaus Deringer (Freshfields) from its European panel because the firm had been a key adviser to Nestlé's archrival, Mars. Freshfields had in 1999 lost another major client in Citigroup for acting against it in the Prince Jefri Bolkiah litigation.

[10] These banks are DBS Bank, Oversea-Chinese Banking Corporation (OCBC) and United Overseas Bank (UOB). Surveying the cases which have proceeded to trial in the High Court, no Singapore firm with more than 20 lawyers has acted against UOB in the past five years. As for OCBC, the only large firms taking on court cases against it were Drew & Napier, KhattarWong and Stamford Law Corporation; similarly for DBS Bank, only Drew & Napier, Shook Lin & Bok and WongPartnership. *See* also Michael Hwang, "Apathy and Independence" (Sept 2009) *Singapore Law Gazette* 1 at 4.

[11] A "bank" here includes not just a banking group's main lending business but its other business arms as well, like its stock-broking, investment banking, underwriting and corporate trustee businesses, for example.

firm was defined as having less than 20 lawyers; correspondingly, a larger law firm had 20 lawyers or more.

Table 1: Singapore High Court Cases Involving at Least One Bank

Year	No. of cases where a bank was an adverse party	No. of cases where a bank was represented by a larger firm, and opposing party was either unrepresented or represented by a small firm	No. of cases where a bank was represented by an SC*, and opposing party was not represented by an SC	No. of cases where a bank was represented by an SC, and opposing party was also represented by an SC	No. of cases where a bank was not represented by an SC, but opposing party was represented by an SC
2007	9	2 (22%)	0 (0%)	1 (11%)	1 (11%)
2008	9	2 (22%)	1 (11%)	2 (22%)	1 (11%)
2009	14	9 (64%)	4 (29%)	1 (7%)	0 (0%)
2010	34	17 (50%)	8 (24%)	4 (12%)	4 (12%)
2011	10	8 (80%)	3 (30%)	0 (0%)	1 (10%)

* SC: Senior Counsel practising in Singapore

As Table 1 shows, it is becoming increasingly more likely for a bank's opponent to be represented in a Singapore court by a small firm. While there are potentially many reasons for this phenomenon, the Minister for Law for one did not doubt Chan CJ's belief that the main cause was the larger firms being frequently conflicted out of acting against the banks.[12] Together with the fact that only five of the larger law firms have acted against Singapore's three biggest banks in recent years, Table 1's figures are, with respect, consistent with that belief.

The Detriments of Legal Representational Imbalance

Let us fast forward to our hypothetical trial. Mrs Smith has had no real choice but to engage counsel from a small firm. Her representative in court

[12] *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 38 (14 Feb 2012) (K Shanmugam).

will doubtless still be an accomplished litigator, although perhaps slightly less endowed with the mental brilliance of, and certainly lacking the huge resources so readily available to, the opponent bank's lawyers—who are of course from the bigger firms. Chan CJ expressed resignedly that:

> "What is also happening is that where counsel from a big firm appears against counsel from a small firm, the chances are that the former is better prepared than the latter, if only because he has more resources at his command."[13]

Our judges are surely those best placed to know if lawyers from smaller firms are less prepared in court than their counterparts in bigger firms, and the consequences of this unpreparedness are worth emphasising. Not only is it a setback to justice, so that cases are no longer even contests but steep uphill climbs for many individual litigants, but public confidence in the legal system will be harmed as a result.

Moreover, there are severe policy ramifications stemming from this inequality in arms. First, imbalances in legal representation may have the effect of discouraging inflow of foreign capital into Singapore. As Chan CJ pointed out recently:

> "[A] major corporate client with a court case could immobilise all the litigators in the large law firms, including our best Senior Counsel. *To maintain our eminence as an international business and financial centre, we should make available to litigants in important commercial and financial disputes a greater diversity of legal representation in our courts.*"[14]

The unspoken fear (also harboured by the Ministry of Law)[15] is that foreign investment, a vital lifeline of Singapore's economy, may be harmed. Potential investors will note with concern the inordinate difficulties in finding top quality counsel, should they ever become embroiled in legal disputes with large corporate and financial entities in Singapore. This unwelcome scenario highlights the significant impact which legal policies can have on a country's fortunes. It is a complex and sobering task that faces our policymakers, a never-ending challenge to tweak and revamp in a changing environment.

[13] Interview of Chan Sek Keong, Chief Justice of Singapore, by Kwek Mean Luck in *Inter Se: Singapore Academy of Law* (May–June 2006) 10 at 14.

[14] Chan Sek Keong, "Response of Chief Justice Chan Sek Keong" (Opening of the Legal Year 2011, Singapore, 7 Jan 2011) (emphasis added).

[15] Singapore, *Consultation Paper on the Proposed Licensing Scheme for Independent Counsel*, Available at http://app2.mlaw.gov.sg/LinkClick.aspx?fileticket=rB2X880QZHo%3d&tabid=204 at para 3.

Second, the problem of inequality of arms in banking and commercial disputes would, if left unabated, be inconsistent with a stated policy at work in this area. The Singapore Academy of Law is statutorily tasked to promote the use of Singapore law in commercial transactions,[16] but this sensitive mandate is made only more difficult by the inequality of arms problem arising in court-based dispute resolution. It may be that no amount of cajoling will tempt foreign commercial parties to choose Singapore law as the governing law for their international business transactions, nor Singapore as the forum for litigation, so long as they are more likely than not to be unable to secure the services of a top-flight litigator *in* Singapore.[17] Notwithstanding the undoubted fact that Singapore has a "rich talent pool",[18] the unavailability of top-quality representation in certain corporate and banking court disputes risks frustrating the goal of promoting Singapore law as the governing law in regional commerce.

The Ministry's Solution—Relaxing the Requirements for *Ad Hoc* Admission of Foreign Lawyers

What then can reasonably be done to improve the predicament of those taking on big financial houses and corporations in court? As noted, the non-affordability of counsel is a difficult factor to affect so long as Singapore remains a free-market economy, with prices dictated by supply and demand. The Ministry of Law focused instead on curing the availability problem, and came up with the answer of relaxing the rights of audience requirements for Queen's Counsel and Senior Counsel from other jurisdictions (collectively referred to as QCs, for convenience). It is noted in passing that the Ministry, for undisclosed reasons, did not canvass a solution some might have thought equally obvious—that of splitting the fused legal profession in Singapore. Amending legislation has instead

[16] Singapore Academy of Law Rules (Cap 294A, R 1) r 13C(2)(a). This is no easy task even within South-East Asia in view of the British and American hegemony on the provision of legal services, as Chan CJ recognised when he was still Attorney-General (Chan Sek Keong, "Keynote Address by the Attorney-General Mr Chan Sek Keong" (Law Society's Conference on "The Future of the Legal Profession", Singapore, 16 Feb 2006)). *See* also Singapore, "Report of the Committee to Develop the Singapore Legal Sector" (Sept 2007) at paras 7.13–7.15.

[17] A dichotomy is observed in this respect. Foreign-based law firms are allowed (through the Qualifying Foreign Law Practice scheme) to advise on Singapore commercial law in non-contentious matters, which may well encourage commercial parties to choose Singapore law as the governing law in their transactions. They will, however, find no such equivalent foreign representation should judicial resolution of disputes become necessary. *See* also text at n 169.

[18] Singapore Academy of Law, *Singapore: Your Partner for Legal Solutions in Asia*, 9, Available at http://www.sal.org.sg/content/eBooks/Singapore%20Law/index.html.

now been passed to make it easier for QCs to plead in Singapore's courts,[19] in an attempt to aid those litigating against large banks and corporations. While some Singapore lawyers have raised disquiet over this measure, their concerns are perhaps overstated. The greater appearance of QCs is unlikely to form a threat to the upward progression of the Singapore Bar.

The Rationale

It is suggested that the motivation behind now relaxing the criteria for allowing QCs rights of audience in Singapore is in fact *not inconsistent* with the original intent to limit the appearances of QCs. In 1991, the old s 21 of the Legal Profession Act was amended to permit *ad hoc* admission of QCs only in cases of sufficient difficulty and complexity,[20] and this requirement was subsequently read very restrictively by the Singapore courts.[21] Chan Sek Keong J (as he then was) stated the rationale for taking this tight line:

> "*The object … was to lay the foundation for the development of a strong local Bar by the imposition of more stringent conditions for the admission of Queen's Counsel to appear in our courts*, but at the same time, to continue to allow litigants to avail of their services in appropriate cases. The function of the courts is to maintain a proper balance between the two competing interests."[22]

Another judge would in time suggest the repeal of s 21 for having lost its relevance:

> "Section 21 of the Legal Profession Act will look increasingly incongruous in our statute books as the local Bar continues to mature and the number of SC increases… [T]his provision is transitional and is not meant to be a permanent part of our law. We are steadily progressing towards the day when this provision can and should be deleted…"[23]

Singapore today has a strong set of Senior Counsel, and the *original* rationale for giving QCs rights of audience in Singapore—that of bringing

[19] Legal Profession (Amendment) Act 2012 (No 3 of 2012). This legislation took general effect (with a few exceptions not relevant here) on 1 Apr 2012 (Legal Profession (Amendment) Act (Commencement) Notification 2012 (S 114/2012)).

[20] Legal Profession (Amendment) Act 1991 (No 10 of 1991).

[21] See eg *Re Gyles QC* [1996] 1 SLR (R) 871, [16]; *Re Millar Gavin James QC* [2007] 3 SLR (R) 349, [24]; *Re Joseph David QC* [2012] 1 SLR 791, [20].

[22] *Re Oliver David Keightley Rideal QC* [1992] 1 SLR (R) 961, [8] (emphasis added).

[23] *Re Millar Gavin James QC* [2008] 1 SLR (R) 297, [46].

in expertise—has obviously diminished.[24] Indeed, suggesting otherwise might even cause some Singapore lawyers to take umbrage.

But any objectors to the new legislation should recognise that new circumstances have appeared. There is now *another* reason to admit more QCs into Singapore's courts: the difficulty of engaging a local Senior Counsel to represent the ordinary person against a large financial or corporate institution in court. The situation is ironical. Because many Senior Counsel in Singapore often refuse to take on cases against large financial houses and corporations,[25] the Government intervened by introducing a more liberal scheme for *ad hoc* admission of QCs. But some Singapore lawyers now argue that this move potentially threatens the continued growth of the local Bar, since it might deny younger lawyers the court appearances so essential to improve one's court craft.[26] This can seem altogether somewhat perplexing. That lawyers should want to do well in their chosen field is a natural thing, but might not the problem (and there *was* undoubtedly a problem) have been created by their colleagues in the first instance?

Some Members of Parliament who spoke on the proposed easing of the *ad hoc* admission criteria could therefore have been confusing two *separate* justifications—the introduction of expertise, and the unavailability of local Senior Counsel—for allowing QCs to plead in Singapore. Indeed, the Minister for Law had to repeatedly emphasise in Parliament that "the challenge is not so much the quality of our local counsel but the availability of [Senior Counsel] in commercial cases".[27] The fault did not lie with the Minister's delivery, but rather with the apparent reluctance of his audience to accept that there was indeed an extant problem of Senior Counsel often being conflicted out of certain types of cases.[28]

Once it is recognised that a key motivation for having more QCs is to address the shortages in supply of top-tier counsel in Singapore, the

[24] The need for expertise was why Singapore permitted the introduction of QCs in the first place (*Parliamentary Debates Singapore: Official Report*, vol 55, col 520 at 534–535 (20 Mar 1990) (Prof S Jayakumar)).

[25] According to the Minister for Law and, separately, Michael Hwang SC (*Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 27 (14 Feb 2012) (K Shanmugam); Michael Hwang, "Apathy and Independence" (Sept 2009) *Singapore Law Gazette* 1 at 4).

[26] *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 29–30 (14 Feb 2012) (Hri Kumar Nair) and at col 36 (Christopher de Souza). The Senior Counsel Forum, on the other hand, "overwhelmingly" welcomed the liberalisation of the QC *ad hoc* admission scheme (*Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 38 (14 Feb 2012) (K Shanmugam)).

[27] *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 37 (14 Feb 2012) (K Shanmugam).

[28] "In essence, the issue here may be that there are insufficient qualified Counsels who will litigate against a big MNC or a bank *but this concern is also questionable … So, is there really a need to have QC to fill a gap that does not seem to exist?*" (*Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 35 (14 Feb 2012) (Christopher de Souza) (emphasis added)).

main objections relating to any stunting of growth of the Singapore Bar fall away. Chan CJ has already stated that:

> "[Admission of QCs] *will not be a free for all.* The courts will admit ad hoc expert counsel on the basis of need, and not simply because a litigant can afford to pay. We do not want to disadvantage litigants who cannot afford equivalent representation, *nor do we want to impede the nurturing of our own Senior Counsel.* So, ad hoc admission will be on a case by case basis, with the court doing a judicious balancing of competing interests in each case."[29]

No one can doubt that any judge, least of all the Chief Justice, is sensitive to the arguments for and against the appearance of greater numbers of QCs in a Singapore courthouse. In fact, the continued development of the Bar is probably an issue on which nobody has a clearer perspective than Chan CJ himself, given his oversight of the process of appointing Senior Counsel in Singapore.[30]

The Newly Amended Legislation on Ad hoc *Admission of QCs*

It is therefore essential that the barriers to entry for QCs into the Singapore courts are set sufficiently high to weed out those cases for which top Singapore counsel are available, but not so unreachable as to deny deserving parties foreign expert counsel when none from Singapore are on hand. Amended s 15 of the Legal Profession Act now states:

> **"Ad hoc admissions**
>
> **15.**–(1) Notwithstanding anything to the contrary in this Act, the court may, for the purpose of any one case, admit to practise as an advocate and solicitor any person who –
>
> (a) holds –
>
> (i) Her Majesty's Patent as Queen's Counsel; or
>
> (ii) any appointment of equivalent distinction of any jurisdiction;

[29] Chan Sek Keong, "Response of Chief Justice Chan Sek Keong" (Opening of the Legal Year 2012, Singapore, 6 Jan 2012) (emphasis added).

