"Developments in maritime law: the view from Singapore?"

Professor Stephen Girvin[*]

(1) Background: Singapore the city-state

- Singapore's total land area: 715.8 km^2
- Singapore's total population: about 5.3 million[1]
- Singapore's port: second busiest[2]

(2) Singapore's legal system

- former British colony
- common law jurisdiction
- Application of English Law Act 1994, cap 7A:

> **Application of common law and equity**
>
> 3.—(1) The common law of England (including the principles and rules of equity), so far as it was part of the law of Singapore immediately before 12th November 1993, shall continue to be part of the law of Singapore.
> (2) The common law shall continue to be in force in Singapore, as provided in subsection (1), so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require.

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[1] Department of Statistics: http://www.singstat.gov.sg/statistics/latest_data.html#12.

[2] See, e.g., Damien Brett, "Shenzhen set to overtake Hong Kong as third-busiest box port", *Lloyd's List*, 23 July 2013. See too the World Shipping Council: http://www.worldshipping.org/about-the-industry/global-trade/top-50-world-container-ports.

- legislation derived from English statutes[3]
- maritime legislation derived from English statutes[4]
- court structure (Supreme Court of Singapore)[5] and judiciary[6]

(3) Carriage of Goods by Sea

3.1 Straight bills of lading and delivery against originals

APL Co Pte Ltd v *Voss Peer* [2002] SGCA 41; [2002] 2 Lloyd's Rep 707:

- Shipper (Seller) v Carrier
- Seller (VP) → Mercedes Benz CLK320 → Buyer (Korean Co)
- B/L held by VP as Korean Co had yet to pay in full
- Goods discharged into APL's office at Busan
- Released, on production of a commercial invoice, by Korean Co
- Claim for misdelivery

> A set of three originals of this bill of lading is hereby issued by the carrier. Upon surrender to the carrier of any one negotiable bill of lading, properly endorsed, all others shall stand void.
>
> Once [the shipowner] issues a bill of lading …, whether it is an order bill or a straight bill, he must not deliver the cargo except against its production. The contrary view had much less support and most of it was recent and cursory. (Judith Prakash J)[7]
>
> … looking at the matter from the perspective of the market place, there is much to commend the rule that even in respect of a straight bill presentation of it is a pre-requisite to obtaining delivery. If nothing else, the advantage of this rule is that it is simple to apply. It is certain. It would prevent confusion and avoid the shipowners and/or their agents having to decide whether a bill is a straight bill or an order bill … and run the risk attendant thereto if the determination they

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[3]Factors Act 1889, cap 386; the Partnership Act 1890, cap 391; the Third Parties (Rights Against Insurers) Act 1930, cap 395; Misrepresentation Act 1967, cap 390; Sale of Goods Act 1979, cap 393; Unfair Contract Terms Act 197, cap 396; Contracts (Rights of Third Parties) Act 2001, cap 53B.

[4]Marine Insurance Act 1906, cap 387; High Court (Admiralty Jurisdiction) Act 1961, cap 123; Carriage of Goods by Sea Act 1971, cap 33; the Merchant Shipping Act 1995, cap 179.

[5]See http://app.supremecourt.gov.sg.

[6]See "New Admiralty Court gives edge to shipping hub's maritime law regime", *Lloyd's List*, 20 September 2002.

[7]*Voss Peer* v *APL Co Pte Ltd* [2002] SGHC 81; [2002] 1 SLR(R) 823, at [33].

make on that point should turn out to be erroneous. The rule would obviate such wholly unnecessary litigation. (Chao Hick Tin JA)[8]

3.2 Transfer of bills of lading and the acquisition of rights of suit

Keppel Tatlee Bank Ltd v *Bandung Shipping Pte Ltd* [2003] 1 Lloyd's Rep 619:[9]

- Bankers (Keppel) v Owners of the *Victoria Cob* (Bandung)
- Sellers → crude palm oil → Buyers (RPH) → Sub-Buyers (Lanyard)
- B/L endorsed in blank and handed to Keppel for negotiation
- Keppel filled in "State Bank of Saurashtra in India" and forwarded them to State Bank
- Lanyard did not pay for the cargo
- B/L returned by State Bank to Keppel (who stamped "cancelled" over the endorsement)
- Cargo discharged to Lanyard's agents without the B/L
- Keppel sued Bandung as "lawful holders" of the B/L

