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THE LEGAL STATUS OF SHIPPING ORDERS AND THE SHIPPING MANIFEST AS DOCUMENTS OF TITLE UNDER THE HAGUE RULES IN MALAYSIA

by DR IRWIN UJ OOI *

Introduction

There has been a dearth of reported shipping law cases in Peninsular Malaysia since the mid to late 1990s, and this is a trend that persists until today. Only a handful of cases are now reported annually in the local law reports and development of shipping law via the common law of Malaysia has come almost to a standstill in the Peninsular. Therefore, two recent decisions generated an unusually high degree of excitement among the marine legal fraternity as the Malaysian judiciary was presented with two opportunities to express views on the legal status of two documents used in local commercial shipping. Both these cases were heard in the High Courts of Kuching and Miri respectively, thus preserving Borneo's reputation as a hotbed of litigation on shipping matters in Malaysia. The first part of this article deals with the legal recognition of shipping orders as a document of title, and the second part concerns the shipping manifest.

Part I - Shipping Orders

The Malaysian judiciary had its first ever opportunity to examine shipping orders in a case involving the ship, the *Ming Soon Jaya*, recently in *Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd*,¹ where no bill of lading was issued, and the High Court of Kuching had to decide whether a shipping order was a good document of title for the purposes of the contract of carriage. The term "shipping order" refers to a document instructing the master to either load onto the ship or to unload from the ship a specified quantity of cargo to an identified party. The shipping order may be issued either by the cargo-owner, or even the charterer where the ship is chartered.

Where the shipping document contains an order given by the owner of goods and/or consignor, to the sea carrier, giving directions to deliver the goods to the party named

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1 [2000] 5 MLJ 721.

in the order,² it is known as a ship's delivery order, and it is a "close relative" of a shipping order. However, it is not this latter form of document that was the subject of litigation in *Sarawak Electricity Supply*. Ship delivery orders are already subject to a complex structure of rules at common law, and supplemented by statutory provision such as the English Carriage of Goods by Sea Act 1992. Unlike a ship's delivery order, the humble shipping order though, is of a less glamorous pedigree in common law terms. As it has hardly ever been the subject of litigation in the Commonwealth and rarely used by buyers and sellers in the context of international trade, no distinct body of law has developed to provide any guidelines for shipping circles and the legal fraternity as to the legal characteristics of this document. As a shipping order is strikingly similar to a ship's delivery order, it is submitted that the process of adapting the law on ship's delivery orders for application in the context of a shipping order appears feasible.

In the *Sarawak Electricity Supply Corp* case, the consignor, Sarawak Electricity Supply Corp shipped a consignment of cables, wires, electrical goods, engine parts and office stationery valued at RM100,689.05 on board the *Ming Soon Jaya*, owned by MS Shipping Sdn Bhd. The goods were loaded on board the ship at Kuching and were destined for Limbang and Lawas. During the voyage, the *Ming Soon Jaya* encountered what Mr Justice Ian Chin described as "boisterous and rough weather".³ The ship went aground at Kuala Bintulu after water entered the ship. This outcome was inevitable after wires that held the goods on the deck snapped, causing goods to roll to the right, in turn, forcing the ship to list. The consignor received an indemnity from UMBC Insurance Sdn Bhd.⁴ The underwriters then exercised their right of subrogation and sued the owner of the ship, in the name of the consignor.⁵

As part of its defence, MS Shipping Sdn Bhd argued that it was entitled to an exemption under Article IV of the Hague Rules.⁶ In Sarawak, the Hague Rules are incorporated into state law via the Merchant Shipping (Implementation of

2 See Treitel & Reynolds, *Carver on Bills of Lading* (Sweet & Maxwell 1st Ed 2001) at 378, para 8-028. The statutory definition provided in s 1(4) of the English Carriage of Goods by Sea Act 1992 states that a ship's delivery order "is neither a bill of lading nor a sea waybill but contains an undertaking which - (a) is given for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and (b) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person".

3 Ibid at 726.

4 Sarawak Electricity Supply Corp obtained a marine insurance policy on goods with UMBC Insurance Sdn Bhd. Malaysia does not have its own statute on marine insurance. No provision was made for this area of law in the Insurance Act 1996. Hence in *Leong Brothers Industries Sdn Bhd v Jerneh Insurance Corp Sdn Bhd* [1991] 1 MLJ 102 (High Court, Penang) and *The Melanie; United Oriental Assurance Sdn Bhd, Kuantan v WM Marzariol* [1984] 1 MLJ 260 (Federal Court), the Malaysian courts have resorted to s 5 of the Civil Law Act 1956 and applied the English Marine Insurance Act 1906. In *Leong Brothers*, Mr Justice Wan Adnan referred to s 30 and the First Schedule of the 1906 Act. In *The Melanie*, the Chief Justice of Malaya, Salleh Abas, applied the concept of constructive total loss as stated in s 60 of the 1906 Act.

5 The rights of subrogation are dealt with in s 79 of the Marine Insurance Act 1906. Under s 79(1), it is provided that "where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in an respect of that subject-matter as from the time of the casualty causing the loss".

6 Art IV is titled "Rights and Immunities". The exemption from liability for the owner of a ship is found in Art IV(2)(a)-(q), Art IV(3), Art IV (4) and Art IV(6).

Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and others) Regulations 1960.⁷ The Hague Rules are given the force of law in Sarawak via regulation 2.⁸ Regulation 4 makes it crystal clear that the Hague Rules only apply to a “bill of lading or similar document of title”.⁹ Hence, in order to take advantage of the exemptions under Article IV, MS Shipping Sdn Bhd would have to show that the shipping order was a “similar document of title” since no bill of lading was issued in respect of the cargo carried by the Ming Soon Jaya.

The “Bill of Lading” as the Benchmark for a “Document of Title”

Before embarking on an examination of the judgment of Mr Justice Ian Chin in *Sarawak Electricity Supply Corp*, it is essential to understand what is a “bill of lading”. If one were in the dark as to what particular shipping document the term “bill of lading” referred to, an appreciation of what the legislative terms “similar document of title” used in conjunction with the former term, could prove to be difficult. There is no statutory definition of the term “bill of lading” in Malaysia, although it is a document used extensively to ship cargo and a term that is used widely in shipping circles. Even the drafters of the Hague Rules refrained from providing a definition. Hence it is no surprise that the Malaysian judiciary have resorted to a widely quoted English Law definition. Mr Justice Ian Chin himself adopted the definition from *Halsbury’s Laws* that states:¹⁰

A bill of lading is a receipt for goods delivered to and received by a ship, signed by the person who contracts to carry them, or his agent, and evidencing the terms of the contract of carriage under which the goods have been so delivered and received. During the period of transit and voyage the bill of lading is recognised by the law merchant as the symbol of the goods described in it, and the indorsement and delivery of the bill of lading operates as a symbolic delivery of the goods.¹¹

The English legislature has wisely steered away from providing a statutory definition as generations of parliamentary drafters have found the task of providing a comprehensive definition virtually impossible, although the Carriage of Goods by Sea Act 1992 does come tantalisingly close to doing this. Even the designation attempted by *Halsbury’s Laws* is far from perfect. For example, it makes no express reference to a “shipped bill of lading”, which is a bill of lading that indicates that the

7 Hereinafter referred to as the 1960 Regulations. In Peninsular Malaysia, the Hague Rules are incorporated into national law by virtue of the Carriage of Goods by Sea Act 1950. Sarawak had to implement the Hague Rules via the 1960 Regulations because s 1(2) of the Carriage of Goods by Sea Act 1950 confines the application of the Act “to the States of West Malaysia only”.

8 The Hague Rules are given the force of law in Peninsular Malaysia via s 2 of the Carriage of Goods by Sea Act 1950.

9 The equivalent to Regulation 4 is s 4 of the Carriage of Goods by Sea Act 1950, which is substantially the same statutory provision.

10 *Halsbury’s Law of England* 4th Ed vol 41, para 946.

