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FOREIGN LAW IN BILLS OF LADING

Pacific Electric Wire & Cable Co Ltd & Anor v *Neptune Orient Lines Ltd & Ors*[1]

This case is likely to be cited as an important authority for giving full effect to choice of law by parties in a contract. The result of the case is undoubtedly correct, but it raised a number of latent issues in conflict of laws which deserve greater consideration.

The first plaintiffs (the shipper) had shipped cargo from Taiwan to Singapore to the second plaintiffs (the consignee), a Singapore company. The defendants, another Singapore company, were the carrier. The cargo was delivered damaged, and the two plaintiffs sued. There was a combined transport bill of lading,[2] issued in Taiwan in the name of the defendants, and made out as a straight bill[3] to the consignee. Two clauses in the bill of lading were crucial to the court's decision. Clause 21 stated that the contract contained in or evidenced by the bill of lading was governed by the law of Singapore. Clause 3 contained the "paramount clause",[4] and two of the subclauses must be mentioned. First the bill of lading was subject to legislation enacted in the country of shipment *(ie,* Taiwan) which made either the Hague Rules or the Hague-Visby rules applicable. Secondly, where there is no such law, the carrier was to be entitled to all "privileges rights and immunities" contained in the Carriage of Goods by Sea Act 1924 (United Kingdom), which incorporated the Hague Rules.

The case came before Selvam JC in the High Court on a preliminary point of law: what law governed the claim between the relevant parties? The resolution of this question was crucial in determining the maximum amount of damages recoverable from the defendants, if they should be found liable.

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1 Suit No 527 of 1990, 29 May 1993, High Court, Selvam JC. This comment is based upon the transcript of the case, which has not been reported yet.

2 It was assumed that combined transport bills fell within the Bills of Lading Act 1855 (United Kingdom). Although some doubts remain, the assumption was probably correct: see *Rights of Suit in Respect of Carriage of Goods by Sea,* Law Commission 196, §2.49.

3 It was therefore not a document of title.

4 A paramount clause is an express statement in a bill of lading which specifies that the bill of lading is to have effect subject to either the Hague Rules or the Hague-Visby Rules.

Three possible ceilings were considered by the court. The plaintiffs contended that the limit to liability was set by the Hague-Visby Rules, which applied by virtue of the Singapore Carriage of Goods by Sea Act 1972.[5] Another possible limit could be set by the Hague Rules, which could be applicable by the subclauses in Clause 21 of the bill of lading. Even though the bill of lading containing the choice of Singapore law clause was issued by the defendants, the defendants raised Taiwanese law to cap their potential liability.

The judgment can be summarised into the following propositions:

(a) Applying section 5 of the Civil Law Act,[6] because the issue related to the law of carriage by sea, section 1 of the Bills of Lading Act 1855 (United Kingdom) applied to the facts.

By section 1 of the Act, the second plaintiffs, as the consignee of the bill of lading, assumed the rights and liabilities of the first plaintiffs as shipper, as against the carrier, upon the passing of property by consignment. Consequently, only the second plaintiffs could maintain an action against the defendants. They were also bound by the terms in the bill of lading.

(b) Applying section 5 of the Civil Law Act[7] for same reason, English conflict of laws rules applied to determine the respective rights and liabilities of the parties.

Applying English law, Selvam JC reviewed three milestone cases in choice of law in contract: *In Re Missouri Steamship Company,*[8] *The Torni,*[9] and *Vita Food Products Inc* v *Unus Shipping Co Ltd.*[10] He concluded that the formulation made by Lord Wright, sitting in the Privy Council in *Vita Food,* represented English law correctly. In his Honour's own words: "English law will recognise and give effect to an express choice of law by the parties to the contract provided the choice is bona fide and legal and provided there is no reason for avoiding the choice on the ground of public policy."[11] However, his Honour went on to point out that in the interests of international business, the parties' choice of law ought to be "supreme".[12]

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5 Cap 33, 1985 Rev Ed.

6 Cap 43, 1985 Rev Ed. This section provides for the continuing reception of English commercial law in Singapore. This section will be repealed, but not retrospectively, when the Application of English Law Bill (No 26 of 1993) is passed.

7 *Ibid.*

8 (1889) 42 Ch D 321.

9 [1932] P 78.

10 [1939] AC 277 (PC Nova Scotia) (hereafter *Vita Food).*

11 *Supra,* note 1, at 16D-E. The original passage was emphasised.

12 *Supra,* note 1, at 17A.

(c) Since the contracting parties had expressly selected Singapore law as the governing law, their rights were to be determined by this law. Far from being against public policy, it was in the interest of public policy to give effect to the choice of law.

