RECEPTION OF ENGLISH COMMERCIAL MARITIME STATUTES IN MALAYSIA: A PSEUDO "INTERNAL" CONFLICTS PERSPECTIVE

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Abstract: In negotiations leading to independence, the British government and local representatives explored ways on ensuring legal certainty and continuity, especially in matters of commercial and maritime law. In the Federation of Malaysia, an ordinance was enacted a year before Independence to provide for the reception of English mercantile law (including shipping law) statutes until the gaps are filled by the local legislature. For the constituent states in the federation, which were protectorates previously, there was a cut-off date being applied to the received statutes, namely 7 April 1956. For states which were former colonies, under direct rule, the reception of English statutes was on a continuing basis. In mercantile matters jurisdiction is vested in two High Courts in a federation of 13 *negeris* and three federal territories, but without a single, unified set of received mercantile laws. This article tests if an internal application of the doctrine of *forum conveniens*, amongst other solutions, might help ensure a degree of legal certainty and clarity.

Keywords: *reception of English statutes; former British colonies and protectorates; commercial maritime law; forum non conveniens; federal systems*

I. Introduction: Contextual Framework

Upon independence, Malaysia, like many former British colonies and protectorates, adopted a reception statute that introduces into its legal system the laws of England, broadly speaking. The laws of England in question include the rules of the common law, equity and statutes. A distinction is further made between English statutes of general application and those dealing with mercantile matters. In Malaysia, the former is largely governed by s.3 of the country's Civil Law Act 1956, whilst the latter is governed by s.5. This article is concerned with the latter.

For context, though, s.3 of the Act should be cited. It provides that the Court shall

(a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;

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(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;
(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949.

Section 3 goes on to state that "provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary". The matter as to what is meant by statutes of general application was subject to judicial treatment at the highest level, within the British Commonwealth in *Christian v The Queen (The Pitcairn Islands)*,[1] as late as in 2006. In that case, the court held that the Sexual Offences Act 1956, a criminal statute, was one of general application. The court acknowledged the difficulty in interpreting and defining the term "statutes of general application" and quoted Sir Kenneth Roberts-Wray that if the phrase "statutes of general application" were to be offered as a novelty to a legislative draftsman today he would disclaim responsibility for its consequences unless it were defined.[2] But he acknowledged that it had been in use for many decades, that it does not appear to have given the courts serious trouble and that it has much the same effect as the common law rule by which the English law taken by the settlers is both the unwritten law (common law and equity) and the statute law in force at the time of settlement.[3]

Under s.5(1) of its Civil Law Act 1956, in mercantile matters,[4] the law administered in States of Peninsular Malaysia other than Malacca and Penang shall be the same as would be administered in England in the like case *at the date of the coming into force of the Act* (7 April 1956). Post-1956 English mercantile law (including statutes) would only have persuasive effect. However, for Sarawak, Sabah, Penang and Malacca,[5] s.5(2) makes it plain that in mercantile matters (and only in mercantile matters), the law to be administered shall be the same as would be administered in England in the like case *at the corresponding period*, if such question or issue had arisen or had to be decided in England, unless overtaken by local written

1 [2006] UKPC 47.
2 Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens, 1966), 545. Sir Kenneth was Legal Adviser to the Commonwealth Relations Office (Dominions Office until 1947) and the Colonial Office from 1945 to 1960.
3 *Ibid.,* 540.
4 Section 5 refers to "the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally".
5 In this article the English, instead of the Malay, spellings of the place names have been used because the Civil Law Act, a pre-Independence legislation, had referred to them as such. In the Malay language, Penang is properly called Pulau Pinang and Malacca, Melaka.

law. In Singapore, where the legal position was similar to that of Sarawak, Sabah, Penang and Malacca, the law was changed in 1993[6] freezing the relevant English statutes in aspic so that the Singaporean courts would not apply any post-1993 statutory changes/developments in England. An important driver to that legislative change was the express rejection of EU law rules which had been incorporated into English law through the United Kingdom's membership of the EU.[7] On the other hand, other former colonies such as Sri Lanka have kept the reference like in Malaysia to "at the corresponding period".[8] Yet others, like Kenya, provide for a specific list of British statutes which would be received.[9]

The different reception dates largely reflected the fact that Malaysia was not a single colonised entity—the so-called Federated and Unfederated Malay states were legally treated as protectorates with varying degrees of British control, whilst Penang, Malacca and Singapore were under direct rule as the British Straits Settlements[10] and Sabah and Sarawak were ceded territories, which were also under some kind of direct rule. The former direct rule states were less autonomous and their pre-Independence governance was heavily influenced by the East India Company's demand for a harmonised mercantile law system between the colonies and the mother country.[11] Hence, the continuing reception of English mercantile law had already previously been recognised in the Straits Settlements by the Civil Law Ordinance (Straits Settlements) 1878.[12]

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6 Application of English Law Act 1993.

7 In 1979, Singapore first removed the EU law as a source of law; the Civil Law (Amendment No 2) Act 1979 provides that Singapore would not be bound by "any law enacted after or made in the United Kingdom, . . . —(i) Giving effect to a treaty or international agreement to which Singapore is not a party". This includes all treaties forming the constitution of the EU. That however gave rise to the practical difficulty of having to excise the EU parts or influences in UK law when applying UK law. Thus, finally in 1993, the Singapore legislature took the drastic step of domesticating its own commercial laws.