11 [2000] 5 MLJ 721 at 728.

goods have actually been loaded on board the ship. The reference is instead made to a “receipt for goods ... received by a ship”, hence the definition in the *Halsbury's Laws* is merely an explicit nod to a “received for shipment bill of lading”. This particular type of bill of lading is generally, not favoured by the banks.¹² It would therefore be difficult to use this document to procure financing for purchase of the goods as the bill of lading merely indicates that goods had been received by the sea carrier and taken into care of the carrier. There is no acknowledgement on the document itself whether the goods had in fact been loaded on board the ship. Uncertainty also abounds as to what a received for shipment bill of lading actually encompasses, as Todd makes the following observation:

[T]here is no clear notion of what a received for shipment bill of lading is. It may clearly state that the goods have been received for shipment aboard a particular vessel, or it may leave the carrier with a discretion as to the identity of the vessel. It may state that the carrier received the goods personally, or it may merely state receipt by an agent.¹³

The lack of precision in the definition provided by *Halsbury's Laws* is rather disturbing as consignees and consignors are left in a state of legal uncertainty. At least in the context of the Hague Rules, the shipper has the right to demand a “shipped” bill of lading under Article III(7). An added difficulty is that only a shipped bill of lading is regarded as a document of title at common law¹⁴, there is no such recognition for a received for shipment bill of lading.¹⁵ These difficulties though, appear to be more apparent than real, as the authors of *Benjamin's Sale of Goods* point out, “refusal to recognise received bills as documents of title need not hamper dealings in such goods once they have been shipped, for it is then a simple matter to turn the received into a shipped bill by a notation recording the fact of shipment”.¹⁶

The Judgment of Mr Justice Ian Chin in *Sarawak Electricity Supply Corp*

A “bill of lading” occupies the position as the premier shipping document of title in Malaysia, and in many instances, for most of the rest of the world too. Hence the Hague Rules first makes reference to a “bill of lading” and then only refers to “or similar document of title”. The words “similar document of title” were obviously an attempt to bring some of the “lesser” shipping documents such as the sea waybill and

12 See Art 23(a)(ii) of the Uniform Customs & Practice For Documentary Credits (1993 Revision) of The International Chamber of Commerce ICC. Publication No.500-ISBN 92-842-1155-7(E) which makes it very clear that a received for shipment bill of lading is unacceptable as the only marine/ocean bill of lading recognised is one that “indicates that the goods have been loaded on board, or shipped on a named vessel”.

13 Todd, *Bills of Lading & Bankers' Documentary Credits* (Lloyd's of London Press, 3rd Ed 1998) at 119.

14 See *Diamond Alkali Export Corporation v Fl Bourgeois* [1921] 3 KB 443 per Mr Justice McCardie at 450.

15 In the context of a writ *in rem*, the Privy Council has accepted in *The Marlborough Hill* [1921] 1 AC 444 that a received for shipment bill of lading was indeed a bill of lading. However, this is restricted to context the old, s 6 of the Admiralty Court Act 1861 which was in force at that time. By implication, this probably meant that a received for shipment bill was a document of title for the purposes of whether there could be a service of a writ *in rem*.

16 (Sweet & Maxwell 5th Ed 1997) vol 1 at para 18-045.

ship's delivery order within the ambit of the Hague Rules. Hence, it is obvious that a shipping order has its limitations and will not have the versatility of being able to perform all the functions of a bill of lading. This is a fact that is not lost on Mr Justice Ian Chin as he makes the following observation in *Sarawak Electricity Supply Corp*:

[t]hough [the shipping order] ... has some of the features [of the bill of lading], like the name of the vessel, the port of loading and destination, the place of payment of the freight, the description of the cargo, a place for the acknowledgement of the receipt of the cargo, it does not contain the other terms of the carriage, like whether the Hague Rules should apply and what are the excepted perils.¹⁷

Despite those deficiencies, a shipping order is able to fulfil many of the important functions of a bill of lading. This is a fact acknowledged by Mr Justice Ian Chin who remarked that, "a shipping order has the other important attributes of a bill of lading like, an acknowledgement by the shipping company that the cargo had been received in apparent good order and condition and that it had been shipped by a consignor".¹⁸ His Lordship also added that, "just like the bill of lading, [the shipping order] states the destination and description of the cargo".¹⁹

If the shipping order were to be accepted as a "similar document of title" to a bill of lading for the purposes of the Hague Rules it would have to perform the most critical and fundamental function of a bill of lading, i.e., being able to function as a document of title. Possession of a bill of lading gives its holder "constructive possession" of the goods, allowing the holder of the bill legal control over the fate of the goods, in the absence of actual physical possession of the goods.²⁰ In determining whether or not a shipping order fulfilled this requirement, Mr Justice Ian Chin adopted the following test from *Ramdas Vithaldasm Durbur v Amerchand (S) & Co; Ramdas Vithaldas Durbur v Chhaganlal*:²¹

17 Ibid.

18 [2000] 5 MLJ 721 at 729.

19 Ibid.

20 The holder of a bill of lading has possession and control of the goods covered by the bill of lading. See *Bangkok Bank Ltd v Wiel Brothers Cotton Inc* [1977] 2 MLJ 134 (Federal Court, Penang) per Lee Hun Hoe AG LP at 139, citing the judgment of Lord Justice Diplock in the English decision of *Barclay's Bank Ltd v Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep 81 at 89. See also *The Santorini I: Owners of the Cargo Carried in the Ship 'Santorini I' v Owners of the Ship and Other Interested* [1994] 3 MLJ 709 (High Court, Kuala Lumpur) per Mr Justice VC George at 714, citing the judgments of *Kuwait Petroleum Corp v I & D Oil Carriers Ltd* (Court of Appeal, 21 July 1994) (unreported) and *Glyn Mills Currie & Co v East & West India Dock Co* (1882) 7 App Cas 591 at 610. See also *B Daldas & Co (Pte) Ltd v Sin Sin & Co & Others* [1984] 2 MLJ 223 (High Court, Miri) per Mr Justice Chong Yik Liong at 224, quoting *Halsbury's Laws of England*, 3rd Ed, vol 35 at 332, where it is stated that "a bill of lading is 'a symbol of the right of the property in the goods specified therein. Its possession is equivalent to the possession of the goods themselves, and its transfer, being a symbolical delivery of the goods, has by mercantile usage the same effect as an actual delivery in the same circumstances'; and at 346, it is stated that 'the issue or transfer to the buyer of a bill of lading operates prima facie as a delivery to the buyer of the goods shipped'". See also *The Jag Shakti; Chhabra Corporation Pte Ltd v mv "Jag Shakti" Owners & Ors Interested* [1986] 1 MLJ 197 (Privy Council, appeal from the Court of Appeal, Singapore) per Lord Brandon at 199.

21 (1916) 85 LJPC 214.

whenever any doubt arises as to whether a particular document is a 'document showing title' or a 'document of title' to goods ... the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods there represented.²²

The key element that has to be satisfied appears to be whether the holder of a shipping order has "possession and control" of the goods. From the evidence adduced in court, it appeared that if a consignee wanted to claim possession of the cargo, a shipping order signed²³ by the owner of the ship,²⁴ would have to be produced.²⁵ The consignee must also sign a copy of the shipping order acknowledging receipt of the cargo, and, this would then be used by the shipowner to obtain payment of freight from the customer.²⁶ In the light of this evidence, Mr Justice Ian Chin concluded that "the shipping order is as good as being a document of title" as without it, Sarawak Electricity Supply Corp "would not have been able to claim the cargo" from MS Shipping Sdn Bhd.²⁷ His Lordship explained that:

the shipping order is clearly a document used in the ordinary course of business since it was one of the documents used in the business transaction between the parties over a period of time as proof of the control or possession of the cargo and authorizing the possessor to receive the goods represented by the shipping order.²⁸

The Legal Status of Shipping Orders at Common Law and the Effect of Local Custom on Such Status

Throughout the course of his judgment in *Sarawak Electricity Supply Corp*, Mr Justice Ian Chin omitted to mention that generally, a ship's delivery order, i.e., which is a shipping order containing an order given by the owner of goods and/or consignor, to the sea carrier, giving directions to deliver the goods to the party named in the order, is in actual fact, not a document of title that is recognised at common law. This

22 Ibid at 215.

23 A specimen of the shipping order is reproduced in the judgment at [2000] 5 MLJ 721 at 727 & 728. The legal effect of such countersigning is hazy at best although this is a practice previously seen in cases such as *Colin & Shields v Weddel & Co* [1952] 2 All ER 337, *The Osterbek; John Martin of London Ltd v AE Taylor & Co Ltd* [1953] 2 Lloyd's Rep 589, *Olearia Tirrena Sp A v NV Algemeene Oliehandel* [1972] 2 Lloyd's Rep 341, *Crener v General Carriers SA* [1974] 1 WLR 341 and *Waren Import Gesellschaft v Internationale Graanhandel Thegra NV* [1975] 1 Lloyd's Rep 146. See Treitel & Reynolds, above n 2 at 380 para 8-032.

