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Theoretical conundrums and practical solutions in Singapore commercial law: A review and application of section 5 of the Civil Law Act

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THEORETICAL CONUNDRUMS AND PRACTICAL SOLUTIONS IN SINGAPORE COMMERCIAL LAW: A REVIEW AND APPLICATION OF SECTION 5 OF THE CIVIL LAW ACT*

By ANDREW BOON LEONG PHANG

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I Introduction and Background

Singapore plays an important role as a centre of trade and finance. For that reason, therefore, commercial law is arguably the most important branch of law in this island republic.

The commercial law of Singapore is governed, in the absence of local law, by English law. It might in fact, at this juncture, be noted that the whole foundation of the Singapore legal system is premised upon English

* I would like to thank my former colleague, Mr. Rodney L. Germaine, for his helpful comments and suggestions. I remain, of course, solely responsible for all errors as well as infelicities in language.

law which has been received *via* either general or specific reception.

General reception of English law is traditionally accepted to have been effected by the Second Charter of Justice of 1826.[1] This meant that pre-1826 English statutes became law in Singapore, subject to the qualifications of modification and suitability.[2] There is some controversy (and consequent uncertainty) with regard to the reception of the common law,[3] although the 'popular' view is that there is a *continuous* reception of the common law in Singapore, *i.e.*, that the *entire* English common law continues to form part of the corpus of Singapore law and is thus binding on the Singapore courts.[4]

The reception of English commercial law in Singapore, on the other hand, is effected *via* specific reception. This simply means that there is a specific *local legislative* provisions which directly provides for the reception of English law. Such provisions are not unusual in the Singapore context.[5] The most important, however, must be the 'infamous' s. 5 of the Civil Law Act[6] (hereinafter referred to as "s. 5") which provides for the continuous reception of English commercial law in Singapore. The section itself has given rise to a veritable plethora of academic literature which is totally out of proportion to its size on the Singapore statute book simply because it has created equally disproportionate problems of interpretation as well as

1. Letters Patent establishing the Court of Judicature at Prince of Wales' Island, Singapore, and Malacca dated November 27, 1826, and made under the authority of Act 6 Geo 4, c. 85. One academic has sought to argue that the Second Charter of Justice never introduced English law into Singapore: see Mohan Gopal, "English Law in Singapore: The Reception That Never Was", [1983] 1 M.L.J. xxv; *contra* Andrew Phang Boon Leong, "English law in Singapore: Precedent, Construction and Reality or 'The Reception That Had to Be'", [1986] 2 M.L.J. civ.
2. For a general discussion of the 'cut-off' date for English statutes and a reinterpretation of the concepts of modification and suitability, see Andrew Phang Boon Leong, "Of 'Cut-Off' Dates and Domination: Some Reflections on the General Reception of English Law in Singapore" (1986) 28 Mal. L.R. 242.
3. See Phang, *supra*, note 2, at pp. 246 to 247.
4. *Cf.* the case of *Singapore Finance Ltd. v. Lim Kah Ngam (S'pore) Pte. Ltd. & Eugene H.L. Chan Associates (Third Party)*, [1984] 2 M.L.J. 202, at p. 205 that appears to support the 'popular' view; I, however, argue against such continuous reception (see, *supra*, note 3). Also, I have elsewhere sought to argue that there is an inconsistency between the binding effect of the received English law and the doctrine of binding precedent or *stare decisis;* such an issue is, however, outside the scope of the instant article. See, generally, Phang, *supra*, note 2, at pp. 262 to 265.
5. See, *e.g.*, s. 101(2) of the Bills of Exchange Act, Cap. 23, 1985 Rev. Ed.; and s. 5 of the Criminal Procedure Code, Cap. 68, 1985 Rev. Ed.
6. Cap. 43, Singapore Statutes, 1985 Rev. Ed.

application.[7] All this is despite a major 'overhaul' in 1978[8] which, unfortunately, generated even more problems.[9] Needless to say, the very quantum of literature suggests that no satisfactory solutions have emerged with regard to the interpretation and application of s. 5 itself. The result is an unsatisfactory situation which was probably responsible for prompting some recent and rather unflattering remarks by a leading local academic.[10]

The purpose of the instant article is not to flog the proverbial dead horse but, rather, to make some, albeit tentative, efforts to break out (or, perhaps, more appropriately, to climb out) of the ivory tower which Professor Hickling refers to.[11] The attempt may not, of course, succeed, but it is, in my view at least, worth the effort. To this end, the present article has two main purposes that correspond with the two subsequent and substantive parts that follow.

Part II summarizes the problems generated by s. 5 itself. As already alluded to above, these problems in their various forms have been well-canvassed in the literature.[12] I will not therefore dwell at undue length on these (more theoretical) conundrums. The purpose of this Part of the article is to lay the premises for the analysis that follows (in Part III). To this end, I will take a stand, so to speak, on the various facets to be considered, though, as suggested by the literature itself, the various problems do not admit of any one (let alone easy) solution. Since the

7. See, generally, [1935] M.L.J. lxxvi; [1935] M.L.J. xlviii; N. Vaithinathan, "Logic and the Law: a Note on Section 5(1) of the Civil Law Ordinance", [1957] M.L.J. xxxvi; Chan Sek Keong, "The Civil Law Ordinance, Section 5(1) - A Reappraisal", [1961] M.L.J. lviii, lix; G.W. Bartholomew, *The Commercial Law of Malaysia* (1965); R.H. Hickling, "Civil Law (Amendment No. 2) Act 1979 (No. 24), Section 5 of the Civil Law Act: Snark or Boojum?", (1979) 21 Mal. L.R. 351; D.K.K. Chong, "Section 5 Thing-Um-A-Jig!", [1982] 1 M.L.J. c; Soon Choo Hock and Andrew Phang Boon Leong, "Reception of English Commercial Law in Singapore - A Century of Uncertainty" in Chapter 2 of *The Common Law in Singapore and Malaysia* (Edited by A.J. Harding, 1985); Walter Woon, *Report on s. 5 of the Civil Law Act and the Applicability of English Commercial Law in Singapore* (unpublished; dated January 25, 1986 and prepared for the consideration of the Working Group on the Singapore Legal Database; and hereinafter referred to as *Report on s. 5 of the Civil Law Act);* and, most recently, by the same author, "The Continuing Reception of English Commercial Law" in Chapter 5 of *The Singapore Legal System* (Edited by Walter Woon, 1989) (reference will be, as far as is possible, to this piece) because of its relatively greater accessibility); and Tan Yock Lin, "Characterization in s. 5 of the Civil Law Act", (1987) 29 Mal. L.R. 289.

8. See the Civil Law (Amendment No. 2) Act 1979 (No. 24 of 1979).

9. See, generally, Soon and Phang, *supra,* note 7, *passim.*

10. See R.H. Hickling, "Breaking Apron Strings", (1987) 8 Sing. L.R. 78, at p. 93 where he remarks thus (emphasis added): "Now I appreciate that this Faculty [this was a reference to the Faculty of Law of the National University of Singapore] prefers to live in its own little ivory tower: free of competition, *happy to be engaged in innocent research (dear old s. 5 again!),* never to be engaged in controversy, never ever (if possible) to be remarked upon by those in authority. All very admirable, no doubt: at least, safe." It ought, of course, to be pointed out that Professor Hickling himself is no stranger to the complexities of s. 5, having been on the Committee that suggested amendments to the section and having himself authored one of the leading articles (see Hickling, *supra,* note 7).

11. See, *supra,* note 10.

12. See, generally, the references at note 7, *supra.*

problems generated by s. 5 are, in all probability, relatively unknown outside the local context, it is also hoped that the discussion in Part II will be of interest to the foreign reader whose appetite might be whetted sufficiently to dip into the relevant literature for further detailed discussion. I might, however, add that Part II does contain a few new analyses as well as modifications of certain views in the light of later writing and/or further reflection. To that extent, therefore, it is hoped that at least part of the discussion in Part II of this article will be of interest even to those readers who are relatively familiar with the various problems and arguments centring around s. 5 itself.

Part III constitutes the core focus, as it were, of the instant article. In this Part, I attempt to '*apply*' s. 5 to various English *contract* statutes that have traditionally been assumed to apply in the Singapore context.[13] I hope to demonstrate that the application of s. 5 to these ostensibly simple situations is, in fact, a rather complex process which is (with regard to some statutes at least) fraught with difficulties, generating numerous as well as specific problems *vis-a-vis* each statute concerned. I will not be dealing as such with the *substantive* problems pertaining to each statute.[14] The result discussion and analysis will, it is hoped, support my simple thesis. Briefly and simply stated, it is that, at least in the sphere of contract law, the local legislature ought to re-enact the corresponding English legislation so as to obviate any uncertainty that might result from the application of s. 5. I will argue, *inter alia,* that such a process of re-enactment has at least one prior local precedent, and that, in any event, such a move would not be peculiar to Singapore.[15] These suggestions are by no means novel, for there have been suggestions for the repeal of s. 5 and either an enactment of local commercial legislation or the listing of English statutes that are considered either in force or not in force in Singapore.[16] Such suggestions, however, have been made on a rather vague as well as abstract or theoretical level. What I seek to do, especially in Part III, is to focus on English commercial statutes within one specific (and extremely important) area of commercial law, *viz.,* the law of contract in order to ascertain how s. 5 might operate 'on the ground', so to speak. Such an exercise has, to the best of my knowledge, never been undertaken, except in one brief instance.[17] As previously mentioned, it is hoped that

13. This statement corresponds with the writer's own experience in the teaching of the law of contract at the Faculty of Law of the National University of Singapore.
14. Although these 'doctrinal' problems are also relevant; for further discussion, see, *infra,* Part IV.
15. See, *infra,* Part IV. And see also (in a very recent context), *infra,* note 171.
16. See, *e.g.,* Soon and Phang, *supra,* note 7, at pp. 72 to 73; and Woon, *supra,* note 7, at pp. 18 to 23, and 156 to 161, respectively.
17. See Ho Peng Kee, "Exemption Clauses and the Unfair Contract Terms Act: The Test of Reasonableness", [1985] 2 M.L.J. ccxxiv, at pp. ccxxiv to ccxxv; the writer deals with the applicability of the United Kingdom Unfair Contract Terms Act 1977, c. 50, in Singapore, but it is respectfully submitted that the analysis is a little too brief. *Cf.* also some tangential discussion only on the applicability of certain English statutes in Soon and Phang, *supra,* note 7, especially at pp. 41, 42, 53, 66, 67 and 70; and Woon, "The Continuing Reception of English Commercial Law", *supra,* note 7, especially at pp. 149 to 153.

such an exercise as presently attempted, although still *necessarily* theoretical in nature, will persuasively demonstrate the *practical* importance of, and necessity for, *concrete legislative* action in a *manageable* area in order not only to eradicate the conundrums that result from an application of s. 5 but also to simultaneously inject a small measure of certainty into the local law of contract.

It might be pointed out, at this juncture, that there has been, as will be seen in the discussion below, virtually no discussion in the local case-law or the applicability of various English contract statutes in the context of s. 5. This, it is submitted, may be due to one of two main but contrasting reasons. First, it may be the case that practising lawyers shy away from raising 's. 5 issues' because of the complexities generated by the section itself and that relate to the mere *threshold* question of whether the English statute concerned applies in Singapore. If this is so, then the proposed alternative of re-enactment just mentioned would be a highly desirable solution. Secondly, it may be that practising local lawyers *assume* that the various English contract statutes apply by virtue of s. 5. If this be so, then, as will be seen below,[18] this is an altogether simplistic assumption - and one that, if discarded, would raise (yet again) the complexities just mentioned. This, of course, brings us back 'full circle', whereupon the alternative of re-enactment would be, it is submitted, the most appropriate as well as pragmatic solution for all concerned.

II The Problems

1. *The Section:*

As a starting-point, it would not be inapposite to set out the section in full. The amendments effected in 1979[19] are represented by italics. It should also be noted, at the outset, that s. 5 provides for *continuous* reception of English commercial law, since it is not subject to the 'cut-off' date under *general* reception as briefly detailed above. The section reads as follows:

> "5(1)*Subject to the provisions of this section,* in all questions or issues which arise or which have to be decided in Singapore with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law *with respect to those matters* to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any law having force in Singapore.

18. See, *infra,* Part III.
19. *Supra,* note 8.

(2) Nothing *in this section* shall be taken to introduce into Singapore -

(a) any part of the law of England relating to the tenure or conveyance or assurance of, or succession to, any immovable property, or any estate, right or interest therein;

(b) *any law enacted or made in the United Kingdom, whether before or after the commencement of the Civil Law (Amendment No. 2) Act 1979*[20] -

(i) *giving effect to a treaty or international agreement to which Singapore is not a party; or*

(ii) regulating the exercise of any business activity by providing for registration, licensing or any other method of control or by the imposition of penalties; and

(c) *any provision contained in any Act of Parliament of the United Kingdom where there is a written law in force in Singapore corresponding to that Act.*

(3) *For the purposes of this section* -

(a) *the law of England which is to be administered by virtue of subs. (1) shall be subject to such modifications and adaptations as the circumstances of Singapore may require; and*

(b) *a written law in force in Singapore shall be regarded as corresponding to an Act of Parliament of the United Kingdom under para. (c) of subs. (2) if (notwithstanding that it differs, whether to a small extent or substantially, from that Act) the purpose or purposes of the written law are the same or similar to those of that Act".*

As can be seen, the 1979 amendment[21] effected a fair number of changes to the section. But, as already mentioned, these amendments generated even more problems.[22]

We may now proceed to briefly outline the problems engendered by the section itself.

20. *I.e.,* October 5, 1979.
21. *Supra,* note 8.
22. *Supra,* note 9.