8 Section 2, The Introduction of Laws of England (Civil Law Ordinance) No: 5 of 1852. The subject matter in s.2 is largely on commercial maritime matters. In scope, it is slightly narrower than s.5 of the Malaysian Civil Law Act 1956 (n. 4).

9 In Kenya, s.3 Judicature Act 1967 provides that the courts would be "(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date". Part 1 then sets out a very short list of UK statutes, namely, the Admiralty Offences (Colonial) Act 1849; Evidence Act 1851, ss.7 and 11; Foreign Tribunals Evidence Act 1856; Evidence by Commission Act 1859; British Law Ascertainment Act 1859; Admiralty Offences (Colonial) Act 1860; Foreign Law Ascertainment Act 1861; Conveyancing (Scotland) Act 1874, s.51; and Evidence by Commission Act 1885.

10 Historically the settlements also included a small territory now subsumed into the state of Perak, called *Dindings*.

11 See Baharuddeen Abu Bakar, " 'The Commercial Law of Malaysia' – Revisited Section 5(2) of the Civil Law Act 1956; Constitutionality, The EU and Islamisation" (2013) 21 IIUMLJ 1, 5 and 7.

12 Adapted from s.2 of the Civil Law Ordinance, 1853 of Ceylon (Sri Lanka). Interestingly, of course, Sri Lanka too has a continuing reception provision at present. See text accompanying n. 8.

Reception of English law statutes were clearly intended to be an interim stop-gap ensuring legal certainty and continuity—especially crucial in mercantile and maritime matters. Left to fester, structural and legal fissures will emerge. There is indeed much literature, as alluded in Section II, on the ideological, legal and constitutional difficulties with the application of this provision. This article however looks at a matter not aired in the literature, namely whether and to what extent the reception of English law mercantile law with different dates of application for different constituent parts of a unitary state raises an apparent conflict of laws within that unitary state. The section goes on then to probe various ways of resolving the "problem".

One solution might be the abolition of s.5 and for the state to undertake a full review of all applicable mercantile statutes and introduce new laws. This of course is a legislative course of action and for various reasons, which would be examined, may not be the most appropriate.

The second option is more textured, deploying an internal conflicts rules approach judicially. Section III thus takes up this question of how the internal conflicts problem arises against the backdrop of the Malaysian superior court system. It investigates some of the conceptual problems that might ensue from the application a conflicts-based solution.

The third option, given the conflicts situation, might be to establish unified commercial/maritime courts with a single harmonised set of mercantile laws. It will be argued in Section IV that there are intrinsic problems where there is, as in Malaysia and elsewhere, a blurring of matters of jurisdiction and applicable/proper law. Malaysia has indeed recently introduced a single, unified Admiralty Court, but its powers are statutorily linked to the English system. The law admits into Malaysia the provisions of the UK Senior Courts Act 1980 dealing with Admiralty powers. As would be argued, that runs the risk of bringing into the Malaysian maritime law system not only English jurisdictional rules but also international treaty rules to which Malaysia had not signed up. A contrast is then made with s.5 and it is reasoned that the section too has the potential effect of admitting into Malaysian law international treaty laws which Malaysia had not ratified.

The Conclusion in Section V touches on the wider issue of federal systems without a proper system of internal conflict of laws and contends that providing for division of legislative powers is not enough in itself where laws are not simply made up of federal and constituent states' written laws but also rules of the common law, equity and foreign statutes with different reception dates.

This research question as also partly concerns whether there is a true internal conflict of laws issue in law. In examining *how* such a matter might be interrogated, we should be clear that the term "internal conflict" is used to connote a potential situation where the dispute is potentially subject to different laws applicable to different parts of the unitary state and not a conflict between the constituent state and the federal or unitary state.

The reception of English law legislation, the Civil Law Act 1956, was enacted at a time soon after Malaya was reorganised from the short-lived, Malayan Union

to a federal state Malaysia. The much-loathed Malayan Union formed by the British in 1946[13] after the war was intended to be a single unionised entity thus enabling for more efficient government.[14] The originally planned union also envisaged harmonising the legal administration.[15] When the federal system was mooted and subsequently took shape, a trawl of Hansard and the Colonial Office's records[16] reveals no consideration of internal conflict of laws. A reason for that is that the federation was largely to maintain the pre-Malayan Union organisational structure. As Mr Lennox-Boyd, the Secretary of State for the Colonies, said when moving for the Second Reading of the Federation of Malaya Independence Bill in July 1957:

> In 1948 the Federation of Malaya Agreement was signed, under which a High Commissioner was appointed, a Federal Legislature set up, a considerable degree of authority was ensured for the rulers—acting in consultation with their State Executive Councils, and a form of common citizenship was created. Within this framework, the Settlements of Penang and Malacca remained British territory, and Singapore became a separate Colony under its own Governor.[17]

The issue of internal conflict of laws never really arose in the pre-Malayan Union days, despite the fact that the Malay states were *legally* independent of each other. With independence, there was no expectation for the constituent states to have legislative powers to make laws in contract matters.[18] It was envisaged that matters relating to commercial contracts would be left to the federal government, unlike, say, the United States. However, as will be argued, the admission of English statutes with different reception dates via the Civil Law Act 1956 has created a not-immediately obvious rupture in this well-laid plan.

