THE HAGUE RULES AND THE CARRIAGE OF GOODS BY SEA ACT, 1972: A CAVEAT

In this article, it is proposed to consider the status of the law in Singapore giving effect to the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924,[1] as amended by the Brussels Protocol, 1968.[2] It is not principally intended to examine the substantive provisions of this law.

BACKGROUND TO THE CONVENTION

At common law, a shipowner who received goods to be carried for reward, whether in a general or chartered ship, was held to be a virtual insurer of the cargo in the absence of any special agreement, and could only be excused for loss or damage to the goods if caused by act of God, King's enemies, inherent vice of the goods or general average.[3] It was, therefore, not surprising that by the nineteenth century carriers were contracting out of their common law responsibilities by insisting on the inclusion of an increasing number of exceptions in their contracts for their protection. There was good commercial sense in giving the carrier freedom to enlarge the list of common law exceptions. Thus freight rates would be lower than in cases where he had to carry the cargo at his own risk. On the other hand, if the carrier exempted himself from all liability whatsoever, the merchant had no guarantee that the carrier would do his best to ensure the safe arrival of his goods. There was therefore some merit in striking an even balance in the allocation of risks between the parties.

Where the contract of affreightment was in the form of a charterparty,[4] no substantial difficulties normally arose, since shipowner and charterer would have negotiated the terms of the document with full

[1] League of Nations, *Treaty Series,* Vol. 120, No. 2764, p. 157. See also N. Singh, *International Conventions of Merchant Shipping,* 2nd. ed., London: Stevens & Sons, 1973, Chap. 10. The Rules adopted under this Convention are popularly known as the "Hague Rules" because they were originally drafted at The Hague in 1921. The terms "Brussels Convention" and "Hague Rules" are sometimes used interchangeably to indicate those rules which were approved at the 1924 Conference. See *infra,* p. 87.

[2] United Nations, *Register of Texts of Conventions and Other Instruments Concerning International Trade Law,* Vol. II, 1973, p. 180 (hereafter referred to as "United Nations, *Register,* Vol. II").

[3] *Morse* v. *Slue* (1671) 1 Ventris 190, 238; *Liver Alkali Co.* v. *Johnson* (1874) L.R. 9 Ex. 338; *Nugent* v. *Smith* (1876) 1 C.P.D. 19, 423. There is some academic debate as to whether the shipowner's liability as stated above hinged on the finding that he was a "common carrier". For contrasting views, see Carver, *Carriage by Sea,* 12th ed., London: Stevens & Sons, 1971, paras. 2-7, and Scrutton, *Charter parties and Bills of Lading,* 18th ed., London: Sweet & Maxwell, 1974, Art. 102.

[4] The word "charterparty" is derived from medieval Latin, *carta partita,* an instrument written in duplicate on a single sheet and then divided by indented edges so that each part fitted the other. The expression is now used only for this particular kind of shipping document. See Scrutton, *op. cit.*, Art. 3, fn. 16.

knowledge before entering into a final agreement.[5] However, where a bill of lading[6] constituted the effective contract between carrier and shipper, different considerations prevailed. As the bill of lading was a document of title,[7] and negotiable in the wider sense of the word,[8] third parties acquiring it for valuable consideration would find themselves bound contractually[9] by its terms, notwithstanding the fact that they had no prior opportunity to read or object to the conditions of carriage.

As the volume of international trade increased before and after the First World War, problems arose because of the growing diversity in the terms of contract offered by carriers, and the need was felt for some standardization of terms. The American Harter Act, 1893 had taken the initiative in attempting to impose a uniform system of rights and responsibilities on carriers and shippers. In September, 1921, representatives at a meeting of the International Law Association held at The Hague formulated a set of rules known as the "Hague Rules 1921", which they recommended for international adoption. As it became clear that the Rules would have to be imposed by legislation rather than left to the discretion of shipowners whether to incorporate them contractually in their bills of lading, delegates at the Diplomatic Conference on Maritime Law held at Brussels in October, 1922 decided to submit the Rules (with some modifications) to their respective governments for legislative action. A Committee of the Conference further amended the Rules in October, 1923 and embodied them in a Draft Convention in the French language. The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (hereafter referred to as "the Convention"), the original text of which was also in French, was signed at Brussels on 25th August, 1924 by fourteen countries, differed slightly from the 1923 Draft Convention.[10] The purpose of the Convention was to establish fixed responsibilities and a certain minimum of liabilities on a carrier entering into a contract for the transport by sea of goods (as defined), where the contract was evidenced by a bill of lading or any similar document of title. To date some eighty countries have either ratified

[5] But other difficulties have now arisen with the continued application to charterparties of the principle of freedom of contract — see Report by the United Nations Conference on Trade and Development (UNCTAD) Secretarial on *Charterparties* (TD/B/C.4/ISL/13), 1974.

[6] Formerly "bill of loading". A bill of lading used to be by indenture, like a charterparty. See Report by the UNCTAD Secretariat on *Bills of Lading* (TD/B/C.4/ISL/6/Rev. 1), 1971, p. 12, fn. 61 (hereafter referred to as "UNCTAD. *Bills of Lading")*.

[7] *Per* Bowen L.J. in *Sanders* v. *Maclean* (1883) 11 Q.B.D. 327 at 341; *per* Earl Loreburn L.C. in *Horst* v. *Biddell Bros.* [1912] A.C. 18 at 22.

[8] An instrument is said to be "negotiable" in the strict sense of the word when any person who has acquired it in good faith for value can enforce the contract contained in it or the right of property evidenced by it against the person originally liable on it, although he may have acquired it from a person with a defective title, or none at all. In relation to bills of lading the word is used in a wider sense to mean simply transferable by indorsement or delivery: *Lickbarrow* v. *Mason* (1794) 5 T.R. 683 at 685, 686.

[9] By virtue of the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), section 1: applicable in Singapore under the terms of the Civil Law Act (Cap. 30. Singapore Statutes, Rev. Ed. 1970), section 5.