2. *Legislative History and Purpose:*[23]

The original purpose of s. 5 may be inferred from part of a report on the original Civil Law Ordinance[24] prepared by Sir Thomas Braddell which was enclosed in the submission by the then Governor, William C.F. Robinson, of, *inter alia,* the Civil Law Ordinance to the Secretary of State, M.E. Hicks Beach, Bart., for the Queen's Confirmation and Allowance. The text of the relevant portion of this report (which is not readily accessible) is as follows:[25]

> "... Part II. Introduces a provision as to Mercantile law, taken from the Ceylon Ordinance 22 of 1866, by which the law to be administered in this Colony as to Mercantile matters is to be the same as in England.
>
> This enactment, although it may be said in some respects not to alter our law, will be of service in this respect.
>
> At present, *cases* involving *mercantile law* are, *by usage not by any*

23. See, generally, Soon and Phang, *supra,* note 7, at pp. 35 to 41. And *cf.* Woon, "The Continuing Reception of English Commercial Law", *supra,* note 7, at p. 155, note 40, where he states thus: "The root of all the problems with s. 5 is that the form of words chosen was not apt. The section was copied from a similar Ceylonese provision. However, in Ceylon the common law prevailing is Roman-Dutch law ... It might be argued that the Ceylonese section was meant to make clear that in commercial matters English common law rather than Roman-Dutch common law was to apply. If this is correct, the Ceylonese section is a choice of law provision and not a reception provision. The legislators of the time apparently did not appreciate that the form of words chosen was perfectly adequate for the purposes of the Ceylonese statute but not for the stated purpose of the section in the Straits Settlements (including Singapore)." Whilst not unpersuasive, another argument might, however, well run along these lines. While the then existent Ceylonese commercial law indeed was Roman-Dutch law, the intention of the Ceylonese legislature was in fact that English law apply instead, thus regularizing what was a *de facto* practice of the Ceylonese courts in applying English law for various reasons (*e.g.,* familiarity with English but not Roman-Dutch law): see, *e.g.,* M.J.L. Rajanayagam, "The Reception and Restriction of English Commercial Law in Ceylon", (1969) 18 I.C.L.Q. 378, especially at pp. 380 to 383; and T. Nadaraja, *The Legal System of Ceylon in Its Historical Setting* (1972), especially at pp. 229 to 230, 238 to 239, and 268 to 269. As we shall see, the intention of the legislative council of the Straits Settlements in introducing s. 5 was also to introduce English law. It is true that English law was already the basis of the local legal system under general reception (see, *supra,* notes 1 to 4, and the accompanying main text), but it was generally accepted that insofar as English *statutes* were concerned, no statute after 1826 would be part of the local law (see, generally, Phang, *supra,* note 2, especially at pp. 243 to 246). Local courts, however, were, apparently, applying *post*-1826 statutes without any legislative sanction and, again as we shall see, s. 5 was enacted to regularize otherwise illegitimate judicial activity; in this sense, therefore, there are broad similarities between the Ceylonese and Straits provisions. In any event, the intention of the legislatures of both countries was to introduce English law in the specific spheres enunciated and, if this be so, then the 'legislative borrowing' is, in fact, justifiable. This does not, of course, imply that the form of words chosen was apt; in fact, it is precisely the language of s. 5 that gives rise to so many difficulties as we shall discover below. The problem was really how to improve the wording. Such a task was attempted *via* the Civil Law (Amendment No. 2) Act 1979 (*supra,* note 20), but, unfortunately, generated even more problems. *Cf.,* also, Bartholomew, "The Reception of English Law Overseas", (1966) 9 Me Judice 1, at p. 13.

24. See *Proceedings of the Legislative Council of the Straits Settlements (with Appendices) for 1878,* Appendix No. 48.

25. See, *supra,* note 24 (emphasis added).

> *written law,* decided by our Court on the authority of reported cases decided in the Superior Courts in England. There are *few statutory provisions* for *Mercantile law,* nearly the whole body of the law is the result of the decisions of the Courts; now some of these decisions, no doubt, may depend wholly or partly for their force on *English Statute law, and as we have not all the Statutes in force,* it has been considered advisable to adopt the Ceylon Ordinance, which puts our Court on the same footing as the Courts in England, and *thus prevent questions as to the validity of Judgments of our Court, on the ground that they are not authorized by any law in force in the Colony.* The matter is explained in a statement on the Indian Acts in force, made by me in Council on March 25, p. 7 of the Council Debates".

On the basis of this passage, I have argued, in a joint article,[26] that the original purpose of s. 5 was to ensure that there was statutory authority for the reception in the then Straits Settlements (of which Singapore was a part) of *post*-1826 *English mercantile statutes* (and decisions thereon) that could not otherwise have been legitimately received by virtue of the Second Charter of Justice[27] because of the 1826 'cut-off' date.[28] This view has recently been criticized;[29] the learned writer argues thus:[30]

> "In the end all we can say with certainty is that s. 5 was designed to preclude any future challenge being made to a local case which in effect applies wholly or in part *English statute law. Nowhere is the expression "mercantile statute" to be found.* Nor does the context necessarily supply the missing word "mercantile". But to the contrary the words "wholly or partly" are apt to include authorities which depend on or involve statutes which thought they are non-mercantile in character make substantial alterations to mercantile law.[31]"

He goes on to add:[32]

> "If the purpose of s. 5 were truly the narrow one of making mercantile statutes and only such statutes relevant, one wonders why Sir Thomas had not simply advocated a re-enactment of the list of mercantile statutes then in force in England."

The arguments just set out above are attractive. There is, with respect, however, one particular difficulty which persuades me that the original

26. Soon and Phang, *supra,* note 7, especially at pp. 37 to 38.
27. See, *supra,* note 1.
28. See, *supra,* notes 2 to 4, and the accompanying main text.
29. See Tan Yock Lin, *supra,* note 7, at pp. 289 to 291.
30. *Ibid.,* at p. 291 (emphasis added).
31. I deal with the implication of this argument later under the rubric of "characterization".
32. Tan Yock Lin, *supra,* note 7, at p. 291.

interpretation is, on balance, still preferable.

My main difficulty lies with the fact that if the original purpose behind the enactment of s. 5 were indeed to validate the local application of English statute law *generally,* this would (by the very terms of s. 5 itself, providing for *continuous* reception of English law) lead, *in effect,* to the *obliteration* of the 'cut-off' date (of 1826) for the reception of English statutes *generally*[33] whenever the local court decided that a question or an issue had arisen or had to be decided with regard to mercantile law. This, as we shall see, would be one of the two contradictory approaches adopted by the Privy Council[34] - an approach that is in fact found by the writer just quoted to be inferior to the other, albeit contradictory, approach.[35] The very reference to these approaches in fact raises other issues pertaining to the problem of characterization which is dealt with later. It will suffice for the present to note that there are at least two reasons why a 'cut-off' date should be maintained for *non*-mercantile English statutes.

The first is the creation of undue uncertainty, with the reasoning and result in any particular case being dependent on the court's interpretation. Such a problem would admittedly arise even in the situation where only English mercantile statutes were receivable under s. 5. It is, however, submitted that by narrowing the parameters, as it were, the scope for such uncertainty would be reduced. It could, of course, be argued that the very concept of "mercantile law" engenders uncertainty (a point that I deal with below), but the enlargement of the potential 'pool' of possible applicable English acts to include the *entire* English statute book poses, in my view, *even more* intractable problems. This is especially the case since, even allowing for continuous reception (and the consequent obviation of the problem of the 'cut-off' date), there are still other qualifications on the reception of English statutes in the local context; these have already been alluded to at the outset of the instant article - *viz.,* the concepts of suitability and modification.[36] I have argued elsewhere that there are both theoretical as well as practical difficulties *vis-a-vis* these concepts. There is, first, a theoretical blurring of the lines, so to speak, between the two concepts.[37] Secondly, there are various problems of application.[38] To be sure, the problems of uncertainty could be somewhat alleviated *via* the doctrine of *stare decisis,* but, even this doctrine poses problems in the local

33. See, *supra,* note 2.
34. The so-called '*Seng Djit Hin* approach' based on interpretation of the decision of *Seng Djit Hin v. Nagurdas Purshotumdas & Co.,* [1923] A.C. 444.
35. See Tan Yock Lin, *supra,* note 7, especially at p. 296. The other approach is taken by the Privy Council decision of *S.S.T. Sockalingam Chettiar v. Shaik Sahied bin Abdullah Bajerai,* [1933] A.C. 342, [1933] S.S.L.R. 101.
36. See, *supra,* note 2.
37. See Phang, *supra,* note 2, at pp. 249 to 252.
38. *Ibid.,* at pp. 252 to 262. And see, also, note 94 of the cited article at pp. 260 to 261.

context[39] and, in any event, may not be of much practical utility simply because (except in the case of 'popular' statutes[40]) similar situations are unlikely to arise for decision by the local courts.

The second reason favouring the maintenance of a 'cut-off' date is perhaps more important. To effect a reception of all suitable English statutes under s. 5 would not be apposite in view of the fact that Singapore has its own legislature. When Singapore was initially a British colony, it was reasonable to provide for the reception of English law, despite its alien cast, simply because it is arguable that a 'pool' of law was required upon which the newly-established local courts could build. A 'cut-off' date provides for this initial situation. Once, however, the local courts and legislature are established, it is submitted that it is for those institutions alone to develop the local law by either creation of new law or the acceptance of foreign (here, probably mainly British) law, whether unqualified or modified. It will, of course, be argued that s. 5 was to continue local dependence on the law of England. This is admittedly so, but my point is simply this - that the continuous reception of English law *via* s. 5 need not be extended to all suitable English statutes but, rather, can and should be confined to English *mercantile* statutes only in order to allow the local courts, as well as legislature, the widest scope to develop Singapore (here, commercial) law.

We have, I think, dwelt at sufficient length on the original purpose behind s. 5 as apparently reflected in the documentary material. We turn now to the case-law that has attributed a quite different object to s. 5 though, admittedly, such an attribution is *consistent* with the general objects of validation mentioned above.

Voules J. at the Court of Appeal stage[41] in *Seng Djit Hin v. Nagurdas Purshotumdas & Co.* remarked that the purpose of s. 5 was "... *to inspire confidence amongst merchants* by assuring them that any questions arising in regard to their commercial transactions will be decided in the like case at

39. See, generally, Harbajan Singh, "*Stare Decisis* in Singapore and Malaysia - A Review", [1971] 1 M.L.J. xvi; Max Friedman, "Unscrambling the Judicial Egg: Some Observations on *Stare Decisis* in Singapore and Malaysia", (1980) 22 Mal. L.R. 227; Walter Woon, "Precedents that Bind - A Gordian Knot: *Stare Decisis* in the Federal Court of Malaysia and the Court of Appeal, Singapore", (1982) 24 Mal. L.R. 1; Andrew Phang, "*Stare Decisis* in Singapore and Malaysia: A Sad Tale of the Use and Abuse of Statutes", (1983) 4 Sing. L.R. 155; and Walter Woon, "*Stare Decisis* and Judicial Precedent in Singapore" in Chapter 4 of *The Common Law in Singapore and Malaysia* (Edited by A.J. Harding, 1985); and, by the same author, "The Doctrine of Judicial Precedent" in Chapter 8 of *The Singapore Legal System, supra,* note 7.

40. Though even in such a situation, uncertainty of another type may be generated simply because of differences in facts that may or may not lead the local court to decide that a question or issue has arisen or has to be decided with respect to mercantile law.

41. The Court of Appeal of the Straits Settlements, to be precise; the reader may recall that *Seng Djit Hin* ultimately reached the highest appellate court, *viz.,* the Judicial Committee of the Privy Council (see, *supra,* note 34) which, incidentally, is still the highest appellate court for Singapore (see, generally, the Judicial Committee Act, Cap. 148, Singapore Statutes, 1985 Rev. Ed.).

the corresponding period in England with the exception that, where other provision is made in the Colony, the colonial provision shall prevail".[42] And in the Privy Council case of *S.S.T. Sockalingam Chettiar v. Shaik Sahied bin Abdullah Bajerai,* Lord Atkin, who delivered the judgment of the Board, observed: "The general object no doubt is *to secure uniformity of mercantile law in Singapore and the United Kingdom* ...".[43] Without, therefore, actually examining the report by Sir Thomas Braddell, thereby ascertaining the *original* purpose behind s. 5 as discussed above, the colonial judges, whom we must assume had a more than adequate grasp of the realities of British rule in the then Straits Settlements, took a highly pragmatic as well as economic perspective with regard to the purpose behind s. 5. This is interesting simply because Sir Thomas's report was more concerned with the *legality* (and therefore validity of) the actions of the colonial courts that were (apparently) indiscriminately applying *post* - 1826 English mercantile[44] statutes (and decisions thereon), in spite of the 1826 'cut-off' date. The colonial Judges, on the other hand, were, it is submitted, more concerned with the *reality,* as it were, especially *vis-a-vis* the *raison d'être* of the British acquisition of the Straits Settlements which had to do, in the main, with trade and commerce.[45] One must note this 'reality' in the context of the position of Singapore as a hugely prosperous as well as thriving commercial port and trading centre - a situation that is very much the same even today. And what better way to have promoted this prosperity in the legal sphere than by establishing as well as maintaining a *uniform* system of *English* commercial law? It ought, I think, to be mentioned at this juncture that this criterion of uniformity continues to be of no mean importance, given the international character of Singapore's trade and financial activities.[46] In fact, it was at least in part because English law itself was, commencing with Britain's entry into the European Economic Community in 1973, becoming increasingly harmonized with European Common Market law that the 1979 amendment to s. 5 was prompted.[47] There was also a recognition that certain United Kingdom legislation (for example, certain complicated legislation relating to consumer law) "may not be quite appropriate to the

42. (1921) 14 S.S.L.R. 181, at p. 208 (emphasis added).
43. [1933] S.S.L.R. 110, at p. 113 (emphasis added).
44. Though this point has been criticized by Tan Yock Lin, *supra,* note 7; and see the discussion above.
45. See, *e.g.,* Nicholas Tarling, *Anglo-Dutch Rivalry in the Malay World 1780-1824* (1962), at pp. 4 and 113, and, by the same author, "British Policy in the Malay Peninsula and Archipelago", (1957) J.M.B.R.A.S., vol. XXX, pt. 3, at p. 13.
46. Though the Singapore economy is presently much more diversified than during the colonial period. There has, *e.g.,* been, for many years, increasing industrialization, with a recent shift toward high technology industries. It is also to be noted that entrepot trade is no longer the mainstay of the Singapore economy as was the case during the colonial period; trade and commerce has, concomitant with modernization and industrialization (and, perhaps, even Westernization) taken on a different (and naturally more modernisitic) cast.
47. See *Singapore Parliamentary Debates,* vol. 39, col. 446, (September 21, 1979).

needs and circumstances of Singapore".[48]

One remaining problem merits some attention. This has to do with the question as to whether s. 5 enables reception of the *common law*. Whichever view one takes of Sir Thomas Braddell's report, it is evident from the terms of the report that the original purpose behind s. 5 was not to effect a continuous reception of the common law. In fact, such an intention *vis-a-vis* the common law was not, in any event, necessary simply because there was, arguably, a continuous reception of the common law *via general* reception under the interpretation placed upon the Second Charter of Justice of 1826. It could, on the other hand, be argued that there should be a 'cut-off' date even where the common law is concerned;[49] such an interpretation, of course, complicates matters a little further. It ought, however, to be pointed out that, in any event, the acceptance of a 'cut-off' date for general reception of the common law does not entail the rejection of all English decisions on the common law which are rendered after the 'cut-off' date; they are merely of persuasive value only, and not binding as received law.[50]

There is, however, at least one authority which quite clearly states that s. 5 entails the reception of the common law as well. It would not have caused much of a problem had the proposition not occurred in a judgment of the Privy Council, which is the highest appellate court in Singapore. This is the decision in *Chan Cheng Kum & Anor v. Wah Tat Bank Ltd. & Anor;*[51] the case itself concerned an action for wrongful conversion of shipments of rubber, with the main issue centring around the status of certain "mate's receipts". The Board had to determine whether these "mate's receipts" were the equivalent of ordinary bills of lading and therefore were to be treated as documents of title with regard to the goods covered. This is an extremely important authority with regard to the criteria for ascertaining a trade custom or usage - an issue that is not, however, central for present purposes. What is interesting, however, is the following observation by Lord Devlin who, in delivering the judgment of the Board, stated:[52]

> "... the custom in this case, if proved, takes effect as part of the common law of Singapore ...
>
> *The common law of Singapore is in mercantile matters the same as the common law of England, this being enacted in the Laws of Singapore (1955) ch. 24, s. 5(1).*[53] Accordingly, the question whether the alleged custom, if proved in fact as their Lordships hold that it is, is good in law must be determined in accordance with the requirements of the English

48. *Ibid.*
49. As I have sought to argue in an earlier article: see, *supra,* note 3.
50. Though there are authorities suggesting otherwise: see, generally, my article, "'Overseas Fetters': Myth or Reality?", [1983] 2 M.L.J. cxxxix.
51. [1971] 1 M.L.J. 177.
52. *Ibid.,* at p. 179 (emphasis added).
53. This is an older reference to the present s. 5(1).

common law. These customs should be certain, reasonable and not repugnant. It would be repugnant if it were inconsistent with any express term in any document it affects, whether that document be regarded as a contract or as a document of title".

