Introduction

Within the time constraints assigned allow me to attempt a general survey of the topic under discussion. The foreign employee employed in Malaysia is referred to herein as 'non-citizens' or 'foreign employees' I propose to divide the subject into the common law jurisdiction and the statutory jurisdiction. Before we do that, I believe since the Malaysian system of democracy is one of constitutional supremacy, some relevant articles of the Federal Constitution should be noted to put the matter in its proper perspective.

Federal Constitution

Articles 6, 10 and 155 of the Constitution are relevant. Irrespective of nationalities, art 6 prohibits forced labour. On the other hand, art 10 provides for the right to form associations as regulated by law -- only for citizens of the country since by law only citizens can hold office in a trade union of workmen. Non-citizens can only be members of the trade union. However, in view of art 155 of the Constitution which bestows 'Commonwealth reciprocity', citizens of Commonwealth countries are entitled to (if legislated) similar rights or privileges which are provided for Malaysian citizens in that Commonwealth country.

The Common law access

English common law is expressly incorporated into Malaysian law by the Civil Law Act 1956 -- unless modified by local statute n2 .

This means that the Civil Courts in Malaysia have the jurisdiction to entertain legal action by non-citizens for breaches of the employment contract or any contract relating to supply of labour. This will of course be subject to Rules of Court -- for example relating to security for costs’ n3 .
Hence, the common law action of wrongful dismissal is also available to a non-citizen employee but only for meagre damages. The provision relating to access to local adjudication system for security of tenure cases will be discussed in the para (4)(f) below.

**The Statutory Access**

The relevant principal statutes relating to legislated matters pertaining to employment in Malaysia are as follows:

-- Wages Councils Act 1947
-- Weekly Holidays Act 1950
-- Holidays Act 1951
-- Workmen’s Compensation Act 1952
-- Employment Information Act 1953
-- Employment Act 1955
-- Trade Unions Act 1959
-- Children And Young Persons (Employment) Act 1966
-- Industrial Relations Act 1967
-- Factories & Machinery Act 1967
-- Employment (Restriction) Act 1968
-- Employees’ Social Security Act 1969
-- Private Employment Agencies Act 1981
-- Workers Minimum Standards of Housing and Amenities Act 1990
-- Employees Provident Fund Act 1991
-- Human Resources Development Act 1992
-- Occupational Safety and Health Act 1994
-- Labour Ordinance of Sabah (Cap 67) [as amended in 2005 vide Act A1238]
-- Labour Ordinance of Sarawak (Cap 76) [as amended in 2005-vide Act A1237]

I propose to briefly outline the nature of rights of non-citizens protected in the some of aforementioned statutes and the availability of access to local adjudication. I say ‘some’ because those statutes not dealt with below do not provide for ‘adjudication’ of individual or collective employment rights thereunder.

(a) Wages Councils Act 1947

The Act applies to both citizen and non-citizen employees. The Act regulates and provides, inter alia, minimum remuneration in the certain sectors like Ports, retail shops and for employees from the unorganized sector of the Hotel
industry. Employees in these sectors (including non-citizens) can benefit from 'Wages Council Orders' relating to, inter alia, minimum remuneration. However, application for such an order to the Human Resources Minister can only be made by either a hybrid organization consisting of a body of employees and employers or either of them n4. This collective right of access has implications when we examine the law relating to Trade Unions below. It is submitted that since the individual employee has no right to initiate an order, the benefit under the legislation is not very practical nor useful to those non-unionized foreign employees until such order is made and becomes enforceable.

However, once such an order is made, the individual employee has a right of access to enforce the provisions of the order under Part XV of the Employment Act 1955 discussed below.

(b) Workmen's Compensation Act 1952

This Act covers the whole of Malaysia (East and West). It does not distinguish between citizens and non-citizens. However, coverage of compensation for injury or death suffered in the course of employment is limited to those 'workman' whose monthly wages do not exceed RM500 n5. Section 8 of the Act provides compensation payable by the employer in case of injury, death, partial or total disablement including temporary and permanent disablement under specified conditions. There can be no contracting out of the Act (s 24) and coverage is excluded if the workman employee has recovered damages in a Civil Court for the same injury. The workman is also barred from seeking relief in the Civil Court if he has initiated a claim under the Act n6. The Act provides for individual employees to lodge a claim under the Act to the Director General of Labour of the Human Resources Ministry ('the DGU').