Despite "the internal conflict of mercantile laws situation" not having received legal and judicial treatment, it is not a matter of pure academic interest. In Malaysia, as will be shown, the general view is that the applicable law follows the jurisdiction.[19] Section 5(1) asserts that "[i]n all questions or issues which arise or which

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13 UK Cabinet Papers (CAB 66/45, W. P. (44) 3; CAB 66/50, W.P. (44) 258; CAB 66/65, W.P. (45) 287; and CAB 128/1, C.M. (45) 27).

14 Martin Rudner, "The Political Structure of the Malayan Union" (1970) 43:1 (217) Journal of the Malaysian Branch of the Royal Asiatic Society 116–128; and more generally, A J Stockwell, "British Policy and Malay Politics During the Malayan Union Experiment 1942–1948" (Malaysian Branch of the Royal Asiatic Society Monograph No. 8, Kuala Lumpur, 1979). On the local reaction to the entity see Gerald Hawkins, "Reactions to the Malayan Union" in Paul H Kratoska (ed), *South East Asia: Colonial History* (Routledge, 2001, Vol V, e-book edition 2021), 155–161; James P Ongkili, "The British and Malayan Nationalism, 1946–1957" (1974) 5:2 Journal of Southeast Asian Studies 255–277.

15 CAB 66/50.

16 A search of Hansard and the National Archives for the period between 1 January 1945 and 1 December 1965.

17 HC Deb 12 July 1957 vol 573, cc633–715.

18 Part VI and ninth schedule, Malaysia Federal Constitution.

19 It is suggested that this is not entirely a settled view (See below at pp. 73–74).

have to be decided in the States of Peninsular Malaysia . . . the law to be administered shall be . . .” and s.5(2) uses a similar form in relation to Sarawak, Sabah, Penang and Malacca, respectively.

There are two scenarios envisaged in s.5. The words “which arise in” have been specifically considered by the House of Lords, albeit in the context of a commercial arbitration clause and not in a statute. In *Premium Nafta v Fili Shipping Company Ltd*,[20] the House of Lords was unanimous in rejecting an over-technically linguistic approach,[21] which offends common sense. By the same token, it might be reasoned that the words “which arise in” should not be over-imagined. A plain meaning should be applied. The section is activated if a question or issue raised is connected with the jurisdiction/state in question.

As to the words “which have to be decided in”, this limb seems more pedestrian: if the question is introduced in a case being tried at a court in the jurisdiction/state concerned, that court shall be bound to apply the English law to which it is subject, without querying whether the matter had any real and close relationship with the state in question. There is no precedent for the application of the *forum conveniens* doctrine[22] in this context. It is therefore quite possible for shrewd litigants to forum shop.

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20 [2007] UKHL 40 (HL).

21 The House of Lords was referred to a number of cases in which various forms of words in arbitration clauses have been considered. Some of them draw a distinction between disputes “arising under” and “arising out of” the agreement. In *Heyman v Darwins Ltd* [1942] AC 356 (HL), 399, Lord Porter said that the former had a narrower meaning than the latter, but in *Union of India v E B Aaby's Rederi A/S* [1975] AC 797 (HL), Viscount Dihorne, at p. 814, and Lord Salmon, at p. 817, said that they could not see the difference between them. Nevertheless, in *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd’s Rep 63, 67, Evans J said that there was a broad distinction between clauses which referred to “only those disputes which may arise regarding the rights and obligations which are created by the contract itself” and those which “show an intention to refer some wider class or classes of disputes”. The former may be said to arise “under” the contract, while the latter would arise “in relation to” or “in connection with” the contract. In *Fillite (Runcorn) Ltd v Aqua-Lift* (1989) 26 Con LR 66 (CA), 76, Slade LJ said that the phrase “under a contract” was not wide enough to include disputes which did not concern obligations created by or incorporated in the contract. Nourse LJ gave a judgment to the same effect. The court there had not been referred to *Mackender v Feldia AG* [1967] 2 QB 590 (CA). There, the Court of Appeal, which included Lord Denning MR and Diplock LJ, decided that a clause in an insurance policy submitting disputes “arising thereunder” to a foreign jurisdiction was wide enough to cover the question of whether the contract could be avoided for non-disclosure.

22 See below at pp. 73–74; the doctrine of *forum conveniens*, which exists mainly in common law jurisdictions, allows a court to decide that another court (often in another jurisdiction) is the more appropriate forum for the civil dispute. It is outside the scope of this article to detail the approaches taken by different common law courts in deciding if a particular court is the *forum conveniens*. In English law, see generally the House of Lords decision in *Spiliada Maritime Corp v Cansulex Ltd* [1986] 3 WLR 972 (esp. Lord Goff’s speech). In England, if another court is more appropriate, the English court may stay its own proceedings to allow the parties to proceed in the *forum conveniens*. Likewise, if a party had instituted action in a forum which is not the *forum conveniens* (eg in breach of an exclusive jurisdiction clause), the English court may issue an antisuit injunction ordering that litigant to cease or suspend their action in that country (*Donohue v Armco Inc* [2001] UKHL 64). See n. 38 too.