It is respectfully submitted that the observation just quoted is erroneous, having regard to the original purpose of s. 5 as embodied in Sir Thomas Braddell's report. Furthermore, the purpose of the section attributed to it *via* case-law is, at best, ambiguous, and furnishes no support for the proposition that s. 5 effects a continuous reception of the common law (as opposed to statute law).

It must be pointed out that the above observation was not strictly necessary to the reception and subsequent application of the basic common law principles for ascertaining whether or not a custom is good in law. In other words, without actually having to rely upon s. 5, the Board could have based its rationale upon principles of *general* reception of English law under the Second Charter of Justice, with the problem of the 'cut-off' date arguably posing no problems because such principles were probably established prior to 1826.[54] In any event, even if such principles were established after 1826, this would, in accordance with the discussion above, not preclude the Singapore courts from considering and adopting such principles, although they would not be *bound* to follow them since they were not received as part of the corpus of Singapore law.

3. *The Problem of Characterization:*[55]

This is one of the major problems, and has to do with how the court is to ascertain whether or not a question or issue has arisen, or has to be decided, with respect to the enumerated categories of law or with respect to mercantile law generally.[56] There are, as alluded to earlier, two conflicting approaches represented by two rather dated Privy Council cases[57] that still, unfortunately, represent the law, or the problem rather, today. Discussion of the problem is based on an approach taken in an earlier joint article which I co-authored,[58] though there has been a very recent article that takes a somewhat different interpretation of these two cases.[59] I will briefly consider this latest piece before concluding this Section of the article.

The first decision, *Seng Djit Hin v. Nagurdas Purshotumdas & Co.*[60]

54. See, *e.g.,* Walker & Walker, *The English Legal System* (6th edn., 1985), at pp. 64 to 67.
55. See, generally, Soon and Phang, *supra,* note 7, at pp. 41 to 48.
56. The reader is referred to the actual language of the section set out in full above at s. 1 of the instant Part; the present reference is to the phrase occurring in subs. (1).
57. See, *supra,* notes 34 and 35 where the two cases are first mentioned. The instant Section elaborates upon them and the problems as well as contradictions generated.
58. See, *supra,* note 55.
59. See Tan Yock Lin, *supra,* note 7.
60. [1923] A.C. 444.

(hereinafter referred to as the *Seng Djit Hin* approach), at the risk of over-simplification, appears to stand for the proposition that in order to ascertain whether an issue relating to, say, mercantile law has arisen, one has to look at the nature of the transaction concerned, taking into account the nature of the subject matter concerned. The problem with this approach, of course, is that the outcome is left very much at large, and depends, in the main, upon the perspective taken by the court which could thus frame the issue at hand in various ways, entailing possibly different results.[61] This approach has, however, received express application in the case of *Moscow Narodny Bank Ltd. v. Ko Teck Kin (widow),*[62] but, because of the relatively low level of court,[63] and the fact that this formed but one alternative ground for the decision, it is submitted that the alternative approach also remains a viable one - an approach that we now turn to.

The second case, *S.S.T. Sockalingam Chettiar v. Shaik Sahied bin Abdullah Bajerai*[64] (hereinafter referred to as the *Sockalingam Chettiar* approach), again at the risk of oversimplification, appears to stand for the proposition that in order to ascertain whether a relevant issue has arisen so as to bring the section into operation, one has to look at the nature of the act or statute sought to be received. For example, insofar as the last general category of "mercantile law generally" is concerned, the court will have to determine whether the act sought to be applied is part of the mercantile law. Whilst this approach is simpler and more certain than the first (as described in the preceding paragraph), and is (in my view at least) consistent with the legislative purpose of s. 5 as discussed in the previous Section,[65] it is not actually supported by the *language* of s. 5(1) itself. Further, such an approach leads, *in substance,* to a permanent *importation* of the statute concerned simply because once the act is determined to be part of the mercantile law (and that, *therefore,* there is a mercantile issue under s. 5(1)), any subsequent case concerning the reception of that act will already have been determined by the previous decision since the basic methodology will be the *same.* There is also a possible problem as to what

61. See Soon and Phang, *supra,* note 7, especially at p. 43.
62. [1982] 2 M.L.J. xcviii. Woon in "The Continuing Reception of English Commercial Law", *supra,* note 7, at p. 148, classified Thean J.'s approach in *Butterworth & Co. (Publishers) Ltd. & Ors. v. Ng Sui Nam,* [1985] 1 M.L.J. 196 (at p. 204; affirmed by the Court of Appeal (but without reference to s. 5) in [1987] 2 M.L.J. 5) as falling within the *Seng Djit Hin* approach. Whilst such an interpretation is not unpersuasive, it is respectfully submitted that the learned judge did not really canvass in any great detail the various complexities generated by s. 5 (being concerned, rather, with refuting counsel's argument which was clearly regarded as being marginal at best), and the fact that he apparently perceived no inherent contradiction between the two cases (by citing also from the *Sockalingam Chettiar* case) does nothing to enlighten us, it is submitted, on the exact approach preferred.
63. This was a decision of the Registrar of the Supreme Court of Singapore. See, also the discussion at note 62, *supra,* with regard to the *Butterworth* case.
64. [1933] A.C. 342, [1933] S.S.L.R. 101.
65. *I.e.,* s. 2, *supra; contra* Tan Yock Lin, *supra,* note 7, and as also discussed in the selfsame Section.

constitutes "mercantile law" which undermines some of the certainty offered by this approach.[66]

As can be seen, therefore, there are problems with *each* of the aforementioned two conflicting approaches - problems that remain even today, although the 1979 amendment appears to favour the *Sockalingam Chettiar* approach.[67]

As has already been alluded to above, a recent article has taken a somewhat different approach.[68] The writer first construes the *Seng Djit Hin* approach as centring around the issue in the cause of action, and the *Sockalingam Chettiar* approach as centring around the issue in the defence; he concludes that, having regard to the (at least implied) reference in s. 5(1) to *all* possible questions or issues arising, Lord Atkin's approach in the *Sockalingam Chettiar* case is to be preferred.[69] He also observes that "... there is in principle no material difference to be made between an issue raised by the cause of action and an issue raised by way of defence".[70] He thus concludes that "... s. 5 must be tested with respect to every issue arising *whether in the cause of action or in the defence*".[71] To this point, the approach is perfectly acceptable. The writer, however, goes on to criticize the interpretation placed on the *Sockalingam Chettiar* case as described in the preceding paragraphs. The crux of his criticism is, it is submitted, to be found in the following passage that, because of its importance, is set out in full:[72]

> "... it is incorrect to say that Lord Atkin's approach boils down to asking: Is the statute pleaded a mercantile statute? Lord Atkin asks: Does the statute form part of mercantile law? To ask whether a statute forms part of mercantile law is not the same thing as asking whether a statute is a mercantile statute. *To ask whether a statute forms part of mercantile law is to recognize that although a statute may not be a mercantile statute, nevertheless one section (say) may be intended to apply to mercantile law cases.* Such would be true of s. 61 of the English Law of Property Act 1925 (LPA) which provides that in *all contracts* "month" means calendar month and was held to apply in *Fresh Food*

66. See, *infra*, s. 5 of the instant Part.
67. See, generally, the following Section. And *cf.* also practitioners' attitudes towards the reception of English statutes under s. 5: see Woon, *Report on Section 5 of the Civil Law Act, supra*, note 7, at p. 18, Tables 3 and 5 to Appendix 1, and Appendix 2, and, by the same author, "The Continuing Reception of English Commercial Law", *supra*, note 7, at p. 155. Woon, in his latter piece, at pp. 148 to 149, also classifies the recent decision of *Wai Wah Enterprises & Eastern Watch Co. Pte. Ltd. v. China Airlines Ltd.*, [1986] 2 M.L.J. 269, as falling within the *Sockalingam Chettiar* approach. As the learned writer himself appears to admit, however (at p. 149), the statement in the case is not really unambiguously in favour of the *Sockalingam Chettiar* approach. The *Wai Wah Enterprises* case is discussed further at note 171, *infra*.
68. See Tan Yock Lin, *supra*, note 7.
69. *Ibid.*, at pp. 293 to 294.
70. *Ibid.*, at p. 294.
71. *Ibid.* (emphasis added).
72. *Ibid.*, at p. 295 (emphasis mine).

and Refrigerating Co. v. Syme (significantly decided after the *Sockalingam Chettiar* case). Arguably another *e.g.* would be s. 41 of the Matrimonial Proceedings and Property Act 1970 (MPPA) which abolishes the wife's *agency of necessity.* That the *Act* is not mercantile in character *need not necessarily preclude s. 41* from forming *part of mercantile law.* The danger here is in reading the passage quoted from Lord Atkin's judgment too closely when it ought to be confined to the statute there in question, *i.e.* the Moneylenders Acts. Given that there were saving clauses in the Acts which excluded ordinary commercial transactions from their scope, *no section* of the Acts could *possibly have any impact on, relevance to or affect commercial transactions.* That being so, *no section* could raise *any issue of mercantile law*".

I think that there is, *in substance,* no real conflict between the two approaches just enunciated. The writer just quoted is, in effect, arguing that it is unnecessary (if one adopts the *Sockalingam Chettiar* approach) for the *entire* English statute concerned to be mercantile in nature. He argues, for example, that there could be part (say, a section, even) of a *non*-mercantile English statute that could be intended to apply to mercantile law cases. It should, however, be noted at this juncture that he is *not* arguing that *that section need not* be part of the *mercantile* law. On the contrary, a close perusal of the passage quoted above renders it imperative that the section concerned *is* part of the mercantile law. Insofar, therefore, as the views in the joint article[73] suggest that the *entire statute* concerned must be part of the mercantile law, the criticism presently considered is valid. To extract, however, such a suggestion or inference would, it is submitted, be to *ignore* a *subsequent* part of the (joint) article that deals with the issue of severability - an issue that I consider in more detail below;[74] in that part, it is argued that, contrary to the traditional view, severance ought to be permitted - that, in other words, it is entirely possible to sever (under certain conditions, to be elaborated upon later[75]) one or more sections from an otherwise *non*-mercantile statute, *provided that such section(s) form part of the mercantile law* (a proviso that is at least strongly implied from the preceding discussion with regard to characterization[76]). It is interesting, also, to note that the writer quoted himself recognizes the importance that the issue of severability poses.[77] Looked at in this light, it is submitted that there is, as mentioned at the outset of the instant paragraph, no *substantial* conflict between the two approaches just considered. At worst, the earlier (joint) article may be criticized for not making the link between characterization

73. *Supra,* note 55.
74. See Soon and Phang, *supra,* note 7, especially at pp. 55 to 57. And see the discussion at, *infra,* s. 8 of the instant Part.
75. See, *infra,* s. 8.
76. As to which see, also *supra,* note 55.
77. See Tan Yock Lin, *supra,* note 7, at p. 296.

on the one hand and severability on the other as clear as it could otherwise have been, and that, in this regard, the recent article that has been just considered[78] has made for more *structural* clarity.

4. *The Problem of What Law is to be Administered:*[79]

This problem is closely linked to the issues canvassed in the preceding Section and is dependent, in fact, upon which of the two conflicting approaches as embodied in the Privy Council cases discussed above is taken.[80]

If the *Seng Djit Hin* approach is adopted, once an issue with regard to mercantile law is determined to exist, then the local court is to apply the *whole* law of England; the local court is, as it were, "teleported" to England.[81] This is (according to the interpretation adopted in the instant article[82]) at variance with the original legislative purpose as embodied in the Braddell report.

If, on the other hand, the *Sockalingam Chettiar* approach is adopted, the problem resolves itself. By its very essence, this approach would entail applying the very statute (or section(s)[83]) in question that are, of course part of the mercantile law of England. This approach is, in fact, ostensibly supported by the 1979 amendment.[84]

5. *What is "Mercantile Law"?*

This particular problem is of especial importance insofar as the *Sockalingam Chettiar* approach is concerned - an approach that, as the reader may recall, entails ascertaining whether or not the particular statute (or section(s) thereof) that is sought to be received is part of the mercantile law.[85]

This particular issue raises a host of problems[86] of definition (especially

78. *I.e.,* by Tan Yock Lin, *supra,* note 7.
79. See Soon and Phang, *supra,* note 7, at pp. 50 to 54.
80. For reasons that have been canvassed in the preceding Section, I am adopting the approach taken by Soon and Phang: see, *supra,* note 55.
81. See both pieces by Woon cited at, *supra,* note 7.
82. See, *supra,* s. 2.
83. *Cf.* Tan Yock Lin's views discussed in the preceding section.
84. See, *supra,* note 8. And see *Singapore Parliamentary Debates,* vol. 39, at col. 447 (September 21, 1979).
85. See, *supra,* s. 3.
86. See, generally, Soon and Phang, *supra,* note 7, at pp. 48 to 50.

as exemplified by the case-law[87]) that are exacerbated by the fact that, as Bartholomew has quite pertinently pointed out, mercantile law lost its specific identity when it was absorbed by the common law.[88]

6. *How do we construe and apply the last portion of s. 5(1) (popularly known as the "third limb")?*

This "third limb" reads as follows: "... unless in any case other provision is or shall be made by any law having force in Singapore". It is one of the limitations on the reception of English commercial law *via* s. 5 - if, in other

87. There are basically two views - a narrower view and a wider one. Insofar as the former is concerned, the reader is referred to the pronouncements, first, by Wood J. in *Vulcan Match Co. v. Herm Jebsen & Co.*, (1884) 1 Ky. 650, at p. 651 (mercantile law has "... reference only to the law of buying and selling merchandise") and the majority of the Court of Appeal of the Straits Settlements in *Seng Djit Hin's* case (1921) 14 S.S.L.R. 181, where Bucknill C.J. (at p. 200) thought that "... the expression covered merely the usages of merchants and traders in the different departments of trade ratified by the decisions of Courts of law ...", and where (at p. 204) Barrett-Lennard J. expressed a similar view. Insofar as the latter (wider) view is concerned, one may have regard to the view of Voules J. in *Seng Djit Hin's* case, *supra,* where his Lordship observed (at p. 209) that "... the expression 'mercantile law generally' is a very wide one and I think that it must embrace those branches of the whole body of law ... which are of particular importance to persons engaged in trade and commerce" - a view that was followed by Whitley J. (whose view was endorsed by the Court of Appeal) in *King Lee Tee v. Norwich Union Fire Insurance Society Ltd.,* [1933] S.S.L.R. 167, at p. 169. It was submitted in a joint article (see Soon and Phang, *supra,* note 7, at p. 49) that the narrower definition of "mercantile law" (by Bucknill C.J., above, as opposed to the definition by Wood J. that was argued to be far too narrow) was to be preferred, for insofar as the wider definition was concerned, "... to define the term so widely is to render it meaningless and this idea has never figured in any orthodox definition of the term" (see Soon and Phang, *supra,* at p. 49).