Bills of Lading Act 1992, cap 384:

Rights under shipping documents
2.—(1) Subject to the following provisions of this section, a person who becomes —
(a) the lawful holder of a bill of lading;
(b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or
(c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order,

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

Interpretation
(2) References in this Act to the holder of a bill of lading are references to any of the following persons:
(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

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[8][2002] 2 Lloyd's Rep 707, at [51]. Also reported *sub nom* as *APL Co Pte Ltd* v *Voss Peer* [2002] SGCA 41; [2002] 2 SLR(R) 1119.

[9]sub nom *Bandung Shipping Pte Ltd v Keppel Tatlee Bank Ltd* [2002] SGCA 46; [2003] 1 SLR(R) 295. The High Court hearing, reported at [2002] SGHC 47, did not canvass the points raised in the appeal in detail.

> (b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;
> (c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates,
>
> and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.
>
> We must reiterate that the Court does not look behind a B/L to determine who is entitled to delivery. As pointed out by the English and Scottish Law Commissions (the Law Commissions) in their joint report, which led to the passing of COGSA, 1992, under the law as it then stood, a carrier was bound to make delivery against presentation of the B/L without inquiry as to the way in which the presenter of the B/L had acquired the property in the goods. The change brought about by COGSA was to simplify the law. The Law Commissions further pointed out that if a person who transfers a B/L were to retain rights, it would enable him to undermine the security of the new holder and expose the carrier to inconsistent claims. Keppel TL's attempt to rely on their underlying arrangement with the State Bank pursuant to which the B/Ls were specially indorsed over to the State Bank was, therefore, without merit.
>
> Accordingly, there was no basis for Keppel TL to claim that they had acquired any rights of suit in relation to the B/Ls, as the B/Ls were not indorsed specially in their favour or in blank. Physical possession of a B/L does not constitute the holder the lawful holder; there must be a valid indorsement. (Chao Hick Tin JA at [27-28])

The Dolphina [2011] SGHC 273; [2012] 1 Lloyd's Rep 304:

- Bank (BOC) v Owners of the *Dolphina* (Universal)
- Universal also connected to two other companies, KOSB and Dongma
- Sellers (KOSB) → RBD[10] Palm Olein → Buyers
- Sellers (Felda) → RBD Palm Olein → Buyers (KOSB)
- KOSB chartered the *Dolphina* from Universal
- Universal issued 4 B/Ls to Felda
- KOSB issued LOIs to Universal
- Cargo pursuant to B/L 4 discharged at Huangpu
- Alleged misdelivery

[10] i.e. "refined, bleached and deodorized" palm oil.

This shipment is carried under and pursuant to the terms of the Charter dated 19 February 2008 between [Universal] as owner and [KOSB] as [charterer], and all conditions, liberties and exceptions whatsoever of the said Charter apply to and govern the rights of parties concerned in this shipment.

19. THIS CP TO BE GOVERNED BY ENGLISH LAW. IN THE ABSENCE OF ORIGINAL BL/S AT DISCHARGE PORT, OWNER TO DISCHARGE AND RELEASE ENTIRE CARGO TO RECEIVERS AGAINST PRESENTATION OF CHRTR'S LOI

The incorporation clause in BL4, with its reference to "all conditions, liberties and exceptions whatsoever of [the February Charterparty]", was wide enough to incorporate all provisions of the February Charterparty which are directly germane and material to the shipment, carriage and delivery of the BL4 Cargo (i.e. all "conditions"). By virtue of clause 32 of the February Charterparty, those provisions would be governed by English law. I agreed with Sir Boyd Merriman that it would not be sensible to incorporate those provisions into BL4 but ignore the fact that they were intended (in their original setting in the February Charterparty) to be governed by English law. Indeed, I was prepared to go further and conclude that clause 32 was itself a "condition", for it provided a system of law by which the other conditions (ie provisions in respect of the shipment, carriage and delivery of the BL4 Cargo) were to be construed for their meaning, scope and effect. That BL4 and the February Charterparty related to the same voyage by the same carrier also meant that it made good commercial sense for its rights and obligations as carrier against the original and any later holder of the bill of lading to be, as far as possible, the same as its rights and obligations against the charterer. Consequently … I held that the only sensible inference to be drawn from the terms of the February Charterparty and BL4, in the circumstances of this case, was that the parties intended to choose English law as the law governing both contracts. (Belinda Ang J at [128])

