INTRODUCTION

Francis **REYNOLDS**
DCL(Oxford); Queen's Counsel, FBA;
Barrister and Honorary Bencher of the Inner Temple;
Professor of Law Emeritus, University of Oxford, UK.

1 Until fairly recently, in common law countries at least, much commercial law was a recondite topic, most of the law and lore concerning which was known to only a fairly small number of specialised practitioners (though a few of them, notably Scrutton LJ, achieved considerable prominence). This was true of shipping law in general, and also of company law; and doubtless of other areas also. Shipping law had its own special series of reports, *Lloyd's Law Reports*, slim numbered volumes dating back to 1919, but these were not easy to use and some of the earlier ones were in effect no more than reports from Lloyd's List of day-by-day proceedings in court, renewed from day to day. The prestigious books, *Scrutton*[1] and *Carver*,[2] dating from the 1880s and the early days of steam and the electric telegraph, have continued to be re-edited, the former having the cachet of continuing to be edited by highly distinguished members of Scrutton's old chambers. But re-edited books can lose vitality however distinguished their editors, and in any case they are difficult to use, which was true of both of these works – especially *Scrutton,* in which the relevant discussion might only be in a footnote which was difficult to find, if pregnant with meaning when eventually located.[3] By way of parallel, company law likewise depended a lot on accumulations of case law for some time available only in certain specialised chambers; and this may have been true in other areas too.

2 The influx in England of new practitioners after the Second World War was accompanied eventually (though not immediately) by a great broadening out of commercial law litigation (and arbitration) in London.[4] Unusually quick to reflect this in the shipping context, in 1951, the *Lloyd's Law Reports* moved to the format they have today, with two volumes a year, much more like the official law reports. (*Butterworth's Company Law Cases* and *British Company Cases* came, for their area of

1 *Scrutton on Charterparties and Bills of Lading*, first edition published in 1886.
2 *Carver's Carriage By Sea*, first edition published in 1885.
3 A dramatic example is provided by what is now fn 84 on p 259 of the 20th edition (S C Boyd, A Burrows & D Foxton eds) (Sweet & Maxwell, 1996).
4 Lord Roskill used to say that shipping chambers had comparatively little business in the late 1930s, apart from some brought in by the Spanish Civil War.

law, considerably later, in 1983.) In the 1960s there began to be suggestions for new books and even university courses in maritime law, or specific parts of it. I remember hearing stories of scorn poured on such courses from specialised chambers, one of which set out over tea to devise an examination, starting with the question "What is a weather working day?" – which was assumed to be of course unanswerable by any academic or student. But the market developed undeterred. Courses were introduced, and new books began to appear: a pathfinding work was Wilford, Coghlin & Healy's *Time Charters* (1978), now in its fifth edition,[5] eventually joined by a considerably more substantial work from the same publishers, Cooke, Young and Taylor's *Voyage Charters* (1993, now in its third edition[6]). There have been student's textbooks, of which a conspicuous early example was Wilson's *Carriage of Goods by Sea* (1988, now in its fifth edition[7]). The Institute of Maritime Law at the University of Southampton dates from 1982; in England there is now some form of maritime law course at many universities, including some (such as Nottingham) located (by UK standards) some way from the sea.

3 This trend has taken root, and courses and books, and a measure of maritime litigation, came in in other common law countries also, for example, Australia and Canada. Likewise commercial law and commercial litigation in general, including shipping and insurance law, have become conspicuous in the common law territory of Singapore, as even a casual look over the cases decided over the last ten years shows, and as Singapore's pivotal geographical position leads one to expect. So in fact two years before Wilson's *Carriage of Goods by Sea*, in 1986, Prof Tan Lee Meng (now Justice Tan Lee Meng) published his *The Law in Singapore on Carriage of Goods by Sea*, now in its second edition.[8] Practitioners of these subjects and the specialised judges have become more prominent; and there are other local books in the shipping area such as *Insurance Law in Singapore*, again by Prof Tan Lee Meng (1988), now in its second edition,[9] Mr Toh Kian Sing's *Admiralty Law and Practice*,[10] and several works by Assoc Prof Poh Chu Chai.[11] The Singapore journals have published articles. And of course the Singapore International Arbitration Centre

5 Michael Wilford, Terence Coghlin & John D Kimball, *Time Charters* (LLP, 5th Ed, 2003).
6 Julian Cooke *et al*, *Voyage Charters* (LLP, 3rd Ed, 2006).
7 John F Wilson, *Carriage of Goods By Sea* (Pearson/Longman, 5th Ed, 2004).
8 Butterworths Asia, 1994.
9 Butterworths Asia, 2nd Ed, 1997.
10 Butterworths Asia, 1998.
11 For example, *Principles of Insurance Law* (LexisNexis, 6th Ed, 2005).

adds to the amount of commercial dispute resolution taking place on the island.