24 The actual signature used in the shipping order itself is " 'Chinchoo' of Vessel", which is the phonetic in Chinese Hokkian for "shipowner". See [2000] 5 MLJ 721 per Mr Justice Ian Chin at 728.

25 [2000] 5 MLJ 721 at 728.

26 The term "customer" is used here because the person who is liable to pay the freight varies, depending on the type of freight that is payable. If the freight is payable in advance, as it is in most cases in modern shipping, then the person liable to pay freight is the shipper or consignor, ie, the person delivering the cargo the shipowner for shipment. If the ordinary freight is payable, then freight is payable at the port of discharge by the consignee upon collecting the goods.

27 [2000] 5 MLJ 721 at 728.

28 Ibid at 729.

has been the legal position since the decision of the House of Lords in *The Julia*.²⁹ This raises the question whether the legal position is also the same for a shipping order as it shares so many characteristics with a ship's delivery order.

There is an exception to the rule in *The Julia*. A delivery order will be treated as a document of title if there is a proven custom in relation to that particular kind of document in question.³⁰ That is the exception to the rule, which his Lordship appears to have resorted to in the course of delivering his judgment, although specific reference was not made to this rule.³¹ What Mr Justice Ian Chin did say is that, if the House of Lords in *Official Assignee of Madras v Mercantile Bank of India Ltd*³² were convinced that a railway receipt could perform the function of a document of title, his Lordship could "see no reason why the shipping order [could not] ... be one".³³ His Lordship held that the "shipping order has all the essential features as that of a railway receipt, that is, the fact of the shipment by the owner and the need to produce the document to collect the cargo".³⁴

In adopting that approach, Mr Justice Ian Chin overlooked the case of *Chan Cheng Kum & Another v Wah Tat Bank Ltd & Another*³⁵ where both the Federal Court and the Privy Council recognised that in principle, a mate's receipt could be a document of title for the purposes of trade between Sarawak and Singapore as there was a practice among merchants of treating such a document as if it were a bill of lading.³⁶ Although *Chan Cheng Kum* concerns a different type of shipping document, the Privy Council made important observations on the role of custom in the recognition of shipping documents. In particular, Lord Devlin explained that the custom must be known and accepted universally "by those who habitually do business in the trade or market concerned" and "is neither uncertain [n]or unreasonable".³⁷ His Lordship quoted³⁸ with approval Chief Justice Tindal, who said in *Lockwood v Wood*³⁹

29 *Comptoir D'Achat Et De Vente Du Boerenbond Belge S/A v Luis De Radder Limitada; The Julia* [1947] WN261; 177 LT 648 (Court of Appeal) (Master of the Rolls, Lord Greene & Mr Justice Croom-Johnson, Lord Justice Asquith, dissenting); [1949] AC 283 (House of Lords) (Lord Porter, Lord Simonds, Lord Du Parcq, Lord Normand, Lord Macdermott) at 316, reversing the judgment of the Court of Appeal.

30 See for example *Merchant Banking Co of London v Phoenix Bessemer Steel Co* (1877) 5 Ch D 205. See also Treitel & Reynolds, n 23 at 397, para 8-057.

31 As to the evidence that must be adduced to establish this custom in practice, see *Chan Chen Kum & Another v Wah Tat Bank Ltd & Another* [1967] 2 MLJ 263 (Federal Court); [1971] 1 MLJ 177 (Privy Council) where attempts were made to prove that it was the custom of trade between Sarawak and Singapore that the mate's receipt was treated as equivalent to a document of title for goods, in the same way as bills of lading. See also *The MV Thonfullin; Kuok Ling Timber Industries Sdn Bhd v The Owners of and Other Persons Interested in the Vessel 'MV Thonfullin'* [2000] 2 MLJ 615 (High Court, Sibiu) where there was an attempt by the sea carrier to show that for the carriage of timber from ports in Sarawak, there was a custom that the cargo owners had to effect a marine insurance policy the goods being transported in the vessels, and that, this was not the responsibility of the carrier.

32 [1935] AC 53.

33 [2000] 5 MLJ 721 at 730.

34 Ibid.

35 [1967] 2 MLJ 263 (Federal Court); [1971] 1 MLJ 177 (Privy Council).

36 Evidence that was adduced before the court showed that from Sarawak to Singapore, between 90 and 95 percent of the shipping traffic was being carried on a mate's receipt without a bill of lading whereas in the opposite direction the percentage was between 75 and 80 percent, see [1971] 1 MLJ 177 at 178.

37 [1971] 1 MLJ 177 at 179. See also *Fraser v Evans* [1867] 6 NSW 325 and *Merchant Banking Co of London v Phoenix Bessemer Steel Co* [1877] 5 Ch D 205 where the courts recognised a custom among merchants to treat warehouse certificates or warrants as documents of title.

38 Ibid.

39 [1844] 6 QB 50.

that a good and established custom “obtains the force of law, and is, in effect, the common law within that place to which it extends”.⁴⁰ The decision in *Chan Cheng Kum* therefore provided an exception to the rule in *Hathesing v Laing*⁴¹ and *Nippon Yusen Kaisha v Ramjiban Serowgee*⁴² that a mate’s receipt amounted to nothing more than mere evidence that goods have been received on board the ship and was not a document of title. In *Chan Cheng Kum*, Lord Devlin also pointed to the fact that bills of lading did not enjoy their current status as the premier shipping document until *Lickbarrow v Mason*,⁴³ where it was declared that by the custom of merchants, bills of lading were transferable.⁴⁴ It was only after this decision that the final piece of the legal jigsaw was in place to allow the bill of lading to assume its position as the premier document of title in the context of shipping goods.

Shipping Orders Containing Languages Other Than English

The fact that the Chinese “Hokkian” phonetic for shipowner, “Chinchoo”, is used in the signature of the shipping order raises the issue whether the use of a foreign language in conjunction with English would affect the status of the shipping order as a document of title. In his judgment in *Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd*,⁴⁵ Mr Justice Ian Chin noted this fact in passing, and did not express any view on the legal implications, if any, of the use of the “Hokkian” phonetic.⁴⁶

In the recent case of *The MV Thonfullin*,⁴⁷ the High Court of Sibul had to decide whether the Chinese characters in the delivery order were of any legal significance. The signature of the buyer was in Chinese, and so were the marks concerning the cargo of sawn timber. Mr Justice Tee Ah Sing held that the Chinese characters did not affect the delivery order. His Lordship was able to “understand the nature of the document and the particulars stated”.⁴⁸ This is due to the fact that the delivery order, “clearly sets out in English the name of the seller, buyer, the species of the timber bought and sold, the quality, the specification and the price”.⁴⁹ His Lordship did not understand what the marking on the timber meant, but that was irrelevant as “[t]he marking of the sawn timber [was] . . . not in issue”.⁵⁰ In reaching his decision, Mr Justice Tee Ah Sing applied the case of *Yap Piew Chuan v Araca Enterprise Sdn Bhd*⁵¹ and distinguished the facts of *Syarikat Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd*.⁵²

40 Ibid at 64.

41 [1873] LR 17 Eq 92.

