CHARACTERIZATION IN SECTION 5 OF THE CIVIL LAW ACT

I. Introduction

SECTION 5[1] is justly famous. No less than five major articles[2] have discussed the problems that it creates and as many views canvassed. The principal difficulty concerns of course the first limb which says: "In all questions or issues which may hereafter arise … with respect to mercantile law generally". There is said to be a problem of issue characterization; *i.e.* how does one determine the issue or question arising? At what level of abstraction does one frame the issue?

Because no clear answer is forthcoming from the wording itself, section 5 has been much criticised.

II. Sir Thomas Braddell's Report

On one interpretation[3] of Sir Thomas Braddell's report which accompanied the bill enacting section 5, the purpose of the section was to render applicable in Singapore post-1826 English mercantile statutes. Being post-1826 statutes they could not be received by virtue of the Second Charter of Justice. But there is room for doubt. One wants to look carefully at that report in order to see that there is in fact much ambiguity in what was supposed to be accomplished by section 5. The relevant part is this:[4]

> "At present, cases involving Mercantile Law are, by usage not by written law, decided by our Court on the authority of reported cases decided in the Superior Courts in England. There are few

[1] The relevant part of section *5* reads: Subject to the provisions of this section, in all questions or issues which arise or which have to be decided in Singapore with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and life insurance, and with respect to mercantile law generally, the law with respect to those matters to be administered shall be the same as administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any law having force in Singapore.

[2] Soon and Phang, "Reception of English Commercial Law in Singapore — A Century of Uncertainty" in *The Common Law in Singapore and Malaysia,* A.J. Harding, (ed.), (1985); Chan Sek Keong, "The Civil Law Ordinance, s. 5(1) — A Reappraisal" [1961] M.L.J. Iviii, lix; G. W. Bartholomew, "The Commercial Law of Malaysia" [1964] M.L.J. Ixii; D.K..K. Chong, "Section 5 Thing-Um-A-Jig!" [1982] 1 M.L.J. c; R.H. Hickling, "Civil Law (Amendment No. 2) Act 1979 (No. 24), s. 5 of the Civil Law Act: Snark or Boojum?" (1979) 21 Mal.L.R. 351.

[3] Soon and Phang, "Reception of English Commercial Law in Singapore — A Century of Uncertainty" in *The Common Law in Singapore and Malaysia,* A.J. Harding (ed.), (1985), 33.

[4] See the Proceedings of the Legislative Council of the Straits Settlements (with Appendices) for 1878 for 15, 22, 25 and 29 Mar; 30 April; and 7 May; Appendix No. 48.

> statutory provisions for Mercantile law, nearly the whole body of the law is the result of the decisions of the Courts; now some of these decisions, no doubt, may depend wholly or partly for their force on English statute law, and as we have not all the Statutes in force, it has been considered advisable to adopt the Ceylon Ordinance, which puts our Court on the same footing as the Courts in England, and thus prevent questions as to the validity of Judgments of our Court, on the ground that they are not authorized by any law in force in the Colony. The matter is explained in a statement on the Indian Acts in force, made by me in Council on the 25th of March, page 7 of the Council Debates."

The first sentence says that "our Court" (in the singular) follows English authorities on mercantile law by usage and not by written law. The statement is unqualified. The fact that local cases are decided according to English authorities does not seem to be restricted to authorities which depend wholly or partly on English statute law. The natural reading of the statement would be that all local cases rest their validity on usage rather than written law.

But there are difficulties with the natural reading. We do not know whether Sir Thomas regarded mercantile law to be part of common law. Most probably he did for by the late 19th century mercantile law clearly had been absorbed into common law.[5] So he cannot be contrasting common law cases with mercantile law cases. He cannot be saying that common law cases would by written law (*i.e.* the Second Charter of Justice) be decided on English authorities but mercantile law cases are so decided only by usage. Also we cannot be certain that he subscribed to the so-called doctrine of continuing reception of common law; although most likely he did because at that time *Robins* v. *National Trust*[6] had yet to be decided and the theory ofjudicial precedent yet to be articulated. He cannot be suggesting therefore that post-1826 mercantile cases decided in England are at best merely highly persuasive whereas it is desirable that they should be made binding on the local court. In the light of these difficulties the natural reading would not make sense; so that the first statement might be seen as confined to local cases which follow English authorities in which statute law figures either wholly or partly.

