Commercial Laws of Sri Lanka:
Applicability of Laws of England

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INTRODUCTION OF THE LAWS OF ENGLAND TO SRI LANKA – A BRIEF HISTORY

In its recent history Ceylon was first occupied by the Portuguese (1505 AD) then the Dutch (1656 AD) and finally the British (1796 AD) before gaining independence in 1948.

The Laws of Portugal were never introduced to any material extent. The Dutch occupation of the Maritime Provinces in 1656 marks the beginning of the Dutch era and has a special significance for our legal system as it determined its distinctive character and the course of subsequent development. The Dutch administered theses Provinces partly according to the Dutch Laws and partly according to the Statues of Batavia, a code of laws promulgated by the Dutch East India Company through its Governor General in Batavia and adopted in Ceylon in1666. Thus the Roman Dutch Law was introduced to Ceylon and became firmly enthroned as its basic fabric – its common law, subject to such deviations as might be legislatively ordained.

In 1795, the French occupied the Republic of the United Netherlands. The King of Netherlands William V fled from Netherlands to England and sought refuge there. The British persuaded William V to instruct Governor Van Angelbeek to permit the British garrisons to land in Ceylon. In consideration, the British assured William V that the British presence on the Island of Ceylon would only be temporary and would until William V would have restored his sovereign position in the Republic.[1]

The Governor Van Angelbleek, though initially was making preparations for the arrival of 800 British Soldiers, due to a miscommunication, decided to resist the

1 Marleen H. J. Van den Horst, Roman Dutch Law in Sri Lanka P85. Free University Process, Amsterdam; 1985

British arrival in the Island. When the British troops discovered that the Central Government of Ceylon had changed its mind, they decided to take the Island by force. The Fortresses of Trincomalee, Batticaloa, Jaffnapatnam, Mannar, Kalpitiya, Chilaw and Negombo were conquered from Dutch. Meanwhile, the British managed to get the support of the Kandyans. On 14th February 1796, Colombo was surrounded by 10,000 soldiers. On 15th February 1796, Governor Van Angelbleek and Major Agnew signed the Capitulation Treaty.[2] During the first two years Ceylon was governed from the City of Madras. On the 1st of October 1798 Fredrick North assumed duties as the first British Governor of Ceylon.

The Proclamation of 23rd September 1799 provided the basis for the continuity of Roman Dutch Law. The British Colonial Policy at that time was to maintain the legal system existing in their newly acquired colonies insofar as possible. In conformity with the policy, Governor North was given the instructions from London to continue the administration of Justice based on the Dutch Legal System that existed for over a century in Ceylon by that time.

Thus in 1799 Governor North issued three proclamations to bring stability to the legal system, the most important being the proclamation issued on 23rd September 1799. Section 2 declared.

> *"The administration of Justice and Police in the island shall henceforth and during His Majesty's pleasure be exercised by all courts of Judicature, Civil and Criminal Majesty's and Ministerial Officers, according to the laws and institution that subsisted under the ancient government of the United Provinces, subject to such deviations and alterations by any of the respective powers and authorities hereinbefore mentioned and to such other deviations and alternations as we shall by these presents, or by any future proclamation and in pursuance of the authorities confided to us, deem it proper and beneficial for the purposes of Justice to ordain and publish, or which shall or may hereafter be by lawful authority ordained and published"* [3]

[2] Ibid, page 86
[3] Weeramantry, C G, The Law of Contracts, Vol I, page 23, Colombo 1967

However, by the proclamations of 23rd September and 14th October 1799, the criminal jurisdiction of the Raden Van Justitae in Colombo, Jaffnapatnam, Galle and Trincomalee was abolished.

In the early stages of British Administration, the existence of Kandyan Law which was administered in the entire central part of the Island, made matters more complicated. The Kandyan Kingdom was strong and applied a well developed legal system for the inhabitants of the Kingdom for several centuries. The British wanted to limit the application of Kandyan Law to personal laws and to the exclusion to all other commercial matters.