4 It is therefore not at all inappropriate that this special issue of the *Singapore Academy of Law Journal* should be devoted to shipping law, and should contain a mixture of contributions coming from Singapore itself, but also from the US and the UK, all part of the extensive network of common law commercial dispute settlement. As in London, the emphasis in shipping litigation can be seen recently to have moved perceptibly away from pure carriage disputes (charterparties and bills of lading) towards insurance, on which several useful cases have been decided.

5 The first article in this issue, by Prof Robert Force of the Tulane Law School, authoritatively and exhaustively deals with the global, and serious, problem of dangerous goods (recently raised in Singapore in a tort case concerning nitric acid, *The Sunrise Crane*[12]). Even in the context of straight carriage disputes such goods may raise serious problems of vessel and crew safety, as in *The Eurasian Dream*,[13] where the crew were not trained in carriage of motor cars and the special hazards raised by this, with catastrophic results. An interesting point in this context is always the relevance of International Maritime Organization instruments, such as the ISM Code,[14] and other provisions, which seek for the benefit of seafarers to improve safety conditions. They can certainly be taken into account in ascertaining whether goods are dangerous or the ship seaworthy, but will be more effective when actually supported by legislation in an adherent state. It is slightly surprising that, as Prof Force explains, an American court so readily followed the House of Lords case of *The Giannis NK*,[15] holding that the shipper's duty not to ship such goods is strict, with the result that if neither shipper nor carrier knows of the dangerous quality of the cargo, it is the shipper who takes the risk. The Hague Rules are geared to negligence: there are few other strict duties (one is the duty to issue a bill of lading). A charterer (who may also be a shipper) gives quite limited undertakings about the safety of ports, as appears below.

12 [2004] 4 SLR 715.

13 *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] 1 Lloyd's Rep 719.

14 International Management Code for the Safe Operation of Ships and for Pollution Prevention.

15 *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605, followed in *Senator Linie GmbH & Co KG v Sunway Line, Inc* 219 F 3d 145 (2d Cir, 2002).

6 Prof Rhidian Thomas of the University of Wales at Swansea, discussing this notion of the unsafe port, deals among other matters with the problems of the rather strange rule in *The Evia (No 2)*.[16] One aspect of it is not difficult to understand – the charterer does not guarantee that the port will remain safe from arrival to departure, only that it is prospectively safe at the time of nomination. But the decision on this point was quite unexpected at the time, and as suggested above differs from the rule on safety of cargo. No doubt reasons can be thought up for the difference. But it is also true that the duty is strict, and the idea of a *strict* duty that a port is prospectively safe is not easy to operate: prospectively safe to whom and on the basis of what information? Further, if the port proves unsafe on arrival (as in the case in question), it is established that a time charterer (which the case itself concerned) must make another nomination. Technical difficulties based on the idea that a nomination is in a voyage charter deemed to be written into the charter make it more difficult to hold that a voyage charterer must do the same; but that he should be required to do so is supported not only by the practical needs demonstrated by the rule for time charters but also by the position as to legitimate last voyage, which, whatever the situation when the order was given, is finally ascertained only at the time of the commencement of the voyage.[17]

7 The topic of bills of lading has received much elucidation and some significant development before Singapore courts. The somewhat rough situations which carriers can encounter in South, South-East and East Asian ports (and no doubt elsewhere too) generate frequent bill of lading disputes. Some of these are extremely complex as pure matters of law; some stem from frauds which have to be sorted out (but may, as often with fraud, involve difficult questions of law too); some arise merely from lack of understanding, or at best mistaken operation (sometimes by banks, sometimes by others), of the procedures to be followed in connection with shipping documents. The cases, the most important of which are carefully summarised by Mr David Chong below, sometimes decide new points for the purposes of regular business; but sometimes they correct in one way or another mistaken practices and usages. An example is the purported cancellation of an indorsement by the indorser who has transferred the bill away but receives it back physically: see the

16 *Kodros Shipping Corporation of Monrovia v Empresa Cubana de Fletes (The Evia) (No 2)* [1983] 1 AC 736.