[30] Legal Profession Act, s 30.

> (b) does not ordinarily reside in Singapore or Malaysia, but has come or intends to come to Singapore for the purpose of appearing in the case; and
>
> (c) has special qualifications or experience for the purpose of the case.
>
> (2) The court shall not admit a person under this section in any case involving any area of legal practice prescribed under section 10 for the purposes of this subsection, unless the court is satisfied that there is a special reason to do so.
>
> ...
>
> (6) Before admitting a person under this section, the court shall have regard to the views of each of the persons served with the application [*viz.* the Attorney-General of Singapore, the Law Society of Singapore, and the parties to the case].
>
> (6A) The Chief Justice may, after consulting the Judges of the Supreme Court, by notification published in the *Gazette*, specify the matters that the court may consider when deciding whether to admit a person under this section.
>
> ..."

By removing the requirement that a case be of sufficient difficulty and complexity before a QC may be admitted, the newest legislative amendments in fact return the statutory language to almost as it existed immediately before 1 February 1991.[31] Unfortunately there exist very few reported case authorities on *ad hoc* admission in Singapore prior to that date. Factor in the terse nature of the legislation, and it becomes apparent that some judicially propounded guidelines will be needed in the interests of justice and legal certainty. Chan CJ has therefore stated, pursuant to s 15(6A), certain matters which may be considered in deciding whether to admit foreign counsel:

(a) the nature of the factual and legal issues involved in the case;
(b) the necessity for the services of a foreign senior counsel (ie a QC);

[31] The commencement date of the Legal Profession (Amendment) Act 1991 (No 10 of 1991).

(c) the availability of any Senior Counsel or other advocate and solicitor with appropriate experience; and
(d) whether, having regard to the circumstances of the case, it is reasonable to admit a foreign senior counsel for the purpose of the case.[32]

It is certain that the judicial application of these matters – such as whether in restricted or relaxed fashion – will be subject to close scrutiny by legal watchers in Singapore, especially since some there already feel that the judges should not be the sole gatekeepers.[33] Of particular interest will be the interpretive approach taken with respect to amended s 15. Despite the facial similarity of the statutory wording with that immediately prior to 1991, it should not be thought that the amendment is a legislative licence for a complete return to the times when QCs were admitted almost freely into the Singapore courts. The intention of Parliament is patently to remedy the particular problem of a lack of quality representation in certain cases, and Chan CJ has made it unwaveringly clear that there will not be a repeat of the lax conditions which made QCs so eager to appear in Singapore in the 1980s.[34]

Yet the removal of the statutory criterion for cases to be of sufficient difficulty and complexity throws up a *tabula rasa* of sorts. Whether foreign counsel are allowed rights of audience in particular cases will be a highly facultative decision for the judges, their discretion guided only by the legislative intention, the basic technical requirements stipulated in s 15 and the Chief Justice's stated matters. This partially blank slate reasonably permits of two possible approaches. Courts could retain the pre-existing set of principles and tests found in the case law, and modify them to accommodate the situation of local Senior Counsel being frequently conflicted out of acting. While this may have the advantage of certainty, it would arguably be unfaithful to the legislative wording. Most of the existing decisions on *ad hoc* admission proceeded on the footing that QCs would only be admitted in cases of sufficient difficulty and complexity, but the principles enunciated in the former should no longer be controlling given the deletion of the requirement for sufficient difficulty and complexity in a case.

[32] Legal Profession (Ad Hoc Admissions) Notification 2012 (S 132/2012) n 3.
[33] *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 30 (14 Feb 2012) (Hri Kumar Nair).
[34] *See* n 29. These halcyon days are briefly described in *Re Young David Edward Michael* [1991] SGHC 177.

Alternatively, it is possible for the courts to work out a fresh set of principles, taking into consideration a multitude of factors such as parliamentary intention and the different public interests at stake. There are distinct advantages in taking such a course, for courts can then restate more of the relevant factors in *ad hoc* admissions with much greater sensitivity. It is the public interest, above all, which determines whether foreign counsel should be admitted in any case—but the public interest is not an unyielding totem. *Different* aspects of the public interest may justify or weigh against admission in any case, necessitating a delicate judicial balancing exercise. Setting out the pertinent factors and principles will allow legitimate considerations to be taken into account in the balancing analysis; conversely, irrelevant considerations will be recognised for what they are and discounted accordingly. Looking at the matters stated by Chan CJ pursuant to s 15(6A), it appears that this *second* approach has been taken by the courts; they have eschewed setting rigid standards which a case must meet before it can be argued by foreign counsel, and instead listed down in more general terms certain relevant considerations.

Certainly, the accretion of case law will gradually allow observation of the judicial treatment of the relevant factors in QC admissions. It may not be simple though for judges to straightaway deliver a comprehensive set of principles or guidelines. As such, an examination of the situation in Hong Kong may prove fruitful. Hong Kong, like Singapore, has in place a system for the *ad hoc* admission of QCs. The two jurisdictions have similar circumstances as well; both are international financial centres stocked with a knowledgeable Bar and a reputable judiciary, and the two remain subject to strong British legal influence. There is even substantive similarity in their respective provisions on *ad hoc* admission (although they are not *in pari materia*). Section 27(4) of the Legal Practitioners Ordinance reads:

> **"Power of Court to admit barristers**
>
> **27.**–(4) Notwithstanding that a person does not satisfy all the requirements specified in subsections (1) and (2)(b), where the Court considers that he is a fit and proper person to be a barrister and is satisfied that he has –
>
> > (a) the qualification acquired outside Hong Kong to engage in work that would, if undertaken in Hong Kong, be similar to that undertaken by a barrister in the course of ordinary practice as a barrister in the High Court or Court of Final Appeal; and

> (b) substantial experience in advocacy in a court, the Court may admit such person as a barrister under this section for the purpose of any particular case or cases and may impose such restrictions and conditions on him as it may see fit."[35]

Section 27(4), like amended s 15(1) of the Legal Profession Act, lays down only some basic requirements for the admission of foreign counsel (such as in respect of experience); both provisions otherwise offer little direction as to other, more particular, factors which should potentially influence a court in deciding whether to admit the foreign counsel. The Hong Kong courts have consequently come up with some general guidelines to be applied in any foreign lawyer's application for *ad hoc* admission.[36] What follows is a discussion of each of the s 15(6A) matters specified by Chan CJ, informed by a survey of both Singapore and Hong Kong case law—in the belief that a comparative view will better promote the achievement of justice.

Expounding on the Section 15(6A) Matters

Some preliminary comments should be made before delving into Chan CJ's stated matters. No one likes to miss the wood for the trees, especially when important questions are raised concerning public access to justice and the health of the local Bar. It is therefore useful to describe what it is exactly that makes a court willing to admit foreign counsel in any particular case.

The paramount, if not the sole, consideration in the court's exercise of discretion should be whether admission *would be in the public interest*.[37] That is the core principle. By itself, however, public interest is a phrase devoid of clear meaning, and judges have rightly noted that the public interest is not one-dimensional. There are many and sometimes conflicting aspects of the public interest, and other aspects may be identified from time to time as a result of change of circumstances.[38]

This article has already noted three of these aspects: the creation of a strong and independent Bar, the need of the general populace to have adequate legal representation and the maintenance of Singapore's reputation and eminence as an international financial centre. The first of

[35] Legal Practitioners Ordinance (Cap 159) s 27(4).
[36] *See eg Re Gerald James Kay Coles* QC [1985] HKLR 480, 482–483; *Re Flesch* QC [1999] 1 HKLRD 506, 515–516.
[37] *Re Flesch* QC, 511.
[38] *Ibid.*

these goes towards the quality of a country's legal system. Because of the rule that common law judges can generally only rule on those arguments proffered by counsel,[39] the failure to raise good arguments not only harms a client's case but can petrify the development of the common law. A court's reputation also depends on the quality of its judgments, which stem from counsel's arguments. But even more importantly, though, the fact that most common law judges are recruited from the practising Bar entails a direct correlation between their standards. It is essential to a strong Judiciary that the best litigators earmarked for ascension to the Bench are indeed some of the most knowledgeable and experienced advocates around, capable of holding their own against their Commonwealth peers.

The second aspect is the public's recourse to adequate legal representation. The key means of obtaining redress in a society that observes the Rule of Law is through the legal system, which therefore requires the government to structure access channels to the courts. One indispensable element in any structure is the availability of adequate legal representation;[40] indeed, a credible and capable Bar, accessible to the laity, is fundamental to a democratic society.[41] Chan CJ, on a softer but no less carrying note, described a society without access to justice as one lacking the virtues to make it civilised and compassionate.[42] In the context of *ad hoc* admissions, however, any rule that a litigant is entitled to counsel of her choice means no more than that she has a right to choose counsel who are available and entitled to practise; she does not have a right to demand that foreign counsel be admitted to represent her.[43]

[39] *See* eg Michael Zander, *Cases and Materials on the English Legal System* (Cambridge: Cambridge University Press, 10th edn, 2007), p 382; *contra* N. H. Andrews, "The Passive Court and Legal Argument" (1988) 7 *Civil Justice Quarterly* 125. One notes incidentally that modern technology has greatly reduced the dependency of courts on counsel to inform them of the latest legal developments around the Commonwealth.

[40] While this applies in both the civil and criminal contexts, the point is more often encountered in discussions of the criminal justice system; *see* eg *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198, 210. *See* also Gary K. Y. Chan, "The Right of Access to Justice: Judicial Discourse in Singapore and Malaysia" (2007) 2 *Asian Journal of Comparative Law*.

[41] *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 44 (14 Feb 2012) (K Shanmugam). The late Lord Alexander of Weedon QC had earlier described the lawyer as having "an important role in the preservation of the independent society which enables him to flourish. His role in the minimization of corruption and of injustice, and in the fearless defense of minorities, may dispel conditions which might otherwise undermine democracy" (Robert S. Alexander, "The History of the Law as an Independent Profession and the Present English System" (1983) 19 *The Forum* 185, 186).

[42] Chan Sek Keong, "Remarks by Chief Justice Chan Sek Keong" (Dinner Hosted by the Judiciary for the Forum of Senior Counsel, Singapore, 18 May 2012).

[43] As noted by courts in Singapore and Hong Kong; *Re Seed Nigel John QC* [2003] 3 SLR (R) 407, [34] (on criminal cases); *Re AR Tyrrell QC* [1984] HKLR 370, 371; *Re Gerald James Kay Coles QC*, 483. *See* also Tan Yock Lin, *Singapore Academy of Law Annual Review of Singapore Cases* (2004) at para 18.2.

A third aspect, the need to maintain Singapore's enviable place in the international financial system, was discussed earlier. Suffice it to say here that it is now ever more vital for Singapore to retain its competitiveness in the changing world economy, so that legal policies which were once suitable may need to be reviewed. Finally, two other ideals (to be discussed contextually below) may be mentioned briefly as facets of the public interest also. The virtue of fairness has always been striven for and it will be no different in deciding whether to admit a foreign lawyer to represent a litigant. Judges should be ever mindful of doing justice between the individual parties and the private interests they represent. There is also the vital concern of maintaining public confidence in the legal system, for on this rests the orderly resolution of the affairs of society.

Given the multifarious nature of the public interest, it is only natural, and even right, that the courts flexibly and sensibly apply a balancing approach in deciding whether one aspect of it outweighs another.[44] Chan CJ has already assured that the courts will judiciously balance the competing interests in each case. But Professor Tan Yock Lin notes interestingly that in the situation where QCs are now most likely to be admitted—the unavailability of representation by a top-tier local advocate—there is likely to be *no real question of balancing*, since there would be an overriding interest in remedying the litigant's lack of adequate local representation.[45] The "real risk of failure of justice" is for him a trumping factor.[46] However, while concern over the public's access to justice is only natural, it is submitted that there may still be *other* factors to consider, such as whether the litigant herself was at fault for not attempting to procure local representation earlier.[47] This is where the court must strain to focus on all those matters which ought to be taken into consideration in any application for admission, despite the attractions of placing dispositive weight on any one factor.