88. See Bartholomew, *The Commercial Law of Malaysia, supra,* note 7, at p. 95. For the history and development, as well as descriptions, of the law merchant (for which the literature is enormous), see, generally (as a representative sample), A.T. Carter, "The Early History of the Law Merchant in England", (1901) 17 L.Q.R. 232; Thomas Edward Scrutton, "General Survey of the History of the Law Merchant" in *Select Essays in Anglo-American Legal History,* vol. 3 (1908), p. 7; Bernard Edward Spencer Brodhurst, "The Merchants of the Staple" in *Select Essays in Anglo-American Legal History,* vol. 3 (1908), p. 16; Francis Marion Burdick, "Contributions of the Law Merchant to the Common Law" in *Select Essays in Anglo-American Legal History,* vol. 3 (1908), p. 34; F.C.T. Tudsbery, "Law Merchant and the Common Law", (1918) 34 L.Q.R. 392; Charles Kerr, "The Origin and Development of the Law Merchant", (1929) 15 Va. L. Rev. 350; F.D. MacKinnon, (1936) 52 L.Q.R. 30; William C. Jones, "An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States" (1958) 25 Univ. of Chicago L. Rev. 445; Aleksander Goldstajn, "The New Law Merchant", [1961] J.B.L. 12; Paul R. Teetor, "England's Earliest Treatise on the Law Merchant - The Essay on *Lex Mercatoria* from *The Little Red Book of Bristol* (circa 1280 AD)", (1962) 6 Am. J. Leg. Hist. 178; H.J. Berman and C. Kaufman, "Law of International Commercial Transactions (lex mercatoria)", (1978) 19 Harv. Int. L.J. 221; J.H. Baker, "The Law Merchant and the Common Law before 1700", [1979] C.L.J. 295; Leon E. Trakman, "The Evolution of the Law Merchant: Our Commercial Heritage - Part I: Ancient and Medieval Law Merchant", (1980) 12 J. Mar. L. & Com. 1; Leon E. Trakman, "The Evolution of the Law Merchant: Our Commercial Heritage - Part II: The Modern Law Merchant", (1980) 12 J. Mar. L. & Com. 153; and Harold J. Berman, "Mercantile Law" in ch. 11 of *Law and Revolution - The Formation of the Western Legal Tradition* (1983).

words, there is such "other provision", then the English law concerned will not be received.

There are, in this regard, problems of application as well as construction.[89] Insofar as the former is concerned, and prior to the 1979 amendment,[90] there were two main approaches. Both these approaches may be traced to the Court of Appeal decision in *Seng Djit Hin*.[91] Both Bucknill C.J.[92] and Voules J.[93] appear to suggest that the local law, in order to have the requisite 'displacing' effect, must correspond exactly to the specific English provision in issue, the net effect of which is really quite liberal as such an approach would enable far too many English statutes to be received *via* s. 5.[94] The other main approach is to take a much broader and more purposive approach - that is, admittedly, hazier, though it has the support both of at least one prior precedent[95] and the 1979 amendment.[96]

Insofar as the latter is concerned (*viz.*, the issue of construction), the question arises as to whether the word "law" includes the common law. It has been suggested, in a rather technical and involved argument, that the word "law" does *not* include the common law,[97] such a suggestion being in accordance with logic and commonsense.[98]

The aforementioned discussion, especially with regard to the former point (*viz.*, the issue of application) leads to a further, allied point to which I now turn.

7. *When is there a written law in force corresponding to an Act of Parliament of the United Kingdom so as to result in the latter not being received via s. 5 (s. 5(2)(c) read with s. 5(3)(b))?*

The problems in this regard centre around the language of s. 5(3)(b) which, together with s. 5(2)(c) which it seeks to elaborate upon, was introduced by the 1979 amendment.[99] What, for example, do the words in parenthesis, *i.e.* "notwithstanding that it differs, whether to a small extent

89. See, generally, Soon and Phang, *supra*, note 7, at pp. 57 to 64.
90. See, *infra*, the discussion at s. 7.
91. (1921) 14 S.S.L.R. 181.
92. *Ibid.*, at pp. 199 to 200.
93. *Ibid.*, at p. 210.
94. See Soon and Phang, *supra*, note 7, at pp. 62 to 63. And see, especially at p. 63 thus: "This result ... runs counter to the original object behind the enactment of s. 5, which was simply to provide for the lack of local mercantile statutes."
95. See *Tan Mooi Liang v. Lim Soon Eng*, [1974] 2 M.L.J. 60.
96. See the discussion at, *infra*, s. 7.
97. See Soon and Phang, *supra*, note 7, at pp. 57 to 62.
98. *Ibid.*, at pp. 57 to 58: "... to read the word "law" in the proviso as including the common law would render it so wide ... as to render the substantive part of s. 5(1) virtually useless."
99. *Supra*, note 8. For the text of the specific provisions themselves, see, *supra*, s. 1.

or substantially, from that Act", mean?[100]

Further - and more importantly, perhaps - what are the criteria that would enable us to ascertain whether the "purpose or purposes" of the local written law are "the same or similar" to those of the English statute?[101] There are no clear and ready answers to this particular problem; a joint article indicates, in fact, five possible (and quite different) scenarios that may arise,[102] and suggests "... that for s. 5(2)(c) to have any meaningful effect, s. 5(3)(b) must be amended to make it clear which of the five situations are meant to be covered".[103]

8. *The issue of severability and suitability, and the effect of s. 5(3)(a):*

The issue of severability involves the question as to whether the local court can 'bring in', so to speak, *only part* of an English statute, leaving, as it were, the rest of the statute 'back in England'. The traditional view, which is based on a famous passage by Lord Atkin in *Sockalingam Chettiar's* case,[104] is that severability is not a viable concept, although certain academic commentators have argued (and there is ostensibly some support for such an argument in the case-law itself[105]) that only a municipal statute whose provisions are incapable of standing on their own cannot be severed, and that any statute that comprises several component parts that are mutually independent may in fact be severed.[106] In any event, after the 1979 amendment, the rather broad language of the (then) newly-introduced s. 5(3)(a) suggests that severability is in fact possible.[107]

There remains, however, the question as to whether or not the suitability requirement under the general reception of English law is to be imported into s. 5 itself, since an examination of the language of the section reveals that there is *no express* suitability requirement as such. Although there is support in both the literature[108] as well as case-law[109] for an '*implied* suitability' requirement, an argument has been made to the

100. See Soon and Phang, *supra,* note 7, at pp. 64 to 68; see, especially, at p. 65: "It is submitted that this phrase refers to the *form* in which the local and United Kingdom Acts are couched. In other words, it matters not that the local Act differs in wording from the English Act so long as it can be shown that notwithstanding this difference (and here follow the concluding words of the provision) "the purpose or purposes of the written law are the same or similar to those of that Act"."
101. See, generally, *ibid.,* at pp. 65 to 68.
102. *Ibid.,* at pp. 66 to 67.
103. *Ibid.,* at pp. 67 to 68.
104. [1933] S.S.L.R. 101, at p. 116.
105. See Sproule J. at first instance and Terrell J. in the Court of Appeal in *Sockalingam Chettiar's* case, *supra,* note 104, at pp. 103 and 111, respectively.
106. See, *e.g.,* D.K.K. Chong, *supra,* note 7, at pp. civ to cv.
107. Section 5(3)(a) reads as follows: "... the law of England which is to be administered by virtue of subs. (1) shall be subject to such modifications and adaptations as the circumstances of Singapore may require".
108. See G.W. Bartholomew, *The Commercial Law of Malaysia, supra,* note 7, at p. 22.
109. Lord Atkin in *Sockalingam Chettiar's* case, *supra,* note 104, at p. 115, discussing with approval the view taken by the courts below which held that the English Moneylenders Acts were unsuitable and therefore not applicable in the local context.

effect that to sanction such a requirement would be to run counter to one of the original objectives behind the enactment of s. 5 itself which was to maintain the uniformity of laws between traders in England and the Straits Settlements.[110] It has also been argued that, in any event, had the local legislature intended a suitability test, it would have *expressly* included this safeguard in the section itself.[111] It has further been argued, in the same article, that the 1979 amendment made no substantive change to the existing situation for s. 5(3)(a)[112] does *not* deal with the requirement of suitability; as its wording suggests, the subsection *presupposes* that the English statute concerned has already been received under s. 5(1) and is only concerned with its modification or adaptation to the circumstances of Singapore.[113]

9. *Miscellaneous Problems:*

There are other problems. They are largely concerned with the rest of the provisions introduced by the 1979 amendment and are of relatively less importance. An account as well as discussion of them may be found in the relevant secondary literature.[114]

10. *Some Concluding Remarks:*

Thus ends our discussion of the manifold problems generated by s. 5. As may be seen, they are extremely complex and it is no wonder that so much literature has been generated *vis-a-vis* merely one section of a relatively short statute.[115] It is, however, presently appropriate for us to turn to the central focus of the instant article, *i.e.* to 'apply' the section to the various English *contract* statutes that have been assumed to apply in the Singapore context. It will be seen, as mentioned at the outset of the present article, that such assumptions are indeed too simplistic as an actual application of s. 5 reveals that there are numerous difficulties in arriving at such pat conclusions. I will, in fact, attempt in the concluding Part (IV) of the article to argue that, in the light of these difficulties, the best solution would be for the Singapore Parliament to re-enact these English contract statutes, and thereby obviate the problems engendered by s. 5 itself. This suggested solution is more specific and less abstract than the blanket solutions traditionally advocated,[116] being rather more *piecemeal* in nature. Having regard, however, to the fact that the sphere of contract law

110. See, *supra,* s. 2 with regard to the original objectives behind s. 5.
111. For this and the preceding argument, see Soon and Phang, *supra,* note 7, at p. 55.
112. For the text of s. 5(3)(a), see, *supra,* note 107.
113. See Soon and Phang, *supra,* note 7, at p. 57.
114. *Ibid.,* at pp. 68 to 71. Though *cf.* discussion *vis-a-vis* the Unfair Contract Terms Act at s. 4, *infra,* especially at notes 173, 174 and 180, and the accompanying main text.
115. See, *supra,* note 7 that refers to the relevant literature.
116. See, *supra,* note 16.

constitutes a rather large and significant segment of commercial law generally, the suggested solution would, it is submitted, act as an impetus to *further,* albeit piecemeal, reforms that would, in the final analysis, result in a *de facto* comprehensive commercial code for the island republic of Singapore.

III Applications in the Sphere of Contract Law

1. *Preliminary Remarks:*

Before considering the main English contract statutes that are traditionally considered to have been received in the Singapore context, a few preliminary observations are in order.

First, I assume that mercantile law includes contract law. It is, in fact, submitted that the term "mercantile law" in s. 5(1) itself may reasonably be construed to be somewhat *wider* in ambit than the law merchant itself - that the former term may really be equated with the term "commercial law". Looked at in this light, it is clear that both the law merchant and the law of contract are facets of a yet wider generic category, *viz.*, that branch of the common law which we term "commercial law". One writer, in fact, has observed that the law of contract itself "... necessarily includes the Law Merchant".[117] This is not an implausible proposition simply because the law merchant itself, that developed from customary norms,[118] was itself ultimately absorbed into, and became part of, the common law. Whatever may have been the actual process of the absorption of the law merchant into the common law,[119] it is presently clear that such a 'merging' did in fact occur. And it should be noted that the law of contract is itself a development from, and a consequent branch of, the common law. The 'umbrella' term, "commercial law", has, on the other hand, been used *quite loosely* to refer to those branches of the common law that have to do with commercial matters. It is submitted that these matters would include all those categories expressly mentioned in s. 5(1) itself, *viz.*, the law relating to partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, as well as average, life and fire insurance, not forgetting the final seemingly 'catch-all' category of "mercantile law generally". The focus, for present purposes, as already mentioned, is really upon this final (rather amorphous) category, or one particular branch thereof, *viz.*, the law of *contract.*

Secondly, I shall *not* be dealing with *every possibly applicable* English contract statute; I deal, in the main, with the more significant acts. It ought, however, to be mentioned, on the other hand, that I will also be

117. See Kerr, *supra,* note 88, at p. 361.
118. For the history and development of the law merchant (which makes for rather fascinating reading), see, generally, the literature cited at, *supra,* note 88.
119. See, generally, the literature cited at note 88, *supra.*

briefly considering one particular English statute that, at first blush, deals with a whole clutch of other *non*-commercial matters, *viz.*, the Family Law Reform Act 1969;[120] this particular statute (or, more specifically, s. 1 thereof) is of great potential significance in the sphere of infants' contracts, and may be applicable depending on the view one takes *vis-a-vis* the concept of severability.[121]

Further, it is acknowledged that, whilst many of the statutes to be discussed in the instant Part of the article fall clearly within the rubric of the *general* law of contract, there are a few acts that are, perhaps, more appropriately classified under other (more specific) categories, *e.g.*, commercial transactions; a good example may be found in the Sale of Goods Acts.[122] Such overlaps are, however, inevitable, and will be noted where appropriate.

Finally, it should be noted that certain problems generated by s. 5 either pose few, if any, real difficulties *vis-a-vis* (at least) the present focus or remain constant, regardless of the scenario in question.