[10] The variations between the two texts are noted in Carver, *op. cit.*, App. 2; Scrutton, *op. cit.*, App. VI.

or acceded to the Convention, or have passed legislation giving effect to it.[11]

ADOPTION IN SINGAPORE

Great Britain, one of the signatories to the Convention, ratified it on 2nd June, 1930. The Protocol of Signature directed the contracting parties to give effect to the Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under the Convention. The British Carriage of Goods by Sea Act, 1924 was enacted on 1st August, 1924 before the date when the Convention was signed, and is expressed to be based on the 1923 Draft Convention.[12] It was this Draft Convention that the Imperial Economic Conference of November, 1923 recommended for adoption by the Governments and Parliaments of the British Empire.

Article 13 of the Convention provides:

> The high contracting parties may at the time of signature, ratification or accession declare that their acceptance of the present convention does not include any or all of the self-governing dominions, or of the colonies, overseas possessions, protectorates or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate or territory excluded in their declaration.

Such a declaration was made by the British Ambassador at Brussels, both at the time of signing the Protocol of Singapore and on ratification. On 2nd December, 1930, the colony of the Straits Settlements acceded to the Convention. By virtue of the Straits Settlements Act, 1866,[13] Singapore then formed part of the colony. Imitating the British example, and following the recommendation of the Imperial Economic Conference, the colonial legislature passed the Carriage of Goods by Sea Ordinance, which came into force on 22nd April, 1927 prior to the accession of the colony to the Convention, and, like the English Act, was based on the 1923 Draft Convention.[14]

After the Straits Settlements were dissolved with effect from 1st April, 1946,[15] Singapore was constituted a separate colony, and an Order in Council provided for the continuance of existing laws.[16] The Carriage of Goods by Sea Ordinance subsequently became the Carriage of Goods by Sea Act.[17] We shall hereafter use the term "Hague

[11] For a survey of these countries, see Carver, *op. cit.*, Apps. 3, 5; Scrutton, *op. cit.*, Apps. IV, V.

[12] See the preamble to the Act (14 & 15 Geo. 5 c. 22).

[13] 29 & 30 Vict. c. 115.

[14] See the preamble to the Ordinance (No. 4 of 1927). It is thus permissible to refer to the Draft Convention when assistance is sought to construe any ambiguities in the statute: see Lord Pearson in *Albacora S.R.L.* v. *Westcott and Laurance Line* [1966] 2 Lloyd's Rep. 53 at 64. Devlin J., however, referred to the Convention itself in *Pyrene* v. *Scindia Navigation Co.* [1954] 2 Q.B. 402 at 421.

[15] Straits Settlements (Repeal) Order in Council, 1946 (S.R. & O. 1946, No. 462) made under the Straits Settlements (Repeal) Act, 1946 (9 & 10 Geo. 6 c. 37).

[16] Section 42 of the Singapore Colony Order in Council, 1946 (S.R. & O. 1946, No. 464).

[17] Cap. 184, Singapore Statutes, Rev. Ed. 1970.

Rules" to mean those rules set out in the Schedule to that Act, although there are some differences between these Rules and those laid down in the Convention.[18]

BRUSSELS PROTOCOL

Although it was by no means perfect, the Convention was widely accepted by many countries. It was estimated in 1955 that about four-fifths of world tonnage was under the flags of countries which adhered to the Convention or Rules, or which, without adhering thereto, had enacted national legislation incorporating the Rules.[19] Vocal criticisms were not mounted against it until the historic decision of the House of Lords in the *Muncaster Castle*,[20] spearheaded in the first instance by British shipowners protesting bitterly against the interpretation placed by that august body on Article 3(1). It was against a background of dwindling British merchant fleets and reduced confidence in the decisions of the House of Lords because of the "unbusinesslike flavour of some of their Lordships' speeches"[21] that a Conference of the International Maritime Committee was convened at Stockholm. Certain reforms were recommended,[22] and these were considered at the twelfth session of the Brussels Diplomatic Conference on Maritime Law (1967 and 1968), with the result that a Protocol to the Convention was drafted, agreed upon and signed by eighteen (subsequent twenty-two) countries on 23rd February, 1968.[2] In this instance, the official text of the Protocol was in both the French and English languages. Article 6 of the Protocol provided that as between parties to the Protocol, the Convention and the Protocol should be read and interpreted together as one single instrument.

Article 13(1) of the Protocol reads as follows:

> This Protocol shall come into force three months after the date of the deposit of ten instruments of ratification or accession, of which at least five shall have been deposited by States that have each a tonnage equal or superior to one million gross tons of tonnage.

Although she was not represented at the 1968 Conference, the Republic of Singapore was the first, and still appears to be the only, State to have acceded to (or ratified) the Protocol, doing so on 25th April, 1972.[23] It therefore follows that the Protocol is not yet in force. The cautious appraisal of one observer that the reforms offered in the Protocol strike a reasoned balance between what shippers might desire and what carriers feel they can reasonably afford[24] has not been shared

18 See, e.g. Article 10 of the Convention and section 2 of the Carriage of Goods by Sea Act. *Infra,* p. 99.

19 UNCTAD, *Bills of Lading, p.* 32, fn. 139.

20 *Riverstone Meat Co. Pty. Ltd.* v. *Lancashire Shipping Co. Ltd.* [1961] A.C. 807.

21 R.P. Colinvaux, "Revision of the Hague Rules relating to bills of lading" [1963] J.B.L. 341.

22 *Ibid.;* K. Gronfors, "Why not independent contractors?" [1964] J.B.L. 25; C. Legendre and P. Lureau, "La Conference de Stockholm du Comite Maritime International" (1964) 16 D.M.F. 387 (with a Draft Protocol embodying the proposed amendments at p. 402).

23 United Nations, *Register,* Vol. II, p. 180, fn. 1. The Singapore Registry recorded its first million gross registered tons in July, 1972, its second million in April, 1973, its third million in May, 1974 and passed the four million-ton mark in June, 1975: Straits Times, Friday, 27th June, 1975, p. 11.

24 F.J.J. Cadwallader, "CoGSA 1971" (1972) 35 M.L.R. 68 at 72.

by the international community, and recent developments have so completely overtaken the results of the 1968 Brussels Conference that the Protocol today must be considered a dead letter.