The applicant also bears the burden of satisfying the court that it is in the public interest to grant her admission.[48] This is clear from the set-up of the *ad hoc* admissions system. The foreign lawyer wishing to be admitted for a particular case must apply to the High Court by originating summons; the burden is on her to fulfil the requirements set out in s 15(1).[49] She must also serve notice of her application on the

[44] *Re Flesch QC*, 515; *Re McGregor QC* [2003] 3 HKLRD 585, 591–592.
[45] Tan Yock Lin, *Singapore Academy of Law Annual Review of Singapore Cases* (2002) at para 18.5.
[46] Tan Yock Lin, *Singapore Academy of Law Annual Review of Singapore Cases* (2001) at para 18.3.
[47] See eg *Re Badenoch QC (No 2)* [1999] 2 HKLRD 215.
[48] See eg *Re AR Tyrrell QC*, 371; *Re David Perry QC* (unrep., HCMP 503/2012, [2012] HKEC 529) [15].
[49] *Price Arthur Leolin v Attorney-General* [1992] 3 SLR (R) 113, [12].

Attorney-General of Singapore, the Law Society of Singapore and the other parties to the case. On this last point, the position in Hong Kong is that even if the relevant governmental department and the professional governing body do not object to the application for admission, the applicant should still place all the relevant materials before the court.[50] This is a sensible rule given that these other bodies may view the various interests at stake from different vantage points.[51] It is, in the end, for a neutral court to decide whether admission should be allowed in the *overall* public interest, and this it cannot do with confidence unless it has all the information it needs to properly evaluate and weigh the different aspects of the public interest in any particular case.

The nature of the factual and legal issues involved in the case

This is the first of Chan CJ's enumerated s 15(6A) matters. Under this broad heading may be listed some oft-cited factors which are said to favour the admission of foreign counsel. But these are not stand-alone factors that are automatically determinative of the enquiry; rather, they are frequently only one element in the court's consideration of the overall public interest. For instance, those seeking admission of a QC because a case requires specialist knowledge of a kind not found locally may well be required to satisfy the court that a reasonable enquiry had been made of the capability of local Senior Counsel—this latter enquiry potentially being covered under the *third* of Chan CJ's s 15(6A) matters. No one factor is likely to be dispositive, and all the following discussions should be read with that caveat in mind.

Factor 1-1: The case is one of such difficulty or complexity that, in the opinion of the court, it warrants the admission of foreign counsel.

The latest legislative amendments return the *ad hoc* admissions scheme in Singapore to almost the position immediately prior to 1991, on which but a single reported case has expounded.[52] That decision does not bind the

[50] *Re Flesch QC*, 516.

[51] *See Price Arthur Leolin v Attorney-General*, [20]; *Re Joseph David QC* [2012] 1 SLR 791, [61]. An interesting instance in Singapore when the Attorney-General's objection to admission appeared to be dismissed outright was in *Re Isaacs Stuart Lindsay QC* [1992] SGHC 163. The applicant there had desired admission to argue an appeal; the problem was that the trial itself had earlier been heard by a judge who later became the Attorney-General by the time the application for admission was heard. Goh Phai Cheng JC, hearing the application, therefore did not think that the Attorney-General was in a position to object on the ground that the case was not of sufficient difficulty and complexity.

[52] *Re Phillips Nicholas Addison QC* [1979–1980] SLR (R) 111.

High Court.[53] Nevertheless, its main holding—that QCs will ordinarily be admitted only in cases with a minimum level of complexity—should still be a key consideration when admitting foreign counsel, for two reasons. First, it is the intention of Parliament that the guidelines laid down in that case continue to be relevant, so that the level of difficulty and complexity of a case should remain a factor to be considered in any application for admission, notwithstanding the deletion of the statutory requirement of "sufficient difficulty and complexity".[54] This is also consistent with the pre-1991 position that QCs should not be admitted for those routine, ordinary or simple cases which can be capably handled by local lawyers[55]—although there are now additional factors favouring admission, as will soon be seen.

Second, the original public interest rationale for imposing this requirement of difficulty and complexity—to foster a strong Singapore Bar—still holds true today. Allowing foreign counsel to argue straightforward cases, in the absence of any other factor favouring admission, would leave Singapore advocates despairing of ever getting any significant court time. For these reasons, it is suggested that one important factor in the balancing analysis will be *whether the case was of such difficulty or complexity that it would, in the opinion of the court, warrant the admission of a QC*. The exact level of difficulty and complexity required should no longer be held to a strict standard, given the deletion of the statutory condition of sufficiency, but rather be a flexible one in order to adequately do individual justice. Judges should accordingly be free (and even entitled) to depart from cases expatiating on the now-repealed sufficiency requirement.

Even in this fluid test, however, one important consideration guiding the court will be the level of expertise possessed by local counsel.[56] No case is too difficult or complex if knowledgeable lawyers comparable to the best of their Commonwealth peers are generally available locally; conversely, a middling case by other jurisdictions' standards can be too difficult for insular and uninformed lawyers. It may, then, come down to how our judges view local lawyering standards. Another consideration may be the type of issues raised by the case, a point related to Factor

[53] The High Court of Singapore is not bound by its own decisions (*Wong Hong Toy v Public Prosecutor* [1986] 2 MLJ 336, 338; *Downeredi Works Pte Ltd v Holcim (Singapore) Pte Ltd* [2009] 1 SLR (R) 1070, [27]).

[54] *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 39 (14 Feb 2012) (K Shanmugam). The Minister for Law also referred twice in his speech to admissions for "complex" civil cases and matters (at col 39–40).

[55] *Parliamentary Debates Singapore: Official Report*, vol 55, col 520 at 535 (20 Mar 1990) (Prof S Jayakumar).

[56] *See* eg *Re Gyles QC* [1996] 1 SLR (R) 871, [13].

1-2 (covered next). If the area of law is one local advocates have little experience litigating over, it may follow that the case is more easily found, in the court's opinion, to be of such difficulty or complexity that it warrants the admission of foreign counsel.

Factor 1-2: The case requires specialist knowledge of the kind not available from the local Bar.

Another factor favouring admission of foreign counsel is where the local Bar cannot provide the specialist knowledge the former possesses;[57] this goes towards addressing the clear public interest of protecting the public from insufficiently skilled legal practitioners.[58] But as local lawyers become abler and grow more specialised practices, it is inevitable that this ground for admission of QCs will shrink in importance. Judges in Singapore, who are necessarily best placed to observe any improvement in standard of the Bar, have noted over the years that there are few areas of law that can genuinely trouble Singapore lawyers,[59] at least not to the extent of requiring constant referral to foreign counsel. But the possibility that there *are* still such areas means that the door should not be closed to foreign counsel to argue those cases on which Singapore advocates can provide little specialist knowledge.[60] One can perhaps single out two fields in which Singapore counsel may have slightly less confidence: constitutional and public international law. Constitutional law has traditionally been an infrequent litigation topic in Singapore, but recent years have seen more legal challenges in the constitutional arena.[61] As for international law, that is the stronghold of International Affairs Division lawyers at the Attorney-General's Chambers and not private sector litigators, although international law arguments have

[57] *Re Gerald James Kay Coles* QC, 483; *Re Flesch* QC, 517.

[58] See eg *Re HW Shawcross* [1956] MLJ 104, 106.

[59] *Re Flint Charles John Raffles* QC [2001] 1 SLR (R) 433, [9]; *Re Platts-Mills Mark Fortescue* QC [2006] 1 SLR (R) 510, [18]; *Re Millar Gavin James* QC [2007] 3 SLR (R) 349, [24]; *Re Joseph David* QC, [20]. It is also observed that the range of work done by Senior Counsel in Singapore is increasing; in recent years, specialists in admiralty, insolvency, intellectual property and mediation work, amongst other areas, have been appointed to the honour rank.

[60] That there were still some areas of law not ably covered by Singapore lawyers was separately alluded to by Chan CJ, Deborah Barker SC and Hri Kumar Nair SC ("The Leading Questions: An Interview with the Senior Counsel Selection Committee" (Jan–June 2008) *Inter Se: Singapore Academy of Law* 30 at 32; Deborah Barker, cited in Tan Boon Khai, "Confessions from Three Senior Counsel" (Jan–June 2008) *Inter Se: Singapore Academy of Law* 36 at 39; *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 30 (14 Feb 2012) (Hri Kumar Nair)).

[61] Alvin Yeo SC notes that constitutional cases are relatively rare in Singapore (quoted in Goh Chin Lian, "Constitutional cases 'rare'", *The Straits Times*, 25 August 2012). Important cases in recent years have raised legal questions on, *inter alia*, the constitutional right to free speech (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52), the President's clemency powers (*Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189) and the ambit of prosecutorial discretion (*Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49).

similarly been increasingly made in support of substantive legal claims.[62] The admission of foreign counsel can therefore provide the necessary expertise in these areas, and, in due course, even aid the growth of local jurisprudence—with the added option of calling upon legal academics as *amici curiae*, of course.

It appears also that a court may be more likely to allow admission where the specialism alleged to be lacking at the local Bar is a distinctly legal one. For instance, if there are no local lawyers familiar with the *Pallant v Morgan* equity[63] (unlikely as this is), then that fact may favour admission of a chancery QC. But where it is asserted that the case will involve specialist engineering knowledge, for example, expert witnesses will be expected to provide such expertise and there is consequently less need for a lawyer with a practice dedicated to engineering disputes.[64] An applicant in the latter situation may therefore want to show further that her specialised knowledge and practice would be beneficial to the court during the examination and cross-examination of the expert witnesses, and that such expertise could not be found at the local Bar.[65]

Factor 1-3: The case involves the determination of legal principles which may substantially impact the development of local jurisprudence.

The reputation of a court is greatly influenced by the quality of its judgments, and nothing is quite so pleasing as to see them being cited approvingly by judges in other jurisdictions. Every such instance is a testament to the authoring judge and the greater judicial community to which she belongs. One major concern, therefore, of every judge handing down a judgment is for it to contribute to the healthy development of local jurisprudence—but this will depend heavily on the submissions of counsel appearing before her in the case, since judges as mentioned can traditionally rule only on the proffered arguments.

The need to develop local jurisprudence has provided another ground for admitting a QC in Hong Kong. Cases the determination of

[62] See eg *Re Millar Gavin James QC* [2008] 1 SLR (R) 297 (whether right to equality of arms in court mandated by international law); *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 (whether death penalty in violation of international law).

[63] Eponymously named after the case of *Pallant v Morgan* [1953] Ch 43.

[64] This partly explains why a QC specialising in ecclesiastical law was not admitted for a case involving a member of the Catholic Church; the expert witnesses called there would have provided adequate guidance on canon law to both the court and local counsel (*Re Seed Nigel John QC* [2003] 3 SLR (R) 407). See also *Re Nicolas Dusan Bratza* [1986] HKLR 763, 765; Malcolm Merry, "Notes of Cases – *Re Nicolas Dusan Bratza*" (1986) 16 *HKLJ* 420, 423.

[65] This point draws its inspiration from a slightly different argument made by Professor Tan (Tan Yock Lin, *Singapore Academy of Law Annual Review of Singapore Cases* (2003) at para 18.13). See also *Re Price Arthur Leolin QC* [1997] SGHC 157, [8]; *Re Price Arthur Leolin QC* [1998] 3 SLR (R) 346, [23].

which would substantially impact the development of the law may be appropriate ones for a QC to argue, provided that the QC is of sufficiently high quality and can provide a significant dimension to the case.[66] The determination of important legal principles may even be, in suitable cases, a *powerful* factor favouring admission of a QC.[67] Courts obviously place great value on the added experience and perceptiveness (amongst other qualities) which a QC can bring to the resolution of such cases.

Indeed, this may be a factor which the Singapore courts *already* consider when dealing with applications for *ad hoc* admission. There have been judicial statements that admission may be favoured for cases potentially having a widespread impact on the law or which will attract considerable interest from the international legal community.[68] Courts are naturally entitled to, and should, take this legitimate factor into account in light of the strong public interest of promoting a sound and reputable body of local jurisprudence. In Professor Tan's words:

> "If the nature of the development, its intricacies, influences and impact have to be appreciated, a skilled QC should be admitted (to work with local lawyers) to elucidate these matters; for he would have valuable contributions to make, which local lawyers would be incapable of making."[69]

By its very definition, however, the application of this factor must diminish in frequency with any rise in standards at the local Bar. If local lawyers are consistently able to furnish more than adequate assistance to the court on matters of substantial legal import, it is only logical then that there will be increasingly less need to have recourse to foreign legal expertise.

Factor 1-4: The case is derived from, and also inextricably linked to, prior arbitration proceedings; and the foreign counsel was substantially involved in those proceedings.

A court may be more inclined to admit foreign counsel for a case stemming from prior arbitral proceedings if that counsel was substantially involved in those related proceedings. This recognises that the foreign counsel will be particularly well-acquainted with the legal and factual issues of the dispute,[70] thereby being able to render the best assistance to the court

[66] *See* eg *Re Flesch QC*, 513–514; *Re Michael Crystal QC* (unrep., HCMP 598/2005, [2005] HKEC 541) [10]–[11].

[67] *Re McGregor QC*, 589.