I have no doubt that clause 19 of the February Charterparty was incorporated into BL4, as it was a term that was germane to the discharge of the cargo … However, it has consistently been held that the true effect of such clauses is not to oblige the shipowner to discharge the cargo without production of the bill of lading, but to permit the shipowner to do so if necessary, and to afford the shipowner the benefit of an indemnity from the charterer in case liability should befall the shipowner as a result. (Belinda Ang J at [146])

I am now entirely satisfied that the evidence shows quite clearly that KOSB's endorsement of BL4 was ineffective and sorely lacking in *bona fides*. (Belinda Ang J at [164])

3.3 Seaworthiness

Sunlight Mercantile Pte Ltd v *Ever Lucky Shipping Co Ltd* [2003] SGCA 47; [2004] 2 Lloyd's Rep 174:[11]

- Shippers/Sellers (Sunlight) v Shipowners (Ever Lucky, owners of the *Pep Nautic*)
- Sellers → African round logs → Buyers
- 21 B/Ls issued
- 3 derricks broke down; hostile crew (following death of a sick crewman); arrest of the master and second officer; eight stowaways; insufficient provisions; slow outbound voyage because of seaweed and barnacles; generator failures; explosion in the main engine crankcase; towed to Tuticorin for scrap

> Pieces shipped on deck at Shipper's risk; the Carrier not being responsible for loss or damage howsoever arising.
>
> Logs … loaded on deck at the shipper's and receiver's risk, expense and responsibility without liability on the part of the vessel or her owners for any loss, damage, expense or delay howsoever caused.
>
> It is well established that an exception that is intended to relieve a shipowner from the consequences of the unseaworthiness of the vessel at the commencement of the voyage must be "express, pertinent and apposite" (Bigham J in *Sleigh* v *Tyser* [1900] 2 QB 333 at 337). Innumerable cases have shown how difficult it is to frame an exception that would be applicable in cases of unseaworthiness. (Tan Lee Meng J at [13])
>
> As we held that the exceptions in the bills of lading for the deck cargo in the present case are inapplicable because the vessel was unseaworthy when she commenced on her contractual voyage, it followed that there was an actionable fault on the part of the respondents. In view of this, the question of a contribution from the appellants for general average expenses did not arise. We thus allowed the appeal with costs. (Tan Lee Meng J at [26])

[11]This reversed the judgment at first instance of Judith Prakash J: [2003] SGHC 80. See Stephen Girvin, "Exempting clauses and the obligation to provide a seaworthy vessel at common law" [2004] *Lloyd's Maritime & Commercial LQ* 297-303.

3.4 Suing in conversion

Antariksa Logistics Pte Ltd v McTrans Cargo (S) Pte Ltd [2012] SGHC 154; [2013] 1 Lloyd's Rep 117:

- conversion?

  Oakley v *Lyster* [1931] 1 KB 148:

  Conversion has been very much extended in the last two hundred years. In early times the plaintiff began with a writ for trespass. That was, found not to be sufficient; then came a writ on the case framed on the special circumstances, which extended the writ for trover, and all those remedies have been labelled as actions for conversion. (1) I take the modern definition of conversion from the judgment of Atkin J in *Lancashire and Yorkshire Ry Co* v *MacNicoll* ((1918) 88 LJ KB 601, 605), where he said: "It appears to me plain that dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right". (Scrutton LJ at 153)[12]

- Plaintiffs (Antariksa/FF) v Defendants (McTrans)
- Antariksa (Singapore) → Prolink (Indonesia)
- 30 x 40' containers received at Jakarta but not delivered to the named consignees
- Agreed that containers to be returned to Singapore (with Antariksa named in the B/L as consignee)
- Prolink requested US$170,000 and Rp1.2 billion (demurrage charges) and this was paid
- Prolink then changed the name of the consignee to McTrans (who stored the containers in Singapore)
- Prolink demanded a further Rp45 billion from Antariksa
- Antariksa sued McTrans in conversion

  It is reasonably clear that all that is required to sue in conversion is a right to immediate possession. This right to immediate possession arises from the existence of a legal relationship of bailor and bailee as a matter of general principle of law on bailment. [Belinda Ang J at 53]

[12]See also *The Cherry The Cherry* [2002] SGCA 49; [2003] 1 SLR(R) 471; *Faith Maritime Co Ltd* v *Feoso (Singapore) Pte Ltd* [2002] SGHC 229; [2002] 2 SLR(R) 1088.