(d) The Singapore Carriage of Goods by Sea Act,[13] which would have applied the Hague-Visby rules to the contract, was not applicable to the facts because the statute "has application only to cargo loaded in Singapore and no application to cargo discharged in Singapore."

(e) No evidence was adduced of the relevant Taiwanese law, so the first subclause in Clause 3 did not operate to incorporate either the Hague or Hague-Visby Rules.

(f) Because the first subclause was not satisfied, the alternative subclause in Clause 3 of the bill of lading operated to incorporate the Carriage of Goods by Sea Act 1924 (United Kingdom), which contained the Hague Rules. Thus the Hague Rules applied to set the limit to the defendant carrier's liability.

A. *Applying section 5 of the Civil Law Act,*[14] *because the issue relates to the law of carnage by sea, section 1 of the Bills of Lading Act 1855 (United Kingdom) applied to the facts of the case.*

English law was applied to the issue, by default as the *lex fori,* because no foreign law had been raised. Section 1 of the Bills of Lading Act 1855 (United Kingdom)[15] operates to create a statutory contract between the consignee or indorsee and the carrier on the terms of the bill of lading, when the property in the goods named in the bill passes to such a party by consignment or indorsement.[16] The basis upon which this Act applies raises complex questions of classification. While it is difficult to challenge its application in this case given the abundance of connections with Singapore, its applicability to facts with more foreign connections remains an open question.

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[13] *Supra,* note 5.

[14] *Supra,* note 6.

[15] This Act has been superseded by the Carriage of Goods by Sea Act 1992 (United Kingdom) with effect from 16 September 1992. The new Act does not define its conflictual scope either. The following discussion therefore applies equally to the new Act.

[16] The issue whether the property had in fact passed by way of the consignment, and not otherwise by contract, was not raised.

1. *Application of the lex fori*

If the results of cases[17] are anything to go by, then it might be said that section 1 of the Bills of Lading Act 1855 applies irrespective of the foreign connections of the case. The assumption is that the question of whether the holder of the bill of lading is a party to the contract is logically anterior to the consideration of the application of foreign law.[18] If this assumption is correct, then the Act must apply as *lex fori.* While the result is convenient,[19] it is not easy to find a principled justification.

(i) *Forum mandatory statute*

Theoretically, it is up to the legislator to inform the courts of the international purview of a statute. However, in most cases, as in the Bills of Lading Act 1855,[20] and its successor, the Carriage of Goods by Sea Act 1992,[21] the question is left open. It is usually impossible to divine a legislative intention in such cases, since Parliament obviously gave no thought to the matter, or thought it best to leave the matter to the courts. It is then left to judges to determine, according to conflict of laws principles, whether the Act should apply only as part of, or irrespective of, the governing law.

Ordinarily, statutes, like the common law, only apply as part of *lex causae.* However, a statute may reflect such a distinctive policy of the forum that it ought to override the governing law of the transaction. If a statute is meant to protect the public or a class thereof, by regulating certain activities (normally within the jurisdiction), the court is likely to

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[17] The leading cases in England have been applying the *lex fori* by default: *Sewell* v *Burdick* (1884) 10 App Cas 74; *The San Nicholas* [1976] 1 Lloyd's Rep 8. Singapore courts have also applied the Act without considering choice of law issues: *Bank of China* v *Brusgaard Kiosterud & Co* [1956] MLJ 724 (HC); *MV "Jag Shakti", Owners & Ors Interested* v *Cabbra Corp Pte Ltd* [1983] 1 MLJ 58 (CA).

[18] Typically, the court considers whether the party before the court is a party to the statutory contract by virtue of the Bills of Lading Act 1855, and then considers the question of the proper law of such a contract: see, *eg,* Lord Denning MR in *The San Nicholas* [1976] 1 Lloyd's Rep 8.

[19] However, the result of the case may then depend on which forum adjudicates the dispute.

[20] In *Sewell* v *Burdick* (1884) 10 App Cas 74, Earl of Selborne LC stated that the legislator had contemplated that the Act would apply to foreign transactions (at 85). However, this was in the context of defining the meaning of "property" under the Act, and further, the awareness of the potential conflict of laws issues does not necessarily imply that the Act was intended to apply to *any* foreign transaction (see *infra,* note 21).