17 *Torvald Klaveness A/S v Arni Maritime Corporation (The Gregos)* [1995] 1 Lloyd's Rep 1.

important case of *Bandung Shipping Pte Ltd v Keppel TatLee Bank Ltd*,[18] which also clarifies a point not well understood in the shipping business, that a bill of lading indorsed in blank can be converted back from a bearer document by a special indorsement.[19] A number of points on the enactment which started as the UK Carriage of Goods by Sea Act 1992,[20] a statute drafted in a complex and non-user-friendly way, have first been decided in Singapore: examples concern the notion of "holder", "lawful holder" and the result of holding through an agent; there is also contribution to the question of whether and when a bill of lading becomes spent.[21] As Mr Chong's article shows, Singapore case law has also attacked the problem of switch bills of lading, including the initial one of whether and when the issue of such documents is a breach of contract to the shipper; and the interaction of the action of conversion with contractual claims has repeatedly been faced in highly complex situations. (The UK Act of 1992 in fact concerns bills of lading and other shipping documents, hence was rightly named, when enacted in substance in Singapore, as the Bills of Lading Act.[22] Attempts to have the title changed before enactment in the UK were unsuccessful, though both of the earlier Acts of the same name concerned not the documents used but the regime (the Hague and Hague-Visby Rules) under which the goods they represent are carried. Hopes were expressed at the time that the UK Act of 1992 could instead be referred to among lawyers as "Lord Goff's Act", after the model of Lord Cairns' Act and certain other statutes, but the name does not appear to have caught on.)

8 A new and major point first decided in Singapore, but probably for all common law outside the US, concerns the nature of a "straight" bill of lading, that is to say, a bill of lading which only names a consignee and contains no reference to "order". The question is whether the carrier must only deliver the goods against surrender of such a bill. If so, such a document provides protection for the shipper rather than for the carrier,

18 [2003] 1 SLR 295; [2003] 1 Lloyd's Rep 619. It was failure to get the bill of lading back from a bank in Chile to which it had been sent for release to the buyer, coupled with the virtual impossibility on the facts to hold that that bank acted as agent only, that led to the complicated bailment reasoning deployed in *East West Corpn v DKBS AF 1912 A/S* [2003] QB 1509 ("the *East West* case").

19 But I suggest that the decision of the Court of Appeal in *UCO Bank v Golden Shore Transportation Pte Ltd* [2006] 1 SLR 1, that a consignee bill of lading passing under a negotiation credit through the hands of a bank to the consignee itself does not need indorsement, is undoubtedly correct.

20 1992 (c 50) ("UK Act of 1992").

21 On this further issues have recently been raised in England in *Primetrade AG v Ythan Ltd (The Ythan)* [2006] 1 Lloyd's Rep 457.

22 (Cap 384, 1994 Rev Ed).

who at the port of discharge may find itself unable to obtain a bill and yet wish to unload the cargo and (if possible) leave without delay.[23] The decision (on somewhat unusual facts) in *APL Co Pte Ltd v Voss Peer*,[24] referred to in Mr Chong's article, that surrender is required, may be a sensible one, and indeed seems to accord with practice in Europe relating to what seems to be called a "Recta" bill of lading[25] – the word "Recta" certainly looking (from its Latin meaning) linguistically similar to the English "straight" bill of lading. But it appears that in the US it is established that such a document (now called a "non-negotiable bill of lading") need not be surrendered. Hence a Singapore carrier who reaches a port in that country carrying goods under a straight bill of lading governed by the law of Singapore and dutifully refuses delivery there except against the document, in accordance with the law of Singapore, could raise an interesting problem. For some purposes (for example, the Bills of Lading Act[26]) a straight bill is clearly a waybill; but this may not be an easy explanation in the US either, as the treatment of North European waybills there has caused problems. Further, to ascertain whether bills are "straight" requires (a sometimes magnifying-glass) examination of the small print. Whereas many bills of lading carry the words "or order" in the consignee box, from which they can be deleted to make the bill "straight", in these documents such words are not operative at all unless actually inserted: for example, the bill may say "not negotiable unless consigned to order". This is the reverse of the position that might be expected. Finally, bills of this sort often (but not always) are issued in sets and contain the same general type of attestation clause as negotiable bills, which may even (as in the *Voss* case[27] itself) purport to require surrender of "any one negotiable" bill of lading, perhaps even "duly indorsed", words which must be ignored (as they were in that case) if the rule is to apply.[28]