The matter is thus not inconsequential, despite a perception that it is of pure academic interest. It indeed becomes more acute in the field of shipping litigation where English statutes continue to play a prominent role. For example, in a dispute over the transfer of contract rights under a bill of lading, given the cut-off dates in s.5, it means that for Peninsular Malaysia the relevant English statute is the Bills of Lading Act 1855, whilst for Sarawak, Sabah, Penang and Malacca, it will be the Carriage of Goods by Sea Act 1992 that applies. There are fundamental differences between the two statutes; indeed, the latter was introduced to repeal the former and to rectify the former's deficiencies. Hence, which Act applies does make a fundamental difference to the outcome of the case. There are conceivably a number of other similar examples.

II. Literature Review

The prevailing literature focuses on why s.3 (and to some extent s.5) of the Civil Law Act 1956 should no longer endure. The thrust of the argument is premised on the fact that (West) Malaysia has now been independent for 65 years and has established largely a judiciary which is well respected and trusted. The broader argument naturally is focused either on removing a relic of colonialism and admitting local cultural norms,[23] or that there is and has always been a distinctive Malay jurisprudence fomented by Islamic values.[24] As to the reception of English *statutory* law, the prevailing literature does rehearse the main criticisms made of s.3 earlier.

The literature also casts significant doctrinal challenges on the practical application of s.5. There are, as any doctrinal law scholar might observe in support of the literature, a number of obvious problems of interpretation with s.5. These include the definition of "mercantile" law to whether English legislation is included and when an English statute might be characterised as "mercantile".[25] Another is whether "statute" includes continuing amendments and iterations of the relevant statute applicable at the cut-off date. There are other significant ideological and policy objections to the tenor and spirit of s.5—such as the impropriety of admitting into Malaysian law EU-influenced principles; the failure to properly accommodate Islamic law, which has been increasing prominence in the global and local financial and commercial markets, and constitutional law arguments about Parliament's

23 Ahmad Ibrahim, "The Civil Law Ordinance in Malaysia" [1971] 2 MLJ viii; Joseph Chia, "The Reception of English Law under Sections 3 and 5 of the Civil Law Act 1956 (Revised 1972)" [1974] JMCL 42. See too the Ahmad Ibrahim Memorial Lecture delivered by Rais Yatim at the International Islamic University Malaysia, Kuala Lumpur 3 October 2017, reported as "What is So Common About the Common Law?: Towards the Creation of the Malaysian Rule of Law System" [2018] 1 MLJ i.

24 Ahmad Ibrahim, "The Civil Law Ordinance in Malaysia" (n. 23), at lxi.

25 For a useful list of these questions and the cases in Malaysia and Singapore which had the occasion to interact with the niceties of these interpretive questions, see Baharuddeen Abu Bakar, "Commercial Law of Malaysia" (n. 11).

legislative sovereignty.[26] It is beyond the scope of this article to repeat or to re-engage with these interpretive and substantive infelicities of s.5. Indeed, given the fervour of the argument for the abolition or at least, to diminish the force of s.5, in the commentaries referred to in this work, any attempt, intentional or otherwise, to keep s.5 in its full vigour is unlikely to be popular.

Those works point to the need to create a "Malaysianised" corpus of mercantile law, quite rightly. This is supported by commentators like Abu Bakar who makes a constitutional law point that "it is unconstitutional and invalid to apply in any part of Malaysia, the post-Independence commercial legislation of England as binding law" because art.44 of the Federal Constitution provides that "the legislative authority of the Federation shall be vested in a Parliament. . .".[27] He further argued that "the effect of the article is that a foreign legislature cannot make law for application in Malaysia, only Malaysian legislatures may do so".[28]

Importantly, if that interpretation is correct, the references in s.5 to the "corresponding period" in the case of the former Straits Settlements and East Malaysia would be unconstitutional. Notably, the matter of constitutionality had not come before a court of law in Malaysia. It is speculated that lawyers arguing on a point of commercial law, especially on maritime-related matters, would not wish to find themselves having to deal with the problem of a lacuna or gap in the law. Despite some commentators' views that the gap problem is misperceived[29], having to deal with an absence of applicable law in matters of international commerce is a threat not many self-respecting, fee-earning lawyers would wish to countenance.

"Malaysianising" the law of course is a laudable objective but no legislature, even working briskly, would be able to replace the entire suite of relevant English statutory rules quickly and thoughtfully. Such a matter is exacerbated by the fact that Malaysia lacks an independent law reform commission[30]; law reform is thus unlikely to be swift. Moreover and importantly, legal certainty and continuity is fundamental in mercantile and commercial matters to a trading nation like Malaysia.

Hence, a more practical solution is needed to ensure the legal certainty and continuity.

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26 *Ibid.,* and, in a Singapore context, see generally Michael F Rutter, *The Applicable Law of Singapore and Malaysia* (Malayan Law Journal Publishing, 1989).

27 See Baharuddeen Abu Bakar, "Commercial Law of Malaysia" (n. 11), 19.

28 *Ibid*.