The second sentence describes mercantile law as being a body of law in which there are few statutory provisions. It does not say that there are few statutory provisions in the Straits settlements; the statement of that occurs much later in this manner: "and as we have not all the Statutes in force". We can also see this from the words immediately following the first part of the second sentence. They obviously qualify the first part because they refer to the "Courts" (plural) which Sir Thomas uses consistently throughput to mean the Courts in England while reserving the singular expression "our Court" for the local court. It is after Sir Thomas has thus described the mercantile law that he states the reason for section 5 as follows: "now

[5] See *e.g.* T.E.Scrutton, "General Survey of the History of the Law Merchant", in 3 Selected Essays in Anglo-American Legal History, 7.

[6] [1927] A.C. 515, 519; *per* Viscount Dunedin: "… when an appellate Court in a colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong."

some of these decisions... may depend wholly or partly for their force on English Statute law, and as we have not all the Statutes in force, it has been considered advisable to adopt the Ceylon Ordinance..." From the ensuing reference to the Indian Acts we may gather that Sir Thomas admitted that some of the Indian Acts in force corresponded to the relevant English statutes;[7] but apparently it was hard to say definitively which Indian Acts were in force and which were not. The adoption of the Ceylon Ordinance would therefore render the whole exercise of determining which Indian Acts applied unnecessary and was from that point of view expedient. In the end all we can say with certainty is that section 5 was designed to preclude any future challenge[8] being made to a local case which in effect applies wholly or in part English statute law. Nowhere is the expression "mercantile statute" to be found. Nor does the context necessarily supply the missing word "mercantile". But to the contrary the words "wholly or partly" are apt to include authorities which depend on or involve statutes which though they are non-mercantile in character make substantial alterations to mercantile law.

If the purpose of section 5 were truly the narrow one of making mercantile statutes and only such statutes relevant, one wonders why Sir Thomas had not simply advocated a re-enactment of the list of mercantile statutes then in force in England. In that event English decisions on these statutes would for all practical purposes be binding on the local court and there could be no objection taken to following them.[9] Sir Thomas evidently thought that there were only a few statutory provisions in mercantile law and so there would have been little difficulty in re-enactment. Moreover re-enactment would have preserved to the local legislature the power to either adopt the latest legislative changes in England or drop them.

Furthermore, — and no doubt with the benefit of hindsight — the object of section 5 goes beyond conferring jurisdiction to the local court in effect to apply English statute law. A pre-1826 House of Lords decision on non-statutory mercantile law, being also a decision of common law, would by virtue of both the 1826 Charter and section 5 be binding on the local court. But supposing that a post-1826 House of Lords decision overrules the earlier, that post-1826 decision would merely be highly persuasive by virtue of the Charter but would be binding under section 5. And likewise where there is a conflict between a post-1826 Privy Council decision and a House of Lords decision on non-statutory mercantile law. In such cases, section 5 has more than a perfunctory role to play. Being a later enactment than the Charter and addressed specifically to mercantile law matters, section 5 assures preeminence to the House of Lords decision. It was presumably the recognition of this that led the Privy Council to declare that the object of section 5 was "to secure uniformity of mercantile law in Singapore … and the United Kingdom."[10]

[7] *E.g.* Indian Act X of 1866 which extended the English Companies Act 1862 to India; this was one of the few of which it could be said with confidence that it had the force of law in Singapore.