CARRIAGE OF GOODS BY SEA ACT, 1972

Although the United Kingdom had merely signed, and not ratified, the Protocol, the Carriage of Goods by Sea Act, 1971 was passed by the U.K. Parliament to give effect to it. However, this Act will only come into force when an Order in Council is made to that effect,[25] and no Order has so far been made.

The British example was followed in Singapore. The Minister for Finance introduced the Carriage of Goods by Sea Bill in the Singapore Parliament on 24th October, 1972, six months after Singapore's accession to the Protocol. At the second reading of the Bill on 3rd November, the Minister declared:[26]

> Most maritime nations of the world have acceded to this Protocol and have incorporated it in their legislation. Singapore, in keeping with other world maritime nations, has also acceded to the Protocol and is now, therefore, required to pass legislation to incorporate the Protocol.

The correctness of this statement was not questioned, and there was no debate on the Bill. After the third reading on the same day, the Carriage of Goods by Sea Act, 1972[27] (hereafter referred to as "the 1972 Act") was passed without amendment. By section 1, the Act was to come into operation on such date as the Minister might, by notification in the *Gazette,* appoint, and the Carriage of Goods by Sea Act would then be repealed.[28] The 1972 Act follows the pattern of the Carriage of Goods by Sea Act, with the Rules as amended contained in a Schedule to the Act. The expression "Amended Rules" will hereafter be used to refer to these Rules.

On 13th July, 1973, the following notification appeared in the *Government Gazette*:[29]

> THE CARRIAGE OF GOODS BY SEA ACT, 1972.
> (ACT 30 OF 1972).
>
> THE CARRIAGE OF GOODS BY SEA ACT (COMMENCEMENT) NOTIFICATION, 1973.
>
> In exercise of the powers conferred by section 1 of the Carriage of Goods by Sea Act, 1972, the Minister for Finance hereby makes the following Notification:
>
> 1. This Notification may be cited as the Carriage of Goods by Sea Act (Commencement) Notification, 1973.
>
> 2. The Carriage of Goods by Sea Act, 1972 shall come into operation on the 16th day of July, 1973.
>
> Made this 10th day of July, 1973.
>
> (Signed)
> *Permanent Secretary (Development Division),*
> *Ministry of Finance,*
> *Singapore.*

[25] Carriage of Goods by Sea Act, 1971, c. 19, section 6(5).

[26] Republic of Singapore, *Parliamentary Debates: Official Report of the 1st session of the 3rd Parliament (12th October, 1972 — 18th December, 1973),* col. 347.

[27] Act 30 of 1972.

[28] *Ibid.*, section 9.

[29] G.N. No. S 235/73.

Four days after the appointed date on which the 1972 Act came into operation, the following notification was inserted in the *Gazette* of 20th July, 1973:[30]

THE CARRIAGE OF GOODS BY SEA ACT, 1972.
(ACT 30 OF 1972).

CORRIGENDUM.

It is hereby notified for general information that the Carriage of Goods by Sea Act (Commencement) Notification, 1973 which has been published in error is to be treated as cancelled.

(Signed)
Permanent Secretary (Development Division),
Ministry of Finance,
Singapore.

It seems clear that the Singapore Government did not really intend to bring the 1972 Act into force, having realized that no other country had committed itself to the Protocol, and was anxious to reinstate the *status quo,* so that it would be the Carriage of Goods by Sea Act and not the 1972 Act which was the operative statute. Several nice questions spring immediately to mind. What was the effective law between 16th and 20th July, 1973? Can an Act normally be repealed by subordinate legislation? If we assume that the 1972 Act can be repealed by subordinate legislation, did the repeal effected by the second notification automatically revive the Carriage of Goods by Sea Act, which was itself repealed when the 1972 Act came into force?[28] Did the Minister for Finance have power to insert the *Corrigendum* in the *Gazette* withdrawing the prior notification?

It is submitted that the last question is the crucial one, and that since, for the reasons to be discussed below, the answer to it must be in the negative, the Amended Rules came into force in Singapore as from 16th July, 1973 and continue to apply until repealed by statute. This conclusion is reached based on a consideration of the doctrine of *functus officio* and the provisions of section 19 (a) of the Interpretation Act.[31]

Functus officio

Black's Law Dictionary[32] defines the expression *"functus officio"* as follows:

> Having fulfilled the function, discharged the office, or accomplished the purpose and therefore of no further force or authority. Applied to an officer whose term has expired, and who has consequently no further official authority; and also to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.

Thus, where a person is granted authority to perform a specified act for a certain purpose, then as soon as this act is performed and the purpose accomplished, the authority comes to an end and he cannot subsequently in any way modify, amend or deny his act. So a judge who has heard the evidence, received counsel's submissions and delivered judgment in a case cannot thereafter alter his decision, even

[30] G.N. No. S 239/73.
[31] Cap. 3, Singapore Statutes, Rev. Ed. 1970.
[32] 4th ed., 1951.

if he subsequently discovers he has erred in law or otherwise. The doctrine has been well established at common law, and a few examples from the decided cases will amply illustrate the scope of its application.

In *Ward* v. *Dean*,[33] an arbitrator in a dispute ruled that the plaintiff had no cause of action, and verdict was to be entered for the defendant. The arbitrator intended that the plaintiff should pay the costs of the arbitration, but by mistake he inserted the name of the defendant instead of that of the plaintiff in the appropriate place in his written award. The award thus charged the costs of the arbitration on the defendant. The arbitrator subsequently realized his error and attempted to correct it by striking out the defendant's name and substituting the plaintiff's. However, the plaintiff moved the court for a taxation of his costs on the basis of the unamended award. His counsel submitted:[34]

> The award is either good or bad altogether, and must be so dealt with. The arbitrator could not exercise a new act of judgment after having once made his award.

The Court of King's Bench agreed with this submission and, although the mistake was "as simply clerical as could possibly be made",[35] held that having executed his award in the form that he did, the arbitrator could not thereafter rectify it.

An umpire in *Henfree* v. *Bromley*[36] made an award in writing under which the defendant was to pay the plaintiff £57, and signed it. Later on the same day, before the award was delivered to the disputants, and while it was still in his possession, the umpire struck out the figures "571", inserted "661" and re-signed the award in the presence of attesting witnesses. Notice was then given to the parties of the award as altered. The Court of King's Bench held that the purported alteration was void and the award was good for the original sum, viz. £57. The reason was that the umpire's power terminated after he had made the award, and it was just as though the alteration had been made by a mere stranger without the privity or consent of the interested parties.