(c) Employment Act 1955

The Act applies to West Malaysia only n7. It covers all 'employees' irrespective of nationality earning monthly remuneration below RM1,500 or in occupations (irrespective of remuneration) specified in the First Schedule thereof. Notwithstanding the First Schedule, s 69B of the Act also enables employees earning between RM1,500 and RM5,000 per month to have access to the adjudicating mechanism in Part XV of the Act only for contractual dues. Amendments are planned to increase the remuneration threshold of RM1,500.

The Act is quite comprehensive in nature as it embodies some common law principles together with statutory modifications for the benefit of the 'sweated' category of employees. The areas covered include mode and time of payment of wages, deductions thereof, liability of contractors and principles for wages restriction on employment of women during specified hours and specified places, maternity benefits employment of children and young persons, procedure for termination of domestic servants n8 rest day, hours of work, holidays and other conditions (eg shift work, task work). Termination and lay off benefits, employment of foreign employees, and maintenance of Registers and inspection of the same by the Director General of Labour.

The Part (XIIB) of the Act relevant to our discussion should be surveyed. In August 1998 Part XIIB of the Act was introduced. That part requires employers of 'foreign employees' to notify the DGL of such recruitment. For this purpose, a permanent resident is not within the scope of 'foreign employee'. The part enables local employees to complain to the DGL on his discriminatory treatment vis-a-vis the foreign employee on terms and conditions of service, and termination including retrenchment.

Other than that, all employees -- both foreign and local, can access the adjudicating and enforcement mechanism under Part XV of the Act in respect of '... wages or any other payments in cash ....' due to such employee under his 'contract of service' or under the Act or under the Wages Council Act 1947 (discussed above). This access to the DGL's 'Labour Court' is a cheap and speedy remedy for both local and foreign employees to enforce their contractual and statutory rights under the said Acts.

Access is also provided for the employer sub-contractor against a contractor for labour for money due and any employer (including a principal employer) for (only) indemnity in lieu of notice of termination under s 13(1) of the Act
These ‘employees’ also have a right of access to the adjudication system under the Act for any disciplinary action carried out under s 14 of the Act n10.

However, under s 69A of the Act, the adjudication mechanism cannot be accessed if the same subject matter of the complaint is pending or decided under the Industrial Relations Act 1967. Section 86 of the Act preserves the right of an employee to opt to go to a civil court to ‘enforce his civil rights and remedies...’. He cannot resort to remedies both under the Act and the civil court. The Act provides for enforcement of any order by the DGL and or the employee. An appeal to the High Court is available to either aggrieved party n11.

The latest statistics available on claims instituted under the Employment Act 1955 and the Sabah & Sarawak Labour Ordinances are in the table below:

<table>
<thead>
<tr>
<th>LABOUR DEPARTMENT PENINSULAR MALAYSIA</th>
<th>Num. Indicator</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>2004</td>
</tr>
<tr>
<td>1. Employee Complaints</td>
<td>Against Employer (a) Non-compliance of Labour Laws</td>
<td>7,919</td>
</tr>
<tr>
<td></td>
<td>Against Employer (b) Non-compliance of Government Policies</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Against Employer (c) Unfair Labour Practices</td>
<td></td>
</tr>
<tr>
<td>2. Hearing of Claim in Labour Court (a) Claim Against Employer (b) Claim Against Employee</td>
<td></td>
<td>8,561</td>
</tr>
<tr>
<td>3. Prosecution Against Employer at Magistrate Court (a) EmployerProsecuted (b) Employer Found Guilty</td>
<td></td>
<td>15 4</td>
</tr>
<tr>
<td>4. Retrenchment of Workers (a) Workplace Involved</td>
<td></td>
<td>968 20,706</td>
</tr>
</tbody>
</table>
(b) Employees Retrenched

**LABOUR DEPARTMENT SABAH**

<table>
<thead>
<tr>
<th>Num.</th>
<th>Indicator</th>
<th>Number</th>
<th>2004 Jan- August 2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Labour Inspections</td>
<td>3,854</td>
<td>5902</td>
</tr>
<tr>
<td>2.</td>
<td>Employee Complaints</td>
<td>632 498</td>
<td>497 563</td>
</tr>
<tr>
<td>3.</td>
<td>Claims for Employee</td>
<td>587 565</td>
<td>505 414</td>
</tr>
<tr>
<td>4.</td>
<td>Claims for Employee Compensation</td>
<td>846 367</td>
<td>354177</td>
</tr>
<tr>
<td>5.</td>
<td>Application of License for Hiring Immigrant Workers</td>
<td>8,653 9,077</td>
<td>3797 5457</td>
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</tbody>
</table>