The Introduction of Laws of England (Civil Law Ordinance) No: 5 of 1852 was to cater to the above need which introduced into Ceylon the Laws of England in certain cases, e.g. Maritime matters, commercial matters etc. Subsequently over a period of time our commercial law assumed the broad outline of the English Law, Sometimes to the total displacement of the Roman Dutch Law.[4]

Thus today in Sri Lanka, the Roman Dutch Law, the English Law and the Indigenous systems of law exist side by side.

THE LAW APPLICABLE TO THE COMMERCIAL MATTERS

Maritime Law

The Section 2 of *The Introduction of Laws of England (Civil Law Ordinance) No: 5 of 1852* introduced the law of England in respect of all contracts or questions relating to the shops and to the property therein, and to the owners thereof, the behaviour of master and mariners, and their respective rights, duties and liabilities relating to the carriage of passengers and goods by ships, to stoppage in transit, to freight, demurrage, insurance, salvage, average, collision between ships, to bills of lading, and generally to all maritime matters. The most important provision of this section is the extent of applicability of English Law, which is the law "administered in England in like case at the corresponding period, if the contract had been entered into or if the act in respect of which any such question shall have arisen had been done in

[4] De Costa Vs Bank of Ceylon (1969) 72 New Law Reports per Weeramantry J at page 501

England" unless special provisions are made by any enactment in Ceylon. The Ordinance also provided that English Law shall apply in respect of partnerships, corporations, banks and banking, principals and agents, carriers by land, and life and fire insurance. It is important to note that this ordinance is still in force.

Subsequent legislation affecting Admiralty Law

Nine years after the Civil Law Ordinance of 1852, "An Ordinance Relating to Wrecks, Sea Casualties and Salvage No.5 of 1861" was introduced to deal with the subjects of salvage of life and cargo wrecks and sea casualties. Two years later, in 1863, there was enacted "An Ordinance relating to Merchant Shipping." These two enactments continued to be in force in their original form until the enactment of Merchant Shipping Act No.7 of 1953,which made special provision for "Wreck and Salvage" with the jurisdiction to deal with such matters being vested in the Admiralty court. The 1953 Act was replaced by the Merchant Shipping Act No.52 of 1971. It is noted that both these acts were similar in provisions to the English Merchant Shipping Act of 1894.

Admiralty Jurisdiction Act No.40 of 1983

The present admiralty jurisdiction of the High Court of Sri Lanka is set out in the Admiralty Jurisdiction Act of 1983. The provisions contained therein closely follow the English Supreme Court Act of 1981. Interestingly, through this Act too, there is an attempt to import English Admiralty Law as applied in England in like cases at the corresponding time; the extent of applicability will be dealt with later in this article.
It is important to bear in mind that the Admiralty Jurisdiction Act of 1983 deals with the jurisdiction of the Admiralty Court and the procedure of the court whereas the Civil Law Ordinance deals with the substantive (applicable) law.

Section 2 of the Admiralty Jurisdiction Act (which corresponds with section 20 of the United Kingdom Supreme Court Act of 1981) deals with heads of claims that can be pursued in the High Court of the Republic of Sri Lanka. Section 3 of the said Act specifically grants jurisdiction in "personam" and "in rem" with regard to specific heads of claims under the preceding section. Power to arrest ships in case of an action in rem has been provided in section 7 of the said Act and a Marshal and a Deputy Marshal are appointed under section 9 of the Act. Rules with regard to the procedure are made by the Supreme Court in terms of the powers granted in Article

136 of the Constitution of the Democratic Socialist Republic of Sri Lanka, as provided in section 11(3) of the Admiralty Jurisdiction Act.