The doctrine of *functus officio* was eloquently summarized by Parke B. in *Brooke* v. *Mitchell*,[37] another case involving an arbitrator's award:

> For that purpose [i.e. for the purpose of making the award valid] it is only necessary that the act should be complete so far as the arbitrator is concerned; that he should have done some act whereby he becomes *functus officio,* and has declared his final mind.... Here the instrument was complete as an award, and the umpire could make no alteration in it, after the execution of it; he was then *functus officio,* having declared his final mind.

The result of the cases was therefore clear and straightforward: when an arbitrator had signed a document as and for his award, he became

[33] 3 B. & Ad. 234.
[34] *ibid,* at 236.
[35] *Per* Sir W.M. James L.J., commenting on *Ward* v. *Dean, supra,* in *Mordue* v. *Palmer* (1870) 6 L.R. Ch. App. 22 at 30.
[36] 6 East 309. See esp. Lord Ellenborough C.J. at 312.
[37] 6 M. & W. 473 at 476, 477,

functus officio and could not of his own authority remedy any mistake whatsoever.[38] The policy reason behind this doctrine was that:

> it was thought a safe thing to keep the arbitrator strictly to his award, and to shut the door against the admission of evidence as to what the arbitrator intended to do, or had omitted to do. It was considered dangerous to admit anything but the written document, which, once signed, must stand.[39]

The doctrine is not confined solely to arbitrators, but is of general application. Thus it has been held to apply to a master exercising the powers of certifying of a judge at *nisi prius*,[40] a judge making an order for a stay of execution,[41] administrative officials drawing up and approving a budget,[42] and a writ of process served after the expiry of its return date.[43]

Bearing these principles in mind, let us examine the 1972 Act and the relevant *Gazette* notifications. By section 1,[44] the appropriate Minister was given specific authority to accomplish a particular purpose, viz. bringing into force the 1972 Act. Once that purpose was achieved by the Carriage of Goods by Sea Act (Commencement) Notification, 1973 (hereafter referred to as "the first Notification"), the Minister having declared his final mind became *functus officio* and had no further power or authority in the matter. Consequently, the *Corrigendum* being null, void and of no effect, the 1972 Act came into operation on 16th July, 1973, repealing the Carriage of Goods by Sea Act, and continues to be in force until it is itself effectively repealed by subsequent legislation.

[38] *Per* Sir G. Mellish L.J. in *Mordue* v. *Palmer, supra* at 31. As far as arbitrators are concerned, the rigours of the common law doctrine have been mitigated by section 13(b) of the Arbitration Act (Cap. 16, Singapore Statutes, Rev. Ed. 1970) so that unless the arbitration agreement expresses a contrary intention, arbitrators now have power "to correct in an award any clerical mistake or error arising from any accidental slip or omission". This change in the common law position was first effected by section 7(c) of the English Arbitration Act, 1889 (now section 17 of the Arbitration Act, 1950). The Court of King's Bench has examined the scope of the English equivalent of section 13(b) of Cap. 16 in *Sutherland & Co.* v. *Hannevig Bros. Ltd.* [1921] 1 K.B. 336.

As regards judges, notwithstanding the reservation contained in Order 20 rule 8(2) of the Rules of the Supreme Court, 1970 excepting from the general power of amending documents in proceedings any judgment or order, Order 20 rule 11 (the "slip rule") provides that the court may, at any time, by summons without appeal correct "clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission". The court will correct a slip due to a failure to express its manifest intention properly, but will not correct what was "a mistake of its own in law or otherwise, even though apparent on the face of [the judgment or] the order": *Supreme Court Practice 1970,* Vol. 1, para. 20/11/1. See *Shipwright* v. *Clements* (1890) 63 L.T. 160; contrast *Karupaya* v. *Ramasamy Chetty and Palaniappa Chetty* 15 S.S.L.R. 3.

[39] *Per* Sir W.M. James L.J. in *Mordue* v. *Palmer, supra* at 30.

[40] *Bedwell* v. *Wood* (1877) 2 Q.B.D. 626.

[41] *Per* Morton J. in *Re V.G.M. Holdings* [1941] 3 All E.R. 417 at 418.

[42] *Board of School Trustees of Washington City Administrative Unit* v. *Benner* 24 S.E. 2d. 259 at 263 (Supreme Court of North Carolina).

[43] *Blanton Banking Co.* v. *Taliaferro* 262 S.W. 196 (Court of Civil Appeals of Texas). Lomey J. invoking the doctrine of *functus officio* held that the error was "fundamental in nature".

[44] Section 1 of the 1972 Act reads: "This Act shall come into operation on such date as the Minister may, by notification in the *Gazette,* appoint." See Art. 42(2) of the Constitution of Singapore. By section 10 of the Interpretation Act, a law which is expressed to come into operation on a particular day shall come into operation on the expiration of the previous day.

However, it is also established that where a person has been appointed to make a decision and purports to do so, he cannot be said to be *functus officio* if the purported decision turns out to be a nullity because of his non-compliance with certain mandatory stipulations.[45] In *Davies* v. *Howe Spinning Co. Ltd.*,[45] a medical referee's certificate fixing the date of a cotton-spinner's disablement (this being a prerequisite to any claim for compensation from his employers) was invalid as the referee had not complied with certain regulations laid down for the issue of the certificate. The employers therefore objected to the certificate, and when the county court judge ordered the matter to be referred to the referee to enable him to comply with the regulations, they appealed from this order on the ground that the referee was *functus officio,* having already issued a certificate for the purposes of the claim. The Court of Appeal held that he was not *functus officio,* since he had not yet done his duty by issuing a valid certificate. Slesser LJ. remarked:[46]

> It seems to me, however, that his position was exactly the opposite [of being *functus officio*], because so far from being *functus officio* he had not performed his duty as referee on the reference sent to him and therefore he had not issued a certificate.

One should therefore examine whether the first Notification can be called in question for some reason. There are three possible grounds for impugning its validity:

1) non-observance of certain conditions;
2) *ultra vires;* and
3) lack of proper signature.