**LABOUR DEPARTMENT SARAWAK**

<table>
<thead>
<tr>
<th>Num.</th>
<th>Indicator</th>
<th>Number</th>
<th>2004 Jan - Sept 2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Statutory Inspection of Workplace</td>
<td>4,352</td>
<td>2,283</td>
</tr>
<tr>
<td>2.</td>
<td>Employee Complaints</td>
<td>633 86 111 57 7 51</td>
<td>396 37 118 13 19 93</td>
</tr>
</tbody>
</table>
3. Dispute cases (a) 12 928 12 198
   Reported (b)
   Settled
4. Retrenchment of 13 187 12 198
   Workera (a)
   Workplace Involved (b) Employees
   Retrenched


(d) Trade Unions Act 1959

This Act covers the whole of Malaysia. Except for office- bearers and employees of Trade Unions, there is no restriction on foreign non-citizen employees joining or participating in the activities of a registered Trade Union. Membership of a Trade Union has legal consequences when it comes to accessing the industrial adjudicating system under the Wages Council Act 1947 (above) and other statutes especially the Industrial Relations Act 1967 discussed in para (f) below. It is to be noted that both trade Unions of workers and employers can be registered under the 1959 Act.

(e) Children And Young Persons (Employment) Act 1966

The Act applies only to West Malaysia and does not exclude non-citizens working in West Malaysia. A 'child' (below 14 years of age) and a 'young' person' (14 to 16 years of age) are prohibited from being employed in certain types and places of employment. It also provides for certain maximum hours of work and between certain hours in a day or night

Section 16 of the Act incorporates by reference certain sections of the Employment Act 1955 as part of this Act. Since Part XV and XVI of the latter Act are also incorporated, I believe that both local and foreign children and young person have access to the adjudicating system under the Employment Act which was outlined earlier.

(f) Industrial Relations Act 1967

This Act is applicable to the whole of Malaysia. Again, it does not distinguish between citizens and foreign employees. Broadly speaking, the Act provides for ‘... the regulation of relations between employers and workman and their Trade Unions ...’

The policy of the Act can be summed up as voluntary cum compulsory system of regulation of employer-employee relations under the Act. The Malaysian pattern of Industrial relations embodied in the Industrial Relations Act 1967 can be traced in part to the Australian system currently housed in the Australian Workplace Relations Act 1996. Most rights created by the Act can be adjudicated upon in the Industrial Court. Access to the Court is after a filtration and conciliation process by the Director General of Industrial Relations (‘DGIR’) in the Ministry of Human Resources.

As I mentioned in para (d) above, foreign employees who are not members of a trade union have no access to the
collective representation or negotiation provisions of this Act. Examples are the right to collective bargaining and espousing trade disputes relating to terms and conditions of employment including exercising the only weapons in the armoury of Trade Unions (of employees) -- the right to take legal industrial action, including a legal strike. Hence, a foreign employee who is not a member of a local Trade Union is deprived of access to the local adjudication system on a wide range of matters. However non-union membership statues does not exclude him from the coverage of any collective Agreement or Award of the Industrial Court made under the Act. This is the effect of ss 17 and 32 of the Act.

Only Part VI of the Act relating to unjust or unfair dismissals are accessible by trade union and non-trade union member employees n13. In Mostek Malaysia Sdn Bhd Penana v Cik Aniza Yaacob & 763 Ors Penana (1986) 2 ILR 876, the Industrial Court had declined to exercise jurisdiction when the employing entity is located outside jurisdiction. This decision was upheld by the High Court. However, in Kathiravelu Ganesan & Anor v Koiasa Holdings Bhd [1997] 2 MLJ 685, the Federal Court held that the mere fact that a foreign workman was required by his local employer to carry out his duties in a foreign country would not by itself place his subsequent dismissal in the category of extra-territorial disputes and therefore outside jurisdiction.

I believe that the springboard for the enactment in 1967 of the predecessor to Part VI of the Act on security of tenure can be traced to ILO Recommendation 119 of 1963. That Recommendation imposes on member countries like Malaysia an obligation to protect the right to livelihood by 'national laws' and urges the remedy of 'reinstatement or adequate compensation'.