[8] S. 5 cannot be read as a validating provision. It applies *in futuro*... in all questions or issues which may *hereafter arise.*

[9] Following the rule as to statutes *in pari materia;* see *e.g. de Lasala* v. *de Lasala* [1980] A.C. 546 (PC), *Trimble* v. *Hill* (1879) 5 App. Cas. 342 (PC)

[10] *Per* Lord Atkin in the *Sockalingam Chettiar* case (1933) S.S.L.R. 101,113.

III. The Seng Djit Hin Approach

For the foregoing reasons, we get little assistance from Sir Thomas Braddell's report even, if contrary to principles of statutory interpretation, we were permitted to look at it. The actual wording of section 5 remains our starting point. Nothing is clearer than that section 5 draws a distinction between issues or questions arising on the one hand and the law to be administered on the other. The mistake in *Ngo Bee Chan* v. *Chia Teck Kim*[11] was to ignore this distinction and to ask whether the Infants Relief Act 1874 was a mercantile statute. As the Privy Council held in *Seng Djit Hin* v. *Nagurdas Purshotumdas,* the first thing to be settled is: "Has a question or issue arisen in the Colony with respect to... mercantile law generally?... That being settled the section goes on to say not... that "the mercantile law" ... but that "the law" to be administered shall be the same as would be administered in England in the like case at the corresponding period."[12] In that case, the buyer, c.i.f., of certain cargo counterclaimed for damages for failure to deliver the rest of the cargo beyond 265 tons. The seller pleaded impossibility of performance as well as a defence based on the Defence of the Realm regulations 1915 and the Courts (Emergency Powers) Act 1917. Woodward J. dismissed the counterclaim but this judgment was reversed by the Court of Appeal. On appeal to the Privy Council, Woodward J.'s judgment was restored. Lord Dunedin, delivering the judgment of the Privy Council, held that the question there to be decided was a question as to the law of sale, which no one could gainsay was part of mercantile law. Therefore seeing that a question as to mercantile law arose, the whole law of England was to be administered and the regulations and statute of 1915 and 1917 could be pleaded.

The decision in *Seng Djit Hin* is eminently sound so far as the distinction between the issue raised and the law to be administered is concerned. That the whole law of England must be administered is implied by the nature of the proviso to section 5. The proviso states that nothing shall be taken to introduce any part of the law of England relating to tenure or conveyance and so on. The *Ngo Bee Chan* approach of "characterizing the statute" would leave no scope for the proviso. It might as well have been omitted altogether because it adds nothing to section 5. For if the statute was a property statute, it would not be a mercantile statute; and we should not need to say: but nothing shall be taken to introduce property statutes.

The *Seng Djit Hin* decision moreover cannot be faulted on the issue point. Some writers have expressed the view that that case stands for characterizing the issue arising on the basis of the transaction involved.[13] Such view does injustice to the judgment. Lord Dunedin actually says: "Now the question to be decided... is a question as to the law of sale".[14] Some earlier writers correctly interpret him as saying that one decides whether the cause of action raises an issue with respect to mercantile law[15] and an action based on short delivery

11 (1912) 2 M.C. 25.
12 [1923] A.C. 444, 448–449.
13 Soon and Phang, *supra.*
14 [1923]A.C. 444, 449.
15 *E.g.* [1935] M.L.J. lxxvi; [1935] M.L.J. xlviii.

pursuant to an international trade contract certainly does. In other words, for Lord Dunedin, the nature of the issue raised by way of defence is not the relevant issue to look at for purposes of section 5.

IV. The Irreconcilable Sockalingam Chettiar Approach

However as every student of section 5 knows the later case of *Shaik Sahied bin Abdullah Bajerai* v. *Sockalingam Chettiar*[16] comes up with an approach irreconcilable with the *Seng Djit Hin* decision.[17] The plaintiff moneylender sued the defendant for moneys loaned and interest due on a promissory note and dishonoured cheque. The defendant relied on section 6 of the Moneylenders Acts 1900–1927 and pleaded that the absence of a memorandum in writing of the contract of loan was fatal to the plaintiffs claim. Sproule A.C.J. rejected the defence. Both the Court of Appeal and the Privy Council affirmed his judgment but the latter by a different line of reasoning.