29 For example, Ahmad Ibrahim, "The Civil Law Ordinance in Malaysia" (n. 23) and Baharuddeen Abu Bakar, "Commercial Law of Malaysia" (n. 11). For a broad rhetorical argument, see G W Bartholomew, "The Reception of English Law Overseas" (1968) 9 Me Judice 1.

30 In Malaysia, a Law Reform Committee was set up in 2009 but headed by a minister and so is not independent for all intents and purposes. For a contrast, in the United Kingdom the Law Commission of England and Wales and the Scottish Law Commission are drawn from judges, practice and academia with a duty "to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law . . ." (Law Commissions Act 1965, s.3(1)).

III. The Internal "Conflicts" Angle?

At the outset it should be recalled that the problem caused by s.5 is not a true conflict of laws situation. A conflict of laws arises when a tribunal has to decide between two or more competing laws which of those country's laws is most closely connected to the dispute.[31] Instead, in the s.5 scenario, it is arguable that there are no competing laws. There is only one law, the federal law in the Civil Law Act 1956, but that Act allows for different English laws (or at least English laws with different dates) to apply. Indeed, commercial contracts are thus likely to be expressed as governed by "Malaysian law" and not "the law of Malacca". Litigants do not select the laws of a constituent state as the proper law, especially where, under the Federal Constitution, the constituent states do not have legislative competence for making commercial contract law.[32] In fact, though, there is certainly a knotty question as to whether the issue in litigation arose in a particular state or whether the issue is being tried at a court in a particular state.[33]

The problem is acute, because in Malaysia, unlike other federal systems such as the United States or Germany, the constituent states do not have state-based judicial competence. Unlike those other federalised countries where each constituent state has its own superior court, in Malaysia there are only two High Courts, one for West Malaysia and the other for East Malaysia. But the two high courts have various sitting[34] locations within their respective territories. The Malaysian Courts of Judicature Act 1964 provides in s.23(1) that the High Court's civil jurisdiction is premised on:

> where-
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> (a) the cause of action arose;
> (b) the defendant or one of several defendants resides or has his place of business;
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
> (d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.[35]

The "where" in s.23(1) is restricted to either Peninsular Malaysia or East Malaysia and *not* the constituent states.

Thus, for the purposes of s.5, might it be plausibly argued that if a case is instituted in, say, Penang, regardless of which state the case has a closer connection

31 *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50 (HL).
32 See above at p.4 [will amend at proof stage].
33 Section 5(1)(2). See above at p. 66.
34 Section 19 Courts of Judicature Act 1964.
35 Section 23(1) Courts of Judicature Act 1964.

in law and fact, s.5(2) means that the High Court sitting in Penang must apply English mercantile law at the corresponding period? At a practical level, this raises the stakes for forum shopping, which is made more acute because no decision is required as to which forum is more appropriate.

It might be suggested that there was nothing in law to prevent a High Court sitting in, say, Johor (which might ordinarily apply English mercantile law as a matter of direct reception before 7 April 1956) from applying the laws of Penang (which continues to receive current English mercantile law) if it finds that the dispute is more closely connected to Penang than to Johor.[36] However, this would seem to go against the terms of s.5 "in all questions or issues which arise or which have to be decided", which suggest that as long as the question is to be decided in Johor, the court in Johor could apply the English law relevant to the state of Johor.

This approach, it is submitted, is redolent of a now-unappealing rule of conflict of law where the court would simply apply the *lex fori* rule, regardless of the appropriateness of the forum to the dispute.[37] It might thus be asked, given the pseudo-internal conflict of laws brought about by s.5, whether a modified form of the doctrine of *forum conveniens* might provide a solution.[38]

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36 Assuming, of course, that there is no express choice of law provision.

37 Albert A Ehrenzweig, "The Lex Fori – Basic Rule in the Conflict of Laws" (1960) 58:5 Mich L Rev 637. For criticisms of the *lex fori* approach, see David F Cavers, "A Critique of the Choice-of-Law Problem" (1933) 47:2 Harv L Rev 173, 193 and Albert A Ehrenzweig, "Contracts in the Conflict of Laws—Part One: Validity" (1959) 59:7 Col L Rev 973. See also the Hague Resolution of 30 August 1875, Institut de Droit International, Tableau Général des Resolutions (1873–1956) 365 (1957).