An example of the former would be the miscellaneous problems arising as a result of the 1979 amendment that have been referred to above.[123]

Examples of the latter would include the following. First, there is the uncertainty engendered by the *Seng Djit Hin* approach in the context of characterization[124] that really admits of no real (even speculative) analyses simply because the very nature of the approach is itself a very factual one, depending on the individual facts and circumstances of each case. The *Sockalingam Chettiar* approach[125] toward the question of characterization does not, admittedly, yield a definitive answer either. To the extent, however, that the focus is not on the individualized fact as such but, rather, on the *very nature of the statute (or section) itself,* it is possible to at least attempt an analysis that will yield a conclusion that, if accepted, will hold good for subsequent cases involving the same statute as well. I will thus attempt to apply the *Sockalingam Chettiar* approach, rather than the *Seng Djit Hin* approach to the statutes considered in the instant Part. If this be the case, then, as discussed in the previous Part,[126] there is no problem with regard to the law to be administered - that would be the very statute itself (or a part thereof).[127]

Yet another example of a conundrum that remains both constant as well as intractable pertains to the question of whether the "third limb" includes the common law as well. I have already argued that it does not,[128] and though the point is arguable, I will not deal with it in connection with

120. Chapter 46.
121. See, generally, the discussion at Part II, s. 8, *supra.*
122. See, *infra,* s. 2.
123. See, *supra,* Part II, s. 9.
124. See, *supra,* Part II, s. 3.
125. See, *supra,* Part II, s. 3.
126. See, *supra,* Part II, s. 4.
127. If, of course, the *Seng Djit Hin* approach were adopted, the *whole* law of England would be applicable: see, *supra,* Part II, s. 4.
128. See, generally, *supra,* Part II, s. 6.

the specific statutes to be considered below. And another problem pertains to the interpretation of the language of s. 5(2)(c) read in conjunction with s. 5(3)(b);[129] fortunately, however, with the exception of one situation,[130] this problem does not really arise.

Let us now turn to an analysis of the possible application (and consequences) of s. 5 to various selected English statutes in the context of local contract law.

2. *The Sale of Goods Acts of 1893*[131] *and 1979:*[132]

As a preliminary point, it is noted that both the aforementioned acts are basically the same in substance, the latter consolidating changes wrought on the former by various other statutes. It will, of course, be the 1979 act that will apply in the Singapore context if received by virtue of s. 5 because, as already mentioned above, the reception effected under s. 5 is a continuous one. What is clear is the fact that, whatever the differences in substance between these two acts, the points to be made shortly in the context of s. 5 will apply equally to each.

It has traditionally been assumed by the Singapore courts and their predecessors[133] that the Sale of Goods Act is good law locally. Indeed, so deeply entrenched is this assumption that there have been, to the best of my knowledge, no Singapore decisions that have attempted to grapple with the relationship of the statute to s. 5 itself. The cases demonstrating this attitude are numerous,[134] one of the latest Singapore decisions being reported as recently as 1987.[135]

129. See, *supra,* Part II, s. 7.
130. See, *infra,* s. 5; this pertains to the applicability of the U.K. Family Law Reform Act 1969, c. 46.
131. 56 & 57 Vict., c. 61.
132. Chapter 54.
133. *I.e.,* the courts of the Straits Settlements (of which Singapore was, of course, a part) and the courts of the Colony of Singapore.
134. See, *e.g., Behr & Co. v. Lee Swee Tin,* (1895-96) 3 S.S.L.R. 48; *Saiboo Tamby v. Chop Kim Chin Bee,* (1898-99) 5 S.S.L.R. 54; *Leach v. Sin Moh & Co.,* (1902-3) 7 S.S.L.R. 38; *Nagurdas Purshotumdas & Co. v. Mitsui Bussan Kaisha, Ltd.* (1911) 12 S.S.L.R. 67; *Lohmann & Company, Limited v. Mong Huat & Company,* [1931] S.S.L.R. 129; *A.H.W. Miles v. Sandilands Buttery & Co.,* [1932] S.S.L.R. 49; *Chop Ngoh Seng v. Esmail and Ahmad Bros.,* [1948] S.L.R. 117, [1948-49] M.L.J. Supp. 93; *Hock Hin & Co. v. Allwie & Co. Ltd.,* [1961] M.L.J. 232; *Yap Chin Hock & Anor. v. Cheng Wang Loong,* [1964] M.L.J. 276; *Muthusamy v. Subramaniam,* [1965] 2 M.L.J. 273; *Malayan Miners Co. (M) Ltd. v. Lian Hock & Co.,* [1966] 2 M.L.J. 273; *Seng Hin v. Arathoon Sons Ltd.,* [1968] 2 M.L.J. 123; *Himatsing & Co. v. P.R. Joitaram,* [1970] 2 M.L.J. 246; *Bulsing & Co. v. Joon Seng & Co.,* [1972] 2 M.L.J. 43; and *Eastern Supply Co. v. Kerr,* [1974] 1 M.L.J. 10. I have only listed cases that are either probably binding on the Singapore courts by virtue of the doctrine of *stare decisis* or are in any event, part of the corpus of Singapore law itself. But, the point made is, it is submitted, evident without citing other cases, simply because of the sheer number of cases cited in this note alone.
135. See *Harrisons & Crosfield (N.Z.) Ltd. v. Lian Aik Hang (Sued as a Firm),* [1987] 2 M.L.J. 286, a decision of the Singapore High Court.

Notwithstanding, however, the lack of reasoning in the decisions mentioned in the preceding paragraph, it is submitted that the assumption adopted is a reasonable one. In fact, of all the various English statutes considered in the present article, the Sale of Goods Act poses the fewest problems.

Applying the *Sockalingam Chettiar* approach, for example, there is no difficulty in classifying the Sale of Goods Act as constituting part of the mercantile law; the act itself relates, as the very title suggests, to the sale of goods which is recognized as a specific branch of commercial law. And since the subject matter of the statute itself is fairly uncontroversial (as just mentioned), the problems of definition engendered by the term "mercantile law" do not arise in the first place.[136] There is also no apparent local legislation that 'displaces', as it were, the English act itself.[137]

The only possible problems are miscellaneous and minor in character. There are, for example (and for obvious reasons), numerous references to the United Kingdom. The obvious solution in this regard is the purely cosmetic substitution of the word "Singapore" wherever the phrase "United Kingdom" occurs by virtue of the power conferred under s. 5(3)(a). A more substantive problem may arise with regard to s. 22 of the 1979 act that refers to goods sold in market overt.[138] One writer refers to the concept as follows:[139]

> "The rule about sale in market overt of course comes from old market law and the fairs, where any one could search for his goods if he chose. A person buying in these circumstances took a good title against all but the Crown, and afterwards, by 21 Hen. VIII, c. 11, against the prosecutor to conviction."

The problem in the local context is, of course, how to *apply* this concept of "market overt". This is, perhaps, where the fairly wide-ranging power in s. 5(3)(a) may be prayed in aid so as to allow the local courts to interpret the concept in accordance with local circumstances.

All in all, however, the reception of the Sale of Goods Act *via* s. 5 appears to be relatively free of the vexed problems described in Part II of the instant article.

136. As to the problems of definition of "mercantile law", see, *supra,* Part II, s. 5.
137. For a discussion of the general problems in this regard, see, *supra,* Part II, ss. 6 and (especially) 7.
138. The relevant portion of the section is subs. (1) which reads as follows: "Where goods are sold in market overt, according to the usage of the market, the buyer acquries a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller". And see Woon, "The Continuing Reception of English Commercial Law", *supra,* note 7, at p. 153, where the issue is, apparently, first raised.
139. See A.T. Carter, *supra,* note 88, at p. 243.

3. *The Misrepresentation Act 1967:*[140]

This particular statute has, unlike the Sale of Goods Act considered in the preceding Section, not apparently figured in any local case. It is a short act, and clearly deals with the law of contract, amending in quite a significant manner the law relating to misrepresentation. Applying the *Sockalingam Chettiar* approach, there can be little doubt that the act, dealing as such with a clearly established branch of the law of contract, is a mercantile statute. The only apparent problem, at first blush, appears to be s. 4 which effects certain amendments to the Sale of Goods Act of 1893. It is, however, submitted that there are no difficulties, in effect, for the following reasons. First, the Sale of Goods Act, as already discussed in the preceding Section, is probably itself a mercantile statute. In any event, the amendments refer to the 1893 Act that has now been superseded by the 1979 Act. Finally, even if the foregoing reasons are not accepted, it will, as argued in the previous Part,[141] be possible to *sever* s. 4 from the rest of the (Misrepresentation) Act.

Since the act is a mercantile statute, there is again no problem as to the law to be administered.[142] There is no problem with regard to the nature of the statute even though the act deals with the law of contract since, as already submitted above,[143] the law of contract is part of the mercantile law.[144]

There is also clearly no corresponding local act that would serve to bar, as it were, the reception of this particular statute.[145]

Only a couple of minor problems remain; and they have to do with the specific language of s. 6, particularly subss. (3) and (4) thereof that relate to the applicability (or non-applicability, rather) of the act to Scotland and Northern Ireland, respectively. Again, there is really no problem since s. 5(3)(a) gives the Singapore court the power to sever these provisions.

It can thus be seen that, as with the case of the Sale of Goods Act discussed above, the reception *via* s. 5 is relatively unproblematic. One rather curious (local) episode, however, remains to be described; it is tucked away in an obscure corner of the *Singapore Parliamentary Debates* of almost two decades ago, and has, to the best of my knowledge, not been raised by any writer. It had to do with an oral answer to a question that asked "the Minister for Law and National Development if he will consider introducing legislation similar to the Misrepresentation Act 1967 ... of the United Kingdom".[146] The Minsiter's reply ought, in my view, to be quoted *in extenso:*[147]

140. Chapter 7.
141. See, *supra,* Part II, s. 8.
142. On the general problems, see, *supra,* Part II, s. 4.
143. See, *supra,* s. 1.
144. On the problems of definition *vis-a-vis* the term "mercantile law", see, *supra,* Part II, s. 5.
145. On the problems in this context, see, *supra,* Part II, ss. 6 and 7.
146. *Singapore Parliamentary Debates,* vol. 28, April 10, 1969, at Col. 1008.
147. *Ibid.* (emphasis added).

"The scope of this Act, which has effected some improvements in the law, is far-reaching, not only altering the substantive law but conferring very wide discretionary powers on the courts. *The Member will also be aware that the amendments to the law have been the subject of considerable comment and criticism in the United Kingdom. In the circumstances, it is desirable that a careful study of the Act and its effects as shown by the experience of the courts in England should be made before similar legislation is introduced in Singapore*".

Although the Misrepresentation Act itself has generated very little case-law in England, there have been relatively few complaints; in any event, the act is still on the English statute book. Yet, after close on two decades, nothing whatsoever has been done to re-enact the statute locally.

4. *The Unfair Contract Terms Act 1977*:[148]

The applicability of this act in the Singapore context has, in fact, been considered by one writer.[149] That writer, however, deals with the various issues a little too briefly. I will note his views where appropriate. Insofar as local case-law is concerned, there appear to be no reported Singapore cases, though there is one decision of Roberts C.J. in the High Court of Brunei that, unfortunately merely refers to the statute, the main issue being quite different, focusing upon the area of industrial law and the contract of employment.[150]

Turning, then, to an analysis of the applicability of the act in the context of s. 5 in general, and the issue of characterization in particular, it is submitted that there are problems raised, even when applying the relatively less problematic *Sockalingam Chettiar* approach. That the statute does not deal exclusively or almost totally with commercial matters is evident even from a cursory perusal of the act itself.[151] The act, for example, covers *tortious* liability as well;[152] special note should be taken of s. 1(1)(c) that refers to the Occupiers' Liability Act of 1957[153] that is *not*

148. Chapter 50.
149. See Ho Peng Kee, *supra,* note 17. And *cf.* tangential reference in a rather more specific context by Soon and Phang, *supra,* note 7, at p. 70; and, more recently, by Woon, "The Continuing Reception of English Commercial Law", *supra,* note 7, at p. 159.
150. See *Haji Ismail Bin Haji Tar & Ors. v. Brunei Shell Petroleum Co. Sdn. Bhd.,* [1987] B.L.D. [May] 89, [1988] 2 C.L.J. 571.
151. And *cf.* the long title that reads as follows: "An Act to impose further limits on the extent to which under the law of England and Wales and Northern Ireland civil liability for breach of contract, *or for negligence or other breach of duty,* can be avoided by means of contract terms *and otherwise,* and under the law of Scotland civil liability can be avoided by means of contract terms" (emphasis mine). The short title of the act is thus somewhat misleading insofar as the act does not deal with contractual matters only.
152. See s. 1(1), and s. 2. *Contra,* Ho Peng Kee, *supra,* note 17, at p. ccxxv, but it is submitted, with respect, that the writer concerned is merely *asserting* that the act is a mercantile one.
153. 5 & 6 Eliz. 2, c. 35.

law in Singapore, not having been received by virtue of the Second Charter of Justice since it was enacted well after the general reception 'cut-off' date of 1826.[154] Also important in this regard is s. 2 which is a substantive provision relating to avoidance of liability for negligence, and covers the exclusion or restriction of such liability by "any contract term *or to a notice given to persons generally or to particular persons*".[155]

It might, however, be possible to argue that the statute deals, *in the main,* with mercantile law, and that one could invoke s. 5(3)(a) to *sever* irrelevant material that occur either within the provisions themselves or that constitute entire provisions.[156] Whilst on the concept of severability, account will also have to be taken of at least three other problems, although the concept itself does also figure in the discussion in the subsequent paragraphs of the instant Section. The first pertains to an entire Part of the act itself, *viz.* Part II, which applies to Scotland. It is submitted that this Part may, in fact, be severed under the authority of s. 5(3)(a). Secondly - and this relates to provisions discussed in the succeeding paragraph - the concept of severability may be applied so as to retain the rest of the statute in the local context.[157] Finally, there are various sections in the act itself that, assuming they are receivable, require a few minor modifications in their language so as to render them apposite to the Singapore context,[158] *e.g.*, the substitution of the word "Singapore" for the phrase "United Kingdom"; here, again, under the authority of s. 5(3)(a), there should be few, if any, problems.

There are, in fact, other provisions in the act itself that also give rise to some ambiguity at least. These fall, in the main, under Part III of the act, and relate to certain miscellaneous provisions that, arguably, may not be appropriate to the local context.