The crucial passage in Lord Atkin's judgment is this:-

> "Now it seems beyond dispute that the English Moneylenders Acts 1900–1927, form no part of the mercantile law. They contain saving clauses which make it plain that borrowing of money in the course of ordinary commercial transactions is excluded from their scope. If such a case as this arose in England between a professional moneylender and a landowner it would not, their lordships think, occur to any one that an issue raised under any of the sections of the Moneylenders Acts related to mercantile law. Indeed, it seemed to be admitted in argument that such a question only arose where the suit was on a negotiable instrument. So that if the moneylender took a mortgage with a covenant or took a promissory note, the same defence that he was unregistered would arise "with respect to mercantile law" in the second case but not in the former. The contention is untenable."

Why then is *Sockalingam Chettiar* irreconcilable with *Seng Djit Hin?* The irreconcilability, it is suggested, lies in the last three sentences of the passage quoted. It was seemingly admitted, following *Seng Djit Hin,* that a question with respect to mercantile law would only arise where the cause of action pertained to the promissory note but not with respect to the dishonoured cheque. This reference to the issue raised by the cause of action to the exclusion of the issue raised by way of defence was rejected by Lord Atkin as untenable. In other words Lord Atkin focuses on the issue in the defence, whereas Lord Dunedin looks at the issue in the cause of action.

In determining which is the correct interpretation of section 5, regard must be had to the purposes of section 5. Whatever may be proper in another case may not be proper for the purposes of section 5. Section 5 speaks of questions or issues (used no doubt synonymously) and these are clearly different from the claims and the allegations of fact; although the issues obviously will depend on the facts relied

[16] [1933] A.C. 342, [1933] S.S.L.R. 101.
[17] Only two writers, it seems, have argued that the two decisions are reconcilable. See [1935] M.L.J. Ixxvi, Ixxviii and Chan Sek Keong, [1961] M.L.J. Iviii, lix.
[18] [1933] A.C. 342, 345.

upon. Of vital significance is the fact that section 5 refers to all questions or issues arising (in the case — this may be implied) rather than to (say) the principal issue or question arising. Lord Atkin's approach achieves greater fidelity to the requirement of "all".

Moreover, there is in principle no material difference to be made between an issue raised by the cause of action and an issue raised by way of defence. In a proper case, depending on which party sues first, that which would otherwise have been raised by way of defence will be raised by the cause of action. It would be anomalous then to apply Lord Dunedin's approach. The results would be fortuitous if we did. Every issue must be tested and it is therefore not a question of reducing the issue to its most basic level.

Accepting then that section 5 must be tested with respect to every issue arising whether in the cause of action or in the defence, the remaining question for our purposes is: when is it true to say that an issue arises with respect to mercantile law? Modern writers take the view that the *Sockalingam Chettiar* case represents a return to statute characterization.[19] Although the basis of this view is not always clearly spelled out, it might be that it is this. If the statute sought to be applied is a non-mercantile statute then any issue raised under any section of the statute will not be an issue of mercantile law. The statute therefore will never be applicable in Singapore. Conversely, if the statute is a mercantile statute an issue raised under any section of that statute will by definition be a mercantile issue. The statute then will always be applicable in Singapore.

The objection to this interpretation is that it seems inconceivable that Lord Atkin should have gone to such lengths to distinguish the issue from the transaction, and then perfectly aware of the stigmatised *Ngo Bee Chan* approach, should have flown in the face of section 5 and given the castigated approach a new lease of life. Soon and Phang submit that although in effect that is what happens, nevertheless the effect is achieved by correct reasoning based on identification of the issue. This has a hint of unsatisfactoriness and it is suggested that in fact we have tended to misunderstand the thrust of Lord Atkin's judgment on this point.