[68] *Re Price Arthur Leolin QC* [1998] 3 SLR (R) 346, [19]; *Re Platts-Mills Mark Fortescue QC* [2005] SGHC 191, [19]. The Court of Appeal overruled the latter case but perhaps not directly on this point; *see Re Platts-Mills Mark Fortescue QC* [2006] 1 SLR (R) 510.

[69] Tan Yock Lin, *Singapore Academy of Law Annual Review of Singapore Cases* (2007) at para 19.3.

[70] *Re Joseph David QC* [2012] 1 SLR 791, [52].

while eliminating any unnecessary costs in briefing other lawyers afresh. These two points therefore almost always further the public interest—it reliably allows the court to arrive at a better decision, and normally also reduces the cost of litigation for the party concerned. Moreover, as both the Attorney-General and the High Court in Singapore noted, continuity of representation in arbitral and court proceedings can even boost Singapore's reputation as a venue for international commercial arbitrations.[71] Most if not all parties who instruct eminent QCs in their high-value arbitration cases do so in the hope of achieving the outcome most favourable to them, but disputes sometimes cannot be satisfactorily resolved in the arbitration chamber and instead escalate into contentious judicial proceedings. Allowing these parties to continue to be represented by their QCs in court may be an inexpressible assurance to the former;[72] it is all a matter of confidence to know that one's lawyer has a unique and almost unmatchable legal and technical familiarity with the case at hand.

This "arbitration factor" can consequently be a powerful one in favour of admission.[73] The only drawback is that it potentially leaves local lawyers out in the cold. One cannot accept that QCs should be admitted to appear in *every* court case stemming from arbitration, for that would obviously not be in the public interest of developing a strong local Bar. Certain threshold barriers ought therefore to be set—but this is where the wrangling may occur. In Singapore, the old fourfold requirement was that the court case had to contain sufficiently difficult and complex issues of law, those issues had to be inextricably linked to the arbitration proceedings, the QC had to have been lead counsel in the arbitration proceedings, and there would be a real benefit in having the same counsel assist the court.[74] As mentioned, the first requirement is no longer statutorily mandated. Courts in Hong Kong, on the other hand, will normally admit foreign counsel where three (non-conclusive) criteria are fulfilled: the case must be on a substantial matter (eg not minor hearings like those for directions),[75] the court proceedings should have emanated from the relevant arbitration,[76] and the QC was substantially

[71] *Ibid.*, [58]–[59].
[72] *Ibid.*, [58].
[73] *Re Goddard QC* [2008] 2 HKC 294, [4].
[74] *Re Joseph David QC* [2012] 1 SLR 791, [59].
[75] *Re Andrew White QC* (unrep., HCMP 1509/2005, [2005] HKEC 1178) [14]; *Re Goddard QC*, [6]–[7].
[76] *Re Goddard QC*, [4].

involved in the relevant arbitration proceedings (not necessarily as lead counsel).[77]

This brief comparison shows that Hong Kong is less rigorous in its requirements for a successful showing of the arbitration factor. Examining each criterion on its own, however, it is submitted that a combination of both the Singapore and Hong Kong positions may be preferred. First, there should remain a threshold requirement for the court case to raise legal issues of such difficulty or complexity that it warrants, in the court's opinion, the admission of a QC. The content of this requirement was discussed earlier and, while slightly unclear as yet, is still preferable to the even more uncertain "substantiality" standard presently utilised in Hong Kong. Second, the legal issues raised in court should continue to be inextricably linked to the arbitration proceedings, for otherwise outside counsel could take on the case without undue hassle in familiarisation with the legal and factual issues. It is likely, though, that most disputes will involve issues going to the heart of the arbitral proceedings. Third, the requirement in Hong Kong that counsel need only be substantially involved in the arbitration proceedings, and not necessarily as lead counsel, is more attractive. A QC may only have drafted the written submissions but that fact alone would not diminish her intimate knowledge of the issues. Moreover, it is not unheard of (although uncommon) for parties to engage more than one Queen's Counsel or Senior Counsel to represent their sides; it might then be unreasonable to deny admitting an eminent and knowledgeable QC (with an excellent grasp of the legal and factual issues at hand) simply because another lawyer had acted as lead counsel in the arbitration. Finally, the fourth factor of showing real benefit may be laid down, although it will normally be taken in the court's stride anyway when examining whether admission would be in the public interest of furthering the administration of justice. These considerations, if addressed well, may persuade a court to look more favourably upon a QC's application for admission.

Factor 1-5: The factual background of a case makes it desirable for foreign counsel to appear.

The backdrop of certain cases may make them more ideally handled by foreign counsel. An example is where one of the litigants is a well-known local personality,[78] such as a senior government official, government-linked company or local opposition politician. The foreign lawyer can bring a professional detachment (whether from local sentiments or the

[77] *Re Andrew White QC*, [14].
[78] *Re Gerald James Kay Coles QC*, 483.

reputation of the litigant) which is potentially very beneficial to a court whose task is to administer fair justice without fear or favour. This observation is not to question the integrity and independence of local lawyers at all, but merely recognises that it will ordinarily be challenging to replicate in local counsel the neutral objectivity of an overseas lawyer lacking the preconceived notions that can materially affect the conduct of litigation. There has indeed been at least one instance in Singapore when a government-linked litigant brought in a QC in its suit against the Government, so as to assure observers that its defence would be conducted with all due "vigour and determination".[79] Thus even the need to preserve an appearance of objectivity can potentially tip the scales in favour of admission.

It is important to emphasise that such furtherance of the administration of justice is the *entire* rationale for admitting a QC in such cases. There is no persuasive reason to bring in foreign counsel if the court is satisfied that local counsel can conduct the case properly and render nothing but the fullest assistance to the court,[80] and that there is little risk of public faith in the legal system being weakened. It is therefore difficult to subscribe to the argument that some litigants in politically charged cases are always unable to brief senior litigators in Singapore because of the latter's unwillingness to take on cases against senior government officials.[81] As at least one judge and successive Ministers for Law have pointed out, this not only casts an unfair slant on local lawyers, but appears to be a problem of simply not trying hard enough.[82] It is not doubted that there are some rare cases where litigants are truly unable to engage a suitable local advocate because of their personal circumstances or that of their opponents,[83] and this exigency may persuade the court to admit foreign counsel. But otherwise, and generally speaking, litigants might instead have a better chance of successfully engaging a QC if they can show that the local lawyers available and willing to take on the case are nevertheless unsuitable, whether in expertise or objectivity, so that

[79] *Re Sher Jules QC* [2002] 2 SLR (R) 377, [19]. See also *Re Clare Montgomery QC* (unrep., HCMP 2516/2010, [2011] HKEC 148); *Re David Perry QC*, [24].

[80] *Re Donald Martin Thomas QC* (unrep., HCMP 4158/1993) [11].

[81] See eg *Re Price Arthur Leolin QC* [1998] 3 SLR (R) 346, [18]; *Parliamentary Debates Singapore: Official Report*, vol 56, col 795 at 803 (14 Jan 1991) (Dr Lee Siew Choh); *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 32 (14 Feb 2012) (Pritam Singh) and at col 34 (Lina Chiam).

[82] *Re Nicholas William Henric QC* [2002] 1 SLR (R) 751, [42]; *Parliamentary Debates Singapore: Official Report*, vol 56, col 795 at 805 (14 Jan 1991) (Prof S Jayakumar); *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 40 (14 Feb 2012) (K Shanmugam).

[83] One such uncommon instance was seen in *Re Price Arthur Leolin* [1999] 1 SLR (R) 1107.

the court is unlikely to receive from them the assistance necessary to arrive at a just result.

Observations on QC admissions in cases involving restricted areas of law. The Singapore legislature has dictated that the admission of QCs is to be stricter in cases involving certain domestic areas of law, namely, criminal, family, constitutional and administrative law (restricted category of cases).[84] Apart from the QC needing to fulfil the requirements in s 15(1), amended s 15(2) also requires a court to be satisfied that there is a "special reason" to admit the foreign counsel for this restricted category of cases. What constitutes a special reason will be left to the judges to determine in each individual case.[85] In public interest parlance, one could say that admission for this restricted category of cases would need to not just be in the public interest, but firmly so. Section 15(2) has therefore been described to impose a "significantly higher threshold" for admission,[86] the existence of a special reason making the key difference—a sort of clinching (but at the same time necessary) justification for admission.

The four restricted areas of law were chosen for being traditionally domestic areas of practice, and also because the problem of senior local litigators being regularly conflicted out of acting was said to be non-existent in the restricted category of cases.[87] Whether these are compelling enough justifications for imposing a "special reason" requirement is up for debate, of course.[88] Taking the law as it stands now, however, it would still be slightly too undiscerning to speak of these four areas in the same breath as normally being off-limits to foreign counsel. While the various factors may be treated differently in the balancing analysis, *the precise extent to which they become more or less relevant will depend in turn on the exact area of law under consideration.*

Criminal law. Criminal law has been a restricted area of practice for QCs since 1997. Until the recent amendments, this was the only protected field and stemmed from the Singapore Government's position that not only were there sufficient local lawyers to deal with criminal cases, but QCs were generally unfamiliar with Singapore's laws on crime,

[84] Legal Profession (Admission) Rules 2011 (S 244/2011) r 32(1), as amended by the Legal Profession (Admission) (Amendment) Rules 2012 (S 131/2012).

[85] *Parliamentary Debates Singapore: Official Report*, vol 66, col 628 at 643–644 (10 Oct 1996) (Prof S Jayakumar).

[86] *Public Consultation on the Legal Profession (Amendment) Bill 2012*, Available at http://app2.mlaw.gov.sg/LinkClick.aspx?fileticket=rioImt0TX6w%3d&tabid=204 at para 6.

[87] *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 40 (14 Feb 2012) (K Shanmugam).

[88] *See* eg *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 31–32 (14 Feb 2012) (Pritam Singh) and at col 34 (Lina Chiam).

criminal procedure and evidence.[89] Judges subsequently elaborated on what could be a special reason that might tilt in favour of admission for a criminal case, although some hastened to add that there was not a closed list of factors which could constitute special reasons, nor did any previously uttered factors conclusively become special reasons *per se*.[90]

Yong Pung How CJ suggested two examples where a special reason for admission might exist: if the criminal case raised important constitutional implications, or if it would have significant repercussions for the way in which an entire section of the population ordered their daily lives or conducted their business.[91] But the first of Yong CJ's illustrations may no longer be a factor pointing to a special reason for admission. This is because the recent legislative amendments *also restrict QC admissions for constitutional law cases* unless a special reason is shown. The parliamentary intention is for local advocates to argue constitutional law cases in the absence of any special reason why QCs should be allowed to do so; *a fortiori*, a criminal case raising constitutional law issues, however important they might be, should also need to pass the litmus test of showing special reason for admission in constitutional law cases. The fact that a case is "half-and-half"—involving both criminal and constitutional legal elements—is unlikely to form a special reason by itself. Parliament was obviously cognizant of this possibility,[92] and, if it had wanted to, drawn a distinction between civil and criminal cases raising constitutional matters; *but this was not done*. Instead, the secondary legislation unambiguously states that constitutional law *simpliciter* is one area of legal practice where special reason needs to be shown before a QC can practise it locally.

[89] *Parliamentary Debates Singapore: Official Report*, vol 66, col 628 at 633–634 (10 Oct 1996) (Prof S Jayakumar).

[90] *Re Caplan Jonathan Michael QC* [1997] 3 SLR (R) 404, [17].

[91] *Re Caplan Jonathan Michael QC*, [14]–[16]. These are not conclusive factors; for example, a criminal case may raise constitutional implications or have some ramifications for an entire section of the population, but these may still not necessarily be special reasons favouring the admission of a QC (*see Re Seed Nigel John QC* [2003] 3 SLR (R) 407; *Re Lasry Lex QC* [2004] 1 SLR (R) 68). Professor Tan, writing academically, attempted to elaborate further on this requirement for showing special reason. First, he suggested that where a criminal case is substantially made out on laws other than those criminal or evidence laws unique to Singapore, there is less probability of injury to the development of local jurisprudence, possibly making it easier to satisfy the requirement of showing special reason (Tan Yock Lin, *Singapore Academy of Law Annual Review of Singapore Cases* (2003) at para 18.17). Perhaps the learned professor was contemplating treaty-implementing legislation. Second, where a ruling on the applicable law would benefit from a comparative approach within the expertise of a QC, then that might be a special reason for *ad hoc* admission (Tan Yock Lin, *The Law of Advocates and Solicitors in Singapore and West Malaysia* (Singapore: Butterworths Asia, 2nd edn, 1998), p 74).

[92] As long ago as 1996; *see Parliamentary Debates Singapore: Official Report*, vol 66, col 628 at 643 (10 Oct 1996) (Prof S Jayakumar).