The first possible set of problems, in this regard, is to be found, however, in Part I of the act, and centres around the reference to the provisions of the United Kingdom Supply of Goods (Implied Terms) Act 1973[159] dealing with the purchase; the provisions involved are s. 6(1)(b) and s. 6(2)(b).[160] Although not expressly articulated by a writer who correctly points out this particular difficulty,[161] one reason for concern stems from a reading of s. 5(2)(c) with s. 5(3)(b) of the Civil Law Act, as we have a local Hire-Purchase Act.[162] Though the 1973 United Kingdom Act appears to have more than one purpose, thus bringing into play the

154. See, *supra,* note 2.
155. Section 2(1) prohibits completely the exclusion or restriction of liability for death or personal injury resulting from negligence, whilst s. 2(2) subjects the term or notice (as the case may be) to the requirement of reasonableness, as to which the reader is referred to s. 11, especially subs. (1) thereof.
156. Though *cf.* the warning against too arbitrary an application of this power: see Soon and Phang, *supra,* note 7, at pp. 56 to 57.
157. *Cf.* Ho Peng Kee, *supra,* note 17, at p. ccxxv.
158. See, *e.g.,* ss. 26 and 27.
159. Chapter 13.
160. See Ho Peng Kee, *supra,* note 17, at p. ccxxv.
161. *Ibid.,* at note 11, where the reason is implied.
162. Cap. 125, Singapore Statutes, 1985 Rev. Ed.

various problems engendered by a construction of the language of s. 5(3)(b),[163] it is my view that the local Hire-Purchase Act does in fact have a 'displacing' effect, whichever of the various tentative views is taken. More importantly, s. 1(5) of the local act excludes the English statutory law of hire-purchase in any event.[164]

The second broad set of possible problem is, as already alluded to above, a hotchpotch of various situations which may, at present, be only briefly described. Sections 26 and 27 pertain to international supply contracts and choice of law clauses respectively. Quite apart from the evident changes in language that have to be effected,[165] both sections appear to be suitable to the Singapore context and thus pose, in effect, no real problems. Indeed, a noted author on the law of contract has observed that both these provisions are probably "designed not to frighten away foreign businessmen by subjecting their contracts to the controls imposed by the Act".[166] Section 28, on the other hand, poses more problems. It refers to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974[167] - a convention that Britain has apparently ratified,[168] though it has, as yet, not been implemented by any domestic legislation. Singapore, however, has not, apparently, as yet ratified the convention.[169] The resultant situation, however, is probably an anomalous one. Section 28 of the Unfair Contract Terms Act, not being a "law *enacted or made* in the United Kingdom ... *giving effect* to a treaty or international agreement to which *Singapore* is *not a party*",[170] is thus not excluded by s. 5(2)(b)(i) of the Civil Law Act. But, because s. 28 has regard to the Athens Convention, the Convention itself is applicable, albeit indirectly, in Singapore. One could, of course, argue that the phrase "giving effect" in s. 5(2)(b)(i) includes all *indirect* modes of giving effect to treaties or international agreements, but, a fair reading of the entire provision does not, it is submitted, admit of such a strained interpretation. It would, of course, have been an entirely different situation altogether if what was at issue was a United Kingdom statute that directly implemented a particular international convention to which the United Kingdom itself was (of course) a party; such a statute would have fallen squarely within

163. See, generally, *supra,* Part II, s. 7.
164. *Ibid.,* and see, especially, Soon and Phang, *supra,* note 7, at pp. 65 to 68.
165. See, *supra,* note 158.
166. *Cheshire, Fifoot and Furmston's Law of Contract* by M.P. Furmston (11th edn., 1986).
167. Though *cf.* (insofar as Britain is concerned) carriage of passengers by *road:* see the Carriage of Passengers by Road Act 1974, c. 35.
168. See D.C. Jackson, *World Shipping Laws - International Conventions (Status and Ratifications of Conventions)* (issued June 1986), especially at p. 21. This data is as at August 31, 1985.
169. This is an inference from the absence of any mention in this regard in *International Agreements/Conventions to which Singapore is a Party* (prepared by the International Organizations Section, Directorate III, Policy, Planning and Analysis Division, Ministry of Foreign Affairs, Singapore; as at June 1, 1986; 1st edn., 1986/1). And see Jackson, *supra,* note 168.
170. Emphasis added.

the proscriptive (or, rather, exclusionary) ambit of s. 5(2)(b)(i).[171] The net result, at present, however, is that s. 28 probably applies in the local context, although it has regard to an international convention to which Singapore is not even a signatory. A further anomalous result, however, remains, for quite apart from the effect of s. 28 of the Unfair Contract Terms Act itself, it is arguable that the Athens Convention *itself applies in any event* simply because the Convention, by virtue of s. 2(1) of the European Communities Act 1972,[172] would have the effect of law in the

171. Interesting issues in a similar vein are also raised by the recent Singapore High Court decision of *Wai Wah Enterprises & Eastern Watch Co. Pte. Ltd. v. China Airlines Ltd.*, [1986] 2 M.L.J. 269, where Lai J. observed thus (at p. 269): "At the trial, the defendants sought to limit their liability by relying on art. 22(2)(a) of the Schedule to the English Carriage by Air Act 1961 which is part of the laws of Singapore by virtue of s. 5(1) of the Civil Law Act (Cap. 30)." The English Carriage of Air Act here mentioned is in fact a law "enacted or made in the United Kingdom" that gives effect to a treaty or agreement, popularly known a "the Warsaw Convention *as amended* at The Hague" (see the long title of the English statute, with emphasis mine). However, Singapore has, in fact, *ratified* both the Convention as well as the amendment (see *International Agreements/Conventions to which Singapore is a Party, supra,* note 169, at pp. 7 and 8). Thus, it would appear that s. 5(2)(b)(i) does *not* operate to exclude the English Carriage by Air Act that is, in accordance with the learned Judge's observations quoted above, received in Singapore by virtue of s. 5. A slight (and rather curious) problem, however, arises in that the U.K. Carriage by Air Act of 1932 was in fact extended to Singapore by successive Orders in Council of 1934 and 1953 vintage, respectively (see *per* Tan Ah Tah J. in *The Borneo Co. Ltd. v. Braathens South American & F.E. Air Transport A.S.*, [1960] M.L.J. 201, at p. 201 (affirmed on appeal in [1959] M.L.J. 253, the first instance decision being actually reported somewhat later, as the dates of the respective reports themselves suggest); and *per* the same Judge (who by then was a Federal Judge) in *Shriro (China) Ltd. & Ors. v. Thai Airways International Ltd.*, [1967] 2 M.L.J. 91, at p. 92 (affirming Ambrose J. in [1967] 1 M.L.J. 109)). See, also, s. 3(6) of the (local) Contributory Negligence and Personal Injuries Act (Cap. 54, Singapore Statutes, 1985 Rev. Ed.) which refers to "Article 21 of the Convention contained in the First Schedule to the Carriage by Air Act 1932 as extended to Singapore by the Carriage by Air (Colonies, Protectorates and Mandated Territories) Order 1934" that "shall have effect subject to this section" (*viz.*, s. 3 of the local act). All this leads, as already alluded to above, to a curious result since the 1961 English act *repealed* its 1932 predecessor that has just been referred to (see s. 14(3) read with the Second Schedule of the 1961 statute); though see the arguments of Charles Lim Aeng Cheng, "The Warsaw System and the Carriage by Air Act 1988 - A Guide and Short Commentary", [1988] 3 M.L.J. lxxxv, at pp. lxxxvi to lxxxvii. Since this article was written, the Singapore Legislature has resolved all possible difficulties by very recently passing the Carriage by Air Act 1988 (No. 20 of 1988) that gives effect to the provisions of the Warsaw Convention as amended by the Hague Protocol, and which also repeals (*via* s. 14) the (problematic) s. 3(6) of the Contributory Negligence and Personal Injuries Act referred to above. And see *Singapore Parliamentary Debates,* vol. 51, at cols. 511 to 514, especially at col. 512 (August 11, 1988) where a statement is made by the Minister for Communications and Information thus: "The Conventions already have the force of law in Singapore by virtue of s. 5 of the Civil Law Act (Cap. 43)." As just seen, however, the pre-enactment position was not really as unambiguous as this lastmentioned remark appears to suggest. And see, also, generally, the article by Charles Lim Aeng Cheng, *supra.*

172. Chapter 68. Section 2(1) reads as follows: "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are *without further enactment to be given legal effect* or used in the United Kingdom shall be recognized and available in law, and be enforced, allowed and followed accordingly; ..." (emphasis added).

United Kingdom *without the need for the United Kingdom Parliament to enact it and* would *not* be excluded by s. 5(2)(b)(i) of the Civil Law Act because it would not fall within its ambit, not being "enacted or made" in the United Kingdom.[173] One suggested solution to obviate this last mentioned difficulty is to replace the phrase "enacted or made" in s. 5(2)(b)(i) with the phrase "having force".[174]

Two other sections of the Unfair Contract Terms Act also pose some problems. It is, for example, unclear whether s. 29, that contains saving for other relevant legislation, ought to be applied in the local context. Section 30, on the other hand, is clearly inapplicable for two clear reasons. First, s. 30 itself amends the United Kingdom Consumer Protection Act 1961[175] - a statute that cannot apply in Singapore because there is local 'displacing' legislation[176] in the form of the Consumer Protection (Trade Descriptions and Safety Requirements) Act.[177] Secondly, s. 30 itself has been *repealed* by the Consumer Safety Act 1978 that, in fact, repealed the entire 1961 legislation;[178] and, by way of completion, it should be noted that the 1978 act itself has very recently been repealed by the Consumer Protection Act 1987.[179]

At least one outstanding problem remains. The issue that is raised is whether the Unfair Contract Terms Act could be completely excluded because it falls within the ambit of s. 5(2)(b)(ii), especially having regard to the phrase "or any other method of control". Could it, in other words, be argued that the statute ought to be excluded because it attempts to exercise a degree of control over business or activity? The answer, it is submitted, is that the act ought *not* to be excluded for the following reason:[180]

> "Having regard to what is the apparent purpose of the paragraph, that is, to exclude the reception of English Acts like the Moneylenders Acts which require licensing and registration, the phrase, "any other method of control" should be read *ejusdem generis,* and therefore restrict its effects."

In summary, therefore, the reception of the Unfair Contract Terms Act *via* s. 5 engenders a fairly problematic scenario, much more so than the previous two statutes considered.[181]

173. And see, generally, the discussion in Soon and Phang, *supra,* note 7, at pp. 68 to 69.
174. *Ibid.,* at p. 69.
175. 9 & 10 Eliz. 2, c. 40.
176. See s. 5(2)(c) read with s. 5(3)(b). And see, also, generally, *supra,* Part II, s. 7, and, in a rather more specific vein, Ho Peng Kee, *supra,* note 17, at p. ccxxv, note 11 (though there is very little elaboration in this latter instance).
177. Cap. 53, Singapore Statutes, 1985 Rev. Ed.
178. Chapter 38: see, especially s. 10(1) read with sch. 3.
179. Chapter 43: see s. 48(3) read with sch. 5.
180. See Soon and Phang, *supra,* note 7, at p. 70.
181. See, *supra,* ss. 2 and 3.

5. *Statutes concerning Minors' Contracts:*

(a) *Introduction*

In this section, I consider three English statutes that impinge upon the law relating to minors' contracts. As we shall see, two of these acts have figured in one local decision each, both of which are, in my opinion at least, unfortunately unhelpful.[182]

Before embarking upon our inquiry, however, it might be interesting to note that s. 3 of the Sale of Goods Act 1979[183] is also relevant insofar as it touches upon the liability of a minor for the sale and delivery to him of necessaries.[184]

(b) *The Infants Relief Act 1874:*[185]

This act is an extremely short one, comprising only two substantive sections. The long title states that the act is "... to amend the Law as to the Contracts of Infants". It is submitted that, adopting the *Sockalingam Chettiar* approach toward characterization, the statute at hand is clearly part of the mercantile law. It deals with that particular branch of the law of contract relating to minors' or infants' contracts. There is, as alluded to in the preceding subsection, one local case that was decided with regard to the act itself. This was the decision of *Ngo Bee Chan v. Chia Teck Kim*[186] which is unhelpful insofar as it paid no regard to the actual language of s. 5(1) as such but, rather, proceeded merely to decide that the Infants Relief Act of 1874 was part of the mercantile law and therefore received by virtue of s. 5 itself. The actual approach of the *Ngo Bee Chan* case as just delineated is unsatisfactory simply because the local court is, in the first instance, supposed to decide whether or not an issue or question has arisen or has to be decided with respect to mercantile law generally.[187] The court is not to ask itself, as a threshold question, whether or not the act concerned falls within the category of mercantile law. One might, however, well argue, especially in the light of the discussion in the previous Part,[188] that the *Sockalingam Chettiar* approach is, in substance, the same as the *Ngo Bee Chan* approach which has just been criticized. This is, in fact, not an unreasonable argument, since, as the reader will recall, the

182. There is one other case: see, *infra,* note 186, though, as will be seen, this was a Malaysian decision and, perhaps more importantly, does not admit of much analysis *vis-a-vis* the specific issues that we are interested in.
183. Chapter 54.
184. See subss. (2) and (3) of s. 3; subs. (3) contains a statutory definition of "necessaries".
185. 37 & 38 Vict., c. 62.
186. (1912) 2 M.C. 25. See, also, *Halijah v. Morad & Ors.,* [1972] 2 M.L.J. 166, where the High Court of Malaysia applied the Infants Relief Act, but the case is rather unhelpful because the Court did not consider in any detail the application of the act itself: see the case-note by Visu Sinnadurai in (1973) 15 Mal. L.R. 114, especially at p. 117.
187. See Soon and Phang, *supra,* note 7, at p. 42.
188. See, *supra,* Part II, s. 3.

Sockalingam Chettiar approach requires the court to ascertain whether or not there is a question or issue with regard to mercantile law by determining whether the act itself is part of the mercantile law. It is, however, submitted that the *Sockalingam Chettiar* approach has, relative to the *Ngo Bee Chan* approach, more to commend itself, for it is, in the first place, less 'crude' as it pays heed to the actual language of s. 5(1) itself. As was recently stated (in advocating the *Sockalingam Chettiar* approach):[189]

> "... although the result and effect are similar, the process of reasoning is entirely different. The *Ngo Bee Chan* approach assumed that the courts only have to decide whether the rule of law is mercantile law in order to determine its applicability, whereas we agree that "[t]he first thing to be settled is: has a question or issue arisen in the Colony with respect to ... mercantile law generally"? We are suggesting that to determine this, we need to inquire whether the Act sought to be applied is part of mercantile law. ... their Lordships [in *Sockalingham Chettiar*] were in fact laying down a new approach for determining when there arises a question or issue with respect to mercantile law, *viz*, when the provisions of the relevant English Act sought to be applied related to mercantile law".

There is, however, and as alluded to above, an acknowledgement that the *Sockalingam Chettiar* approach is, in substance, inconsistent with that in *Seng Djit Hin* in both approach as well as effect[190] - a situation that the *Ngo Bee Chan* approach shares, following from the discussion above.

In summary, therefore, it would appear that, despite the defective *approach* in the *Ngo Bee Chan* case, because the *substance* of both the *Sockalingam Chettiar* and *Ngo Bee Chan* approaches are the same, the actual decision in the *Ngo Bee Chan* case (with regard, it may be recalled, to the applicability of the Infants Relief Act 1874 *via* s. 5) is supportable even on a '*Sockalingam Chettiar* analysis'. It follows that the Infants Relief Act 1874 was received by operation of s. 5 of the Civil Law Act.