38 The origins of the doctrine of *forum non conveniens* are obscure. See, for instance, Joseph H Beale, "The Jurisdiction of Courts over Foreigners: 1. European Law" (1913) 26 Harv L Rev 193. The term was found in early Scottish cases in the 1800s to describe what was by then a "settled rule of Scottish practice", that is trial courts could refuse to hear cases when the ends of justice would best be served by trial in another forum. *Vernor v Elvies* (1610) 6 Dict. of Dec. 4788; *Col. Brog's Heir* (1639) 6 Dict. of Dec. 4816. Cf *Anderson v Hodgson* (1747) 6 Dict. of Dec. 4779; *Parken v Royal Exchange Assurance Co* (1846) 8 Sess. Cas. (2d ser.) 365. In *Longworth v Hope* (1865) 3 Sess. Cas. (3d ser.) 1049, 1053, the court said, "The next question is the question of forum non competens. Now the plea usually thus expressed does not mean that the forum is one in which it is wholly incompetent to deal with the question. The plea has received a wide signification, and is frequently stated in reference to cases in which the Court may consider it more proper for the ends of justice that the parties should seek their remedy in another forum". See also *Clements v Macaulay* (1866) 4 Sess. Cas. (3d ser.) 583. Later on, it appeared that the Scottish courts adopted the term *forum non conveniens* in place of *forum non competens* especially when the court's jurisdiction was clearly established and only a question of discretion to hear or not was involved. See *Brown v Cartwright* (1883) 20 Scot. L. R. 818, *Williamson v North-Eastern Ry Co* (1884) 21 Scot. L. R. 421 and *La Société du Gaz de Paris v La Société Anonyme de Navigation "Les Armateurs français"* [1925] Sess. Cas. 332, [1926] Sess. Cas. (HL) 13. In England, the reception of the doctrine was seen at the turn of the twentieth century. (See *Logan v Bank of Scotland* [1906] 1 KB 141, *Egbert v Short* [1907] 2 Ch. 205 and *In re Norton's Settlement* [1908] 1 Ch. 471). In Malaysia the doctrine is incorporated as a rule of general common law. (See s.3 of the Civil Law Act 1956.) See R H Hickling and Min Aun Wu, "Stay of Actions and Forum Non Conveniens" (1994) 3 Malayan Law Journal xcvii.

IV. A Unified Mercantile or Maritime Court

There is no single, unified commercial court in Malaysia.

However, as regards shipping litigation, a positive change was introduced in 2010: an Admiralty Court was established as a single, specialist High Court having its *seat* in Kuala Lumpur.[39] Its jurisdiction extends to all of West Malaysia.[40] This creates better certainty as to which court might be best seised with jurisdiction to hear a maritime claim dispute. The admiralty jurisdiction of the Malaysian High Court was previously limited to trying claims falling under s.20(1) and 20(2) of the UK Senior Courts Act 1981 (formerly titled the Supreme Court Act 1981).[41] Under the Malaysian Admiralty Court Practice Direction,[42] the categories of triable cases were expanded[43] to include:

(a) claims relating to carriage of goods by sea;
(b) limitation of actions for maritime claims, including actions seeking to limit liability or for extension of time where the limit of liability or the time for commencement of proceedings is prescribed by maritime convention or legislation;
(c) disputes pertaining to marine insurance and reinsurance contracts, including marine insurance agents and brokerage contacts;
(d) disputes arising from shipbuilding agreements, including issues with regard to the construction, design, maintenance and repair of ships;
(e) disputes arising out of the sale and purchase of ships;
(g) civil claims arising out of marine pollution marine or shipping-related agency, freight and multimodal transport and warehousing of goods at any port in Peninsular Malaysia;
(h) claims related to ship financing and documentary credit for the carriage of goods by sea;
(i) death or personal injury, loss or damage arising out of a marine activity in or about a marine facility, which includes ports, docks, berths or any form of structure defined as a "ship" under maritime law;

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39 Note that Kuala Lumpur was not a federal territory in 1956 when the Civil Law Act was passed, but it is safe to assume that it would be subject to s.5(1) and not s.5(2) (recalling that s.5(1) refers generally to Peninsular Malaysia where Kuala Lumpur is located, whilst s.5(2) concerns Sarawak, Sabah, Penang and Malacca). However, see Arun Kasi, "The 'Labuan Lacuna' Hague or Hague-Visby Rules for Labuan?" [2020] 6 MLJ cxxxi, touching on the anomalous legal status of the Federal Territory of Labuan which had been carved out of the state of Sabah, in 1984, post-independence. It appears unclear which part/s of ss.3 and 5 of the Civil Law Act 1956 would apply to this "new" federal territory: is it part of East Malaysia or not? If it is to be treated as part of Sabah, then ss.3(b) and 5(2) which apply to East Malaysia would apply.

40 In East Malaysia, there is no unified Admiralty Court, and admiralty jurisdiction continues to be decided upon by the existing High Court structures.

41 Section 24(b) Courts of Judicature Act 1964 (Malaysia).

42 PD No 1 of 2012 Admiralty and Maritime Claims.

43 In the interest of brevity, readers are asked to consult the full list of the traditional categories available at https://www.legislation.gov.uk/ukpga/1981/54/section/20/enacted (accessed 2 August 2022).

(j) civil claims arising from any breach of any marine regulations, notices, by-laws, rules or guidelines;
(k) disputes pertaining to the welfare of any seaman, including wages and contract of service;
(l) applications in connection with maritime arbitrations, including applications for the preservation of assets pending maritime arbitration and the review, setting aside and enforcement of maritime arbitration awards; and,
(m) appeals in respect of a maritime claim, which are determined by the Subordinate Courts.

The expanded jurisdiction allows for the specialist adjudication of the Court to be applied to essentially all aspects of maritime-*related* trade—including marine insurance, documentary credits, reinsurance contracts, freight forwarding and warehousing.[44] The court thus accepts the filing of both *in rem* and *in personam* claim forms or writs, and the court would also have the power to entertain an *in personam* claim even where there is no identified or identifiable ship in question, provided the claim falls within the aforementioned categories.