Non-observance of certain conditions

It is submitted that, unlike the medical referee's certificate in *Davies* v. *Howe Spinning Co. Ltd.*[45] the first Notification cannot be impeached on this ground. Under the terms of section 1 of the 1972 Act and section 23(1) of the Interpretation Act, it appears that all that was required of the Minister was that he should publish a notification in the *Gazette,* and this was patently done.[47]

Ultra vires

It may be contended that the Minister for Finance was not the "Minister" for the purposes of section 1 of the 1972 Act, and therefore his attempt to bring the Act into force by the first notification was *ultra vires* [48] his powers.

45 *Davies* v. *Howe Spinning Co. Ltd.* (1934) 27 B.W.C.C. 207.
46 *ibid,* at 217.
47 As to proof of the *Gazette,* see the Interpretation Act, section 49, and the Evidence Act (Cap. 5, Singapore Statutes, Rev. Ed. 1970), section 81. As to proof of subsidiary legislation, see the Interpretation Act, section 24 (cf. the Evidence Act, section 56), section 49 and the Evidence Act, section 78(1) (a).
48 The principles of *ultra vires* and *functus officio* should not be confused, although the result of the application of either may be the same, viz. the nullifying of any act or decision purporting to be done or made by authority. A particular act may be *ultra vires* a person's authority and therefore void, but there would still exist the authority to perform an act within the scope of that authority. However, where a person is *functus officio,* he has validly exercised a power granted to him for a defined purpose, with the result that he no longer has any authority in the matter. Consequently, if he purports to act further, no question of *ultra vires* arises at all.

The word "Minister" is defined by section 2(1) of the Interpretation Act as "the Minister for the time being charged with the responsibility for the department or subject to which the context refers". By the terms of the Constitution of Singapore (Responsibility of the Minister for Finance) Notification, 1973,[49] the Minister for Finance was charged with responsibility for various departments and subjects set out in the Schedule. Shipping and freight matters were assigned to one of the departments under the Development Division of this Ministry.

The circular argument that since the 1972 Act (including section 1) was not in force at the time the first Notification appeared in the *Gazette,* and therefore the Minister could not on that date exercise powers granted under the Act is adequately met by reference to section 22 of the Interpretation Act.

Lack of proper signature

The third possible objection is that the first Notification was not signed by the Minister for Finance but by his Permanent Secretary. However, section 35 of the Interpretation Act states that it shall be sufficient if the exercise by the Minister of the power to make subsidiary legislation be signified under the hand of the Permanent Secretary to the Ministry for which the Minister is responsible. It should be noted in our case that it is not the Permanent Secretary who is purporting to exercise the power conferred on the Minister,[50] but the Minister himself.[51]

The point may then be raised that under the terms of section 49 of the Interpretation Act, the *Gazette* is only prima facie evidence of the matters published therein, and is thus by no means conclusive proof that the Minister acted in the way alleged. Viewed from our position, however, both notifications, which are presumably of equal authority as evidence, must be assessed at their face value. Now the *Corrigendum* avers that the first Notification was published "in error". This statement is susceptible to two interpretations:

1) contrary to the express words of the first Notification, the Minister never exercised the powers conferred on him by section 1 of the 1972 Act, and the assertion to that effect contained in the first Notification was erroneous; or

2) the Minister did exercise those powers, but discovered afterwards that he ought not to have done so: consequently the exercise of the powers constituted the error which it was sought to rectify.

Erroneous assertion

To accept the first interpretation as the true one would be to attach greater credibility to the *Corrigendum* than to the first Notification. It is submitted that, without more, there is no justification for doing this, since both notifications must be treated as being of equal

[49] G.N. No. S 12/73: pursuant to Art. 14(1) of the Constitution of Singapore.
[50] This sub-delegation is not permitted by the proviso to section 36(1) of the Interpretation Act.
[51] See the introductory words of the first Notification, *supra,* p. 90.

evidential value. In addition, it is clear that the first Notification invokes the name of, and is expressed to be made by, the Minister: while the *Corrigendum* does not do so, being simply — on its face — a notification promulgated by a civil servant apparently possessed of no specific authority in the matter.

Erroneous exercise

In the alternative, the second interpretation seems to be the better one, and provides a more reasonable explanation of the events of July, 1973. If this interpretation is right, the Minister became *functus officio* upon the publication of the first Notification, and, there being no provision authorising him of his own accord to correct errors of judgment, the *Corrigendum* was ineffective to revoke it.

Could it nevertheless be further argued that the common law doctrine of *functus officio* has been overruled by section 27(1) of the Interpretation Act, which provides that where a written law confers a power, then "unless the contrary intention appears, the power may be exercised.. from time to time as occasion requires"? Thus the Minister would have power to appoint, revoke and re-appoint dates affecting the operation of the 1972 Act as and when he thinks fit, in the same fashion as a disciplinary committee of inquiry in *Wong Keng Sam & Ors.* v. *Pritam Singh Brar*[52] was held to have continuing jurisdiction to call and hear further evidence even after it had submitted a report on the results of its inquiry.

It is submitted that section 27(1) does not confer a continuing power[53] on the Minister to appoint and revoke dates bringing the 1972 Act into force, because firstly, a contrary intention can be gathered from section 1 of the 1972 Act, and secondly, a reasonable construction should be placed on the words "from time to time as occasion requires".

As regards the first reason, we suggest that the contrary intention need not be *expressed* by the terms of the statute in question: it suffices that it *appears* in those terms,[54] or, in other words, that such a contrary intention may be read by implication into the terms granting the power. The purpose of section 1 of the 1972 Act is to fix the date of the operation of the statute, and not the date of its repeal. It is therefore inherent in the nature of the Minister's power that it can be exercised only once. To hold otherwise would be impliedly to confer a much wider power on the Minister, with resulting uncertainty and confusion in the law.

The argument above can be similarly invoked in relation to the second reason. Weight should be placed on the words, "from time to time as occasion requires", and commonsense will indicate that one, and only one, occasion is required for the exercise of the power created under section 1 of the 1972 Act. For, the Minister having brought

[52] [1968] 2 M.L.J. 158. This is the only Malaysian or Singapore case which discusses the doctrine of *functus officio,* although there the Federal Court concluded that it was inapplicable.