[21] The Law Commissioners deliberately left the conflict of laws issue open: Beatson & Cooper, "Rights of Suit in Respect of Carriage of Goods by Sea" [1991] LMCLQ 196, 199.

enforce the statute even if the activities were governed by foreign law.[22] The harmonisation of maritime law has been accepted both in England[23] and Singapore[24] as strong enough a policy to justify the mandatory application of the respective Carriage of Goods by Sea Acts to override foreign *lex causae.* There should also be sufficient connection between the facts of the case and the forum to justify the application of its policies.[25]

It is not obvious that the Bills of Lading Act 1855 contains a distinctive policy of the forum that justifies extra-territorial application. All that is evident is a commercial policy to give the holder of a bill of lading a cause of action in contract. The Act appears to rank with the law of contract in the sense that it forms part of a framework to facilitate the conduct of commerce. For example, the Frustrated Contracts Act[26] was passed to make equitable adjustments between contracting parties as a result of the unsatisfactory state of the common law. Yet no one would suggest that it would apply except by way of *lex causae.*

Moreover, the Act applies regardless of where the relevant events occurred. Therefore in some cases the only connection between the forum and the facts may just be the fact that the plaintiff chose to sue in this forum. This argument, however, may be mitigated in two ways. First, the doctrine *of forum non conveniens* may be able to sieve out unconnected cases. Secondly, the courts may read an implied connection into the statute.

(ii) *Procedure*

The forum always applies its own procedure.[27] But there are two objections to this classification. First, it is an unnatural classification when the issue is one of substantive rights and liabilities. Secondly, a procedural classification could leave a lacuna in the law of Singapore.

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[22] *Skilling* v *Consolidated Hotels* [1979] 3 MLJ 2 and *Raymond Banham* v *Consolidated Hotels Ltd* [1976] 1 MLJ 5 (regulation of professional engineers working in the forum). See YL Tan, "A Case of Forum Illegality?" (1988) 30 Mal LR 420; *Boissevain* v *Weil* [1950] AC 327 (exchange control regulation): *English* v *Donnelly* [1958] SC 494 (regulation of hire-purchase contracts made in the forum). *Freehold Land Investments Ltd* v *Queensland Estates Ltd* (1970) 123 CLR 418 (regulation of real estate agents working in the forum), and *Kay's Leasing Corporation Pty Ltd* v *Fletcher* (1964) 116 CLR 124 (regulation of mortgages made in the forum – the statute would have applied but for the fact that the transaction fell outside its scope).

[23] *The Hollandia* [1983] AC 565.

[24] *The Epar* [1985] 2 MLJ 3.

[25] Kahn-Freund, *General Problems in Private International Law* (1976). See *supra,* notes 22, 23 and 24.

[26] Cap 115, 1985 Rev Ed. Unlike the Law Reform (Frustrated Contracts) Act 1943 (United Kingdom), the Singapore Act does not have an express provision confining the application of the Act to contracts governed by Singapore law.

[27] See, *eg, Leroux* v *Brown* (1852) 12 CB 801, in relation to the Statute of Frauds.

Section 5 of the Civil Law Act[28] does not import English procedural law.[29] Of course, it could be argued that "procedure" has different meanings depending on whether it appears in the context of conflict of laws or in the context of section 5. But it is submitted that the rationale for classification as "procedure" is the same for both. It is to preserve the manner the forum conducts its trials.

(iii) *Remedy*

The nature and extent of the remedy is a question for the *lex fori.*[30] A case will be dismissed if the court finds no forum remedy appropriate for the foreign right infringed.[31] Similarly, the *lex fori* can give a remedy which is unavailable under the *lex causae* for an infringement of a foreign right.[32] However, the question of the forum's remedies only arises when it is shown that there is some foreign right which has been infringed, which, under the *lex causae,* entitles the plaintiff to some remedy.[33] This classification does not avail the party who wants to argue for the application of the Act as a remedy, because it simply begs the question, what right under what foreign *lex causae* has been infringed.

2. *Choice of law*

No case has actually dealt with the issue of the applicability of section 1 of the Bills of Lading Act 1855 from a choice of law perspective. Classification as formation of contract is inappropriate, because the contending choice of law rules were developed on the basis of party autonomy,[34] asking

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[28] *Supra,* note 6.

[29] *K E Mohamed Sultan Maricar* v *The Prudential Assurance Co Ltd* [1940] SSLR 173 (SSCA).

[30] Cheshire & North, *Private International Law* (12th ed, 1992), at 91-92; Dicey and Morris, *Conflict of Laws* (11th ed, 1987), at 175-176.

[31] *Phrantzes* v *Argenti* [1960] 2 QB 19.

[32] *Baschet* v *London Illustrated Standard Co* [1900] 1 Ch 73.

[33] *McMillan* v *Canadian Northern Rlwy Co* [1923] AC 120 (PC).