This admission of s.20 of the UK Senior Courts Act 1981 to create the Malaysian admiralty jurisdiction is an example of reception not of substantive English law but of jurisdictional rules. In the context of commercial maritime law, admitting English jurisdictional rules carries the risk of admitting, through the backdoor, international treaty law, which Malaysia had not signed up to.

Section 24 of the Malaysian Courts of Judicature Act 1964 provides that the Malaysian High Court shall have "the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England". Those powers as set out in ss.20–24 of the Senior Courts Act 1981[45] and are derived substantially from Part I of the former Administration of Justice Act 1956 Act, which was enacted to give effect to the Arrest Convention 1952.[46] Despite the fact that Malaysia had not signed the treaty, the convention provisions apply, albeit as (imported) domestic law and not international law. Indeed, with the extension of the categories falling within the jurisdiction of the admiralty court, the powers of arrest have

44 However, pure international sale disputes, including those which might be commonly considered in industry as "dry shipping" matters, are omitted or absent from these jurisdictional categories.

45 Those powers, it would appear, should exclude the Admiralty Court's procedural powers for case management as those are provided for in the various Practice Directions issued by the Malaysian judiciary for the conduct of civil procedure.

46 Brussels Convention of 1952 relates to the arrest of seagoing ships and the rules concerning civil jurisdiction in matters of collision (Cmd 8954). Note that there is a newer Arrest Convention 1999, which came into force on 14 September 2011, but is not ratified by the United Kingdom. The purpose of the 1952 Convention was to restrict the possibilities of arrest with regard to seagoing vessels flying the flag of a contracting State. Such an arrest was allowed for "maritime claims" (as defined in art.1) against the vessel or against the sister ship belonging to the same owners. Other claims can only be secured if the vessel's home port is situated in a non-contracting State.

expanded beyond those envisaged by the Arrest Convention 1952 and are more closely reflective of the grounds for arrest in the newer Arrest Convention 1999.

Against the backdrop of admiralty jurisdiction, a common law court in a former colony or protectorate could thus controversially admit into its substantive law an international treaty law by means of an English law reception statute. The Supreme Court of India in *MV Elisabeth v Harwan Investment and Trading Pvt Ltd*[47] went even further, reasoning that the principles and rules introduced via reception of English law statute reflected general principles of international law. There, the plaintiff had instituted an *in rem* action before the Andhra Pradesh High Court for misdelivery of cargo without requiring relevant bills of lading.[48] The vessel was arrested on entering the Port of Vishakapatnam. The issue was whether a misdelivery claim founded on contract and tort could provide grounds for seisin by the admiralty court. Indian admiralty jurisdiction at the time[49] was based on Admiralty Court Act 1861.[50] It was unclear if the 1861 Act admitted a *cargo* claim, which bore all the hallmarks of an *in personam* action.[51] The Indian Supreme Court referred to the Arrest Convention 1952 and held that although the convention was one that India had not signed up to, its extension of the power of arrest to cargo claims was one reflective of general international maritime law. It said of the provisions of the international conventions: "Although many of these conventions have yet to be ratified by India, they embody principles of law recognised by the generality of maritime States, and can therefore be regarded as part of our common law".

Importantly for the purposes of this work, the court then cited *The Jade*,[52] where the court there stressed that "the Admiralty jurisdiction of the High Court of Justice in England derived partly from statute and partly from the inherent jurisdiction of Admiralty". The implication is clear. The source of admiralty jurisdiction is deeply embedded in the common law, and the statutory provision is not exhaustive.

In a similar vein, in the more recent case of *Liverpool & London SP&I Association Ltd v MV Sea Success I*,[53] the Supreme Court of India extended the powers of the admiralty court to a dispute over Protection and Indemnity Club cover (essentially a marine insurance contract claim). In that case the insurers sought to arrest the ships for unpaid insurance premium. The issue was whether an unpaid premium

47 1993 AIR 1014; 1992 SCR (1) 1003, (SC of India).

48 Indeed, the carrier had not issued bills of lading as required under the contract of carriage.

49 See now the positively welcomed Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017.

50 The Act was made applicable to India by the Colonial Courts of Admiralty Act 1890, read in conjunction with the Colonial Courts of Admiralty (India) Act 1891. The 1890 Act declared certain courts of unlimited civil jurisdiction as Colonial Courts of Admiralty, but it remained frozen as on the date of Admiralty Court Act 1861.

51 Actions against the ship itself (eg if the defendant's ship collided with a plaintiff's pier or ship, causing damage) are usually deemed to be actions *in rem*, whilst suits based on contract or tort (eg where the plaintiffs allege that the ship carrier had made a misdelivery of the cargo) are deemed to be actions *in personam*. Actions *in personam* had traditionally been excluded from admiralty jurisdiction.

52 [1976] 1 All ER 921.

53 [2003] INSC 580.

debt was a claim which permitted the court to order the arrest of the vessels. There are two international conventions on ship arrest: the Arrest Conventions 1952 and 1999. The 1999 version would have allowed for such an arrest. However, India is not a signatory to either conventions, and, crucially, the United Kingdom has adopted only the 1952 Convention.