Family law. If one accepts the justifications given by the Minister for Law for creating the restricted category of cases, then family law may well deserve protection as a restricted area of practice. Cases on family law are similar to criminal cases insofar as there exists in Singapore a corps of generally competent advocates willing and able to take them on,[93] and the problem of Senior Counsel being regularly conflicted out of acting should logically not arise at all in both types of cases. The imposition of the special reason requirement should in practice have minimal impact on the family litigation arena anyway, since parties there historically have not sought to admit QCs to argue their cases.[94]

Constitutional and administrative law. The areas of constitutional and administrative law should, however, be given separate consideration. While there may be no problem of Senior Counsel being regularly conflicted out of acting in constitutional and administrative law cases, *other* justifications for restricting admission in criminal and family law cases are potentially inapplicable here. It may first be doubted whether there is to be found at the Singapore Bar the strength in depth in constitutional and administrative law as there is in criminal or family law. One suspects that a cursory enquiry would at present find few litigators holding themselves out as public law specialists. What is doubly worrisome about this is that not only might the immediate parties to the case be deprived of a just result because more sophisticated and considered arguments were not proffered, but from a developmental standpoint the basic goal of advancing the law is possibly even more unlikely to be achieved by the uninspired submissions of generalist lawyers.

This is unaided by the fact that Singaporean jurisprudence on public law is less copious than that on criminal or family law. Infrequency obviously does not automatically equate to immaturity, but it cannot be gainsaid that foreign lawyers can potentially offer much-welcome contributions to the development of constitutional and administrative law in Singapore. Their many years of specialised experience in this field would offer insightful and considered perspectives for the courts to ponder over, directly vitalising in the process the case law in these areas so fundamental to a State and its people. It is acknowledged that there have been not insignificant (and perhaps some divergent) developments in the public law of some jurisdictions,[95] but this still cannot deny the essential

[93] But note Engelin Teh SC's growing concerns in this regard (cited in Rajan Chettiar, "Senior Counsel, The Subordinate Courts and Two Lessons Learnt" (Jan–June 2008) *Inter Se: Singapore Academy of Law* 42 at 44–45).

[94] There does not appear to have been any reported application for admission of a QC for a family law case in Singapore.

[95] In the United Kingdom, for example, following the enactment of the Human Rights Act 1998, c 42.

qualities certain QCs possess in such abundance when analysing and presenting a constitutional or administrative law problem. Of course, there must come a time in Singapore when both its lawyers and its public law jurisprudence will mature to a stage where leveraging on foreign expertise will become an unnecessary recourse, but that moment has not arrived. For these reasons, it is suggested that the need to develop constitutional and administrative legal principles of fundamental and significant import may be one special reason to admit foreign counsel under s 15(2).

The necessity for the services of a foreign senior counsel (ie a QC)

The second of Chan CJ's matters, if read alone, can be slightly misleading. Strictly speaking, foreign counsel will be *needed* only in one instance: where the litigant is absolutely unable to procure local legal representation of any kind. But this understanding of necessity appears to be not what Parliament or the Chief Justice meant. Instead, a looser meaning of necessity is discernible from the motivation behind the newest legislative amendments—providing a mechanism to meet the litigant's "need" to engage a QC *when the litigant is unable to procure the services of a local Senior Counsel due to the conflict of interests problem.* This was addressed earlier in the article and the points made will not be repeated here. Instead, another situation is highlighted in which litigants may require the services of foreign counsel due to their inability to obtain representation by a local lawyer of appropriate skill and experience.

Factor 2-1: No local counsel of appropriate skill and experience is available at a fee which is within the range of the client, whereas a foreign counsel is.

Local counsel of appropriate skill and experience (say a Senior Counsel) may be out of a client's financial reach, denying her the services of a senior litigator. If foreign counsel should therefore prove more affordable to the litigant, then this reason may weigh in favour of admission[96]—although affordability should not in itself be a sufficient factor to justify granting an application, seeing as the expense of hiring a QC may be becoming increasingly less prohibitive.[97] One particular instance where the costs of engaging foreign counsel may be lower is where parallel proceedings have already been brought in another jurisdiction, and an inordinate amount of briefing would be needed to bring local counsel up to speed with the

[96] *Re Gerald James Kay Coles QC*, 483.

[97] On the price-competitiveness of QCs, *see* eg Sue-Anne Moo, "Afternoon Tea with Stephen Atherton QC" (May 2012) *Singapore Law Gazette* 38; K. C. Vijayan, "QC's fees comparable to Senior Counsel", *The Straits Times*, 30 January 2012.

case;[98] this extra effort and time would naturally inflate the final bill. But the litigant must ultimately satisfy the court that she was genuinely unable to afford the services of those local senior lawyers who were available.

The availability of any local Senior Counsel or other advocate and solicitor with appropriate experience

The third of Chan CJ's matters pertains to the availability of local Senior Counsel or other lawyers with the appropriate experience. It was described earlier how local Senior Counsel could be unavailable for a variety of reasons (eg cost, lack of expertise, the conflict of interests problem); the present discussion focuses on the steps required to convince a court that local representation was indeed unavailable.

Factor 3-1: Reasonable enquiries should be made on the availability of local counsel of appropriate skill and experience (normally Senior Counsel).

It is plain that those litigants who claim that local counsel of appropriate skill and experience are unavailable (following the factors discussed under Chan CJ's first and second matters) should in fact prove that claim to the court's satisfaction. There is generally no public interest in allowing foreign counsel into a Singapore courtroom if local, equally competent, Senior Counsel are available for hire.[99] This has now assumed centre stage given that the *ad hoc* admissions criteria were relaxed to primarily remedy the frequent problem of local Senior Counsel being conflicted out of acting. Consequently, judges in Singapore have been given the legislative green light to admit more QCs into their courts, but in return for that privilege, litigants should show that they face a legitimate problem in accessing local top-quality legal representation. The court, when weighing the public interest, ought also to be fully apprised of the size of the available pool of local leading counsel, and the reasons why they were not instructed.[100] A requirement should therefore be laid down that parties should first have made reasonable enquiries on the availability of local counsel.

Depending on the exact reasons for a local Senior Counsel's unavailability, however, there may be differences in what can constitute a reasonable enquiry. In cases against banks or large corporations where local Senior Counsel in bigger firms are likely to be conflicted out of acting, litigants may be required to enquire on the availability of most of the very few remaining local Senior Counsel

[98] *Re Platts-Mills Mark Fortescue QC* [2005] SGHC 191, [15], [16] and [18]. The Court of Appeal overruled but not on this point; *see Re Platts-Mills Mark Fortescue QC* [2006] 1 SLR (R) 510.

[99] But *see* n 129.

[100] *Re John McDonnell QC* (unrep., HCMP 1532/2007, [2007] HKEC 1660) [10].

who practise in small firms. Where it is alleged though that the case requires particular expertise not found at the local Bar, a reasonable enquiry need perhaps only be made on the availability of those few local Senior Counsel who are generally acknowledged in legal circles to be more specialised (or at least have had some prior experience) in the relevant area of law. This gauging of the level of expertise of local counsel will be a judgment call for the instructing solicitor.[101] Another situation is where a litigant avers that foreign counsel, but not local Senior Counsel, is the only kind of senior advocate she can afford; a reasonable enquiry there may well necessitate enquiries of several "types" of local Senior Counsel, such as those practising in differently sized firms (where overheads will vary), as well as those of varying seniority (since more experienced lawyers usually charge higher fees than those less experienced).[102]

The non-observance of this requirement can have fatal consequences, for where insufficient efforts to make enquiries on the availability of local Senior Counsel have been shown (or there is insufficient evidence of the efforts made), the court could well refuse admission on this ground alone.[103] As mentioned, this does not mean that litigants should be required to approach *all* local Senior Counsel as some may lack the requisite expertise or standing,[104] but it may not be enough, for example, for an instructing lawyer to merely state that a particular local Senior Counsel is unsuitable for the case at hand.[105] It has also been held that a mere telephone call to a Senior Counsel's office without giving any information about the nature and complexity of the case, the time expected of counsel in handling it, and other special features, if any, may not be satisfactory.[106] In any case, the search for an available local Senior Counsel should be responsible, serious and genuine, and not merely a matter of routine or formality to satisfy one requisite criterion for admission of a QC.[107]

This also means that unexplainable delays in searching for available local counsel are clearly unreasonable because they might lessen the number of available counsel with each passing day, and should ordinarily weigh against admission of a QC. Not only are local Senior Counsel lawyers

[101] *Re Kosmin QC* [1999] 1 HKLRD 641, 646.
[102] *See* eg *Re Gilead Cooper QC* (unrep., HCMP 184/2011, [2011] HKEC 385) [49].
[103] *Re Collingwood Thompson QC* (unrep., HCMP 2190/2007, [2007] HKEC 2057) [6].
[104] *Re Caplan Jonathan Michael QC* [1997] 3 SLR (R) 412, [17]; *Re Joseph David QC* [2012] 1 SLR 791, [51]; *Re Kosmin QC*, 646.
[105] *Re Kosmin QC*, 647.
[106] *Ibid.*
[107] *Ibid.*

with busy practices, but they will typically require time to assess whether there will be a sufficient period to prepare for the case before agreeing to take up the brief.[108] Conversely, timely enquiries demonstrating the non-availability of local counsel would provide credible evidence that the litigant was genuinely unable to procure adequate legal representation. The court should be entitled to consider all this when balancing the relevant aspects of the public interest.[109]

Is it reasonable, having regard to the circumstances of the case, to admit a foreign senior counsel for the purpose of the case?

Considerations which do not fall neatly into Chan CJ's first three matters may be laid down here under the fourth matter. One could even see this last matter as the all-important enquiry, since it purportedly lays down a final requirement of reasonableness for the admission of foreign counsel. As mentioned previously, admission should ultimately be determined after weighing the different aspects of the public interest. An understanding of reasonableness might therefore be taken to comport with this.

Noteworthy also is Chan CJ's resurrection of the phrase "having regard to the circumstances of the case", which was deleted from s 15(1) in the latest legislative amendments. Its reappearance as a s 15(6A) matter appears to be directed at preserving the relevance of prior case law.[110] The following are some additional considerations which should also potentially have an impact on a court's balancing test.

Factor 4-1: An application for admission should be made timeously.

An important part of the *ad hoc* admissions process is simply to make sure that litigants do not *abuse* it by waiting until the last moment before looking for local counsel, and then arguing that they were unable to engage local representation. One main justification for allowing *ad hoc* admission of QCs is the genuine unavailability of suitable local counsel, and the system could not tolerate those litigants who deliberately delayed looking for representation until near the scheduled hearing date, when most if not all local Senior Counsel would likely be unavailable or unprepared. A late application by foreign counsel therefore ought not to weigh in favour of admission; on the contrary, the availability of local counsel may be assessed as if the application had been submitted at an

[108] *Ibid.*, 647.
[109] *Re Michael Crystal QC*, [12].
[110] See eg *Price Arthur Leolin v Attorney-General* [1992] 3 SLR (R) 113, [11].

appropriate date rather than at the later one,[111] and the application may even be denied for lateness alone, if the delay is without explanation.[112]

The question, then, is what counts as a late application. Some litigants will have determined at the outset, when they commence legal proceedings, that the services of a QC are required. Others will only have decided later on that they need QC representation. It is suggested that delayed action should not prejudice the second category of litigants, so long as the application for admission does not cause undue prejudice to the *other* party or result in unjustified postponement of the substantive hearing proper. There can be perfectly reasonable explanations why some parties only seek foreign counsel at a subsequent time; for example, individual litigants in civil cases may, for reasons of cost, only set their minds towards retaining a QC when it is clear after the pre-trial conferences that the case cannot be settled and will be proceeding to trial.[113] It might therefore be preferable to lay down a general time by which applications for admission should be made, and two possible temporal markers suggest themselves.

The first is *the determination of the trial date*. In Singapore, as in Hong Kong, hearing dates of civil trials are usually set within two to three months in advance.[114] It has been suggested that an application should be made, and the Attorney-General and the Law Society approached, *no later than a month after the trial date is fixed*, so that the application if opposed by these parties can be ventilated in sufficient time for alternative counsel to be briefed. In other cases where notice of hearing is likely to be less than three months (such as interlocutory matters, appeals and criminal trials), the application should be made and the Attorney-General and the Law Society approached once the litigant decides to seek the admission

[111] *Re Michael David Sherrard QC* [1988] 1 HKLR 177, 180.

[112] *See* eg *Re Pickup QC* [2009] 1 HKLRD 234, [10]; *Re Brewer III* [2009] 1 HKLRD 550, [39]–[40]; *Re Martin John Pointer QC* (unrep., HCMP 455/2012, [2012] HKEC 493) [24]. Late applications have similarly been frowned upon in Singapore (*Re Reid Joseph Robert QC* [1997] 1 SLR (R) 48, [16]).

[113] Most civil proceedings in the High Court of Singapore are subject to pre-trial conferences as part of an active case management system; Rules of Court (Cap 322, R 5) O.34A. During these conferences the parties can, and are often encouraged to, negotiate a settlement without proceeding to trial. It may be of interest to note that the English Court of Appeal recently introduced the Court of Appeal Mediation Scheme, which is intended to speed up potential settlements and reduce litigation costs.