42 [1938] AC 429.

43 [1794] 5 TR 683; 101 ER 380.

44 [1971] 1 MLJ 177 at 179.

45 [2000] 5 MLJ 721.

46 “Hokkian” is a Chinese dialect spoken mainly by the Chinese community in the states of Penang and Perak, in the north west of Peninsular Malaysia.

47 *Kuok Ling Timber Industries Sdn Bhd v The Owners of and Other Persons Interested in the Vessel ‘MV Thonfullin’* [2000] 2 MLJ 615; [2000] MLJ LEXIS 773.

48 [2000] MLJ LEXIS 773 at 50.

49 Ibid.

50 [2000] MLJ LEXIS 773 at 50.

51 [1998] 1 AMR 645.

52 [1994] 2 MLJ 420.

In *Yap Piew Chuan*, the description of the goods was in Chinese characters but the English words “satin”, “nylon tricot” and “polyter tricot brush” was also used. The quantities were stated in English, ie, the length of material and the price of the goods.⁵³ Mr Justice Abdul Aziz took the view that the documents were “in the English Language but containing certain words in Chinese”.⁵⁴ His Lordship explained, “I am able to understand the nature of the documents and the transactions that they record. What I do not know is the description of the goods concerned. The description of the goods is, however, not in issue. There is no dispute as to the identity of the goods”.⁵⁵

Applying both *The MV Thonfullin*⁵⁶ and *Yap Piew Chuan v Araca Enterprise Sdn Bhd*⁵⁷ to the facts of *Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd*⁵⁸, it is submitted that the Chinese “Hokkian” phonetic for shipowner, “Chinchoo”, used in the signature of the shipping order, would not affect its status as a document of title. Those were the only non-English words in the shipping order as the rest of the document was in English. Three observations can be made at this juncture. First, the amount of Chinese characters found in the shipping order in *Sarawak Electricity Supply Corp* was certainly less in quantity than that found in either *The MV Thonfullin* or *Yap Piew Chuan*. Second, only the phonetic was used, the Chinese characters did not even make an appearance in the document as they did in *The MV Thonfullin* and *Yap Piew Chuan*. Lastly, the “Hokkian” phonetic was only used in the signature, a point that was not in dispute before the court. The legal point in contention before the court, that of whether a shipping order was a document of title, similar to a bill of lading, was not affected by this fact.

It is submitted that *Syarikat Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd*⁵⁹ was rightly distinguished by both Mr Justice Tee Ah Sing in *The MV Thonfullin*⁶⁰ and Mr Justice Abdul Aziz in *Yap Piew Chuan v Araca Enterprise Sdn Bhd*⁶¹. In *Syarikat Telekom Malaysia Bhd*, the relevant document was the Malaysia Business Chinese Directory that was in Chinese writing. The Supreme Court held that it was impossible to come to any decision because members of the judiciary were unable to understand what the book contained. This is clearly not the case in *Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd*⁶² where practically the whole document was in English, with only the signature in phonetic “Hokkian”. In the words of Mr Justice Abdul Aziz in *Yap Piew Chuan*, the case of *Syarikat Telekom Malaysia Bhd* was “a clear case of a document not being in Malay or English”.⁶³

53 [1998] 1 AMR 645 at 651-652.

54 Ibid.

55 [1998] 1 AMR 645 at 651-652; quoted in [2000] MLJ LEXIS 773 at 49.

56 *Kuok Ling Timber Industries Sdn Bhd v The Owners of and Other Persons Interested in the Vessel 'MV Thonfullin'* [2000] 2 MLJ 615; [2000] MLJ LEXIS 773.

57 [1998] 1 AMR 645.

58 [2000] 5 MLJ 721.

59 [1994] 2 MLJ 420.

60 *Kuok Ling Timber Industries Sdn Bhd v The Owners of and Other Persons Interested in the Vessel 'MV Thonfullin'* [2000] 2 MLJ 615; [2000] MLJ LEXIS 773.

61 [1998] 1 AMR 645.

62 [2000] 5 MLJ 721.

63 [1998] 1 AMR 645 at 651-652; cited by Mr Justice Tee Ah Sing in *Kuok Ling Timber Industries Sdn Bhd v The Owners of and Other Persons Interested in the Vessel 'MV Thonfullin'* [2000] 2 MLJ 615; [2000] MLJ LEXIS 773 at 48-49.

The Effect of Countersigning the Shipping Order

From the evidence adduced in *Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd*,⁶⁴ it appeared that the consignee had signed a copy of the shipping order acknowledging receipt of the cargo.⁶⁵ Treitel and Reynolds⁶⁶ note that countersigning or certification by named or designated persons⁶⁷ are sometimes required by the contract of sale and the purpose of this act “is presumably to make the signer, or the person on whose behalf he signs, contractually liable on the delivery order”.⁶⁸ The consignee’s potential liability by signing the shipping order was not an issue that was raised before Mr Justice Ian Chin, and, “it is by no means clear whether a mere counter-signature actually produces [that] effect”.⁶⁹ This is perhaps an issue that could benefit from some judicial guidance and it is hoped that another Malaysian court would be presented with the opportunity to do so in the not too distant future.

Legal Status of a Shipping Order Created by the Cargo-Owner

Counsel for the plaintiff raised the possibility in *Sarawak Electricity Supply Corp* that a shipping order created by the cargo-owner could not be a document of title. This submission by counsel is probably influenced by the fact that the most popular shipping document for contracts of carriage by sea, the bill of lading, is in fact issued by the sea carrier, ie, either the shipowner or charterer, not the cargo owner. This assertion by the plaintiff’s counsel was summarily dismissed by Mr Justice Ian Chin, who quoted the case of *Ant Jurgens Margarinefabrinefabrieken v Louis Dreyfus & Co*.⁷⁰ where the court concluded that “[a] delivery order is not the less a document of title because it is created by the owner of the goods”.⁷¹ In fact, in that case, the court held that a delivery order was a document of title even though the shipper and the consignee were the same person.

Suitability of Using a Shipping Order for the Cargo Carried on Board the Ming Soon Jaya

The cargo carried on board the Ming Soon Jaya consisted mainly of cables, wires, electrical goods, engine parts and office stationery, which are “specific goods”. In

64 [2000] 5 MLJ 721.

65 Ibid at 728.

66 Treitel & Reynolds, n 2.

67 For example, a banker, shipbroker, master or ship’s mate. See *Colin & Shields v Waddel & Co* [1952] 2 All ER 337; *John Martin of London Ltd v A.E. Taylor & Co Ltd* [1953] 2 Lloyd’s Rep 589; *The Osterbek; Olearia Tirrena Sp A v NV Algemene Oliehandel* [1972] 2 Lloyd’s Rep 341; *Cremer v General Carriers S.A.* [1974] 1 WLR 341 and *Waren Import Gesellschaft Krohn v Internationale Graanhandel Thegra NV* [1975] 1 Lloyd’s Rep 146.

68 Treitel & Reynolds, n 2 at 380, para 8-031.

69 Ibid.

70 [1914] 3 KB 40 This case concerned the English Factors Act 1889 and the old Sale of Goods Act 1893. The latter Act has in fact been replaced by the Sale of Goods Act 1979, although the Malaysian Sale of Goods Act 1956 (Act 67) is essentially based on the old 1893 Act.