> It was not disputed that it was the responsibility of the first three Plaintiffs vis-à-vis their customers to send back the 30 FCL containers to Singapore after the carriers could not deliver the 30 FCL containers. After all, the first three Plaintiffs as head bailees under the door-to-door service agreement with their customers who had purchased the goods were entitled, if not obliged, to protect and preserve the February shipment. It was not surprising, and it was clear on the evidence, that the first three Plaintiffs had appointed their receiving agent (i.e., sub-bailee), Prolink Logistics, to arrange for the 30 FCL containers to be shipped back to Singapore. The first three Plaintiffs' rights and interests in the 30 FCL containers were acknowledged by Cuaca and/or Prolink as evident from the efforts they took to keep the subject containers out of the control and possession of the first three Plaintiffs in order to pressurise Hari into paying what Prolink wanted.
>
> After permission to ship back the subject containers was obtained, it was incumbent upon Prolink to ensure that the subject containers were consigned to the 1st Plaintiff as instructed by the first three Plaintiffs, and not to unilaterally send the subject containers to a different consignee. By reason of the unauthorised switch of consignee to the Defendant as Prolink's agent, I held that the sub-bailment ended and the right of possession to the bailed property (i.e., the 30 FCL containers) re-vested in the first three Plaintiffs as the head bailees. (Belinda Ang J at [56]-[57])

3.5 Demurrage in sale contracts

Profindo Pte Ltd v *Abani Trading Pte Ltd (The MV Athens)* [2013] SGHC 10; [2013] 1 Lloyd's Rep 370:[13]

- Profindo (Sellers) v Abani (Buyers)
- Sellers → cement (*MV Athens*) → Buyers (CFR terms)
- *MV Athens* berthed at Diego Suarez (Antisiranana)
- Discharge commenced on 29 June
- Port authorities requested that the *MV Athens* leave berth on 1 July
- *MV Athens* returned to berth on 3 July and discharge completed that day
- Shipowners imposed discharge of US$8,200 on Profindo who claimed from Abani

[13]See P Todd, "Laytime and demurrage provisions in sale contracts" [2013] *Lloyd's Maritime & Commercial LQ* 150-156.

1. Product: Ordinary Portland Cement 42.5 R Conforming to China
Standard GB 175-2007
2. Quantity: 2750 MT (+/- 5% at [the appellant's] option)
3. Unit Price: USD 101/MT CFR …
4. Total Price: USD 277,750.00 CFR …
15. Discharge rate: 1000MT per WWD SHEXC UU
16. Demurrage/Dispatch: USD 5500 per day or prorate/no dispatch
17. Port DA: Port DA at disport of maximum USD5000 is under [the appellant's] account. If [Port DA] exceeds USD5000, [the respondent is] to top up the difference and pay [the appellant]

It is, however, worth remembering that the concept of demurrage as enunciated in demurrage clauses is based on the premise that the contract gives the cargo owner a specific period – the laytime – within which to unload his cargo and if discharge is not completed within the laytime, demurrage runs immediately from the expiry of the laytime and ends only when discharge ends.
In this particular case it is helpful to consider the matter in light of the duties of a seller in a CIF/CFR sale contract. (Judith Prakash J at [23]-[24])

If the CIF/CFR seller (i.e., the appellant) is not even "under any duty to ensure the actual physical delivery of the goods" at the port of discharge, it would be quite remarkable to hold that the risk of delay in unloading the goods at the port of discharge after laytime has commenced has to be borne by him. This is especially so when there is a demurrage clause in the contract since the raison d'être of the same must be to transfer risk of delay in the discharge of goods to the buyer. It is more logical and more in line with commercial realities to hold that such risks, unless they have been expressly allocated to the seller by a specific term in the contract, are to be borne by the CIF/CFR buyer. (Judith Prakash J at [25])