I therefore believe the recent proposal by various quarters n14 to limit access to adjudication on unjust or unfair dismissal by limiting such claims to employees earning below RM10,000 per month will amount to Malaysia ignoring and setting the clock back on its international obligations. The laudable aims of the ILO Recommendation 43 years ago is more relevant in this era of globalization and cross-border recruitment.

In fact, the Court of Appeal in the landmark decision in Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 has pointed out that the right to livelihood, ie not to be dismissed unjustly, is protected by arts 5 and 8 of the Federal Constitution. The said Articles refer to 'person' (including foreigners) and not 'citizens' as in some of the Articles of the said constitution n15. An example is art 9 thereof.

To access the Industrial Court, the employee is required to go through two barriers, one being that he must have a prima facie case on the merits for reference to the Industrial Court. Once inside the Industrial Court, the employee is required to establish the merits of his claim. For foreign employees, these barriers can be overwhelming. This is especially if the employee is facing a corporation with almost unlimited financial resources coupled with the right of either party to go beyond the Industrial Court to the superior Civil Courts and the consequent delay and costs involved n16.

(g) Employees' Social Security Act 1969

This landmark piece of legislation is applicable throughout Malaysia. It provides social security to an employee and his dependants’ n17 as a result of injury or death in employment. However, since 1993, foreign or non-citizen employees employed in the relevant industries are not protected by the Act. This is because of an exemption order made by the Minister for Human Resources pursuant to s 101 of the Act.

It is unfortunate that this important piece of legislation in Malaysia does not protect foreign employees employed locally. This is especially so for two reasons. Firstly, the scheme of the Act is basically modeled as an 'insurance policy' with graduated contributions by both the employee and employer. Secondly, many foreign employees are engaged in the risky sectors, eg the construction industry where the need for such coverage is really felt.

(h) Workers Minimum Standards of Housing and Amenities Act 1990
The Act, applicable throughout Malaysia prescribes minimum standards of Housing and nurseries for workers and their dependents. It requires employers to allot land for cultivation and grazing, to provide health, hospital and social amenities and matters incidental thereof. This applies where an employer chooses to provide housing.

Although the Act is applicable to all employees in a specified 'place of employment', it is common knowledge that this legislation is a 'white elephant' as far as foreign employees are concerned.

In Part V of the Act, enforcement of the impressive provisions of the Act are in the hands of the DGL and certain other Government servants. There is no provision for an employee to initiate a complaint. Complaints on breaches of the Act can only be initiated by the DGL and related officers after an inspection and investigation.

(i) Employees Provident Fund Act 1991

The Act ('EPF') is applicable to the whole of Malaysia and generally provides for social security after retirement from employment. Under the First Schedule of the Act, a foreign employee employed in Malaysia can by prior notice in writing given to the EPF Board and his employer participate in the Provident Fund Scheme set up under the Act n18.

The provisions of the Act provides for joint monthly contributions by both the employee and employer which will be accumulated with investment income earned. It will be payable to the employee after retirement from employment or upon leaving Malaysia permanently whichever comes earlier.

The Act can only be enforced by the EPF Board by prosecution n19. The Board can notwithstanding any other action also recover any contributions payable by either party as a civil debt. Since policing the Act is in the hands of the EPF Board, an aggrieved employee has no direct access to any adjudication or enforcement machinery under the Act.

(j) Occupational Safety and Health Act 1994

The Act applies throughout Malaysia. It does not exclude foreign employees in Malaysia. It provides for safety, health and welfare for employees (persons) at work and protection of third parties who may be affected by the said employees at work. The Act also imposes certain duties on employees. Enforcement is by inspection by officers of the Director General of Occupational Safety and Health and if necessary by service of an 'improvement' or 'probation' notice and prosecution.

Under s 59 of the Act, the provisions relating to statutory duties imposed on employers, employees and manufacturers etc under Parts IV, V and VI of the Act cannot form the basis for civil suit for breach of statutory duty. This excludes civil claims for breach of statutory duty under other legislation. Hence, in the absence of action by the officers under the Act, no access to the Civil Courts is available to all employees for any of the duties imposed by the Act.

(k) The Labour Ordinance of Sabah (Cap 67) and the Labour Ordinance of Sarawak 1949

This legislation which is a product of colonial times remained substantially untouched in the statute books until 2005. By Act A 1238 of 2005 and Act A1237 respectively, substantial changes were made to both legislation ('the 2005 amendments'). The aim was to bring provisions therein in line substantially -- (but not exactly) with the provisions of the Employment Act 1955 in West Malaysia which was discussed earlier. The Acts only apply to Sabah and Sarawak in respect of 'employees' as defined in the Schedule to the ordinance n20.