[53] Cf. the Minister's power under section 7 of the Income Tax Act (Cap. 141, Singapore Statutes, Rev. Ed. 1970).

[54] Cf. the words, "unless the arbitration agreement *expresses* a contrary intention" (italics mine) in section 13(b) of the Arbitration Act, *supra,* fn. 38.

that Act into operation on 16th July, 1973, can it be asserted that another occasion might subsequently arise requiring him to bring into force that which is already in force?

Interpretation Act, section 19(a)

The relevant part of section 19(a) of the Interpretation Act reads as follows:

> When any Act confers power on any authority to make subsidiary legislation, the following provisions shall, unless the contrary intention appears, have effect with reference to the making and operation of such subsidiary legislation:
>
> a) subsidiary legislation may at any time be amended, varied, rescinded or revoked by the same authority and in the same manner by and in which it was made:
>
> *Provided that where any Act is to come into operation on a date to be fixed by subsidiary legislation, the power to make such subsidiary legislation shall not include the power of amending, revoking or suspending the same....*[55]

Thi s clear statutory provision regulates the precise scope of the power granted by section 1 of the 1972 Act. It is but a reaffirmation of the accepted principle that subsidiary legislation is subordinate to, must not conflict with and cannot normally, without more, repeal a main enactment.[56] Although Parliament may authorise the amendment or repeal of statutes by subsidiary legislation, specific authority to do so must be granted by main legislation.[57] Now if we accept the validity of the *Corrigendum* of 20th July, 1973, we shall obviously run counter to this principle and to section 19(a), since we would be really asserting that subsidiary legislation was effective to repeal the 1972 Act, which had been in force at the time of the purported repeal.

On the other hand, it may be pointed out that Section 27(3) of the Interpretation Act states:

> Where any Act confers a power to make subsidiary legislation the power shall, unless the contrary intention appears, be construed as including the power exercisable in like manner and subject to the like consent and conditions, if any, to amend, vary, rescind, revoke or suspend the subsidiary legislation made

The contention would then be that, since the Minister is given power to bring the 1972 Act into force by appointing a certain day to be published in the *Gazette,* he may also in like fashion, viz. by publication in the *Gazette,* revoke such subsidiary legislation. It is submitted that this sub-section is inapplicable to section 1 of the 1972 Act, since on a true construction of the sub-section it contemplates a continuing

[55] Italics mine.

[56] See also section 19(c) of the Interpretation Act: "[unless the contrary intention appears] no subsidiary legislation made under an Act shall be inconsistent with the provisions of any Act."

[57] Thus section 17 of the Income Tax (Amendment) Act, 1975 (Act 4 of 1975) adds a new section 106(3) to the Income Tax Act (Cap. 141, Singapore Statutes, Rev. Ed. 1970), authorising the Minister to "amend, add to or revoke the whole or any part of the First, Third and Fourth Schedules to this Act." Under section 6(1)(e) of the Juries Act, 1922 (12 & 13 Geo. *5 c.* 11), provision may be made by Order in Council for "making such adaptations in any enactments as are necessary for giving full effect to this Act." See further Halsbury's *Laws of England,* Vol. 36, 3rd ed., paras. 708, 743.

power to prescribe rules for the ever present purpose of implementing general principles of law laid down in the main Act and facilitating the smooth working of the statute by allowing some degree of flexibility. It does not contemplate a more circumscribed power which has as its sole purpose the election of a day to give legal force to those principles enshrined in the Act. One may surely argue that a "contrary intention" is inherent in the nature of this power.[58] Furthermore, section 27(3) states the general rule, whereas section 19(a) covers a more precise situation, so that a case falling within the exact ambit of section 19(a) should be governed by that section, and not by section 27(3), in accordance with the maxim, *generalibus specialia derogant.*

Even if we accept the validity and effectiveness of the *Corrigendum* of 20th July, 1973, serious difficulties are posed by sections 12 and 16(a) of the Interpretation Act. Section 12 says:

> Where any written law repealing in whole or in part any former written law is itself repealed, such last repeal shall not revive the written law or the provisions previously repealed, unless words be added reviving such written law or such provisions.

Section 16(a) is equally explicit:

> Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears, the repeal shall not —
>
> a) revive anything not in force or existing at the time at which the repeal takes effect.

"Written law" is defined by section 2(1) of the Interpretation Act to include main Acts and subsidiary legislation. Now even though it was stated in the *Corrigendum* that the first Notification was inserted "in error", we have seen that there is no legal ground on which its validity can be questioned.[59] Therefore the *Corrigendum* must be treated as repealing, not only the first Notification, but also the 1972 Act. Since this Act had repealed the Carriage of Goods by Sea Act, and there were no words in the *Corrigendum* reviving the latter Act, the only conclusion we can reach after considering the effect of sections 12 and 16(a) is that neither the Hague Rules nor the Amended Rules are in force in Singapore today.[60] This startling result is achieved only if we assume that the *Corrigendum* was legally valid and effective.

However, the writer contends that, for the reasons mentioned above, the *Corrigendum* is a nullity and the 1972 Act is currently in operation in Singapore. If it is desired to restore the pre-1973 law, it is submitted that this can only be achieved by legislation: to which end a short repealing Act, dealing with the position of contracts entered into on or after 16th July, 1973, and reviving the Carriage of Goods by Sea Act would be necessary.

[58] See the discussion on section 27(1) of the Interpretation Act, *supra,* p. 96.

[59] *Supra,* pp. 94, 95.

[60] Nor can this conclusion be gainsaid by recourse to section 5(1) of the Civil Law Act (Cap. 30, Singapore Statutes, Rev. Ed. 1970), which provides for the reception in Singapore of English law in mercantile matters, since the English Carriage of Goods by Sea Act, 1924 imposes the Rules only on *outward* shipments of goods *from* U.K. ports. In *Vita Food Products, Inc.* v. *Unus Shipping Co. Ltd.* [1939] A.C. 277, the Privy Council held that, although English law governed a contract for the carriage of goods from a port in Newfoundland, the Rules did not apply as the shipment was not from a U.K. port.