9 Recent developments considered in England but not so far as I know yet litigated, but likely to arise, in Singapore concern the identity of carrier problem (*The Starsin*[29] may arise for application); the possibility of, and technique for, ignoring the first part of a standard Himalaya clause where the independent contractor is an actual carrier (*The Starsin*

23 The situation regarding customs warehouse operators in Chile is considered in the *East West* case, *supra* n 18.
24 [2002] 4 SLR 481; [2002] 2 Lloyd's Rep 707 ("the *Voss* case").
25 See Hugo Tiberg, "Transfer of Documents" [2002] LMCLQ 539.
26 See s 1(2).
27 *Supra* n 24.
28 The question whether such documents are correctly described as "documents of title" (other than in the limited context of the Hague Rules) is a different matter.
29 *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715.

again, where the adviser may take his choice of four different lines of reasoning); the question who takes the risk of delivering against a forged bill of lading (the *Motis Exports* case[30]); and the master who insists on what the shipper alleges to be an inappropriate clausing of a bill of lading (*The David Agmashenebeli*,[31] where there is an interesting attempt to formulate a notion of what might be called "objective honesty"[32] not dissimilar to the problem of objective *dis*honesty considered in a quite different context in *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming*[33]). Reverting to the question of actual carriers, we now have a strange decision of the US Supreme Court, unusually venturing into private law, conferring on a final rail carrier in the US the immunities contained in the bill of lading issued by a German carrier, subcontractor to an Australian freight forwarder who acted as contracting carrier, as well as those in the freight forwarder's bill itself.[34] The decision on the facts (that the railroad should be entitled to the protections of the party who delivered to it) is a fair one, but most of the reasoning ignores internationally recognised (outside the US) principles of the conflict of laws.

10 The UNCITRAL draft convention on carriage by sea may never be adopted; but if it is the topic of exemptions on bills of lading, is likely to loom large in it, largely because of American influence. There is little doubt that printed indications that the carrier does not acknowledge the quantity of goods shipped or the like are contrary to the spirit of Art III r 1 of the Hague Rules, yet the requirement to issue a bill of lading making the required statements only arises "on demand of the shipper"; the shipper's only remedy seems therefore to be the impractical one of demanding another if the bill issued does not conform: see *The Mata K*.[35] This is another problem which may require consideration in Singapore; but if the UNCITRAL rules are adopted, there may be a solution from outside.

30 *Motis Exports Ltd v Dampskibsselskabet AF 1912 Aktieselskab* [2000] 1 Lloyd's Rep 211 ("the *Motis Exports* case"). But as Mr Chong's article suggests, this may have been already assumed by Singapore courts.

31 [2003] 1 Lloyd's Rep 92 (involving a Singapore company).

32 *Ibid*, at 105.

33 [1995] 2 AC 378.

34 *Norfolk Southern Railway Co v James Kirby Pty Ltd* 543 US 14 (2004). A Singapore case offering parallels is *Rapiscan Asia Pte Ltd v Global Container Freight Pte Ltd* [2002] 2 SLR 325.

35 *Agrosin Pte Ltd v Highway Shipping Co Ltd (The Mata K)* [1998] 2 Lloyd's Rep 614 (involving a Singapore company).