[34] Putative proper law: *The Parouth* [1982] 2 Lloyd's Rep 351; *The Atlantic Emperor* [1989] 1 Lloyd's Rep 548. Dicey & Morris, *supra,* note 30, Rule 181; Cheshire & North, *Private International Law* (11th ed, 1987), at 474-477. The technique adopted by the English Court of Appeal takes disputed terms into account in determining the putative proper law. The narrow version of this doctrine, which discards all disputed terms in the contract (Garner, "Formation of International Contracts – Finding the Right Choice of Law Rule" (1989) 63 ALJ 751), is not helpful in an all or nothing dispute. The *lex fori:* Libling, "Formation of International Contracts" (1979) 42 MLR 169; Briggs, "The Formation of International Contracts" [1990] LMCLQ 192; *Oceanic Sun Line* v *Fay* (1988) 79 ALR 9 (High Court, Australia); *Mackender* v *Feldia* [1967] 2 QB 590; *The TS Havprins* [1983] 2 Lloyd's Rep 356 (on the ground of interpretation of Order 11). There is, however, no agreement, on how much of the *lex fori* to use.

the question of what law governs the question whether the parties have consented in such a way that legal consequences follow, an assumption inapplicable in the present context. The following are the more likely candidates:

(i) *Assignment of rights/assumption of liability*

Section 1 of the Bills of Lading Act 1855 performs two actions. First, the shipper's (indorser's) contractual rights against the carrier are assigned to the consignee (indorsee). In involuntary assignments, it is normally the *situs* of the debt (usually the residence of the debtor) that is relevant.[35] Second, the consignee (indorsee) becomes subject to the liabilities[36] under the original contract.[37] The closest categorisation known to the common law is the substitution of one debtor (in this case the second plaintiffs) for another (in this case the first plaintiffs). This question is governed by the proper law of the substitution, which, in the absence of agreement, is the personal law of the debtor, or the law of the place of residence or the place of business of the debtor. This choice of law rule was first suggested by Wolff,[38] and adopted by the Court of Appeal in *obiter dicta.*[39] It is an appropriate analogy for the instant issue because the primary concern of the rule is that the new debtor is not caught by surprise. Presumably the same law will govern the question of whether he ceases to be liable upon a further indorsement.

While this approach is attractive in its classical approach, in examining the substance of the transaction for its centre of gravity, it does have the undesirable effect of having one transaction potentially governed by two different laws. In the present case, both connecting factors pointed to Singapore law, but in another case the situation may not be so fortuitous. In chain sales, the liability of the intermediate and final assignees is governed respectively by the proper law of each assumption of liability. The series of assignments, however, has a constant connecting factor.[40]

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[35] Cheshire & North, *Private International Law* (12th ed, 1992), at 818.

[36] Selvam JC mentioned that the shipper ceases to be party to the contract *(supra,* note 1, at 7B-C). In English law, the shipper may continue to be liable under the Bills of Lading Act 1855: see *Rights of Suit in Respect of Carriage of Goods by Sea,* Law Commission 196, §2.37 and §3.23. Shippers clearly remain liable under the Carriage of Goods by Sea Act 1992, subject to the terms of the original contract: s 3(3).

[37] Under the Carriage of Goods by Sea Act 1992, further conditions have to be fulfilled before the liabilities attach, but they are not material to the choice of law analysis.

[38] Wolff, *Private International Law* (2nd ed, 1950), §441.

[39] *Re Railways of Havana, etc, Warehouses Ltd* [1960] Ch 52. It was adopted in the context of an involuntary substitution.

[40] Subject to a change of residence by the carriers.

It seems incongruous to sever rights from liabilities.[41] The Act should be applied to perform the entire operation or not at all. A partial solution in difficult cases may be to limit the application of the Act to the case where it achieves the effect of the entire operation, even if the other element of the operation has to be accomplished by the other applicable law.[42]

(ii) *Proper law of the transfer of the bill of lading*

The issue of the rights and liabilities of the holder of a bill of lading can be viewed as an incident of being such a holder, and therefore governed by the proper law of the transfer of the bill. On general principles, this may be (i) the place of acting[43] (*ie,* indorsement and/or delivery) on the principle of *locus regit actum,* which will coincide with (ii) the *lex situs* (viewing the bill as a chattel), or (iii) the law governing the original contract (as an issue of contractual rights and liabilities). Something can be said for (iii), which is that there should be one constant law which is evident on the face of the document to govern potentially multiple mutations of rights and liabilities in chain sales. This may not be fair to the indorsee,[44] but it may be justified on the basis of commercial expedience. Also, in some cases, the law governing the bill of lading may not be obvious on the face of the document.[45] Since consignee bills of lading are not transferable, some other contact point needs to be found for such bills. This could be the place where the goods are delivered, or the proper law in the bill of lading, since neither should take the parties by surprise.