DIFFERENCES EFFECTED BY A CHANGE IN THE LAW

During the second reading of the Carriage of Goods by Sea Bill in the Singapore Parliament on 3rd November, 1972, the Minister for Finance, having previously referred to the scope of the Hague Rules in his address to the House, described the effect of the proposed Amended Rules as follows:[61]

> The Protocol does not constitute any change in substance in the balance of liabilities and responsibilities of carriers *vis-a-vis* shippers, and it merely unifies certain rules of law relating to Bills of Lading.

If the Minister is correct, and the changes effected by the 1972 Act are so inconsequential that the substantive rights of parties to a dispute would be unaffected by the repeal of the Carriage of Goods by Sea Act, it might be thought that the foregoing discussion involves a mere academic issue, and the adoption of the Amended Rules would scarcely raise legal eyebrows in Singapore. A comparison of the repealed Carriage of Goods by Sea Act with the 1972 Act does, however, reveal some substantial disparities, *pace* the Minister, and the outcome of an action commenced in a court of law involving the application of the 1972 Act may be materially influenced by this change in the law. It is beyond the scope of this article to analyse all the differences effected by the 1972 Act, and the curious reader may wish to look elsewhere for assistance.[62] Briefly, the changes fall into two main categories:

1) the application of the Amended Rules; and
2) the substantive alterations in the Rules themselves.

Application of the Rules

We propose to deal with this category in slightly greater detail, since the commentaries referred to[62] deal with the U.K. position, which is not identical with the Singapore one in this respect.

It will be observed that both Article 9 of the 1923 Draft Convention and Article 10 of the Convention envisaged the application of the Rules made thereunder to bills of lading *issued* in any of the contracting States. However, the Hague Rules adopted under the Carriage of Goods by Sea Act applied only to outward voyages from Singapore.[63] The Stockholm Conference recommended a wider application to include inward voyages.[64] By virtue of section 3 of the 1972

[61] Republic of Singapore, *Parliamentary Debates, supra,* col. 347.

[62] See Scrutton, *op. cit.*, Section XXI; F.J.J. Cadwallader, "CoGSA 1971" (1972) 35 M.L.R. 68; Halsbury's *Statutes of England,* Vol. 41, 3rd ed., pp. 1312-1330. The authors' commentary on the enacting provisions of the U.K. Act should be treated with caution in Singapore, as they differ somewhat from the equivalent portions of the 1972 Act. For example, the latter Act repeats the enacting parts of the Carriage of Goods by Sea Act containing a direction as to the insertion of a clause paramount (section 5), a qualification of Art. VI in relation to certain voyages (section 6) and a modification of Art. III(4), (5) in relation to bulk cargoes (section 7). These sections are absent from the U.K. Act, which, on the other hand, introduces provisions that have no parallel in the 1972 Act, e.g. section 1(6), (7) and section 2.

[63] Carriage of Goods by Sea Act, section 2. In fact, many countries (e.g. Australia, Canada, New Zealand, the United Kingdom) impose the Rules only on outward shipments.

[64] C. Legendre and P. Lureau, "La Conference de Stockholm du Comite Maritime International" (1964) 16 D.M.F. 387 at 389, 404.

Act and Article X of the Schedule, the Amended Rules apply to the following voyages:

1) any voyage where the port of shipment is in Singapore, whether or not the port of destination is in Singapore;[65]

2) any voyage from a port in one State to a port in another State, where the bill of lading is issued in a contracting State;

3) any voyage from a port in a contracting State to a port in another State;

4) any voyage from a port in one State to a port in another State if the contract contained in or evidenced by the bill of lading provides that the Amended Rules or legislation of any State giving effect to them are to govern the contract.

This extension of the application of the Amended Rules (as illustrated by categories 2 and 3, and the latter part of category 4) beyond the scope of the Hague Rules is uncertain in area and may not in practice be as wide as it first seems. This is because of the absence of any definition of "contracting State" (categories 2 and 3) and because probably no other State has given effect to the Protocol by legislation (category 4).

In an attempt to elucidate the meaning of "contracting State", it is permissible to look to the actual terms of the Brussels Protocol, since section 2 of the 1972 Act makes reference to the Convention "as amended by the Protocol made at Brussels on 23rd February, 1968". A contracting State would thus be a State that enters into a binding contractual obligation based on the Protocol. But the Protocol is not yet in force in accordance with the conditions of Article 13.[66] *Ipso facto* there are no contracting States in the true sense of the word. On the other hand, since this construction would render meaningless Article X of the Schedule to the 1972 Act, we may perhaps opt for a more liberal interpretation of the words in accordance with the maxim, *verba ita sunt intelligenda ut res magis valeat quam pereat.* Thus a "contracting State" may be taken to mean simply a State which has signed the Protocol,[67] thereby authenticating the text and signifying its agreement to consider the undertaking of binding obligations at a later stage.[68] The English statute meets this problem by providing that, for the purposes of the Rules, Her Majesty may by Order in Council certify which States are contracting States, such Order being conclusive evidence of the matters so certified.[69]

[65] This category is qualified by section 6 of the 1972 Act.

[66] See *supra,* p. 89.

[67] The Belgian Ministry of Foreign Affairs and Foreign Trade has indicated that the following twenty-two countries have signed the Protocol: Argentina, Belgium, Cameroun, Canada, Finland, France, Federal Republic of Germany, Greece, Holy See, Italy, Liberia, Mauritania, Paraguay, Philippines, Poland, Republic of China, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Sweden, Switzerland, Zaire. See United Nations, *Register,* Vol. II, p. 180.

[68] Cf. the position of parties who sign an agreement expressed to be "subject to contract": *Coope* v. *Ridout* [1921] 1 Ch. 291 ("subject to title and contract"); *Chillingworth* v. *Esche* [1924] 1 Ch. 97 ("subject to a proper contract").

[69] Carriage of Goods by Sea Act, 1971, section 2.