71 Ibid at 44.

practice, a ship's delivery order, is usually used for bunk goods, ie, "unascertained goods". For example, Trietel and Reynolds⁷² note that "[s]hip's delivery orders are commonly used to split up large bulk shipments among several buyers".⁷³ Bills of lading are not always suitable where a single undivided bulk consignment is sold to a number of buyers,⁷⁴ but clearly this was not the problem facing the parties in *Sarawak Electricity Supply*. This scenario is lucidly explained by Todd with the following example:

If the shipper knows on shipment how the total bulk is to be split between the various buyers, he can obtain a number of sets of bills of lading from the carrier, each for a part of the total bulk, and these can be sent to various buyers. Since bills of lading are issued on shipment, however, or shortly thereafter, this is only possible if the number of buyers is known then. More importantly, perhaps, an intermediate purchaser of bulk afloat, who has become holder of a single bill of lading (or a set of bills), cannot use that bill of lading (or set) to resell the bulk to a number of different sub-buyers. Nor can he at this stage obtain fresh bills for smaller amounts. Although he cannot use the single set of bills for the sub-sales, however, he can use delivery orders. These are directions to the carrier to deliver to the holder the amount of cargo mentioned, so a sub-sale can be effected by sending to each sub-buyer a delivery order in respect of that part of the cargo sold to him.⁷⁵

In the context of shipping orders in *Sarawak Electricity Supply Corp*, the shipping document was not suitable for the cargo of electrical goods and supplies carried on board the *Ming Soon Jaya*. Unlike a ship's delivery order, a shipping order does not have the historical and practical context of being used predominantly in the shipping of bulk cargo. Hence, the shipping order in *Sarawak Electricity Supply Corp* was not used for a novel purpose, beyond the intended role designed for it by the creators of that document.

The Sale Requirement and the Issue of Negotiability / Transferability of the Shipping Order

The test preferred in *Sarawak Electricity Supply Corp* by Mr Justice Ian Chin in determining whether or not a shipping order was a document of title was the ability of the document to give its holder possession or control of the cargo. This was the approach adopted in *Ramdas Vithaldasm Durbar v Amerchand (S) & Co; Ramdas Vithaldas Durbar v Chhaganlal Pitamber*.⁷⁶ According to his Lordship, this requirement was satisfied because "the shipping order in the hands of anyone can be

72 See n 2.

73 Ibid at 391.

74 Todd, n 13 at 137.

75 Ibid.

76 (1916) 85 LJPC 214 at 215.

used to claim delivery or possession of the cargo and this means that it is transferable, that the right of possession can be transferred". Just as judicial acknowledgement was first given in respect of bills of lading in *Lickbarrow v Mason*⁷⁷ in 1794, there is now judicial recognition in Malaysia, that a shipping order is a transferable document giving possession or control of goods, in the new millennium.

In accordance with this approach, Mr Justice Ian Chin was of the view that there was "no need for a cargo to have undergone a sale before the document relating to it can be a document of title".⁷⁸ His Lordship also went further and expressed the opinion that since the test was purely one of possession and control of the goods, there was also "no need for the transaction to be a mercantile one before the relating document can be a document of title".⁷⁹ In arriving at this conclusion, his Lordship considered the case of *Harland & Wolff Ltd v Burns & Laird Lines Ltd*⁸⁰ where an acknowledgement of shipment was held not to be a document of title, as that particular document did not give its holder possession or control of the goods.

Proceeding on the basis that possession and control over the goods was the sole test in deciding whether or not a shipping order was a "similar document of title" to a bill of lading for the purposes of the Hague Rules, Mr Justice Ian Chin took the view that the question of passing of property was not in issue. The decision of *Laurie & Morewood v Dudin & Sons*⁸¹ that dealt with the question of passing of property was therefore, dismissed by his Lordship as "not relevant".⁸²

Conclusions on Shipping Orders

Mr Justice Ian Chin has taken a judicial leap of faith by extending the definition of the phrase "similar document of title" in the Hague Rules to include shipping orders. It is unclear whether this would lead to any practical advantages for those in the Malaysian shipping industry. For instance, the problems of obtaining finance from the banks for the purchase of goods subject to shipping orders still remains. Although his Lordship made it very clear that recognition of shipping orders as documents of title for the purposes of the Hague Rules was not dependant on whether it "had been used or accepted by the bank for documentary credit"⁸³, it does not hide one glaring fact. The Uniform Customs & Practice For Documentary Credits (1993 Revision) of The International Chamber of Commerce⁸⁴ makes it abundantly clear that only the following documents are deemed acceptable for the purposes of financing; the marine/ocean

77 (1794) 5 Term Rep 683.

78 [2000] 5 MLJ 721 at 730-731.

79 *Ibid* at 730.

80 (1931) 40 Lloyd's Rep 286.

81 [1926] 1 KB 223.

82 [2000] 5 MLJ 721 at 730.

83 *Ibid* at 729.

84 ICC Uniform Customs and Practice for Documentary Credits – 1993 Revision, ICC Publication No.500-ISBN 92-842-1155-7(E).

bills of lading,⁸⁵ non-negotiable sea waybills,⁸⁶ charterparty bills of lading,⁸⁷ multi-modal transport documents,⁸⁸ air transport documents,⁸⁹ road, rail or inland waterway transport documents⁹⁰ and transport documents issued by freight forwarders.⁹¹ Nowhere is there any attempt at providing even a hint of recognition for shipping orders. Perhaps the sole benefit that is apparent from Mr Justice Ian Chin's efforts is the fact that there is now more uniformity in Malaysian law as to what constitutes a document of title. For instance, s.2 of the Sale of Goods Act 1957⁹² defines "document of title to goods" to include a "bill of lading, dock warrant, warehouse keeper's certificate, wharfinger's certificate, railway receipt, [and] warrant or order for delivery of goods". His Lordship's test of possession and control of the documents over the goods is also echoed in s.2 as "documents of title to goods" also includes "any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby presented".

Part I - The Shipping Manifest

Inspired by the willingness of the Malaysian judiciary in *Sarawak Electricity Supply* to push the boundaries of what shipping documents were acceptable as documents of title for the purposes of the Hague Rules, an attempt was made in *Polar Light Sdn Bhd & Another v The Owners of the Ship 'MV Soon Yu'*⁹³ to argue that a "shipping manifest" fell within the phrase "similar document of title". The manifest concerned was an "outward manifest" and this was a bold attempt to push the legal boundaries of Malaysian shipping law into uncharted territory. Prior to this, no one had the audacity to argue that such a humble shipping document deserved judicial recognition as a document of title to goods carried by the shipowner and/or charterer. Indeed, no one in the Commonwealth had the impudence to raise this point before the respective courts of law. Litigation was probably inevitable in *Polar Light Sdn Bhd*, as the cargo in question was not covered by an insurance policy, thus leaving the courts as the only means of seeking financial redress.

In *Polar Light Sdn Bhd*, the plaintiff consignors loaded a cargo of plywood on board the MV Soon Yu at Miri, destined for Labuan. No bill of lading was issued in respect of the cargo of plywood that was loaded on board the MV Soon Yu and the only document that existed was the shipping manifest. This rather *laissez faire* attitude towards documentation appears to be prevalent in the sea trade in East Malaysia. It

85 See Article 23.

86 See Article 24.

87 See Article 25.

88 See Article 26.

89 See Article 27.

90 See Article 28.

91 See Article 30.

92 Act 382.

93 [2001] 5 MLJ 339.

was not too long ago in *Chan Cheng Kum & Another v Wah Tat Bank Ltd & Another*⁹⁴ that evidence was adduced to show that in respect of goods going from Sarawak to Singapore, between 90 and 95 percent of the shipping traffic was being carried on a mate's receipt, without a bill of lading ever being issued. In the opposite direction the percentage was between 75 and 80 percent of the traffic.⁹⁵ During the voyage, the ship came upon bad weather and the master guided the vessel into shallow water for shelter. Unfortunately, the MV Soon Yu grounded just off the coast of Brunei, about half a kilometre from Lumut, Bandar Seri Begawan. The change in the weather was gradual and a better response was expected of the master. During the first salvage attempt, the aft-hatch covers were opened to facilitate access to the cargo. Within a short period, that salvage attempt had to be suspended as the sea became a lot rougher. Overnight, a consignment of the plywood was swept away by the forceful actions of the waves. The salvors had not properly secured the hatch covers and the winds had ripped them apart. A second salvage attempt proved successful in recovering the remainder of the cargo.