The aim of the original draftsman to provide minimum benefits for the mostly immigrant labour force in 1949 is still reflected in both ordinance. Hence, both ordinances do not recognize ordinary permanent place of domicile of the employee. However, a new chapter XIXA of both ordinances introduced by the 2005 amendments requires a person to obtain a license from the Director of Labour to employ a 'non-resident employee'. Otherwise, the provisions of this
chapter are similar to Part XIIB of the Employment Act 1955 discussed in para (c) above.

By virtue of a new Chapter IIA, the 2005 amendments now provide for direct access by an aggrieved employee and (in one case) by an employer to adjudication by the Director of Labour with appeals to the superior courts.

The provisions are substantially in pari materia with Part XV of the Employment Act 1955 discussed above. This includes s 7C (in Sarawak s 8c) which is also in pari materia with s 69B of the Employment Act 1955 also discussed above.

Conclusion

This general survey of access to local adjudication system by foreign employees in Malaysia has, I submit, revealed that in most cases, equal protection under the various relevant legislation like the Wages Council Act 1947 and the Industrial Relations Act 1967 bestowing rights in employment is accessible to the foreign employee. It will be more so especially in relation to the rights of collective agreements, bargaining and the attendant benefits if these employees are trade union members. Perhaps the disincentive to join such trade unions is the inability to hold office in trade unions and the provisions of ss 17 and 32 of the Industrial Relations Act 1967. These latter provisions extend the benefits of all negotiated collective agreements or awards by the Industrial Court to all workmen in the 'undertaking' to which the agreement relates. In other words, there is no 'closed shop' system in Malaysia. Hence, the foreign employee also benefits by the activities of registered trade unions in the relevant industry or occupation.

The only useful, cheap and speedy remedy for individual employees to enforce contractual and statutory rights under the Wages Council Act 1947 and Employment Act 1955 is under the latter Act. The said access does not include a claim for unfair or unjust dismissal. That remedy is only available under the Industrial Relations Act 1967 -- which may be unattractive due to the costs and delay involved.

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FOOTNOTES:


n2  See Part II Civil Law Act 1956 -- However, the common law of England relating to immovable property is excluded.

n3  See for example O 23 r (1)(a) Rules of the High Court 1980 and O 18 r 1(1)(a) of the Subordinate Court Rules 1980.

n4  Section 4 of the Wages Councils Act 1947.

n5  The method of calculating the wages is specified in s 9.

n6  See s 41 of the Employment Act 1955.

n7  The statutes providing for similar benefits in East Malaysia are dealt with in para (k) below.

n8  Domestic servants are excluded from the benefits under some of the sections specified in the First Schedule.
n9 Any order of the DGL carries with it interest at 8% pa (s 69 (3A)) of the Employment Act 1955.

n10 The claim must be made within 60 days from the date of notification of the disciplinary order.

n11 And thence to the Court of Appeal subject to certain conditions in the Courts of Judicature Act 1964.

n12 A child or young person in any agricultural undertaking, public entertainment or vessel is not affected by the latter restriction (s 6(2)).

n13 Termed 'workman' under the Act. A non-citizen is also a workman: see Assunta Hospital v Dr A Putt [1981] 1 MLJ 115.

n14 See The New Straits Times of 26 November 2004 -- 'Letters to the Editor' by SH Tan. See also the Press report attributed to the YB Minister of Human Resources in The New Straits Times and The Sunday Star of 20 November 2005 on proposals to amend the Industrial Relations Act 1967 (s 20).

n15 See further, the writer's paper, 'Security of Tenure in Employment -- Constitutional and Proprietary Rights of Employees' [1996] 3 MLJ cxviii.

n16 Section 30(3) of the Act which requires speedy disposal of cases by the Industrial Court therefore appears to be illusory.

n17 An 'employee' is defined in the First Schedule of the Act.

n18 In para 8 of the First Schedule, a foreign employee already participating in another approved scheme in Malaysia is not covered by this provision.

n19 Under s 63 of the Act, an employer who is found guilty of the offence of not remitting monthly contributions to the Board can also be ordered to make restitution of both contributions and income due.

n20 The scope spelt out in the Schedule is substantially similar to the schedule to the Employment Act 1955. For the remuneration threshold, an employee must be earning wages below RM2,500 per month.