It would thus be natural for the Supreme Court of India to hold that, by virtue of the reception of English admiralty powers, the 1952 Convention would so too be admitted to Indian law. But that would not be enough to satisfy the insurers' application. Thus, the court went further, perhaps controversially, stating that "in the absence of any domestic legislation to the contrary, if the Arrest Convention 1952 has been applied, although India is not a signatory thereto, there is obviously no reason as to why the Arrest Convention 1999 should not be applied. It is not correct to contend that this Court, having regard to the decision in *MV Elisabeth,* must follow the law which is currently prevalent in UK and confine itself only to the Arrest Convention 1952 in Indian admiralty jurisprudence". The Supreme Court held that *MV Elisabeth* was authority for the proposition that the changing global scenario should be kept in mind, having regard to the fact that there is no primary Act in India touching on the subject. It is important to note that the rules in the 1999 Convention could not be said to be *jus cogens*. They are clearly not mandatory, overriding rules of international law. There is no universal state practice that the rules in the 1999 Convention might be said to mirror. At best, they reflected the state of contested customary international law—given the fact that many states continue to apply the 1952 Convention rules and equally many have not even adopted either convention. What is clear thus is this. First, there is no objection to using a reception of English law statute to introduce into India an international convention incorporated into English law. Second, there is further no objection to receive a rule of international law which is *inconsistent* with the prevailing English law.

This case also shows that such an accretion of jurisdiction is not merely procedural. It dispels the perception that statutes bringing into local jurisdiction the UK admiralty court's range of powers is largely procedural by nature. In fact, receiving the so-called English statutes providing for procedural or jurisdictional powers could potentially lead to the admission of other rules, which were not always envisaged—such as an international convention conveying substantive principles of law. As is evident in the *Sea Success I*, the Arrest Convention does not merely provide for judicial powers and processes for ship arrest, but it also defines what was meant by a "maritime claim". It would be unrealistic to suggest that such a provision is not substantive law.[54]

A similar concern might be had in relation to s.5. Even with a single admiralty court, the presence of s.5 could conceivably also be used to import international

54 It should of course be recalled that in the case of Malaysia, the powers of the admiralty court had been expanded (see above at p. 75) to include marine insurance disputes. However, this does not detract from the point made here about the backdoor reception into the local legal system of an international convention (not ratified domestically) imbued with substantive legal provisions.

convention rules which the country had not signed up to. For example, if the United Kingdom signs up to say the United Nations Convention on Independent Guarantees and Standby Letters of Credit 1995[55] and introduces a new Act as implementing legislation, this raises the same troublesome question discussed earlier.[56] If the matter comes before the Admiralty Court which is based in Kuala Lumpur, does that mean s.5(2) would not apply since the question is one "which [has] to be decided" in Peninsular Malaysia and no assessment of the *forum conveniens* should be made? If the matter, say, had been brought before the court in Penang, the new UK Act would introduce into the case the UN Convention rules. If the doctrine of *forum conveniens* is impermissible, the place/state where the unified court sits would dictate what the relevant received English mercantile law should be. For example, if the unified court sits in Kuala Lumpur, the applicable English mercantile law is the one with a cut-off date of 7 April 1956, despite the fact that the case may be much more closely connected to, say, Penang. Such an outcome would seem to fly in the face of the present scheme of s.5.

Hence, in the long run, the question as to the applicable or proper law however does not dissipate, despite the creation of a specialist court to attend to maritime trade disputes.

V. Conclusion

What has been articulated in this article, for the wider context of scholastic discourse, is the problem caused primarily by the adoption of a temporary measure as a long-term solution. It is further shown that, for the efficient administration of commercial justice in a federation entity, due regard should be given to matters of internal choice of law and jurisdiction. It is insufficient for a federal state simply to have constitutional provisions for *legislative* competence between states and the federal authority. A federalised former British colony or protectorate, like Malaysia, also needs clearly articulated conflicts rules for the different received laws. Those laws certainly include rules of the common law and equity with different reception dates, but also foreign (UK) statutes, again with different reception dates. All this preferably backed by a set of clear jurisdictional rules.

As to the matter of s.5, plainly put, this section though necessary at the time the country became independent is clearly a square peg in a round hole. As argued, whilst abolishing it and establishing its own federal mercantile laws are obvious solutions, these are but stickily difficult solutions to implement. All this is made worse by the constitutional organisation of Malaysia and the absence of clear rules on internal conflict of (received mercantile) laws. There are no fast and easy solutions, unfortunately. A form of the doctrine of *forum conveniens* to be applied in an

55 Not in force in Malaysia.
56 See above.

internal domestic sense might help. Long term, it is of course a platitude to say that a proper review and revision of Malaysian mercantile law is vital.

It is well and good for practising lawyers to brush off the problem by suggesting that, in Malaysia, English law is used and applied routinely.[57] This perhaps misses the point that it is English mercantile statutes that one is concerned with here, not English case law or principles of equity or even cases which concern statutory provisions. For Malaysia, therefore, to rise to the challenge of being a well-regarded forum for commercial and shipping litigation, it really cannot pretend that the problem will disappear by itself. Some hard decisions will need to be taken.

57 As Abu Bakar suggests: "The English legal education of the majority of lawyers in private practice makes for a tendency to readily rely on English case-law without first considering whether the case-law interprets or applies post cut-off date English legislation which amounts to applying English legislation via case-law". See Baharuddeen Abu Bakar, "Commercial Law of Malaysia" (n. 11), 11.