Before proceeding to discuss the next statute, one point might usefully be made. This has to do with the concept of *suitability*. It might be recalled that I argued, in a preceding Part, that there ought not to be an implied suitability requirement under s. 5.[191] Assuming, however, that there is, in fact, such a requirement, it then becomes necessary to consider whether there is anything peculiar in the local context to necessitate an application of the concept to either modify or even to do away with the Infants Relief Act *in toto*. This is an issue that is fairly at large. It would, for example, depend on whether *Singaporean* minors are any different from their English counterparts - a question that really has no answer since it would depend upon, *inter alia,* cultural as well as other social factors. Whilst on

189. See Soon and Phang, *supra,* note 7, at pp. 46 to 47.
190. *Ibid.,* at p. 47.
191. See, *supra,* Part II, s. 8.

the topic of suitability, it ought to be added that this comment applies equally, in my view at least, to the applicability of the other statutes considered in the preceding sections.[192] One short answer might really be that, in the realm of *commercial* law at least, an English statute is, if otherwise receivable under s. 5 itself, unlikely (except in the most egregious circumstances) to be unsuitable, especially a modern and industrialized nation state such as Singapore. This, however, is what I would term the more 'conventional' view - a view that would, I suspect, be controverted by those espousing a more radical view of the law itself.[193] These less traditional exponents of legal thought would probably take the view that the implied premise behind the view that commercial law would almost invariably be suitable (*viz.* the neutral and value-free character of commercial law) is untenable, and that the local court would therefore have to examine each English statute closely in order to ascertain the discontinuities and contradictions that underlie such statutes, at least with regard to their application *vis-a-vis* the local context. I do not propose to debate the validity (or otherwise) of these two contrasting schools of legal thought. There are, in any event, usually no clear answers to such a debate, having regard to the theoretical complexities that it entails. In my view, however, and leaving aside these theoretical difficulties for the moment, the local courts ought to be *sensitive* to the *possibility* (or even probability) of issues of suitability insofar as the applicability of each English act is concerned - if, indeed, such a requirement exists in the first place. It is only by adopting such an *attitude* that a truly Singaporean jurisprudence might, with some good fortune perhaps, be developed in this sphere.

(c) *The Minors' Contracts Act 1987*:[194]

It ought, at the outset, to be noted that s. 4(2) of this act *repeals* the Infants Relief Act 1874 that was considered in the preceding Subsection. This very recent statute is intended to simplify and improve the law concerning the enforceability of, and remedies with regard to, minors' contracts. The fact that this statute is a very recent one (of 1987 vintage), is of course no obstacle to its reception because s. 5 of the Civil Law Act provides for the *continuous* reception of English commercial law.

192. *Viz.* the Sale of Goods Act (*supra*, s. 2); the Misrepresentation Act (*supra* s. 3); and the Unfair Contract Terms Act (*supra*, s. 4).
193. I have particularly in mind the fairly recent 'Critical Legal Studies Movement' that, at the expense of gross oversimplification, takes (as one of its tenets at least) the view that law is inextricably bound up with political values and choices; there are, in other words, no neutral, value-free standards or arbiters. For a sample of the (now) vast literature, see *The Politics of Law* (edited by David Kairys, 1982); a Symposium on Critical Legal Studies in the January 1984 issue of the Stanford Law Review; Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (1986); and Mark Kelman, *A Guide to Critical Legal Studies* (1987).
194. Chapter 13.

The various issues that arise from the application of s. 5 to the instant act are, for obvious reasons, broadly similar to those considered with regard to the Infants Relief Act, and that were canvassed in the preceding Subsection. Only two apparent problems may arise *vis-a-vis* the present statute. The first, and arguably the more important, has to do with s. 5(3) thereof which reads as follows:

"This Act extends to England and Wales only."

It is submitted that, having regard to the fact that the remainder of the act is probably applicable in the Singapore context, a local court ought to utilize its power under either the case-law or s. 5(3)(a) of the Civil Law Act to *sever* s. 5(3) of the English act, thus preserving, as it were, the applicability of the act in Singapore.[195]

The second possible problem centres around s. 4(1) of the English act which amends s. 113 of the Consumer Credit Act 1974.[196] Insofar as this latter act is concerned, one writer has argued that it should not apply in Singapore at all in view of s. 5(2)(b)(ii).[197] It should, however, be noted that the writer does not view Part VIII of the act (concerning "security" *and that is the Part where s. 113 is to be found)* as falling foul of the aforementioned objection, although in view of her objections to the inapplicability of *other* Parts of the statute, the writer does, in the final analysis, object to the reception of the *entire* act *via* s. 5.[198] Two writers have, however, objected to this 'all-or-nothing' approach, and have suggested that "... if the offending provisions are independent of the rest of the Act, then they can be excluded and the rest of the Act can be applied in Singapore. If the offending provisions are interdependent with other provisions, then they cannot be received in Singapore".[199] If this contrasting reasoning is accepted, then it would appear that Part VIII of the Consumer Credit Act 1974, and therefore s. 113 therein, would be received as part of the law of Singapore. That being so, the reference to s. 113 in s. 4(1) of the Minors' Contracts Act 1987 would pose no problems whatsoever. But, the rejection of such an argument is not fatal. If, indeed, s. 4(1) of the 1987 act is objectionable in the local context, it is submitted that either on the reasoning of the severance of independent provisions (just referred to) or (perhaps more clearly) on the authority of s. 5(3)(a) of the Civil Law Act itself, s. 4(1) may be *severed,* thus 'saving', so to speak, the rest of the act.[200]

195. On severability, generally, see the discussion at, *supra,* Part II, s. 8.
196. Chapter 39.
197. See Lee Chin Yen, *The Law of Consumer Credit - Consumer Credit and Security over Personality in Singapore* (1980), at pp. 359 to 360. Section 5(2)(b)(ii) reads as follows: "(2) Nothing in this section shall be taken to introduce into Singapore - ... (b) any law enacted or made in the United Kingdom, whether before or after the commencement of the Civil Law (Amendment No. 2) Act 1979 - ... (ii) regulating the exercise of any business activity by providing for regulation, licensing or any other method of control or by the imposition of penalties; ...".
198. *Ibid.,* at p. 360.
199. See Soon and Phang, *supra,* note 7, at p. 70. And see, generally, *supra,* Part II, s. 8.
200. See, *supra,* Part II, s. 8.

(d) *The Family Law Reform Act 1969*:[201]

This particular act has to do with an all-important *threshold* issue *vis-a-vis* the area of minors' contracts, *viz.* the ascertainment of the age of majority itself. The age of majority at common law is 21 years[202] - a principle that would, in the absence of any other authority, apply in Singapore. Section 1(1) of the Family Law Reform Act of 1969,[203] however, statutorily reduces the age of majority from 21 years to 18 years, and the question arises as to whether this law applies in Singapore *via* s. 5 of the Civil Law Act so as to reduce the age of majority to 18 years, at least insofar as decisions involving issues or questions pertaining to the enumerated categories and mercantile law are concerned.

There is, in fact, one local case that considers the application of the Family Law Reform Act with regard to the aforementioned reduction in the age of majority. The case has already been mentioned in the context of the more general theoretical problem of characterization.[204] It is the decision of the Registrar of the Supreme Court of Singapore in *Moscow Narodny Bank Ltd. v. Ko Teck Kin (widow)*.[205] This case, however, in adopting the broader *Seng Djit Hin* approach toward characterization, in effect rendered the task of effecting the reception of s. 1(1) of the Family Law Reform Act an exceedingly simple one. The reader may recall that adoption of the *Seng Djit Hin* approach means that once it has been determined by the local court that a question or issue with respect to mercantile law has arisen under s. 5(1) of the Civil Law Act, the *whole* of English law would be applicable,[206] and this would, of course, include the Family Law Reform Act. The main problem with the *Seng Djit Hin* approach, of course, is the uncertainty surrounding the framing of the issues in question.[207]

Applying, however, the *Sockalingam Chettiar* approach,[208] the answer is, it is submitted, quite different. Under this approach, the local court would have to consider whether the very statute in question (here, the Family Law Reform Act) is part of the mercantile law. And even a cursory

201. Chapter 46.
202. See *Kandasamy v. Suppiah*, (1919) 1 F.M.S.L.R. 381; this was, however, a decision of the High Court of the Federated Malay States, but one ought to note the following observation by Innes A.C.J.C. who, at p. 382, stated thus: "The age of majority in the neighbouring Colony is 21 and the disadvantages of a divergent law upon this subject in the two jurisdiction are obvious." It is submitted that this was a reference to the Straits Settlements, of which Singapore was then a part.
203. Section 1(1) reads as follows: "As from the date on which this section comes into force a person shall attain full age on attaining the age of eighteen instead of on attaining the age of twenty-one; and a person shall attain full age on that date if he has then already attained the age of eighteen but not the age of twenty-one."
204. See, *supra*, Part II, s. 3.
205. [1982] 2 M.L.J. xcviii.
206. See, generally, the discussion in, *supra*, Part II, s. 3.
207. See Soon and Phang, *supra*, note 7, at pp. 41 to 42 for a specific (and apposite) example. See, also, Woon, "The Continuing Reception of English Commercial Law", *supra*, note 7, at p. 152.
208. See, *supra*, Part II, s. 3.

perusal of this act would reveal that it is clearly *not* a mercantile statute. There are, in fact, probably several purposes in the act as is evident from the various Parts of the statute itself. Part I is entitled "Reduction of Age of Majority and Related Provisions", whilst Parts II and III are entitled "Property Rights of Illegitimate Children" and "Provisions for Use of Blood Tests in Determining Paternity", respectively. Part IV involves certain miscellaneous provisions.[209] Even if it be argued that s. 1(1) alone be applied, assuming severance to be permissible (a point that we shall be considering shortly),[210] it could not, it is submitted, be argued that s. 1(1) itself is part of the mercantile law.[211] The most that can be said is that s. 1(1) is intended to have a *general* across the board effect - a conclusion that is supported by the substance and tenor of the rest of the Part (I) of the act as well as sch. 1 thereof.

Is severability permissible in any event?[212] This would depend, first, on whether s. 1(1) is independent of the rest of the act. It is submitted that this is a fairly plausible argument, based upon a literal reading of the act itself. It is, however, further submitted that a 'safer route', so to speak, is to rely upon the authority of s. 5(3)(a) of the Civil Law Act. The problem, however, remains (and as noted in the preceding paragraph) to the effect that, if the *Sockalingam Chettiar* approach is adopted, it is doubtful whether there would be a mercantile question or issue arising, regardless of whether it was either the entire statute or s. 1(1) thereof that was being considered.[213]

Even if, however, the Family Law Reform Act (or at least s. 1(1) thereof) satisfied the various criteria in s. 5(1) of the Civil Law Act itself, there would remain the problem that would bring into play s. 5(2)(c) read with s. 5(3)(b), *i.e.*, whether there was corresponding local (and therefore 'displacing') legislation.[214] One local act that could possibly have this 'displacing' effect is the Legitimacy Act.[215] Given the uncertainty surrounding the interpretation of s. 5(3)(b) of the Civil Law Act,[216] the

209. And see the long title that reads as follows: "An Act to amend the law relating to the age of majority, to persons who have not attained that age and to the time when a particular age is attained; to amend the law relating to the property rights of illegitimate children and of other persons whose relationship is traced through an illegitimate link; to make provision for the use of blood tests for the purpose of determining the paternity of any person in civil proceedings; to make provision with respect to the evidence required to rebut a presumption of legitimacy and illegitimacy; to make further provision, in connexion with the registration of the birth of an illegitimate child, for entering the name of the father; and for connected purposes."

210. The then Registrar of the Supreme Court, Mr. Michael Khoo Kah Lip in *Moscow Narodny Bank Ltd. v. Ko Teck Kin (widow),* [1982] 2 M.L.J. xcviii referred to s. 1 *generally* (see p. xcix).

211. Even Tan Yock Lin, *supra,* note 7, would require s. 1(1) to be part of the mercantile law: see, generally, the discussion at, *supra,* Part II, s. 3.

212. On severability generally, see, *supra,* Part II, s. 8.

213. Though *contra,* of course, if the *Seng Djit Hin* approach were adopted. See the discussion of *Moscow Narodny Bank Ltd. v. Ko Teck Kin (widow)* [1982] 2 M.L.J. xcviii, above.

214. See, generally, the discussion at, *supra,* Part II, s. 7.

215. Cap. 162, Singapore Statutes, 1985 Rev. Ed.

216. See, generally, *supra,* Part II, s. 7.

resolution of this issue is by no means certain. On one analysis, for example, with respect to the local Legitimacy Act, a compromise solution was offered that would, in effect, result in the reception of at least s. 1 of the Family Law Reform Act.[217]

Given the various difficulties as enunciated above, it may well be advisable for the Singapore Legislature to enact a statute settling, once and for all, the age of majority in Singapore.[218]

(e) *Conclusion:*

In summary, it is my view that insofar as the Infants Relief Act 1874[219] and the Minors' Contracts Act 1987[220] are concerned, there are relatively few problems with regard to the reception of these English statutes under s. 5 of the Civil Law Act. Given the fact that the latter expressly repeals the former *and* the fact that s. 5 provides for continuous reception of English law, it is submitted that the Minors' Contracts Act 1987 probably represents the law in Singapore today.

Our discussion of the Family Law Reform Act 1969, on the other hand, revealed that there are not a few problems of application.[221] We turn now, in the final and concluding Part of the instant article, to suggest possible reforms in the light of the discussion of the specific English statutes in the present Part.

IV Conclusion and Suggestions for Reform

Before we consider some more concrete suggestions for reform arising from the discussion in Part III above, I ought to reiterate that the English statutes considered in that Part do not by any means exhaust the field, even in the more specific sphere of contract law.[222] I hope, however, to have demonstrated that an actual 'on-the-ground' application of s. 5 to actual English acts will not often result in simple answers *vis-a-vis* the question of applicability.

Certain English acts posed relatively few, if any, problems. These included the Sale of Goods Act,[223] the Misrepresentation Act,[224] and

217. See Soon and Phang, *supra*, note 7, at pp. 66 to 67.
218. See the discussion at, *infra*, Part IV.
219. See the discussion at, *supra*, subs. (b).
220. See the discussion at, *supra*, subs. (c).
221. See the discussion at, *supra*, subs. (d).
222. I focused on the area of *private* contract law (though the 'public-private' distinction is by no means clear, especially in the light of later (and more radical) writings). I do not, *e.g.*, deal with local statutes such as the Government Contracts Act (Cap. 118, Singapore Statutes, 1985 Rev. Ed.). Nor do I deal with provisions that occur in statutes that do not deal exclusively or mainly with the law of contract, though they may be of no mean importance; see, *e.g.*, ss. 93 and 94 of the Evidence Act (Cap. 97, Singapore Statutes, 1985 Rev. Ed.).
223. See, *supra*, Part III, s. 2.
224. See, *supra*, Part III, s. 3.

(perhaps to a lesser extent) the Minors' Contracts Act.[225] Statutes such as the Unfair Contract Terms Act[226] and the Family Law Reform Act,[227] for example, generated far more problems.