(4) Ship Arrest

4.1 Requirements for arrest

The Catur Samudra [2010] SGHC 18; [2010] 2 SLR 518; [2010] 1 Lloyd's Rep 305:

- Sellers (Heritage) → *Mahakam* → Buyers
- Buyers → *Mahakam* (bareboat c/p) → Sellers (Heritage)
- condition precedent under the c/p for execution of a guarantee in favour of the plaintiffs
- Heritage defaulted on the payment obligations under the c/p
- Plaintiffs terminated the c/p and obtained possession of the *Mahakam*
- Plaintiffs arrested the *Catur Samudra* (owned by Heritage's parent company)

High Court (Admiralty Jurisdiction) Act 1961, cap 123:[14]

Admiralty jurisdiction of High Court

3.—(1) The admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:
(g) any claim for loss of or damage to goods carried in a ship;
(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;

Mode of exercise of admiralty jurisdiction

4.—(4) In the case of any such claim as is mentioned in section 3(1)(d) to (q), where (a) the claim arises in connection with a ship; and
(b) the person who would be liable on the claim in an action in personam (referred to in this subsection as the relevant person) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against —

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of that ship under a charter by demise; or
(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

[14] rev ed 2001.

> In order to invoke the admiralty jurisdiction of the High Court against the *Catur Samudra*, four conditions under s 4(4) of the HCAJA must first be satisfied ... These conditions are:
> (a) The claim is mentioned in ss 3(1)(d) to 3(1)(q).
> (b) The claim arises in connection with the ship.
> (c) The person who would be liable on the claim in an action *in personam* (referred to in this subsection as the relevant person) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship.
> (d) At the time when the action is brought, the relevant person is the beneficial owner as respect all the shares in the other ship against which an action in rem is brought. (Steven Chong JC at [24])

The Bunga Melati 5 [2012] SGCA 46; [2012] 4 SLR 546:

- Equitorial (appellants)(Bunker Suppliers) v MISC Berhad (respondents)(owners of the *Bunga Kasturi Lima* and the *Bunga Melati 5*)
- through agents MAL
- bunkers supplied but not paid for
- Equitorial arrested the *Bunga Melati 5* for unpaid bunkers and in restitution

> As a matter of principle, there is no reason why the test (for jurisdictional questions of law) should not simply be that of an "arguable case". The line delineating a "good arguable case" and an "arguable case", if it exists, may be too fine for a court to draw in many situations. The point however, is that the plaintiff only needs to show that its claim is of the same legal character as the s 3(1) limb it is relying on. If the plaintiff cannot show an arguable case on the law, it has failed to prove that it is entitled to invoke the court's admiralty jurisdiction. Indeed, in most cases of legal challenges to jurisdiction, the court would be able to decide whether an arguable case on the law has been made out or not ... The more appropriate description of the test to apply, where a jurisdictional question of law is being challenged, should therefore be that of an "arguable case". (VK Rajah JA at [111])

4.2 Direct Private (Ship) Sales

The Turtle Bay [2013] SGHC 165:[15]

- Application by plaintiff Bank (Germany), registered mortgagees of the *Turtle Bay* and *Tampa Bay*, who had arrested the vessels in Singapore after the shipowners went into liquidation
- Bank wanted approval or confirmation of a Direct Private Sale to named buyers at a specified price

> On the evidence, it was clear that the Direct Private Sale was a private arrangement that the Bank had entered with a named purchaser for a named price to suit its own purposes. In fact, the intention to sell the Vessels to the named buyer at a named price was present before proceedings in rem were commenced ... Such a sale cannot be lightly sanctioned as a matter of admiralty jurisprudence. At the risk of repetition, the purpose to be achieved by an admiralty judicial sale is to protect the rights of and benefit all interested persons, not just the rights and interests of the arresting party and the defendant shipowner. (Belinda Ang J at [33])

[15]See *The M/V Union Gold, the M/V Union Silver, the M/V Union Emerald, & the M/V Union Pluto* [2013] EWHC 1696 (Admlty); [2013] 1 Lloyd's Law Rep Plus 68.