[114] In particular, the current practice in Singapore is for trial dates to be determined at pre-trial conferences before the parties set down for trial (Chan Sek Keong, "Speech of the Chief Justice of Singapore, Mr Chan Sek Keong" (12th Conference of the Chief Justices of Asia and the Pacific, Hong Kong, June 2007)).

of foreign counsel.[115] But the downside to this temporal marker is the resulting likelihood of delay of the substantive trial itself. One notes the narrow two-month window in civil cases within which the application has to be heard and ruled on, not to mention the possibility of an appeal. Furthermore, if the QC is admitted but would only be available after the original trial date, the court may then need to consider whether the intervening delay would cause substantial injustice to the other litigant.[116]

A second marker may be *the close of pleadings*.[117] Parties in civil cases will by that time have narrowed down the scope of the disputed issues, allowing for suitable evaluations as to whether a QC is required for the case—especially where the case is alleged to be so difficult or complex as to favour admission. Applications could then reasonably be required to be made within two months after the close of pleadings, for example. Against this, however, is the fact that the close of pleadings comes at a relatively early stage of the overall proceedings. As mentioned, negotiating a settlement is a *continuing* process and some individual litigants will only seek a QC once trial appears inevitable. Having too early a deadline for QC applications might therefore be unfair to these parties; they hold out on engaging foreign counsel because it is less costly to allow the settlement process a chance to succeed. But since they are also unlikely to give up the opportunity to retain a QC, setting the close of pleadings as the guidepost for applications could discourage settlements before trial. Ultimately, the time by which applications should ideally be made will depend on certain factors, including the possibility of undesirable delay of the substantive trial, the preservation of the beneficial practice of settling disputes before trial, the requirement to air the application early on with the Attorney-General and the Law Society, and the litigant's possible need to first make reasonable enquiries on the availability of local Senior Counsel before turning to foreign counsel.

Factor 4-2: A court should only in extremely rare situations consider an application for admission if no local counsel or only a nominal local counsel is briefed together with the foreign counsel.

Courts in Hong Kong have laid down a policy whereby they will generally only consider a foreign counsel's application for admission if there is at least one local counsel actively involved in the case from an early

[115] *Re Simon Goldblatt QC* [1985] HKLR 484, 488. The Hong Kong Bar Association has therefore decreed that it will ordinarily withhold its consent to any application unless the latter is made at the stage of setting down and in any event not less than three months before the hearing for which the applicant is seeking to be admitted (Hong Kong Bar Association, *Practice Guidelines for Admission of Overseas Counsel*, Available at http://www.hkba.org/admission-pupillage/ad-hoc/ad-hoc5.html). In any case, an application for admission should normally be made no less than two weeks before the hearing date (*Re Flesch QC*, 516).

[116] *Re Beloff Michael Jacob QC* [2000] 1 SLR (R) 943, [16]; *Re Joseph David QC*, [57].

[117] The author is grateful to Douglas Chi for helpful discussions on this point.

stage; the earlier and greater the involvement, the better the chances of the application succeeding. The court will also be more sympathetic to admission if more than one local counsel (including possibly a Senior Counsel) are instructed in the case.[118]

There are sound reasons to mandate the presence of local counsel alongside any QC in a Singapore court. First, the former can provide the detailed knowledge of local law which cannot be expected of foreign counsel,[119] eg the civil procedure rules of the forum. This seems patently reasonable, and has the benign intention of safeguarding the public from any careless oversight.[120] If an English QC would have reason to be doubtful of a Singapore lawyer's knowledge of British legal peculiarities, then the reverse situation surely also holds true. It is a well-expressed concern; recall the old informal tradition of the Privy Council trying to arrange, where possible, for one sitting judge to be from the jurisdiction from where the immediate appeal originated. Some lawyers will also remember the Board's lack of knowledge of local conditions as the Singapore Government's justification for abolishing appeals thereto.[121]

Second, a requirement for accompanying local counsel would help develop an abler Singapore Bar; it is highly desirable that some of the expertise brought in by QCs should rub off on local lawyers.[122] There may even be a serendipitous effect, for if the Ministry of Law's intention is mainly for lawyers in smaller firms to avail themselves of foreign legal expertise,[123] then those who stand to gain the most from any transference of skills will also be these lawyers. A better outcome could not be hoped for—the strength of the Bar might gradually even out and result in better overall standards of legal representation for the general populace.

Factor 4-3: The court should generally not refuse an otherwise acceptable application for the admission of foreign counsel on the ground that the case does not merit a leader.

A case may be simple, but litigants desiring to win might still retain a Senior Counsel.[124] Assuming therefore that a QC's *ad hoc* admission *has otherwise been shown to be in the public interest*, the fact that the case

[118] *Re Flesch* QC, 516. An application is likely to be denied, however, if the foreign counsel who is seeking admission does not intend to act as a leader in the litigation (*Re Brewer III*, [26]–[32]).

[119] *Re Charles Gray* [1984] HKLR 367, 368–369; *Lakhan v Wu Wing Tat* [1987] 3 HKC 54, 57.

[120] *Re HW Shawcross*, 108.

[121] *Parliamentary Debates Singapore: Official Report*, vol 54, col 24 at 24–26 (7 Apr 1989) (Prof S Jayakumar); vol 62, col 388 at 389 (23 Feb 1994) (Prof S Jayakumar).

[122] The Hong Kong courts delightfully term this a "cross-fertilisation" of the legal professions (*Re Flesch* QC, 514; *Re Jonathan Crow* QC (unrep., HCMP 462/2012, [2012] HKEC 757) [20]).

[123] *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 38–39 (14 Feb 2012) (K Shanmugam).

[124] Ng Wai King, "Senior Counsels: The Road to Silk in Singapore" (1989) 10 *Singapore Law Review* 172, 191.

is one which a junior can adequately handle should not be prejudicial to the application[125] (this point of course has no relevance where the factor allegedly favouring admission is the case being of such difficulty or complexity that it warrants the admission of foreign counsel). Perhaps it seems odd that a straightforward case easily taken on by local junior counsel should nevertheless still be allowed to be argued by a QC. Quite apart from the excessiveness, the hearing of the application for admission might even be criticised for wasting judicial time. Moreover, would this not be a denial of the ability of junior lawyers in Singapore, as well as the court time needed for them to improve? It is suggested, however, that this factor serves a greater purpose which is not immediately apparent. That is to maintain public confidence in the legal system.

As the Minister for Law pointed out, it is ordinary human psychology for a litigant seeing its opponent in court with a Senior Counsel to want equivalent representation.[126] It may not be just mental solacement which justifies the desire, however, but a matter of fairness (or the perception of, at least).[127] Litigants should leave the courthouse feeling that their cases have been represented in the fullest possible way.[128] Because most clients are laypersons who cannot know every nuance of a suasive legal argument, they place implicit trust in their lawyers, who do. The more senior and accomplished the lawyer, the greater the client trusts that her case will be well represented. "Queen's Counsel" and "Senior Counsel" are hence not just titles, but shorthand for top-quality pleading. It may be unfair on junior lawyers that the general public expects even contests only when there is equal representation, but the need to maintain public confidence in the legal system means that it is for the litigant and her solicitor to judge whether a Queen's Counsel or Senior Counsel is appropriate in any case. An otherwise meritorious application for admission should

[125] *Re Simon Goldblatt QC*, 487.

[126] *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 39 (14 Feb 2012) (K Shanmugam). Note that there is no *right* to equality of arms in Singapore on current law, but *see* Professor Thio Li-ann's scrutiny of this issue (*Re Price Arthur Leolin QC* [1997] SGHC 157, [9]; *Re Millar Gavin James QC* [2008] 1 SLR (R) 297; Thio Li-ann, "Reading Rights Rightly: The *UDHR* and its Creeping Influence on the Development of Singapore Public Law" [2008] *Singapore Journal of Legal Studies* 264).

[127] *Re Collingwood Thompson QC*, [9].

[128] *See* eg Chan CJ's comments in Chan Sek Keong, "Response by The Honourable the Chief Justice Chan Sek Keong" (Welcome Reference for the Chief Justice, Singapore, 22 Apr 2006); Chan Sek Keong, "Keynote Address by The Honourable the Chief Justice Chan Sek Keong" (15th Subordinate Courts Workplan 2006/2007, Singapore, 18 May 2006).

therefore ordinarily not be denied simply because local *junior* counsel of appropriate skill was available.[129]

Factor 4-4: The court must be satisfied as to the foreign counsel's suitability for admission.

There are two prongs to this. First, s 15(1)(c) requires a foreign counsel to possess special qualifications or experience for the purpose of the case for which she is seeking admission. The reason for this is so that the foreign counsel can better assist the court in its deliberations, in furtherance of the administration of justice.[130] While this almost certainly means that a QC from the criminal Bar will not be admitted for a banking case, it should also not be assumed that an eminent QC practising at the commercial Bar for many years will be admitted for all types of financial disputes. Commercial law litigation has become greatly specialised to the extent that many barristers can claim to have *especially* deep knowledge of particular fields of law, and courts are therefore now likely to be more scrutinising of a QC's résumé to see if it demonstrates special qualifications or experience in the area of law relevant to the case at hand; certainly so where the case is alleged to be of such difficulty or complexity as to justify admission. It will be noted that the late Gerald Godfrey QC, despite his very impressive credentials, would have been denied admission to argue a banking case in Singapore because he did not show any *special* experience in banking law.[131] Pertinent factors showing such experience will likely include the type, importance and number of cases handled (either as counsel or judge), authorship of treatises, industry reviews, technical background and possibly recommendations from other senior advocates.[132] Lastly, there should be no bias against admitting younger QCs, since some may have handled more complex and important cases as a junior than other more senior QCs ever have.[133] The better approach may therefore be to look *in totality* at the various

[129] *Re Simon Goldblatt QC*, 487. As discussed in Factor 3-1, admission can potentially be denied on the ground that local *Senior Counsel* of appropriate skill were available. That this is not an absolute bar, however, is shown by the cases of *Re Beloff Michael Jacob QC* [2000] 1 SLR (R) 943 and *Re Sher Jules QC* [2002] 2 SLR (R) 377. Both these applications for admission were successful even though the litigants were already represented by local Senior Counsel; both are explainable on the ground that the other relevant factors there tended to show that admission was otherwise in the public interest.

[130] *Re Littlemore Stuart QC* [2002] 1 SLR (R) 198, [6].

[131] *Re Godfrey Gerald QC* [2003] 1 SLR (R) 461; affirmed in *Godfrey Gerald QC v UBS AG* [2003] 2 SLR (R) 306. *See* also *Re A Barrister* [2000] 2 HKLRD 752, 756.

[132] *See* eg *Re Fenwick QC* [1995] 1 SLR (R) 262, [9], [11]; *Re De Lacy Richard QC* [2003] 4 SLR (R) 23, [25]; *Re Joseph David QC* [2012] 1 SLR 791, [55]. A barrister may of course have more than one area of specialisation, and that fact should not be held against her application (*Re Reid James Robert QC* [1997] 1 SLR (R) 48, [8]).

[133] *See* eg *Re Fenwick QC*, [11].

factors mentioned above, the court then coming to a conclusion on the applicant's expertise (or lack thereof).

What if the applicant is not a QC or such other lawyer of equivalent standing, not due to a lack of expertise, but simply because the jurisdiction from which the applicant hails does not have an honour rank system? A recent case in Hong Kong threw up this interesting scenario.[134] The applicants there were qualified in various US States, but individual State bars in the United States do not have a Queen's Counsel (or other similar) distinction. Would US-qualified attorneys then ever be admitted in Singapore under s 15? Possibly not, since there is in the United States simply no "appointment of equivalent distinction" to a QC. Then again, if the requirement for such appointment is simply to set up a safeguard for quality,[135] *other* indicators apart from an honour rank could arguably suffice to show the requisite level of quality, such as industry reviews, for example. But there may yet be a further bar to admission—the applicant's need to have "special qualifications" under s 15(1)(c). *Re William Thomas Jacks* decided that these special qualifications were unlikely to be possessed by a US-qualified attorney seeking to argue matters governed by UK-derived common law (and not US common law).[136] This decision appears, rightly or wrongly, to assume an almost unbridgeable gulf between common law in the United Kingdom and in the United States. It is difficult not to wonder though whether their differences are in fact so great as to compel a court to dismiss out of hand a US attorney's application. As one great common law tradition speaks to and informs the other, so too it may be better to individually examine in every such application the US attorney's credentials and qualifications.

Second, an applicant QC must also be deserving of the privilege of being admitted as an advocate and solicitor of the Supreme Court of Singapore. In *Re Littlemore Stuart QC*, the late Lai Kew Chai J laid down two additional conditions of any successful application: the QC's reputation and conduct must show that she will be "responsible, honourable, courteous and respectful" of the Judiciary, and she should "never scandalise, disparage or insult" the judges and the Judiciary.[137] These are judge-made criteria, not to be found in the statute book. But it is surely correct that *all* lawyers admitted to practise—including foreign lawyers—should behave in a manner becoming of an officer

[134] *Re Brewer III.*

[135] *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 37 (14 Feb 2012) (K Shanmugam).

[136] *Re William Thomas Jacks* [1989] 1 MLJ 28. This Bruneian decision may be of some persuasiveness because the legislation discussed therein is *in pari materia* with s 15(1).