Counsel for the plaintiff argued that since no bill of lading was issued, the relationship between the cargo-owner and the sea carrier was governed by common carrier principles. This presented a problem for the sea carrier as none of the recognised common law exceptions⁹⁶ applied. The only exception that could have exonerated the sea carrier was perils of the sea. This is an exception that is found within the Hague Rules.⁹⁷ Just as in *Sarawak Electricity Supply*, counsel for the defendant sea carrier therefore had to show that the shipping manifest, although not a bill of lading, was a "similar document of title",⁹⁸ and was thus subject to the Hague Rules. As the goods were being shipped from a port in Sarawak, the Merchant Shipping (Implementation of Convention relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 gave the Hague Rules the force of law in East Malaysia.

The Judgment of Sulaiman Daud JC

In the High Court of Miri, Sulaiman Daud JC decided that a shipping manifest was not a "similar document of title" to a bill of lading. The defendant sea carrier, i.e., the

94 [1967] 2 MLJ 263 (Federal Court); [1971] 1 MLJ 177 (Privy Council).

95 See [1971] 1 MLJ 177 at 178.

96 The four recognised common law exceptions are Act of God, Act of Queen's Enemies, Inherent Vice of the goods, and fault or fraud of the consignor, consignee or cargo-owner, see *Stohn v Hagland Transport* [1976] 2 Lloyd's Rep 482. The Act of God exception was clearly of no use because of the elements of human negligence on the part of the master and salvor. *Halsbury's Laws of England* 4th Ed vol. 9 at 323 defines it as an extraordinary occurrence or circumstances which could not have been foreseen and which could not have been guarded against, or more accurately as an accident (1) due to natural causes directly and exclusively without human intervention (2) which could not by any amount of ability have been foreseen, or, if foreseen, could not by any amount of human care and skill have been resisted. This definition was adopted by Sulaiman Daud JC in *Polar Light Sdn Bhd v The Owners of the Ship 'MV Soon Yu'* [2001] 5 MLJ 339 at 347. The "act of God" exception is also available in the Hague Rules, see Art IV(2)(d).

97 See Art IV(2)(c).

98 See Art I on the definition of "contract of carriage".

shipowner in this case, could not therefore plead the exception of perils of the sea and was liable to the cargo-owner for the loss of and damage to goods. His Lordship quoted *Jowitt's Dictionary of English Law* that described the manifest of a merchant vessel as merely "a list of goods making up her cargo with the name of the shippers".⁹⁹ As to what characteristics should a document of title possess, Sulaiman Daud JC laid down the following test:

In my view, for a document to be a similar document of title to that of a bill of lading, the said document must satisfy at least the following requirements, that is to say, firstly, it must be issued by the carrier to the shipper, secondly, the document must contain the name of the shipper and the consignee and the description of goods to which the contract of carriage relates and thirdly, there must be acknowledgement by the carrier of the receipt of the goods specified therein.¹⁰⁰

His Lordship applied *Sarawak Electricity Supply* and came to the conclusion that a shipping order in that case had all the required characteristics, but "no such characteristic or attribute [was] present in the outward manifest" in the case before him.¹⁰¹ It is not surprising that his Lordship came to that conclusion because in the context of shipping law, a shipping manifest is only "a record or statement in writing carried by a vessel, containing information with respect to the vessel's cargo".¹⁰²

The Legal and Practical Advantage of the Sulaiman Daud JC Approach

It is submitted that there is also a policy reason why a shipping manifest should not perform the function of a document of title. If there were judicial recognition of the shipping manifest as a document of title for the purposes of the Hague Rules, this would result in complications when a bill of lading is subsequently issued for the cargo listed in the manifest. There would then be two documents of title in respect of the goods being carried by the sea carrier.¹⁰³ A number of problems could flow from this. For instance, the terms and conditions of the two documents could be inconsistent or even downright contradictory. When a conflict arises, there is no precedent as to which document takes precedence; the shipping manifest that is created first in time, or the bill of lading as a later document that supersedes the original document of title. A complex structure of rules would have to be drafted to accommodate this, and greater complication is envisaged as different documents may

99 [2001] 5 MLJ 339 at 346.

100 *Ibid.*

101 [2001] 5 MLJ 339 at 346.

102 *Ballentine's Law Dictionary* (Lexis Law Publishing 1969) www.lexis.com/research, Wednesday, 28 May 2003. In cases such as *The Newton Bay* (CA2 NY) 36 F2d 729, 1929 US App LEXIS 2256 (Circuit Court of Appeals, Second Circuit, United States), the shipping manifest could in fact be a summary of all the bills of lading for the cargo of a vessel.

103 Similar reservations have been expressed by Trietel & Reynolds, n 2 at 374, if a mate's receipt was, recognised as a document of title as it was merely a receipt for goods loaded on board that would later be exchanged for a bill of lading.

prevail depending on who has possession of the document of title at what particular point in time.¹⁰⁴ There is also the possibility of each of those documents being in the possession of different parties, thereby creating a headache for the carrier as to who is the person that is legally entitled to delivery of the goods. Confusion would arise as to whether the sea carrier should deliver to the first person presenting the document of title or whether interpleader proceedings¹⁰⁵ should be commenced to determine the rightful owner of the goods, and if the cost of the legal proceedings could be passed on to the holders of the documents of title.¹⁰⁶

Analysis of the Requirements that a Shipping Document Must Possess to Perform the Function of a Document of Title

The shipping manifest in *Polar Light Sdn Bhd* was nothing more than a list of the cargo that was loaded on board the MV Soon Yu at Miri. That list was made by the shipper and then handed over to the sea carrier for the loading process. Clearly the first requirement, laid down by Sulaiman Daud JC, that the document of title “must be issued by the carrier to the shipper”¹⁰⁷ was not satisfied. This prerequisite is a feature with bills of lading, which are issued by the master¹⁰⁸ on behalf of the sea carrier, either when the goods are received for loading¹⁰⁹, or when the goods are actually loaded on board the ship.¹¹⁰

The second requirement that “the document must contain the name of the shipper and the consignee, and the description of goods to which the contract of carriage relates”¹¹¹ was fulfilled in *Polar Light Sdn Bhd*. Counsel for the defendant sea carrier submitted evidence that the names of the shippers and consignees were clearly stated on the shipping manifest.¹¹² Other shipping documents such as the mate’s receipt, shipping order and sea waybill usually contain similar information, and there would be no difficulty in fulfilling Sulaiman Daud JC’s second prerequisite. In practice, some of the details that eventually end up on the final document of title originate from the shipping manifest. For example, when the cargo is handed over to the sea carrier for loading with the accompanying manifest, a mate’s receipt would be issued. These

104 A set of rules already exist to deal with the conflict between bills of lading and charterparties, as to which document governs the contract of carriage, see for example, *Rodocanachi v Milburn Bros.* (1887) 18 QBD 67; *Calcutta SS Co Ltd v Andrew Weir* [1910] 1 KB 759 and *The Dunelmia; The President of India v Messrs Shipping Co Ltd* [1970] 1 QB 289.

105 See Order 17 of the Rules of the High Court 1980 (PU (A) 50/1980).

106 *Ibid.* Rule 8 only indicates that, “the Court may in or for the purposes of any interpleader proceedings make such order as to costs or any other matter as it thinks just”.

107 [2001] 5 MLJ 339 at 346.

108 In practice, bills of lading are commonly signed, not by the master or owner himself, but by some other person having, or purporting to have, authority for that purpose, see *Treitl & Reynolds*, above n 2 at 130. This is more apparent in the container trade as a single ship may be able to carry many containers from different shippers and the sheer volume of documents generated makes it impossible for the master to attend to each bill of lading personally, and delegation is the only viable practical alternative.

109 This document is known as a “received for shipment bill of lading”.

110 Shipped bills of lading.

111 [2001] 5 MLJ 339 at 346.