We are here dealing with questions or issues arising under statute law. That is the case where the statute furnishes the source of the right or defence that is asserted or claimed such that the interpretation of

[19] Soon and Phang, *supra;* Walter Woon, "Section 5 of the Civil Law Act and the Applicability of English Commercial Law in Singapore", unpublished. Chan Sek Keong in "The Civil Law Ordinance, s. 5(1) — A Reappraisal" [1961] M.L.J. lviii, lix first drew attention to this so-called problem of "issue characterization". He attributed the problem to the erroneous notion that s. 5 had the effect of importing the English statute once it was decided that the statute applied. Once it is clear however that it is the issue which matters, importation ceases to be a problem; the difficulty then is that issues may be pleaded at various levels of abstraction. He then submitted that this might be overcome by reducing the issue to its lowest level of abstraction or that level of abstraction which will resolve the case or some material phase of it. G. W. Bartholomew in "The Commercial Law of Malaysia" [1964] M.L.J.lxii was not convinced that the rejection of the notion of importation really assisted in the interpretation of s. 5; submitting that the difficulty was not in the particular form of words employed but in the erroneous assumption underlying s. 5 that mercantile law was a clearly defined branch of law.

that statute will itself dispose of the claim or defence. The question or issue arising under the statute is one that derives its source from that statute directly. Moreover, that statute necessarily enters into the legal determination of the matter upon the facts stated. But, if say, in a breach of duty case, an issue is raised as to what is the scope of the duty and a statute must be looked at for this purpose, one need not necessarily conclude that an issue arises under the statute. Evidently then there is a real distinction between the issue arising and the statute; the statute may be mercantile but there may be no issue arising under it, although the interpretation of some of its provisions may be necessary. To this extent Soon and Phang are right to highlight the difference between *Ngo Bee Chan* and *Sockalingam Chettiar.*

But one must then go on to ask: is the issue with respect to mercantile law? Here it is incorrect to say that Lord Atkin's approach boils down to asking: Is the statute pleaded a mercantile statute? Lord Atkin asks: Does the statute form part of mercantile law? To ask whether a statute forms part of mercantile law is not the same thing as asking whether a statute is a mercantile statute. To ask whether a statute forms part of mercantile law is to recognize that although a statute may not be a mercantile statute, nevertheless one section (say) may be intended to apply to mercantile law cases. Such would be true of section 61 of the English Law of Property Act 1925 (LPA)[20] which provides that in all contracts "month" means calendar month and was held to apply in *Fresh Food and Refrigerating Co.* v. *Syme*[21] (significantly decided after the *Sockalingam Chettiar* case). Arguably another *e.g.* would be section 41 of the Matrimonial Proceedings and Property Act 1970 (MPPA) which abolishes the wife's agency of necessity.[22] That the Act is not mercantile in character need not necessarily preclude section 41 from forming part of mercantile law. The danger here is in reading the passage quoted from Lord Atkin's judgment too closely when it ought to be confined to the statute there in question; *i.e.* the Moneylenders Acts. Given that there were saving clauses in the Acts which excluded ordinary commercial transactions from their scope, no section of the Acts could possibly have any impact on, relevance to or affect commercial transactions. That being so, no section could raise any issue of mercantile law. Significantly also, Lord Atkin's explanation of *Seng Djit Hin* supports the proposition advanced. He said:[23]

> "In that case the claim arose on a contract for the sale of goods, and the question to be decided was whether the seller of goods cif was excused from delivery because his goods *(sic)* had been requisitioned by the Government. He pleaded the provisions of

[20] S. 61 provides that: In all deeds, contracts, wills, orders and other instruments executed, made or coming into operation after the commencement of this Act, unless the context otherwise requires:-

(a) "month" means calendar month;
(b) "Person" includes a corporation;
(c) The singular includes the plural and vice versa;
(d) The masculine includes the feminine and vice versa.