(iii) *Common law analogies*

English courts have resorted to an implied contract in cases not covered by the Bills of Lading Act 1855. Where the consignee or indorsee presents the bill of lading to the carrier to take delivery of cargo on payment of freight, the law sometimes implies a contract incorporating the terms set

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[41] It is the intention of the Act that the benefit and burden be borne together: see *Sewell* v *Burdick, supra,* note 20, at 85-86.

[42] This is a question of statutory interpretation, but this process can take into account the effect of foreign laws. An example of this process can be found in another context in *Re Thom* (1987) 40 DLR (4th) 184.

[43] See Schmittoff, *A Textbook of the English Conflict of Laws* (2nd ed, 1948), at 196.

[44] Or the consignee, in the case of a consignee bill of lading.

[45] Eg, *The St Joseph* [1933] LI L Rep 180 and *The Elli 2* [1985] 1 Lloyd's Rep 107, where there was no express choice; *The Mariannina* [1983] 1 Lloyd's Rep 12, where the proper law could change.

out in the bill of lading.[46] Little assistance by way of analogy can be gained from this device as it also suffers from problems of classification. The question of the law governing the formation of this contract has never been satisfactorily addressed by the courts. It is theoretically an issue of formation of contract,[47] governed either by the *lex fori*[48] or the putative proper law.[49]

From a domestic point of view, there is some merit to the view that such a contract arises by operation of law, in the same way that some terms in a contract are implied by law.[50] If this is accepted as the correct view of the law, then the device may be, like the statutory contract, and the "special" contract between the shipper and carrier for the benefit of the consignee,[51] a contract that operates independently of parties' consent, not necessarily governed by the normal contract choice of law rules. It has been suggested the implied contract is a remedial device[52] of the forum, but it is a "remedy", only in the broad sense, to the problem of privity, in the same way that the Frustrated Contracts Act is a remedy to the problem of distributive injustice, and does not necessarily lead to a classification as remedy for conflictual purposes.[53]

B. *Applying section 5 of the Civil Law Act,*[54] *because the issue relates to the law of carnage by sea, the English rules of conflict of laws applied to determine the governing law in the case.*

It may be queried whether section 5 actually imports rules of private international law at all. Section 5 had previously been used in relation to the rules governing the exercise of judicial discretion in the context of

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[46] *Brandt* v *Liverpool, Brazil and River Plate SN Co* [1924] 1 KB 575. The scope of this doctrine remains uncertain.

[47] The necessity for proof of contractual intention was recently emphasised by the Court of Appeal in *The Aramis* [1989] 1 Lloyd's Rep 213.

[48] The *lex fori* approach is more consistent with authorities: *The Elli 2* [1985] 1 Lloyd's Rep 107, and *The St Joseph* [1933] LI LR 180. They are not, however, very strong authorities because the conflicts issue was not directly addressed.

[49] Even so, the issue is not necessarily governed by the choice of law in the bill of lading. See *The Elli 2* [1985] 1 Lloyd's LR 107; See also Langton J in *The Torni* [1932] P 27, 43.

[50] Treitel, "Bills of Lading and Implied Contracts" [1989] LMCLQ 162.

[51] This doctrine is not likely to be important today. In *The Albazero* [1976] 2 Lloyd's Rep 467, the House of Lords confined its operation to the cases where there is no contract between the carrier and the person who had sustained the actual loss. This is little different from a "contract implied by law".

[52] Reynolds, "The Significance of Tort in Claims in Respect of Carriage by Sea" [1986] LMCLQ 97, 102.

[53] The learned commentator appears to have left the point open: *ibid,* at 103.

[54] *Supra,* note 6.

stay of action.[55] This may not be totally consistent with the Straits Settlements Court of Appeal case which decided that section 5 did not apply to English procedure.[56] Choice of law rules are not the same as rules of jurisdiction as they do not regulate the conduct of proceedings. But neither are they substantive rules of law as such. They are determinative of what substantive rules to apply.

It is suggested that the better view is that section 5 does not apply to choice of law rules, for the following reasons:[57]

(a) It is submitted that the issue of which law applies to the bill of lading is not a question relating to the law of carriage by sea or to mercantile law.

It is an issue of *which* law of carriage by sea to apply. The ordinary meaning of "law of ... carriage by sea" in section 5 does not include private international law.