It ought, however, to be noted that the problems just mentioned pertain to the *threshold* issue of whether the statutes concerned are received as part of Singapore law in the first place. I have not canvassed as such the *substantive* problems which may and almost certainly will arise *from an actual interpretation and application of the language of the various statutes themselves.* There are, in fact, numerous problems and a few might be mentioned here, albeit in the briefest of fashions. The Misrepresentation Act 1967,[228] for example, is an extremely short statute that changed, in a rather significant manner, the then existing common law relating to misrepresentation. Yet, problems of interpretation remain that have not yet been resolved. A major issue concerns the measure of damages to be awarded under s. 2(1) of the act, *i.e.,* whether the damages should be the contract or the tort measure.[229] Nor is there a settled test *vis-a-vis* damages to be awarded in lieu of recission under s. 2(2) of the act.[230] In fact, s. 2(2) itself poses the further question as to whether the section operates to 'yield' damages where the right to recission has been barred under the common law.[231] Section 3 of the act, which deals with provisions excluding or restricting liability for misrepresentation, has since been amended by s. 8 of the Unfair Contract Terms Act 1977,[232] and thus assimilates certain general problems engendered by the 1977 act, which is, in fact, the statute to which our attention must now briefly turn.

Much has been written about the Unfair Contract Terms Act,[233] and, as just mentioned above, it is not the task of the instant article to delve into the intricate difficulties engendered by the Act. One of the main problems, however, centres around the concept of "reasonableness" - a concept that has generated much uncertainty.[234] And s. 8 of the act, which amended s. 3 of the Misrepresentation Act as mentioned above, has also

225. That repealed the Infants Relief Act: see, *supra,* Part III, s. 5, subss. (b) and (c).
226. See, *supra,* Part III, s. 4.
227. See, *supra,* Part III, s. 5, subs. (d).
228. Chapter 7.
229. See, *e.g., Cheshire, Fifoot and Furmston's Law of Contract* by M.P. Furmston (11th edn., 1986), at p. 286; G.H. Treitel, *The Law of Contract* (7th edn., 1987), at p. 277.
230. See, *e.g.,* Furmston, *supra,* note 229, at pp. 286 to 287; Treitel, *supra,* note 229, at p. 279.
231. See, *e.g.,* Treitel, *supra,* note 229, at p. 275; though Furmston, *supra,* note 229, at p. 284, does not appear to view the issue as problematic, arguing that the remedy of recission must still be available to the innocent party at the time of the action in order for s. 2(2) to be brought into operation.
232. Chapter 50.
233. Leaving aside the citation of specific articles, see, generally (and for excellent overviews), Furmston, *supra,* note 229, at pp. 172 to 188, and Treitel, *supra,* note 229, at pp. 194 to 209.
234. See, *e.g.,* Furmston, *supra,* note 229, at pp. 177 to 181; Treitel, *supra,* note 229, at pp. 202 to 205; and Ho Peng Kee, *supra,* note 17. And see, more recently, John N. Adams and Roger Brownsword, "The Unfair Contract Terms Act: A Decade of Discretion", (1988) 104 L.Q.R. 94.

generated its fair share of problems of interpretation.[235] There are also other concepts in the act that require elucidation and explication.[236]

There are, of course, many other substantive problems with regard to these as well as other potentially applicable English statutes. It can, however, be seen (even from the brief account given in the preceding paragraphs) that these problems do not easily admit of simple solutions. Fortunately, however, we do not, for our present purposes, need to canvass each substantive problem in any detail. What is important is to note the fact that these problems, albeit of a substantive nature, do have a bearing upon the suggested reform to be presently discussed.

The proposed reform is simple. *The Singapore legislature should re-enact the various English contract statutes, thus obviating all the problems associated with s. 5 of the Civil Law Act.*

It ought to be mentioned at the outset that this is not a startlingly radical proposal for at least two reasons.

First, it is not unusual for local legislatures to enact contract statutes. In fact, some legislatures have gone so far as to promulgate what are, in effect, fairly unusual pieces of legislation, an excellent example of which would be that of New Zealand.[237] Even our neighbour, Malaysia, has its own Age of Majority Act,[238] thus avoiding the problems raised for Singapore with regard to the applicability (or otherwise) of the Family Law Reform Act 1969.[239]

Secondly, there is at least one prior local precedent of local enactment of an English contract statute in Singapore itself, *viz.,* what is presently

235. See, generally, Furmston, *supra,* note 229, at pp. 288 to 290, and Treitel, *supra,* note 229, at pp. 298 to 300.

236. *E.g.,* the concept of "consumer", as to which see the recent unreported decision of *R & B Customs Brokers Co. Ltd. v. United Dominions Trust Ltd. (Saunders Abbott (1980) Ltd., third party),* [1988] 1 W.L.R. 321; and Richard Kidner, "The Unfair Contract Terms Act 1977 - Who Deals as Consumer?", (1987) 38 N.I.L.Q. 46.

237. See, generally, J.F. Burrows, "Contract Statutes: The New Zealand Experience", [1983] Stat. L.R. 76; and Francis Dawson, "The New Zealand contract statutes", [1985] L.M.C.L.Q. 42, for excellent overviews of the various statutes as well as associated problems. The more 'specialized' literature is enormous and includes the following, *viz.,* D.W. McLauchlan, "Mistake as to Contractual Terms under the Contractual Mistakes Act 1977", (1986) 12 N.Z.U.L.R. 123; Mindy Chen-Wishart, "The Contractual Mistakes Act 1977 and Contract Formation", (1986) 6 Otago L.R. 334; D.W. McLauchlan, "Mistake of Identity after the Contractual Mistakes Act 1977", (1983) 10 N.Z.U.L.R. 199; Francis Dawson and David W. McLauchlan, *The Contractual Remedies Act 1979* (1981); and J.F. Burrows, "The Contractual Remedies Act 1979 - Six Years On", (1986) 6 Otago L.R. 220.

238. *I.e.,* the Age of Majority Act 1971 (Act 21) which repealed the Age of Majority Act 1961 (No. 9 of 1961). Prior to the 1961 act itself, there were four similar acts, *viz.,* the Age of Majority of Enactment, Cap. 68, Laws of the Federated Malay States, 1932 Rev. Ed., vol. II; the Age of Majority Enactment, Enactment No. 135, Laws of the State of Johore, 1935 Rev. Ed., vol. III; Enactment No. 62 (Majority), Enactment No. 62, Laws of the State of Kedah, 1934, vol. III; and the Majority Enactment, Cap. 35, Laws of Trengganu, 1941 Rev. Ed., vol. I. At present, under the 1971 act, the age of majority is eighteen years.

239. Chapter 46.

known as the Frustrated Contracts Act.[240] The genesis of the act (that dates back to 1959) is, in my view, extremely interesting as well as instructive. During the Second Reading of the bill, the then Attorney-General, Mr. E.P. Shanks, observed thus:[241]

> "For strictly mercantile contracts, the principles of this Bill already apply by reason of s. 5 of the Civil Law Ordinance which imports the English Law for mercantile and similar purposes into Singapore, and so gives effect to the Frustrated Contracts Act of 1943 of the United Kingdom on which this Bill is based.
>
> This Bill will give general application to the modern principles of the United Kingdom, 1943, Act, which the Federation of Malaya has already adopted, and will enable the Courts to make adjustments between parties to a contract that can no longer be continued. In some respects, it will re-establish a principle of ancient Roman Law in which a doctrine of restitution found favour."

It is noteworthy that s. 5 is mentioned, for it appears clear from the passage quoted above that (disregarding for the moment at least whether the aforementioned reasoning with regard to s. 5 is scrupulously correct) the local legislative assembly decided, *as a matter of policy,* to enact the United Kingdom Law Reform (Frustrated Contracts) Act 1943[242] in the Singapore context. It might also be interesting to note that it made this policy choice with full appreciation of the effect of s. 5 and in the absence of any problems insofar as the *suitability* of the act to local circumstances was concerned:[243]

> "The Bill which was published on December 12 has not, so far as I know, been adversely criticized by anyone. It has the support of the Bar Committee and of the Trade Advisory Council, and I have no hesitation in commending it to this House."

One possible objection to such local enactment may centre around the substantive problems, examples of which were mentioned above. Such an objection is, in my view, not in the least persuasive. As a preliminary point, I would assume that persons subscribing to such an objection would not otherwise find problems with the local enactment of English acts. What, then, of those English statutes that actually contained significant substantive complexities? At the most general level, it could be argued that most legislative enactments would contain at least a few significant substantive

240. Cap. 115, Singapore Statutes, 1985 Rev. Ed. See, now, also, the very recent passage of the Carriage by Air Act 1988 (No. 20 of 1988): *supra,* note 171.
241. See *Singapore Legislative Assembly Debates,* vol. 9, at Col. 1759 (January 22, 1959).
242. 6 & 7 Geo. 6, c. 40.
243. *Singapore Legislative Assembly Debates,* vol. 9, at Col. 1761 (*per* the Attorney-General, Mr. E.P. Shanks; January 22, 1959).

problems *in any event.* Even the local Frustrated Contracts Act[244] is, it is submitted, susceptible to various difficulties of interpretation, as evidenced by discussions in the leading English textbooks.[245]

It is, however, admitted that the extent of such substantive problems will *undoubtedly affect the local legislature's decision as to whether or not the English statute concerned ought to be enacted in the local context.* But, this does not, it is submitted, place an insuperable burden on the local legislature. On the contrary, the quintessential task of a legislature is to deal (with the aid of its various supporting institutions and personnel) with questions of policy. It is, in any event, far better for the legislature to decide, *as a matter of policy,*[246] whether a particular English act should take its place formally on the Singapore statute book, rather than to leave the question of applicability of the act to depend upon the vagaries and uncertainty generated by s. 5 of the Civil Law Act.

It ought to be added - and I think this to be an important point - that the Singapore Parliament could take into account the various problems of substantive law generated by the English acts, and in fact enact (assuming that enactment were decided to be feasible as a matter of policy, of course) *improved* 'versions', so to speak, of these English statutes. If, for example, the Singapore legislature decided to enact the Misrepresentation Act locally, then it might want to *expressly specify* whether damages under s. 2(1) thereof are to be awarded on the basis of either tort or contract, thus obviating the uncertainty that exists in England even today.[247] In fact, the Singapore legislature would have the extremely valuable benefit of hindsight. In the area of minors' contracts, for example, the Singapore Legislature need only adopt (with suitable modifications) the Minors' Contracts Act 1987,[248] since the 1987 act has repealed the rather dated Infants Relief Act 1874,[249] and has, presumably, improved the law considerably.[250] In short, the local parliament need only adopt the most updated version of English law, saving itself enormous expenditure of both times as well as resources. This is not, of course, to suggest that English law should be blindly adopted, and, in this regard, the local legislature ought to be astute to either excise or modify those portions of relevant English acts which are unsuitable to the Singapore context.

Another possible objection to the proposed reform of local enactment may be made to the effect that such a move would be far too piecemeal or

244. Cap. 115, Singapore Statutes, 1985 Rev. Ed.
245. See, *e.g.,* Furmston, *supra,* note 229, at pp. 571 to 577; and Treitel, *supra,* note 229, at pp. 704 to 711.
246. This is, by its very nature, an extremely broad and general inquiry. See *infra,* and Soon and Phang, *supra,* note 7, at pp. 72 to 73.
247. See, *supra,* note 229.
248. Chapter 13.
249. 37 & 38 Vict., c. 62.
250. On the various problems arising from provisions of the Infants Relief Act 1874, see G.H. Treitel, "The Infants Relief Act, 1874" (1957) 73 L.Q.R. 194.

ad hoc in nature. The simple answer, really, is that *a start*[251] has to be made and, as evidenced by the discussion in Part III above, most of the English contract statutes are already 'in place', so to speak, and thus ready for immediate (local) adoption. The reform suggested here differs somewhat from the 'usual' suggestions;[252] inasmuch as the *repeal* of s. 5 is *not* advocated, the section would continue to serve as a 'stop-gap' measure. In other words, what is being advocated is a *retention* of s. 5, *but* with *local re-enactment* of suitable English statutes (with the appropriate modifications, whether major or minor) in *specific* areas (for example, the law of contract, as suggested in the instant article); and these local acts would, of course, have a 'displacing' effect on any corresponding English legislation as provided for by s. 5(2)(c) read with s. 5(3)(b).[253] One possible drawback of such an approach, however, centres around the problem of subsequent English *amendment* acts that would also be 'displaced'. The onus would then be on the local legislature to consider, as a matter of policy, whether the amendment concerned ought to be enacted locally. It is my view, however, that if such an approach were adopted, the uncertainty *vis-a-vis* the application of s. 5 would be reduced considerably in those areas where local re-enactment has been effected. A good example where immediate local enactment would yield positive results is in relation to the age of majority. The reader may recall the uncertainty resulting from the analysis of the United Kingdom Family Law Reform Act 1969.[254] If the Singapore Parliament were to expressly stipulate the age of majority, all these problems of uncertainty would be obviated. Such express enactment is by no means unusual; it is to be found in the Family Law Reform Act itself,[255] and (as already mentioned) even Malaysia has its own age of majority legislation.[256]

The basic problem is one of constraints - of colonial imposition, and then, of the (equally involuntary) imposition of (economic) necessity during the modern period, especially since Independence in 1965; in both cases, uniformity of law with England in this, the commercial context, proved, or at least was perceived, to be imperative. In fact - and as we have seen - this concern with uniformity with *English* law resulted, in part, in the 1979 amendment of the Civil Law Act in view of the fact that English law was becoming increasingly harmonized with European Common Market law, and which was thus simultaneously becoming less economically advantageous - at least insofar as its assimilation with European Common Market law was concerned. It is only by developing a

251. *Cf.* Burrows, "Contract Statutes: The New Zealand Experience", *supra,* note 237, at pp. 78 and 97. Burrows suggests, amongst other things (and quite correctly in my view), that reform *via* the *common law* would be an even more laborious process, with the courts lacking, in any event, the necessary conceptual machinery to effect the necessary changes (see at p. 78).
252. See both pieces by Woon, *supra,* note 7, and Soon and Phang, *supra,* at pp. 72 to 73.
253. See, generally, the discussion at, *supra,* Part II, s. 7.
254. Chapter 46. And see, *supra,* Part III, s. 5, subs. (d).
255. See s. 1(1).
256. See, *supra,* note 238.

distinctly Singaporean (here, commercial) jurisprudence that we can ultimately free ourselves from the constraints and fetters inherent in s. 5 itself. Ironically, perhaps, the most expedient manner in which this local jurisprudence may be developed is by adopting the relevant English statutes *via* local enactment, and then to proceed to interpret these local enactments, taking into account the needs and circumstances of Singapore. Even if it be accepted - as some argue - that, in the commercial context at least, there is little scope for local development, it is submitted that, from a purely *symbolic* point of view, local enactment would represent a positive shift toward a local jurisprudence. But, perhaps more importantly, such a reform would obviate many of the problems of uncertainty generated by s. 5. To this end, a start has to be made in a process that would lead ultimately to an entire local commercial code. It is my view that an eminently suitable point of departure lies in the field of contract law, and it is hoped that this article has, in some small way at least, made out a case for more practical action.