Substantive alterations

The Amended Rules introduce significant changes in the rights of transferees of bills of lading; the periods of limitation within which an action governed by the Rules must be brought; the maximum amount for which a carrier may be liable; the mode of calculating the carrier's liability once this is established; and the rights of the carrier's servants or agents (excluding independent contractors).[70]

CONCLUSION

Although, in the writer's submission, the Amended Rules are currently in force in Singapore, other States have steadfastly refused to pay more than lip-service to the Brussels Protocol, and current developments dating just one month after the signing of the Protocol have overshadowed it to such an extent that there would now appear to be not even the faintest glimmer of hope that it will come into effect.[71] In March, 1968, the United Nations Conference on Trade and Development (UNCTAD) resolved to establish a Working Group on International Shipping Legislation, which held its first session in December, 1969 at which it was agreed to give priority to a study on bills of lading. In response to a request by the Working Group, the UNCTAD Secretariat undertook a study of the commercial, economic and legal aspects of bills of lading, with special reference to the Rules under the Brussels Convention. The study, published in 1971, disclosed that the developing countries, which were for the most part transport-users, were invariably the losers in economic terms under the present system.[72] This situation was aggravated by the fact that the working of international maritime laws and practices retained a shipowner orientation, the developed countries being the ship-owning ones.[73] The report felt that the time was ripe for a revision of the Rules or the establishment of a new international convention to redistribute the risks of ocean transport in a more acceptable manner.[74]

Meanwhile, the United Nations Commission on International Trade Law (UNCITRAL), established in 1966 for "the promotion of the progressive harmonization and unification of the law of international trade",[75] decided in 1969 to include international legislation on shipping

[70] See respectively Articles III(4); III(6), (6 bis); IV(5)(a), (b), (e), (g); IV(5)(c), (d); IV bis. As regards the last amendment mentioned, the courts had already given decisions to a similar effect based on common law principles in *Elder, Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.* [1924] A.C. 522; *Carle & Montanari, Inc.* v. *American Export Isbrandtsen Lines Inc* [1968] 1 Lloyd's Rep. 260; *The Eurymedon* [1974] 1 Lloyd's Rep. 534.

[71] The Journal of World Trade Law has traced these developments through successive issues:- (1969) 3:318; (1970) 4:81; (1971) 5:577; (1972) 6:712; (1973) 7:252, 680; (1975) 9:213. See also Vols. I — IV of the *United Nations Commission on International Trade Law (UNCITRAL) Yearbook.*

[72] UNCTAD, *Bills of Lading,* Chap. V.

[73] *Ibid.*, I — III. Footnote 9 at p. 3 is revealing. See also R. Hellawell "Less-Developed Countries and Developed Country Law: Problems from the Law of Admiralty" (1968) 7 Colum. J. Transnat'l L. 203.

[74] *Ibid.*, Chap. **III,** paras. 88, 89.

[76] Resolution 2205 (XXI) of the General Assembly on 17th December, 1966: Resolutions adopted by the General Assembly during its Twenty-first Session (20 September — 20 December 1966), *Official Records of the General Assembly, Twenty-first Session, Supplement No. 16* (A/6316), p. 99. Singapore was elected to membership in UNCITRAL in 1970 and her term will expire on 31st December, 1976.

among the priority items in its programme of work and set up a Working Group for this purpose. The Working Group originally comprised only seven countries, but its membership was later increased to twenty-one (of which Singapore was one). There has been and continues to be close co-operation between UNCTAD and UNCITRAL in this area. Following recommendations made by both Working Groups, UNCTRAL in 1971 adopted a resolution passed by the UNCTAD Working Group in the following terms:[76]

> ...the rules and practices concerning bills of lading, including those rules contained in [the Brussels Convention] and in the Protocol to amend that Convention should be examined with a view to revising and amplifying the rules as appropriate, and a new international convention may if appropriate be prepared for adoption under the auspices of the United Nations.

As opinion grew that the Convention was not responsive to contemporary needs and was heavily weighted in favour of the carriers, the movement for reform gathered momentum, and in 1972, UNCITRAL took the emphasis away from a mere revision of the Convention by advising its Working Group actively to consider the preparation of a totally new convention.[77] This advice was energetically followed and a Drafting Party promptly constituted. By February, 1975, the Working Group had finished its examination of all the various topics assigned to it, and the preliminary version of a draft convention had been drawn up.[78]

The new draft convention is based on a positive affirmation of the carrier's contractual responsibility for the safe delivery of cargo and is patterned after other international conventions concerned with the transport of goods, this correlation being vital in view of the growing importance of combined transport operations, containerization and unitization of cargo. The elimination of the catalogue of excep-

[76] Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), para. 19. The resolution went on to set the terms of reference of the examination, which was to aim mainly at:

> "the removal of such uncertainties and ambiguities as exist and at establishing a balanced allocation of risks between the cargo owner and the carrier, with appropriate provisions concerning the burden of proof; in particular the following areas, among others should be considered for revision and amplification:
> a) responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents;
> b) the scheme of responsibilities and liabilities, and rights and immunities, incorporated in Articles III and IV of the Convention as amended by the Protocol and their interaction and including the elimination or modification of certain exceptions to carrier's liability;
> c) burden of proof;
> d) jurisdiction;
> e) responsibility for deck cargoes, like animals, and transhipment;
> f) extension of period of limitation;
> g) definitions under Article 1 of the Convention;
> h) elimination of invalid clauses in bills of lading;
> i) deviation, seaworthiness and unit limitation of liability."

[77] Report of the Commission on the work of its fifth session (1972), *Ibid., Twenty-seventh Session, Supplement No. 17* (A/8717), para. 51.

[78] UNCITRAL Working Group on International Legislation on Shipping, *Preliminary version of a draft convention on the liability of carriers of goods by sea* (A/CN.9/WG.III/WP.19).

tions, the clarification of the rules on the burden of proof and the imposition of liability for delay, to mention a few changes, are signs of the increasingly active participation of the developing countries in the area of international shipping legislation. One of Singapore's representatives on the Working Group is guardedly optimistic about the chances of international agreement on the text of a new convention, which may possibly come into force within the next three years. In the meantime, if a marine cargo claim arises, parties to the dispute whose relations are or are likely to be governed by Singapore law would, in the present circumstances, be well advised to consider their rights and liabilities in the light of the Carriage of Goods by Sea Act, 1972.

C. A. YING*

* LL.M.(Lond.), Barrister-at-Law, Lincoln's Inn, Lecturer in Law, University of Singapore.