It is also submitted that the principles of choice of law are not part of "mercantile law" either. The meaning of "mercantile law" in section 5 is far from settled in Singapore. A functional meaning, taking mercantile law to be any law that is of importance to people engaged in trade and commerce, has been used before.[58] Conceivably, choice of law rules might be included in this definition. However, it is suggested that this definition is unhelpfully wide.[59]

In the historical sense mercantile law covered "the usages of merchants and traders in the different departments of trade ratified by the decisions of Courts of Law."[60] A cursory review of English legal history leads to the conclusion that choice of law rules were never considered part of mercantile law.[61] Mercantile law originated as the branch of law

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[55] *The Asian Plutus* [1990] 2 MLJ 449.

[56] *KE Mohamed Sultan Maricar* v *The Prudential Assurance Co Ltd, supra,* note 29.

[57] The position taken here does not preclude the possibility of English statutes being treated as forum mandatory statutes. Where s 5 applies, the applicable English statutes are treated as forum statutes. If they are mandatory, it is attributed to the principles of Singapore, and not English, private international law.

[58] Voule J in *Seng Djit Hin* v *Nagurdas Purshotumdas & Co* (1920) 14 SSLR 181, 209.

[59] See Soon & Phang, "Reception of English Commercial Law in Singapore – A Century of Uncertainty", in *The Common Law in Singapore and Malaysia* (AJ Harding ed, 1985), at 49. However, in modern times, it has the support of Karthigesu J in *Rai Bahadur Singh & Anor* v *Bank of India* [1993] 1 SLR 634, but it is a dubious authority because the decision made use of both meanings.

[60] Bucknill CJ in *Seng Djit Hin, supra,* note 58, at 200. Barrett-Lennard J gave a similar definition at 204.

[61] The following (somewhat simplified) discussion is based on a reading of the *Introduction* in Smith & Watt, *A Compendium of Mercantile Law* (12th ed, 1924), and Sacks, "Conflicts

administered by special courts as a kind of international law for special classes of cases. For as long as the mercantile law was thought of as the law of nations and administered by the courts which dealt with disputes relating to foreign trade, there was no need to develop choice of law rules. Later, mercantile law was administered as the custom of merchants to be proven as a fact. Mercantile law was still thought of as having an international character, so that the courts did not contend with the question of the appropriateness of applying the English common law in cases involving foreign elements. Finally, with some help from the great judge Lord Mansfield, it was integrated into the common law. It was during this last period that choice of law rules began to take root as a cohesive body of law, by which time, mercantile law had lost its distinctive meaning.

(b) The use of section 5 to import choice of law rules in contract is of limited utility.

English conflicts rules applicable to any contract made on and after 1 April 1991 are embodied in the Rome Convention, by virtue of the Contracts Applicable Law Act 1990 (United Kingdom). This legislation gives effect to an international convention to which Singapore is not a party, and therefore falls within the exception in section 5(2)(b)(i) of the Civil Law Act. There are limited exceptions where common law rules continue to apply in England.[62]

(c) The use of section 5 to import conflicts principles brings more uncertainty into the law.

If section 5 imports English conflicts law, then if the dispute relates to contract, the court must initially determine if the matter falls within the Rome Convention. If so, English courts would apply the Convention, and therefore Singapore law must be applied. If not, then English common law conflicts rules must apply. This adds another layer to the dispute.

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of Laws in the History of English Law", in *Law - A Century of Progress, 1835-1935* (1937), Vol III, at 342 *et seq.*

[62] Bills of lading do not fall within any of the exceptions. The only way to invoke the exception in the case of a bill of lading is to argue that it is a negotiable instrument, *and* that the dispute arises out of the negotiable character of such instrument (Art 1(2)(c)). By English law, bills of lading are not negotiable, but whether a document is negotiable or not depends on the law of the place where the alleged transfer by negotiation takes place, which is usually the *situs* of the instrument at the time of delivery: Dicey & Morris, *supra,* note 30, at 1306. Thus it is *theoretically* possible for the bill of lading to acquire a 'negotiable' character in a different country and fall within an exception to the Rome Convention. Choice of jurisdiction and arbitration clauses also fall outside the Convention: Art 1(2)(d).

Moreover, European law may be relevant to the question of the scope of the Rome Convention, so that lawyers and judges here would have to familiarise themselves with European approaches to statutory interpretation.

(d) A restrictive approach should be taken of the section.

In modern times, it is more appropriate to restrict rather than to expand the ambit of section 5. Section 5 is something of an anomaly, and the inertia that has thus far saved it from extinction stems from a fear of leaving gaps in the commercial law of Singapore. This fear is justified for statute law, but it is unfounded for judge-made law.