112 *Ibid* at 345.

particulars such as the person responsible for the shipping and the person entitled to delivery of the goods would be gleaned from the shipping manifest and then used to fill up the relevant spaces in a mate's receipt. Additional information not from the manifest that would later be added into the mate's receipt are details such as an acknowledgement of the receipt of goods,¹¹³ and the quantity as well as condition of the goods.¹¹⁴ The mate's receipt is then later presented to the sea carrier in exchange for bills of lading.¹¹⁵ All the details from the mate's receipt, some of which originated from the manifest, would then be used to write up the bill of lading. Further particulars such as the contract of carriage, or a clause incorporating it would be added to the existing information in the bill of lading. These days, most bills of lading are standard form bills and the chore of filling out the contractual details for potentially hundreds of documents per ship has largely been removed.

Sulaiman Daud JC's third requirement that "there must be acknowledgement by the carrier of the receipt of the goods" specified in the document of title¹¹⁶ would not be fulfilled by the shipping manifest. The manifest is just handed over to the sea carrier together with the cargo, and the acknowledgement comes in the form of a mate's receipt. A mate's receipt, in the words of Treitel and Reynolds, is a "preliminary or temporary receipt for the goods which may later be presented ... in exchange for bills of lading".¹¹⁷ Hence the acknowledgement is not indicated on the shipping manifest itself, but comes in a separate document issued subsequently. At common law, the mate's receipt is not normally a document of title.¹¹⁸ If a document like the mate's receipt does not even have the legal status as a shipping document of title though it is issued at a later point in time in the chain of shipping documents, it is submitted that it is even less likely that a shipping manifest, which is in existence prior to it, could amount to a document of title. It is the bill of lading, the document that is created and issued subsequent to the mate's receipt that performs the function of a document of title to the goods in practice.

Could a Common Carrier of Goods by Sea be in a Contractual Relationship via the Hague Rules with the Cargo-Owner?

In the second page of his judgment in *Polar Light Sdn Bhd*, Sulaiman Daud JC stated that it was "not disputed the defendant operated the vessel MV Soon YU for the carriage of goods for reward, and is therefore a common carrier".¹¹⁹ For sea carriers,

113 See *The Nagor Marin; Naviera Mogor S.A. v Soc. Metallurgique de Normandie* [1988] 1 Lloyd's Rep 412 (CA) per Mustill LJ (as he then was) at 420.

114 Triebel & Reynolds, n 2 372.

115 Ibid.

116 [2001] 5 MLJ 339 at 346.

117 Note 2 at 372.

118 Ibid. See *Hathesing v Laing* (1873) LR 92 at 105; *F.E. Napier v Dexters Ltd* (1926) 26 Lloyd's Rep 184 (CA) per Lord Justice Bankes at 189 and *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429 (PC) per Lord Wright at 445.

119 [2001] 5 MLJ 339 at 343.

if there is an event that destroys the contract of carriage, such as a deviation,¹²⁰ the relationship between the carrier and the cargo-owner is governed by common carrier principles.¹²¹ The situation in *Polar Light Sdn Bhd* is similar in that there was no document governing the legal relationship between the plaintiff cargo-owner and the defendant sea carrier because his Lordship took the view that a shipping manifest was not a "similar document of title" to a bill of lading within the meaning of the Hague Rules. However, the mere lack of a document of title does not mean that the common carrier doctrine applies automatically to govern the legal relationship between the parties. All the requirements of the common carrier doctrine have to be satisfied before it is applicable.

With due respect, it is submitted that it is not the carriage for reward that results in the imposition of common carrier liability. After all, even private carriers¹²² do carry for a contractual reward. If private carriers were to act for free, that would fall foul of section 26 of the Contracts Act 1950¹²³ and the contract of carriage between the private carrier and the cargo-owner would be void for a lack of consideration.¹²⁴ The distinguishing feature of common carriers is fact that they serve all and sundry without reserving the right to refuse the goods tendered.¹²⁵ By contrast, private carriers have an absolute right to refuse the tender of cargo. Due to the principle of freedom of contract, private carriers can pick and choose any person they want to forge a contractual relationship with. However, this does not mean that common carriers have no right to refuse the goods tendered whatever the circumstances. Glass and Chasmore¹²⁶ point out that a common carrier could not be sued for refusing to carry goods if the transport vessel is full,¹²⁷ if the goods are tendered at an unreasonable hour,¹²⁸ or if reasonable freight rates are not paid in advance.¹²⁹ In *Polar Light Sdn Bhd*, there is no indication that Sulaiman Daud JC took these principles of law into consideration before arriving at the view expressed in the second page of his judgment.

120 Through a fundamental breach of the contract of carriage, see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; *Suisse Atlantique v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 and *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803.

121 See Boyd, Burrows & Foxton, *Scrutton on Charterparties & Bills of Lading* (Sweet and Maxwell 20th Ed 1996) at 258-260. However not all writers agree with this view, see, for example, Glass & Cashmore, *Introduction To The Law of Carriage of Goods* (Sweet and Maxwell 1st Ed 1989) at 26 who take the view that this only holds true for carriage by sea and does not apply to other forms of carriage.

122 "Any carrier who is not a common carrier is a private carrier", see Glass & Cashmore, *ibid* at 18.

123 Act 136.

124 Further, by virtue of s.101 of the Contracts Act 1950, the private carrier is also a contractual bailee.

125 See Glass & Cashmore, above n 121 at 12 See also *Belfast Ropework Co v Bushell* [1918] 1 KB 210; *James v Commonwealth* (1939) 62 CLR 339 at 367-369 (Australia) and *Hyland Mullaby & Byrne* (1923) VLR 193 (Australia).

126 *Ibid*.

127 See *Jackson v Rogers* (1683) 2 Show 327.

128 See *Lane v Cotton* (1701) 12 Mod 472 at 481.

129 See *Wylde v Pickford* (1841) 8 M & W 443.

Relevance of the Negligence of the Salvors

Among the findings made by Sulaiman Daud JC in *Polar Light Sdn Bhd* was that “the loss of the crates of plywood on board the defendant’s vessel, MV Soon Yu, was the direct consequence of the master’s negligence in manoeuvring the said vessel, and the negligence of the salvors in carrying out the salvage operations after the vessel was grounded”.¹³⁰ This being the case, then the sea carrier is not solely responsible for the loss of the cargo of plywood. If the common carrier doctrine applied, then this finding of fact would have made no difference, as the sea carrier would be strictly liable for the loss of the cargo as a common carrier guarantees the safe arrival of the goods at the port of discharge.¹³¹ But as it has been submitted in the discussion above, contrary to what Sulaiman Daud JC has held, there is no evidence in *Polar Light Sdn Bhd* that the defendant carrier was in fact a common carrier as the mere fact of the carriage for reward is not an indicator. No submissions were made as to whether the defendant sea carriers operating the MV Soon Yu had no right of refusal in respect of goods tendered.

If the defendant sea carrier was not in fact a common carrier, then and, at the very least, the level of financial liability, should be reduced accordingly in light of Sulaiman Daud JC’s findings on the negligence of the salvors. The cause of action that would have to be taken in the absence of an imposition of the common carrier doctrine would be an action in tort via negligence. If this was the case, there is possibility that the act of the salvors could have in fact amounted to a *novus actus interveniens*, thus absolving the defendant sea carrier of liability completely. The intervening act of persons other than the plaintiff could amount to a *novus actus*.¹³² However, there is also the possibility that the doctrine of *novus actus interveniens* may not apply on the fact of *Polar Light Sdn Bhd*. The salvors had opened the aft hatch covers to facilitate the removal of cargo, but later failed to secure it when the weather worsened and salvage operations were suspended. The failure to secure the hatch covers could be viewed as an omission, and it is clear that there would not be a *novus actus interveniens* when the intervening event is an omission by a third party.¹³³ Greater clarity on this point by the learned judge would have certainly been greatly welcomed.

130 [2001] 5 MLJ 339 at 349.