11 There is a considerable amount of Singapore litigation on marine insurance, covering topics such as seaworthiness, piracy, phantom ships, warranty of legality of the adventure and the nature of a time policy. The chapter by Prof Howard Bennett of the University of Nottingham, given as a lecture in Singapore, deals more generally with the governing statute, the Marine Insurance Act 1906.[36] Mr Chan Leng Sun follows on a more specialised but not unimportant point not often discussed, the duration of the sue and labour clause and its relation to abandonment. The 1906 Act is showing its age, and it has the same problem as other legislation drafted by Sir Mackenzie Chalmers, in having set out to reflect the existing law faithfully and with all its faults, and with no attempt to change it or (usually) reconcile inconsistencies that become apparent once further codification is attempted. Parts of the Sale of Goods Act[37] cause difficulty because of this too.[38] In cannot be blamed, however, for not dealing with matters that had not been considered at the time it was drafted, important as many of them may be now. A problem with reform is that most, though not all, of the difficulties reach into, or emerge from, general insurance law also. The Australian Law Reform Commission produced a useful review of the 1906 Act in 2001 and the Law Commission for England and Wales is interested in the general topic. But there are no votes for politicians in reform of insurance law, except perhaps in the consumer sphere, and those involved in marine insurance are likely for some time to have to go on as best they can with notions never properly worked out. An example discussed among others by Prof Bennett is the conceptually confused notion of the promissory warranty.

12 Turning to procedure, interpretation in the European Court of Justice of the EU rules on jurisdiction are producing a serious dismantling of English and other common law developments on this topic over the last ten years. Thus the doctrine of *forum non conveniens*, so painstakingly developed by Lord Goff of Chieveley in the *Spiliada* case[39] of 1987 from a lead given by Lord Diplock in *The Atlantic Star*[40] in 1974, and the practice of granting anti-suit injunctions to force parties to adhere to contractual promises as to place of litigation or (perhaps)

36 1906 (c 41) (UK) ("the 1906 Act").
37 1979 (c 54) (UK).
38 *Eg*, s 30 of the Sale of Goods Act, *ibid*, taken with s 11.
39 *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] AC 460.
40 [1974] AC 436.

arbitration have more or less been rendered impossible in the UK,[41] though they are still available for other common law countries such as Singapore,[42] Australia (where the tests are slightly different) and New Zealand. Also, it is now clear that once a court in one EU country is the first seised of a case, nothing further can occur elsewhere, however obvious that it has no jurisdiction, till it decides this itself. This can take some time, leading to the phrase "the Italian torpedo". The rule appears to apply even though the proceedings were started in bad faith in an irrelevant or only marginally relevant EU jurisdiction in order to obstruct the claimant. The matter is complicated by the use of suits for a declaration of non-liability, unrestricted use of which seems to be assumed to be valid. As Mrs Yvonne Baatz of the Maritime Law Institute of the University of Southampton explains, this may cause surprise and even mystification to litigants in Singapore, who may find a European court refusing jurisdiction over (say) a shipowner under a choice of forum clause in (say) a bill of lading, on the basis that some other, probably undeserving, tribunal is first seised of the case. Such a claimant may also find an English or Irish court regarding itself as bound, even as regards a litigant from outside the EU, to hear a case with which it has little connection and which it would have previously stayed under the *forum conveniens* doctrine.

13 The justification for this approach is said to be the promotion of legal certainty; the placing of proper weight on the doctrine of mutual trust between member states; and the enhancement of the development of the EU internal market. The value of adherence to promises is not mentioned at all. As the present Master of the Rolls has said, these decisions have not provided a fatal blow to commercial litigation, but they have certainly not helped.[43]

14 In a jurisdiction where ships are always passing through, questions of admiralty jurisdiction and arrest are bound to be common. They have generated considerable case law. Mr Toh Kian Sing's article picks two conspicuous points of many recently in issue, concerning

41 A point frequently made by Prof Adrian Briggs: for an example see "The Death of *Harrods*: *Forum non Conveniens* and the European Court" (2005) 121 LQR 535.

42 On *forum conveniens* see *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377; on anti-suit injunctions see *Evergreen International SA v Volkswagen Group of Singapore Pte Ltd* [2004] 2 SLR 457.

43 See Sir Anthony Clarke, "The differing approach to commercial litigation in the European Court of Justice and the courts of England and Wales", *Amicus Curiae*, 2006, Issues 65 and 66. See also Lord Mance, "Exclusive Jurisdiction Agreements and European Ideals" (2004) 120 LQR 357.

judicial assistance in maritime arbitration. The second case was decided by the Court of Appeal shortly before the time of publication, and it has been possible for Mr Toh to add a brief note about this.

15 All in all this set of essays is offered as a contribution from the vigorous commercial jurisdiction from which it emerges.

16 This introduction, in addition to serving as such, suggests in passing a few more points which the Singapore courts may in due course be asked examine; but there is more and richer material within the text which follows.