(e) Finally, using section 5 to import private international law unnecessarily hinders the flexibility of the subject.

It is not uncommon for local judges to disagree with English approaches. In *The Asian Plutus,*[63] Yong J (as he then was) refused to follow the English approach to exclusive jurisdiction clauses because his Honour felt that Singapore judges should not emulate the forum-preferring attitude of their English counterparts. Section 5(3)(a)[64] was thus invoked to modify the English approach. There is no reason why we should depart from English attitudes only when the circumstances are different under section 5(3)(a). It may simply be a case of disagreement over fundamental principles. It is submitted that it is far better to accept that rules of private international law were part of the common law received in 1826,[65] and modified according to local needs since then by local courts.

Selvam JC in the instant case thought the limitations to choice of law in *Vita Food*[66] were incongruous given the interests of the international business community. Assuming that the formulation in *Vita Food* is English law,[67] and that one disagrees with it because, say, one feels that other doctrines, *eg,* illegality, forum mandatory laws, and public policy in the exclusion of foreign law, are a sufficient safeguard, then one would be hard put to find relevant differing circumstances between England and

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[63] *Supra,* note 55.

[64] This section provides that English law may be modified and adapted according to the circumstances of Singapore.

[65] By virtue of the Second Charter of Justice dated 27 November 1826.

[66] *Supra,* note 10.

[67] No single case in England has applied the so-called exceptions. Technically it is not English law, since it is not the *ratio decidendi* of any English case. Several English judges have opined, though, that the choice of the parties is not conclusive: Upjohn J in *Re Helbert Wagg's Claim* [1956] Ch 323; Denning LJ in *Boissevain* v *Weil* [1949] 1 KB 482.

Singapore to justify a departure. It is better to apply English cases as persuasive authorities.

(Proposition C is unexceptional and no comment is made thereon.)

D. *The Singapore Carriage of Goods by Sea* Act,[68] *which would have incorporated the Hague-Visby Rules into the contract, was not applicable to the facts because the statute "has application only to cargo loaded in Singapore and no application to cargo discharged in Singapore."*

This statement[69] cannot be read beyond the context of the facts. Article X rule 1[70] of the Hague-Visby Rules extends the scope of application of the Act to situations[71] which were not applicable to the facts.

The issue of whether the Act could apply if the governing law had not been Singapore law did not arise. However, it was suggested *obiter* in the present case that the technique used in the Singapore Act allows parties to contract out of its application. With respect, two situations must be differentiated. If Singapore is the forum, then the parties *cannot* contract out of the Act.[72] If a foreign court is hearing the case,[73] then if the proper law is not Singapore law, the parties can contract out of the Singapore Act,[74] but they may be subject to a similar Act of the forum.

E. *No evidence was adduced of the relevant Taiwanese law, so the first subclause in Clause 3 did not operate to incorporate the Hague-Visby Rules or the Hague Rules.*

There is an apparent contradiction between this and the earlier part of the judgment where the learned judge said that foreign law is treated as fact

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[68] *Supra,* note 5.

[69] Presumably based on the wording of s 3 of the Act.

[70] S 5 of the Interpretation Act (Cap 1, 1985 Rev Ed) makes it clear that the schedule is part of the Act, and s 3 is subject to other provisions of the Act.

[71] (a) Where the bills of lading are issued in a contracting State, (b) where the carriage is from a port in a contracting State, and (c) where the contract incorporates the Rules or provides that it is subject to legislation in any country incorporating the Rules.

[72] This is the effect of *The Epar, supra,* note 24, applying the reasoning in *The Hollandia, supra,* note 23. The differences between the Singapore and English statutes were considered irrelevant by the Singapore court in *The Epar.* The contrary position was taken with respect to a statute *in pari materia* to the Singapore Act in *Vita Food, supra,* note 10.

[73] Assuming that it applies the same conflicts rules as Singapore.

[74] This is the effect of *Vita Food, supra,* note 10, and the case cited in the instant decision: *Chellaram & Co Ltd* v *China Ocean Shipping* [1989] 1 Lloyd's Rep 413. This position is independent of whether the Singapore court considers its Act to be mandatory (following *The Epar, supra,* note 24) or directory (following *Vita Food, supra,* note 10).

and, unless proven, is presumed to be the same as the *lex fori.* If the presumption were applied here, then Taiwanese law would be presumed to include the equivalent of the Carriage of Goods by Sea Act,[75] and therefore the contract would have been governed by the Hague-Visby Rules.