131 See *Ludditt & Others v Ginger Coote Airways Ltd* [1947] 1 All ER 328 at 329 and *Siohn v Hagland Transport* [1976] 2 Lloyd’s Rep 428.

132 See *The Oropesa* [1943] 1 All ER 211; *Rouse v Squires* [1973] QB 889; *Lamb v Camden Borough Council* [1981] 2 All ER 408; *Smith v Littlewoods Organisation Ltd* [1987] 1 All ER 710 and *Wright v Lodge* [1993] 4 All ER 299.

133 See *Muirhead v Industrial Tank Specialties Ltd* [1986] QB 507 (CA) per Goff LJ at 533 and *Thompson v Toorenburgh* (1975) DLR (3d) 717 (British Columbia CA, Canada).

Significance of the Lack of a Statutory Endorsement on the Shipping Manifest

The Hague Rules apply to Peninsular Malaysia via the Carriage of Goods by Sea Act 1950.¹³⁴ Section 4 which is titled “[s]tatement as to application of Rules to be included in bills of lading”, makes the following provision: “[e]very bill of lading, or similar document of title, issued in Malaysia, which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the said Rules as applied by this Act”. In *Polar Light Sdn Bhd*, because the goods were shipped from Sarawak, the equivalent applicable provision would be Regulation 4 of the Merchant Shipping (Implementation of Convention relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960. Regulation 4 requires the inclusion of an express statement in every bill of lading or similar document of title issued in the state of Sarawak which contains or is evidence of any contract to which the Hague Rules apply, that such shipping document is subject to the provisions of the Hague Rules. In *Polar Light Sdn Bhd*, Sulaiman Daud JC expressed the following view on the application of Regulation 4:

What is the effect of this reg 4? Whether for such Rules to apply, there must be endorsed on such bill of lading or such similar documents the express statement as stipulated in the said reg 4? Upon perusal thereof, in my opinion, such provisions are merely directive, requiring every bill of lading or such document of title to contain such statement without imposing any penalty or adverse effect in case of non compliance. I am also of the view that the absence of such statement from any bill of lading or other similar document will not in any way deprive the holder thereof from enjoying the protection or right and immunities against risk as provided under the said Rules.¹³⁵

The express statement mentioned in Regulation 4 is commonly known in shipping circles as a “Clause Paramount” or “General Clause Paramount”¹³⁶ and this mechanism of securing, the application of The Hague Rules through a contractual clause has been labelled the “Clause Paramount technique” in *The Hollandia*¹³⁷ by Lord Diplock.¹³⁸ In *Polar Light Sdn*, Sulaiman Daud JC overlooked a Privy Council decision when expressing his point of view on Regulation 4. The case of *Vita Food Products Inc. v Unus Shipping Co Ltd*,¹³⁹ demonstrates the difficulty of securing the application of the Hague Rules if a clause paramount was absent from the shipping document. Controversially, in *Vita Foods*, the only reason why the Hague Rules

134 See s 1(2) which states that the Act “shall apply to the States of West Malaysia only, and s.2 which provides that the Hague Rules contained in the Schedule “shall have effect in relation to and in connection with the carriage of goods by sea in ship carrying goods from any port in Malaysia to any other port whether in or outside Malaysia.

135 [2001] 5 MLJ 339 at 344.

136 See Trietel & Reynolds, n 2 at 452.

137 [1983] 1 AC 565.

138 *Ibid* at 577.

139 [1939] AC 277.

applied in the absence of such a clause in the bill of lading was because of the choice of law clause in favour of English law, which at that time meant the Hague Rules applied through the back door through the Carriage of Goods by Sea Act 1924¹⁴⁰ even though the facts surrounding that case had, at the most, a tenuous connection to England.

It is submitted that Sulaiman Daud JC in his observation that a failure to include the clause paramount would not have an adverse effect on the party responsible for the omission because there are no punitive provisions in the statute, has merit. However, the second part of his articulated view is, it is submitted, inaccurate. It is clear from *Vita Foods* that if there was no choice of law clause opting for a jurisdiction that already applies the Hague Rules, the omission of the clause paramount would prove fatal to application of the Hague Rules. It is submitted that in *Polar Light Sdn Bhd*, the Hague Rules would not apply to a shipping document in the absence of a clause paramount. Since there is no statutory provision in Malaysia giving the Hague Rules, the “force of law” similar to The Hague-Visby Rules,¹⁴¹ the holder of the shipping document would not enjoy the protection or rights or immunities of the Hague Rules, as there would be no automatic application of the Rules. If Sulaiman Daud JC’s view was accepted, it would mean that the application of the Hague Rules in Malaysia would no longer be consistent with other jurisdiction that apply that same regime for shipping documents. This discussion is perhaps academic and may amount to nothing more than a storm in a tea cup as the view expressed by Sulaiman Daud JC was merely *obiter*, as his Lordship ruled that the Hague Rules did not apply in any case, because the shipping manifest was not a “similar document of title” to a bill of lading in the context of the Hague Rules.

Conclusions on the Shipping Manifest

The shipping manifest may no longer have the role of a document of title in Malaysia, but this humble shipping document still has an important role to play, especially in the post-9/11 climate that ports currently operate in. With the advent of the Customs-Trade Partnership Against Terrorism in the United States, shipping manifests are now submitted in advance at the port of shipment to aid in the screening of containerised goods.¹⁴² The details in the shipping manifest would, correspondingly aid customs officers determine the contents of containers. Therefore, any discrepancies between the actual content and the items listed on the shipping manifest would easily be detected. Modest and unassuming though it may be, the shipping manifest clearly is a document of some importance, as inaccuracies with its details would result in the

140 England and Wales now apply The Hague-Visby Rules via the Carriage of Goods by Sea Act 1971.

141 See, for example, in England and Wales, s 1(2) of the Carriage of Goods by Sea Act 1971 which provides, “The Provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law”.

142 For more information on this unique partnership between government and business, see The US Customs and Border Protection website at the following address on the Internet: www.customs.gov/xp/cgov/import/commercial_enforcement/ctpat/.

goods being delayed during the clearance procedure.¹⁴³ Further, the shipping manifest would now no longer merely be what Mr Justice Gobbo described as “a confidential document between the parties¹⁴⁴ and the shipping line” in *Gluck Freight Pty Ltd v Livingstone International Freight Ltd & GIF International Forwarding Pty Ltd*¹⁴⁵ when the Container Security Initiative is fully implemented in Malaysia.¹⁴⁶ As United States customs officers co-ordinate the inspection of containers, shipping manifests have to be declared to the authorities 24 hours in advance before loading of cargo at any Malaysian port.¹⁴⁷ However, the fact that the shipping manifest plays an important role in customs clearance at the load port is not a factor in deciding whether or not it amounts to a document of title. In *Polar Light Sdn Bhd*, Sulaiman Daud JC was clearly not swayed by counsel’s submission that shipping manifests had “to be submitted to the customs department before the vessels depart Miri”,¹⁴⁸ although no explanation was offered by his Lordship for his lack of enthusiasm for this particular point of view.

143 See McLaughlin & Grey, *Ports plead for more cash to raise security*, Lloyd’s List, March 1, 2002 at 5.

144 This could be the consignor, consignee or cargo-owner.

145 1990 VIC LEXIS 1334 (unreported) Supreme Court of Victoria, Australia.

146 In March of 2004, US customs officers in collaboration with their Malaysian counterparts embarked on this ambitious security scheme for containers, see Lloyd’s List, 10 March 2004 at 6. There is concern among shipping circles in Malaysia that this scheme would lead to an increase in the running cost of business. This fear was sparked by the extra fees port authorities intend to charge under “extra movement charges” within the existing port tariff structure if containers are chosen for scanning as part of the initiative, see *The Star* Maritime, 29 March 2004 at 28.

147 See Tan Kah Peng, “Council: US should delay implementation of CSI”, Maritime Section, *The Star* 16 September 2002.

148 [2001] 5 MLJ 339 at 345.