[21] [1935] M.L.J. 272.

[22] S. 41(1) says: Any rule of law or equity conferring on a wife authority, as agent of necessity of her husband, to pledge his credit or to borrow money on his credit is hereby abrogated.

[23] *Ibid,* at pp. 345 — 346.

> the Defence of the Realm regulations. The Board decided that such a question arose with respect to mercantile law. Temporarily they formed part of the provisions of the law relating to the sale of goods, clearly a branch of mercantile law."[24]

Clearly the Defence of the Realm regulations regarded as an entire piece of legislation were not mercantile regulations. Nevertheless, temporarily — because they were wartime regulations and not intended to be permanent — they could properly be seen as forming part of mercantile law because they were intended to affect mercantile law questions. So likewise there is no difficulty in seeing section 61 of the LPA and section 41 of the MPPA as forming part of the mercantile law.[25]

Two objections are possible. First, section 61 is more properly characterized as dealing with property law than mercantile law and section 41 as pertaining to matrimonial law than mercantile law. In logic perhaps that is true. Even so the existence of a possible overlap cannot be denied. Where that happens the correct subject matter characterization will have to be determined by policy and extra-logical grounds. Someone well says: "Logic (in this kind of problem) merely displays to us as of equivalent logical value all the possible classifications … which is best for a given purpose is a matter of judgment on higher grounds than logical ones."

Secondly, to seize upon one section such as section 61 and thus pluck it out of its context is exactly what Lord Atkin forbids to be done. In his language, it is not possible to import one section and dump the rest into the harbour.[26] This as David Chong has argued is not an insuperable objection because those remarks manifestly are not directed at individual sections clearly designed to be of general application or better, to apply to mercantile cases.[27]

V. Conclusion

The thrust of the arguments advanced in this paper has been to show that the *Sockalingam Chettiar* case is perfectly correctly decided and superior in approach to the *Seng Djit Hin* decision. The problem with section 5 which has earned its draftsman an exceeding bad name

[24] Lord Dunedin said: "That being settled the section goes on to say not, as the learned judges seem to assume, that 'the mercantile law' *(though indeed if it were so it would be doubtful if the result would be different)* but that 'the law' to be administered..." (emphasis added).

[25] I do not discuss the effect of the 1979 Amendments because my topic is characterization solely. Interesting questions may be posed whether the application of both s. 61 Law of Property Act 1925 and s. 41 Matrimonial Property and Proceedings Act 1970 is precluded by the presence of corresponding legislation, the Conveyancing and Law of Property Act and the Women's Charter respectively. The test of whether there is corresponding legislation is whether local legislation serves similar purposes as the English statute to be applied. A broad understanding of that test would preclude the application of s. 61 and s. 41. The requirement that the law to be administered must be the law with respect to those matters (*i.e.* mercantile matters) makes no difference to the application of s. 61 and s. 41 because if they form part of mercantile law than they will be the law with respect to mercantile matters.

[26] *Ibid,* at pp.346–347.

[27] See D.K.K. Chong, "Section 5 Thing-Um-A-Jig!" [1982] 1 M.L.J. c.

(unjustifiably) is not that issue characterization can occur at various levels of abstraction. Every issue arising must be tested for the purpose of the application, if any, of section 5. The real problem is to characterize the subject matter of the issue. The draftsman of section 5 is not to blame for this which is none other than a problem inherent in the very classification of laws. In the end, policy will dictate whether some section of general application in a non-mercantile statute forms part of the mercantile law so that an issue arising under it is with respect to mercantile law. Given that the uncontroversial purpose of section 5 is to secure uniformity of mercantile law in Singapore and the U.K., what policy can possibly prevent such section applying? Certainly not one hopes the fact that this makes it rather more burdensome on commercial lawyers downtown. And certainly not the argument that this will flood us with all manner of English legislation because we are really only concerned with those general provisions that have implications for or affect commercial transactions.

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