The contradiction is only apparent because the foreign law in this case is relevant merely as *datum,* and not as governing law. It is a pure question of fact which must be positively proven. If not, the fact simply does not exist.[76] For example, if the challenge to the enforcement of a contract is that there was an intention to commit an illegal act in a friendly foreign country, the law of that country not being the proper law, then the defendant must show affirmatively that the act contemplated was illegal by the law of that country.[77] The court will not consider whether the act would have been illegal if committed in the forum.[78]

F. *Because the first subclause was not satisfied, the Hague Rules were applicable to set the limit to the defendant carrier's liability, because they were part of the Carriage of Goods by Sea Act 1924 (United Kingdom) incorporated in the alternative subclause in Clause 3 of the bill of lading.*

The Hague Rules were not applicable as part of the governing law, but by incorporation. The Carriage of Goods by Sea Act 1924 (United Kingdom) had been superseded by the 1971 Act. This temporal factor is a crucial distinction between applying foreign law by incorporation, and by choice of law. While one cannot choose to be governed by a non-existent law, one can incorporate revoked law.[79]

Incorporation is really no more than a short-form for spelling out the terms of the contract. Two implications follow: First, the terms being incorporated must be affirmatively proved, because the foreign law is only

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[75] *Supra,* note 5.

[76] Evidence Act, Cap 97, 1990 Rev Ed, s 3.

[77] Recently, some judges have spoken of the place of performance as a "connecting factor" in testing the legality of a contract. See, *eg,* Staughton J in *Euro-Diam Ltd* v *Bathurst* [1990] 1 QB 1, and Rajah JC in *Overseas Union Bank Ltd* v *Chua Kok Kay & Anor* [1993] 1 SLR 686. This is misleading for several reasons. The doctrine of illegality is based on the public policy of the forum, not the laws of the foreign state: see *Regazzoni* v *KC Sethia* [1958] AC 301 (HL). The foreign law is relevant only as *datum* in the formulation of law made by the forum. Further, the effects of illegality are decided with reference to the forum, not the foreign law: see Diplock LJ in *Mackender* v *Feldia* [1967] 2 QB 590. The supposed absorption of supervening illegality into the doctrine of forum public policy (*Toprak* v *Finagrain* [1979] 2 Lloyd's Rep 98) does not alter the above analysis.

[78] *Florance* v *Hutchinson* (1891) 17 VLR 471.

[79] Similarly, changes in the law affect the proper law but not the incorporated law.

relevant as *datum.* There may, however, be room for the operation of judicial notice of notorious facts.[80] Secondly, as a general rule, the issue of incorporation is governed by the proper law of the contract. This was not expressed in the judgment, and there are no express authorities on the point, but logically it must be so.[81]

Conclusion

(a) The basis for the application of the Bills of Lading Act 1855 (United Kingdom) should be clarified. It is regrettable that the issue of the law relating to the rights and liabilities of a holder of a bill of lading was not raised and discussed in the present case. This would have been an original contribution by the courts of Singapore to choice of law jurisprudence. The resolution of this issue is even more relevant to the new Carriage of Goods by Sea Act 1992 (United Kingdom), because the new Act expands the scope of the old regime on two planes: (1) by removing the causal link between contract and property, and (2) by extending its purview beyond bills of lading.

(b) While the judgment should be lauded for its affirmation of the principle of party autonomy in choice of law for contracts, the use of section 5 to achieve this result is not the most appropriate method. It is submitted that section 5 does not import choice of law rules into Singapore.

(c) There is no presumption that foreign law is the same as the *lex fori* where the foreign law is relevant only as *datum* and not as governing law. It must be positively proven.

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[80] In *Abdul Ghani El Ajou* v *Dollar Land Holdings* (unreported, 12 June 1992, High Court, England) Millet J remarked *obiter* that the court cannot take judicial notice of foreign law, no matter how notorious. This is contrary to authority in England: see Dicey & Morris, *supra,* note 30, at 218, and the authorities cited therein. Presumably the court will take judicial notice of its own laws if a contract governed by foreign law incorporated the law of the forum.

[81] There is an exception when the question of governing law cannot be determined unless the issue of incorporation was first resolved. In *The Amazonia* [1990] 1 Lloyd's Rep 236, a bill of lading was issued in South Australia with one clause incorporating the Sea-Carriage of Goods Act 1924 (Australia), which made it mandatory for the bill of lading to be governed by the law in force at the place of shipment, and provided that any clauses inconsistent with the terms of the Act were null and void. The next clause chose English law as the proper law. The English Court of Appeal applied the *lexfori* to the question of incorporation and held that Australian law had been incorporated, and had the effect of nullifying the choice of English law clause.

(d) As a general rule, incorporation of foreign law in a contract is an issue governed by the proper law of the contract.

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