[137] *Re Littlemore Stuart QC* [2002] 1 SLR (R) 198, [5].

of the court.[138] It would decidedly not be in the public interest to allow a foreign advocate to plead in a court on whose independence she had previously cast aspersions, for this would mire in impossible doubt the question whether she was fully assisting (or undermining) the court.[139]

Factor 4-5: The same considerations should generally apply to all hearings, whether final or interlocutory.

The determination of whether foreign counsel is to be admitted in the public interest should generally be independent of any consideration of the stage of litigation which the litigant is at.[140] For example, the predicament of unequal representation faced by the litigant against the large bank or corporation does not lessen merely because the hearing is an interlocutory one. It should also not be thought that interlocutory hearings are inherently less important than final hearings; a litigant with an ill-prepared lawyer may well lose the entire case to the opponent's tactical manoeuvres in these opening battlegrounds.[141] Indeed, the Singapore Court of Appeal noted that QCs may be admitted solely for interlocutory proceedings in appropriate circumstances,[142] and it is respectfully suggested that one of those circumstances may be where the litigant is unable to engage a local Senior Counsel in a suit against a large bank or corporation. Perhaps QCs will be admitted less often for individual interlocutory matters, but that is simply because they normally raise less complicated issues than do final hearings; it is important to realise that there are not two separate admission standards for final and interlocutory proceedings.

This leads to the next significant point: just because a QC's application should be given the same consideration regardless of the stage of litigation does *not* mean that admission for one stage automatically guarantees admission at another stage of the same case.[143] For example, a court might

[138] *Ibid.*, [13]. Foreign counsel admitted to practise under s 15(1) of the Legal Profession Act are subject to the same professional conduct rules as any other advocate and solicitor with a practising certificate in Singapore (Legal Profession (Professional Conduct) Rules, r 2(1); read with Legal Profession Act, s 15(8)).

[139] See also Tan Yock Lin, *Singapore Academy of Law Annual Review of Singapore Cases* (2002) at para 18.10.

[140] *Re Millar Gavin James QC* [2008] 1 SLR (R) 297, [45]; *Re Mostyn QC* (unrep., HCMP 3552/2003, [2003] HKLRD (Yrbk) 561) [10]; *Re Pannick QC* [2004] 1 HKLRD 950, [18]. *Contra Re Oliver David Keightley Rideal QC* [1992] 1 SLR (R) 961, [24].

[141] See also Tan Yock Lin, *Singapore Academy of Law Annual Review of Singapore Cases* (2008) at para 19.2.

[142] *Price Arthur Leolin v Attorney-General* [1992] 3 SLR (R) 113, [10]. The Court of Appeal based this conclusion on then s 21(6) of the Legal Profession Act (now s 15(10)).

[143] See eg *Re Gyles QC* [1996] 1 SLR (R) 871, [12]; *Re John Vandeleur Martin QC* (unrep., HCMP 31/2003, [2003] HKEC 53) [9].

find that an application for admission for the purpose of an appeal was premature until leave to appeal had actually been granted. It will therefore need to be specified in the QC's application the hearings for which she is seeking to be admitted. Nevertheless it has been said before that continuity of representation at different stages of litigation will normally be in the public interest, since it would be "unfair to deny a party the benefit of having the same counsel who has acted previously in the same case".[144]

It is noted finally that courts have diverged with respect to one particular type of proceeding: the application for leave to appeal. Singapore deems the admission of a QC to be unwarranted for such a routine matter, since the hearing is confined to identifying the issues to be argued on appeal and not involving argument of those issues themselves.[145] Courts in Hong Kong, however, admit QCs to argue such applications provided they are "substantial" ones and the QC can, by virtue of her expertise, make a significant contribution.[146] The position in Singapore is perhaps too categorical in barring the admission of QCs. There is obviously great significance for the parties in the outcome of the application for leave to appeal, and if it is shown to the court's satisfaction that no one else but a QC could conceivably make a difference, then admission might be within contemplation (only if also in the overall public interest, of course). More broadly, though, judges may find it greatly useful in the odd cases to allow QCs to elucidate on any intricate issues which are up for appeal. A discretionary approach might therefore be more suitable, although litigants on their part must then refrain from abusing the QC admissions system by repeatedly "trying their luck".

Relaxing the QC Admissions Criteria: A Sufficient or Riskless Measure?

Would the increasingly frequent appearances of QCs in Singapore entail any risks, whether for the public or the legal profession there? Perhaps certain points should be briefly noted as courts in Singapore ready to face more applications for admission.

The first is a slightly brutal one: will QCs start amassing a high winning percentage against Singapore lawyers in court? This is not without contemplation, given that QCs (with their deeper commercial practices)

[144] *Re Robert Alun Jones QC* (unrep., HCMP 2446/2008, [2008] HKEC 2211) [9].
[145] *Price Arthur Leolin v Attorney-General* [1992] 3 SLR (R) 113, [7].
[146] *Re Pannick QC*, [18]; *Re Robert Alun Jones QC* (unrep., HCMP 2629/2006, [2007] HKEC 120) [12]; *Re John McDonnell QC*, [8].

can use their great experience to their clients' advantage. Despite the undoubted talent of the Singapore Bar, "[t]he life of the law has not been logic: it has been experience", to misquote Justice Holmes.[147] If such a scenario does play out, then rather than seeing this as an affront or threat to the Singapore Bar, litigators there should view this as a most valuable opportunity to learn from the best in the business, short of perhaps working at a barristers' set in London.[148] It was stated earlier that judges in Singapore have generally been effusive in their praise of the lawyers appearing before them; the reappearance of the English silks will provide a measure of exactly how far Singapore's advocates have come.

Second, an unintended consequence of the Ministry's solution may be to dent the standing of the Singaporean Senior Counsel. The present members of the Senior Counsel Forum rank among the very top of Singapore's legal community,[149] and some even have enviable regional reputations.[150] However, this strength will be tested in any case where foreign counsel is admitted; will the litigant whose opponent has retained a QC be content to plod on with the services of a local Senior Counsel?[151] There has been a divergence of views. On the one hand, the managing partner of one of Singapore's largest law firms (himself a Senior Counsel) believed that many Singaporean litigants would still favour the local Bar, with its own Senior Counsel providing depth and breadth of experience and expertise on Singapore law.[152] On the other hand, some traditional institutional clients (like the Monetary Authority of Singapore and members of the Association of Banks in Singapore) have welcomed the

[147] Oliver Wendell Holmes, Jr, *The Common Law* (Boston: Little, Brown, 1881), p 1.

[148] "We still need to grow the pool of Senior Counsel, *and a little competition [from the QCs] now and again will be good for them as well as the younger generation of litigation lawyers*" (Chan Sek Keong, "Remarks by Chief Justice Chan Sek Keong" (Dinner Hosted by the Judiciary for the Forum of Senior Counsel, Singapore, 18 May 2012) (emphasis added)).

[149] The Forum is an informal group in Singapore whose only members are Senior Counsel. To understand more about the Forum, *see* Chan Sek Keong, "Opening Remarks by Chief Justice Chan Sek Keong" (Dinner for the Judiciary and the Forum of Senior Counsel, Singapore, 9 May 2008).

[150] For example, Michael Hwang SC is the current Chief Justice of the Dubai International Financial Centre Courts. Davinder Singh SC, meanwhile, appeared recently in 2011 for the Bruneian Attorney-General in the Court of Appeal of Brunei.

[151] Assuming that a legitimate ground for QC admission exists and the applicant satisfies the balancing test, it is possible for each of the opposing parties to be represented by a QC (*see* eg *Re Beloff Michael Jacob* QC [2000] 1 SLR (R) 943 (allowing both sides to engage QCs in sufficiently difficult and complex case)). The most recent occurrence of this in Singapore was in July 2012, when David Joseph QC and Toby Landau QC locked horns in the High Court (Anita Gabriel, "Asian czars face off in High Court", *The Straits Times*, 23 July 2012).

[152] Lee Eng Beng SC, quoted in K. C. Vijayan, "Views sought on Bill to ease entry of QCs", *The Straits Times*, 7 December 2011.

lower threshold for admission of QCs.[153] It is unclear if these institutional clients are glad because other litigants will be able to procure foreign counsel more easily, thus leading to an increase in investor confidence, or whether because they *themselves* are looking to engage foreign counsel more frequently. No matter which scenario, however, if it turns out that a movement away from local representation is forming, one can foresee the courts placing greater weight on the public interest of maintaining a strong and independent local Bar, consequently restricting QC admissions to only in very limited situations. While the Minister for Law expressed confidence that a more liberal approach to QC admission would benefit not only the interests of the financial services industry but also those of Singaporeans as a whole,[154] it is unlikely that the Senior Counsel rank would be allowed to fade into a euphemism for second-class advocate.[155] Chan CJ warned, after all, that QCs would not be admitted "simply because a litigant can afford to pay. We do not want ... to impede the nurturing of our own Senior Counsel".[156]

Third, QCs often charge substantial fees. Disbursements for airfares, meals and accommodation all contribute to a foreign counsel's bill, which could end up equalling or exceeding those of local counsel.[157] The Minister for Law fairly recognised that relaxing the admission of QCs could not ameliorate the problem of cost,[158] but this solution in the circumstances was probably believed to be preferable in terms of its substantive effect and procedural immediacy. It however continues to leave by the wayside those litigants who cannot engage top-quality local representation by reason of the no-conflict rule, but who also cannot afford foreign counsel. As such, continuing attempts should be made to find *other* solutions which avoid the potentially prohibitive costs associated with hiring a QC.[159] This may necessitate an introspective look at the legal system to decide if certain (difficult) changes need to be made for the betterment of justice. It is recalled that the liberalised

[153] *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 38–39 (14 Feb 2012) (K Shanmugam); K. C. Vijayan, "Concern over Bill on elite lawyers", *The Straits Times*, 6 January 2012.

[154] *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 40 (14 Feb 2012) (K Shanmugam).

[155] See the sentiments expressed in "The Leading Questions: An Interview with the Senior Counsel Selection Committee" (Jan–June 2008) *Inter Se: Singapore Academy of Law* 30 at 31.

[156] Chan Sek Keong, "Response of Chief Justice Chan Sek Keong" (Opening of the Legal Year 2012, Singapore, 6 Jan 2012).

[157] K. C. Vijayan, "QC's fees comparable to Senior Counsel", *The Straits Times*, 30 January 2012.

[158] *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 39 (14 Feb 2012) (K Shanmugam).

[159] For a general discussion on the cost of justice being potentially prohibitive to the ordinary Singaporean, *see* Singapore, "Report of the Committee to Develop the Singapore Legal Sector" (Sept 2007) at paras 3.15–3.28.

scheme for *ad hoc* admission of QCs had as its impetus this satisfying enquiry:

> "And the question … is not so much whether this Amendment benefits or is to the detriment of a small segment of lawyers. The question is, for the man in the street, the litigant, is this beneficial? For the ordinary Singaporean, is this beneficial?"[160]

One last matter should be noted. Applicant QCs who have not yet been admitted must take care not to fall afoul of s 33 of the Legal Profession Act, which criminalises any unauthorised practice of law. But the position is rather unclear. Judges in Singapore have previously expressed the view that QCs who are not admitted remain free to provide out-of-court advice to the client (or her counsel) on litigation in Singapore.[161] Against this is Professor Tan's opinion that this is arguably an unauthorised practice of law, since the giving of legal advice in connection with litigation is the act of an advocate and solicitor, and therefore caught by s 33.[162] *This is no mere academic squabble*; applicants may wish to note the Chief Justice of Hong Kong's readiness in pursuing this issue.[163] If indeed a s 33 action is ever brought against a QC in Singapore, it is uncertain whether the aforementioned judicial statements there may not prove too slender a reed on which to base a defence, especially since there was no consideration of s 33 (or its predecessor provisions) in those cases. This is not the only undecided point. In the first place, whether advice is given in connection with litigation proceedings will not always be easy to determine—what if, for example, the QC is merely making "suggestions" in the abstract on certain lines of arguments which might be pursued, or on the strength of the arguments to be proffered? Also, would the simple expedient of inserting a sentence "In this opinion I advise only on the position under English law …" serve invariably to

[160] *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 38 (14 Feb 2012) (K Shanmugam). Michael Hwang SC put it even more simply: *What does the client want or need?* (Michael Hwang, "Legal Services in the 1990s" (1990) 2 *Singapore Academy of Law Journal* 168, 174).

[161] *See* eg *Re Oliver David Keightley Rideal* QC [1992] 1 SLR (R) 961, [24]; *Re Gyles* QC [1996] 1 SLR (R) 871, [5], [10]; *Re Caplan Jonathan Michael* QC [2006] SGHC 125, [15]; *Re Platts-Mills Mark Fortescue* QC [2006] 1 SLR (R) 510, [19]; *Re Millar Gavin James* QC [2008] 1 SLR (R) 297, [37]. The first QC to have been registered as a foreign lawyer in Singapore, Stuart Isaacs QC, states that he provides services including the "drafting of submissions and provid[ing] detailed advice on the merits of the case" (Stuart Isaacs QC, cited in Rajan Chettiar, "The Singapore QC" *Singapore Law Gazette*, October 2008, p 34).

[162] Tan Yock Lin, *Singapore Academy of Law Annual Review of Singapore Cases* (2008) at para 19.4. *See* also *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd* [1988] 1 SLR (R) 281, [20].

[163] While still Chief Judge of the High Court, in *Re Pickup* QC, [14]–[20].

extinguish any liability the QC might otherwise incur? Whatever the long-standing practice as obtains at present, it may be welcome to have these (and other) questions answered in order to clarify the QC's proper advisory role in local litigation proceedings.

In conclusion, making it easier for QCs to gain rights of audience in the Singapore courts is a bold solution to the inequality of arms problem, and its success depends heavily on the judges who will set the benchmark for *ad hoc* admission. Difficult balancing exercises will have to be undertaken in the knowledge that a case could effectively be won or lost, not on its merits, but on whether foreign counsel was admitted. In this we place our trust in the judges, as we should.[164] It must be recognised, however, that the Ministry of Law's attempt falls short in some places. But in all fairness nobody ever said it was to be a complete solution.

Other Solutions

If liberalising the *ad hoc* admission of QCs is an insufficient measure, what else might promote greater equality of arms in disputes against banks and large corporations? Six suggestions are made to facilitate greater discussion, and they fall into two broad categories: policy- and firm-oriented measures. But they do not all claim to be worthy proposals which should be ushered immediately into the pipeline, nor are they intended to be substitutive of the Ministry of Law's solution.

Policy-Oriented Measures

Encourage alternative dispute resolution (ADR)

One way to minimise the advantages large financial and corporate institutions have in court over their "smaller-sized" opponents is to take that dispute out of court altogether. The effects of superior preparation and argumentation are most strongly felt in the formal atmosphere of the courtroom (after all the judge is required to note the party with the best arguments), but resorting to extra-judicial methods to settle their disputes could then lead *other* factors to inform their ultimate resolution. For example, a settlement might be more easily reached (attractive for reducing both parties' legal fees) or it could be that an extra-judicial tribunal, operating in a less formal environment than a courtroom,

[164] Chan Sek Keong, "Remarks by Chief Justice Chan Sek Keong" (Dinner Hosted by the Judiciary for the Forum of Senior Counsel, Singapore, 18 May 2012).

would be geared more towards the amicable resolution of the dispute (attractive for preserving professional and business relationships). It is also not forgotten that *in camera* proceedings may benefit the reputations of all the parties concerned. Admittedly, though, eschewing courtroom litigation requires the consent of all the parties, and one side could well refuse (for tactical reasons) to submit to extra-judicial dispute resolution altogether. This is therefore not a perfect solution.

Singapore has, in recent years, actively promoted itself as a leading ADR centre—and the effort is reaping dividends, as witnessed by the increasing caseload at the Singapore International Arbitration Centre.[165] But the Government's encouragement of ADR surely also includes the promotion of fairer and more efficient resolutions of financial disputes, and this perhaps spurred the establishment of the Financial Industry Disputes Resolution Centre (FIDReC) in Singapore. That institution exists to mediate disputes between consumers and financial institutions. However, doubts have been raised over FIDReC's operational impartiality:

> "Some of the adjudicators are retired judges and Fidrec's web site shows that most who heard structured product cases are from big law firms... How many of these law firms have financial institutions as clients or potential clients? How many if any have excused themselves because of actual or potential conflicts? These key questions have never been addressed."[166]

These qualms must be assuaged if FIDReC is to become a viable and attractive alternative to litigation. Consumers would hardly be willing to escape the rigours of the courtroom only to meet in the mediation chamber an adjudicator of suspected partiality to the financial institution opposite the table.

Encourage more lawyers to specialise in litigation

Another way to ensure higher quality representation for those litigating against large financial houses and corporations is simply to increase the supply of litigators. Chan CJ presciently stated some years ago (while still Attorney-General) that "we should encourage certain individual lawyers to do nothing but advocacy".[167] Indeed, having more who choose to take up court work may make it probabilistically easier to find top-notch counsel who are not conflicted out in a commercial sense (as when their

[165] From 58 cases in 2000 to 198 cases in 2010.

[166] Larry Haverkamp, "Is FIDReC Fair?" Available at Singapore Business Review http://sbr.com.sg/financial-services/commentary/fidrec-fair.

[167] "In Conversation: An Interview with the Honourable Attorney-General, Mr Chan Sek Keong" (1993) 14 *Singapore Law Review* 1, 18.

firms refuse to act against corporate and bank clients to avoid jeopardising business relationships). It is less likely that a single bank would be able to use the no-conflict rule so expansively as to preclude most of these top advocates from acting against it.

Implementing this solution would not be easy, however. Already there have been concerns that fewer lawyers enter litigation practice in Singapore with each passing year, since many prefer corporate work instead.[168] Litigation, it seems, is losing its appeal. But even if somehow the trend is reversed and more lawyers begin taking on litigation work, the reality is that many of the best lawyers will still want to act for those who are willing to pay the most. Large financial and corporate institutions (with their cavernous pockets) will therefore undoubtedly continue to form the main clientele of the lawyering *crème de la crème*.

Liberalisation of the legal market, including allowing foreign firms to practise litigation

This solution again aims to increase the number of litigators. At present, Singapore has only partially liberalised its legal market and so foreign law firms and lawyers cannot engage in certain practices of law there, including litigation. The Government is clearly wary of the possible adverse consequences of immediately allowing all foreign firms and lawyers to practise Singapore law, resulting in liberalisation thus far being limited to a trickle of developments.[169]

However, it was not so long ago that Chan CJ suggested (while as Attorney-General) that the "case for [foreign] law firms being allowed to provide domestic law services may be justified if the domestic legal system is undeveloped or if its lawyers lack capability in its own laws".[170] These two justifications do not ring true in Singapore today, but one might make

[168] *See* eg Chan Sek Keong, "Chief Justice's Address" (Admission of Advocates and Solicitors, Singapore, 20 May 2006); Chan Sek Keong, "Speech by Chief Justice Chan Sek Keong" (Official launch of *Modern Advocacy: Perspectives from Singapore*, Singapore, 25 July 2008); Singapore, "Report of the Committee to Develop the Singapore Legal Sector" (Sept 2007) at paras 3.2–3.3.

[169] The Minister for Law recently disclosed that "there are many different approaches [to liberalisation]. We could have gone for a Big Bang approach and liberalised completely. But we started in 2000; this is 2012. And in a large measure, the profession continues to be protected. We have taken very, very incremental steps ... The reason why we took this incremental step-by-step approach is to give our law firms the opportunity to level up, tie up, bulk up, consolidate, increase their revenues and size so that they can compete, or create a framework which makes it easier for them to tie up with foreign firms on a reasonable basis. That has been our approach. At each juncture, when we change the law in this area, we have looked at our national imperatives and market needs while keeping as a key prerogative also the interest of the legal profession in Singapore. Can Singapore firms compete?" (*Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 42 (14 Feb 2012) (K Shanmugam)).

[170] Chan Sek Keong, "Globalising the Legal Profession" (13th Malaysian Law Conference, Kuala Lumpur, 18 Nov 2005).

the suggestion that a dearth of top-quality legal representation in certain types of commercial cases is a new and legitimate reason to introduce foreign lawyers—just as how the Ministry of Law lowered the barriers to *ad hoc* admission of QCs. Notably, the future possibility of allowing foreign firms to practise domestic litigation was expressly left open by the Rajah Committee.[171] But even with greater liberalisation, it remains uncertain whether the quantitative increase in litigators would lead directly to qualitatively better representation for people like Mrs Smith. The concerns are similar to those described in the preceding suggestion.

Firm-Oriented Measures

Split up the larger law firms or impose a cap on firm size

Achieving a more even spread of litigation talent among firms might call for either a cap on the number of lawyers in a firm or the division of the bigger law firms. Both these measures would increase the number of firms, and people like Mrs Smith would consequently be more likely to find a top lawyer not conflicted out of acting by her opponent, the powerful financial institution. There would of course be opposition from the bigger law firms, and one can foresee the main complaint being that of unacceptable market intervention. It might also be ignoring the advice of both the Minister for Law and the Chief Justice for law firms to build up their sizes in order to better compete regionally.[172] More importantly, however, the imposition of a split or cap only makes it harder, but not impossible, for financial and corporate giants to use the no-conflict rule to prevent top lawyers from acting against them. They might then simply engage more law firms for their everyday transactional work.

Cap number of Senior Counsel in any one firm

Better legal representation for those up against financial houses and large corporations may be achieved by limiting the number of Senior Counsel in any one firm. This is so that firms with more established litigation practices do not have a stranglehold over the availability of senior and better advocates. (The effect is similar to that of appointing more lawyers from smaller firms as Senior Counsel.) A restriction of this sort would reduce much of the incentive for financial and corporate institutions to

[171] Singapore, "Report of the Committee to Develop the Singapore Legal Sector" (Sept 2007) at para 7.54.

[172] Chan Sek Keong, "Keynote Address by the Attorney-General Mr Chan Sek Keong" (Law Society's Conference on "The Future of the Legal Profession", Singapore, 16 Feb 2006); *Parliamentary Debates Singapore: Official Report*, vol 88, col 26 at 42 (14 Feb 2012) (K Shanmugam).

retain a particular firm just to make sure that a cohort of "star" litigators would be conflicted out of acting against them in any future litigation.

It cannot be said that any particular firm in Singapore presently enjoys a quasi-monopoly over the availability of Senior Counsel (Table 2). Even so, it might be worth considering whether a numerical cap on Senior Counsel is warranted in the hope of increasing access to these senior advocates. Those firms priding themselves on a tradition of developing "homegrown" Senior Counsel may cry foul, but then they will also be resourceful enough to find other ways of standing out from the rest of the crowd.

Table 2: Distribution of Practising Senior Counsel in Singapore

Firm	No. of Senior Counsel
Drew & Napier	6
WongPartnership	5
Rajah & Tann	4
Allen & Gledhill	2
KhattarWong	2
Rodyk & Davidson	2
Tan Kok Quan Partnership	2
Tan Rajah & Cheah	2

Note: Law firms with one Senior Counsel are not included. As of 1 August 2012.

Encourage the development of specialist litigation firms

The reticence of the bigger law firms towards taking on court cases against large financial houses and corporations obviously leaves a significant void. Leaving aside for the moment the quality of lawyers who would fill it, a firm could potentially make this its niche area of practice, becoming *the* firm with a ringing reputation for pitching (and winning) regular battles in court against big business.

Certain firms in the United Kingdom have already made a name for themselves as being willing to take on the large banks and corporations.[173] They are able to do so without the risk of conflict *simply because they have a conscious desire to remain conflict-free* by not taking on everyday transactional work for the big institutions. Of course, the survival of these litigation boutiques depends on there being enough demand for their services—that is, a sufficiently high caseload—but given that the

[173] Cooke, Young & Keidan, Enyo Law, Kobre & Kim, Quinn Emanuel Urquhart & Sullivan, Signature Litigation, and Stewarts Law, to name but a few.

bigger law firms are unable or unwilling to act against their corporate and banking clients, a specialist litigation firm might well be able to profit from this niche area. There are already three well-known Singapore firms with a litigation-only practice model,[174] and this number could increase if more of Singapore's best lawyers with an entrepreneurial streak in them do decide to capitalise on the forced inaction of the bigger firms.

Conclusion

This article has not been able to cover every aspect of the inequality of arms problem in Singapore; for instance, there has been omitted from mention the solution of splitting the legal profession.[175] But the factual and normative discussions which have been made in these pages will perhaps have better exposed the extent of the problem and also provided some insight as to the possible judicial implementation of the Ministry of Law's solution. QC admissions in Singapore, while not quite becoming quotidian, will no doubt increase in the near future. The full ramifications of this for the legal industry and the general populace will be known in time; the success (or not) of this bold measure should then be a cause for reflection: can other measures improve further still the situation of those litigating against a large financial institution or corporation?

The tendency for changes in legal policies to affect a country's fortunes is very real, as seen by the triple fears in Singapore of decreasing foreign investment, frustration of the policy of promoting Singapore law as the regional *lex mercatoria*, and overseas businesspeople shunning the Singapore courts as a forum for dispute resolution. It is therefore vital that governments lay down policies which will not only further the cause of the ordinary person, but also ensure and not defeat the important goal of sustainable economic growth. Singapore's future continued success will depend in part on her ability to instil confidence in potential litigants that their claims can be adequately presented in court by highly competent advocates. For these reasons, constant thought needs to be given to ensuring better equality of representation in cases involving large banks or corporations. The work continues.

[174] Kenneth Tan Partnership, Michael Hwang Chambers, and Michael Khoo & Partners. These firms are each helmed by a Senior Counsel.

[175] "We must try to equalise this inequality of arms and to increase the number of good independent advocates who are not beholden to big business. Theoretically, one answer to that is a split bar. Then everyone has a chance and you can train up a good litigation Bar" (Interview of Chan Sek Keong, Chief Justice of Singapore, by Kwek Mean Luck in *Inter Se: Singapore Academy of Law* (May–June 2006) 10 at 14). The implications of this proposal are much too complex to dissect in this article, however, and deserve their own treatment another time.