In the event of an omission, section 12 of the Admiralty Jurisdiction Act seeks to resort to English law applicable in England. Section 12 reads as follows:

> " *where any proceedings instituted under this act, any matter or question of procedure arises in respect of which no provision or adequate provision has been made by or under this Act or any other enactment or any rule, the court shall have power to make such orders and give such directions which the court exercising the admiralty jurisdiction in England would have the power to make and give in like circumstances in so far as such orders and directions shall not conflict or be inconsistent with any provisions made by or under this Act or any other enactment or any rule* "

It appears that the legislator has taken sufficient precautions to limit the application of this provision to questions of procedure. However, it should be born in mind that the Admiralty Jurisdiction Act deals with only the procedure, and the substantive law on admiralty law is still contained in the Civil Law Ordinance. When compared with the UK Supreme Court Act of 1981, section 20(2) refers to substantive law of salvage and pollution with specific reference to the relevant provisions of the Merchant Shipping Act in order to avoid any possible conflict of common law principles and the modifications brought in by the relevant conventions incorporated into law.

The Extent Of Applicability Of English Law

The introduction of Law of England (Civil) Ordinance deals with substantive applicable law. In *Writ vs. People's Bank*,[5] the court of Appeal of Sri Lanka held that the language used in the Civil Law Ordinance was wide enough to make applicable not only the English Common Law but also the statute law of England. Justice Sarath Silva, in the above case quotes with approval the observations of Dalton J in *Usman vs. Rahim*:

> *"Ordinance No.5 of 1852 directs that in maritime matters the law to be administered in Ceylon shall be the same as that administered in like*

[5] [1985] 2 Sri Lanka Law Reports 292 atp 295.

> *cases at the corresponding period... All these cases show that the legislature has provided in express terms for the application in Ceylon of English law that may come in to be enacted in England after the local enactment was passed."*

Having regard to the close relationship with the English Law, Sri Lanka had over the past two centuries, it is not surprising to observe that Judges of Sri Lankan courts tend to apply English Law whenever possible, even without recourse to the Civil Law Ordinance. This aspect of judicial attitude will be dealt with later in this article. The Civil Law Ordinance, which has been in force for the last one hundred and fifty years, prevents the application of English law only in the case of Sri Lankan legislature making contrary provisions by way of an Act of Parliament.

There have been instances where the Civil Law Ordinance was applied as a saving provision in situations of repeal of an existing enactment, until a new enactment comes into force. In *M.A. Razak & Co Ltd vs. Lanka Wall tiles Ltd*, the issue was whether there was a law in relation to Admiralty in Sri Lanka between the period 1979 to 1983 [during which period, the Administration of Justice Law of 1973 was repealed in 1979 and there was no law governing until the enactment of the Admiralty Jurisdiction Act 1983] in this case the Supreme Court held that, by oversight or omission, the legislature had created a lacuna in Admiralty law but, in any event, by operation of section 2 of the Civil Law Ordinance ,the corresponding English Law applied to Sri Lanka during such period. On the plain reading of the Civil Law Ordinance, it does not appear that such Ordinance deals with the procedural law. However this shows that judges of Sri Lanka have been very liberal in their interpretation of these sections and are ever willing to resort to English law whenever possible. Such judicial attitudes have led to serious anomalies in the long run and need critical analysis.

Issues and Anomalies

The English law would apply to Sri Lanka, unless other provision has been made by any enactment now in force. The word "provision" found in section 2 of the Civil Law Ordinance suggests that even if there is an enactment covering a particular subject, if such enactment does not contain specific provisions covering a particular issue, then the English law would continue to apply. This question is being debated in many

cases in Sri Lana at present and no finality has been achieved yet. In M.V. Propontis vs. Board of Directors of Co-Operative Whole Sale Establishment, the question arose as to the authority of the Master to bind the cargo owner in the event of a salvage operation. Under the English Common law, in the absence of express authority, neither the ship owner nor the master can bind cargo owners save in circumstances which creates an agency of necessity.

The counsel for the ship owner contended that chapter VI of the Merchant Shipping Act does not provide for such an eventuality and therefore the court should resort to English law. The court was invited to apply the UK Merchant Shipping (Amendment) Act 1994 through which the Salvage Convention 1989 was incorporated into law. The Article 6 of the said Convention Mandates the master to bind the cargo owners without their express authority or in the absence of the requirement of agency of necessity.

Although the case is far from reaching finality, this shows the magnitude of the problem. Sri Lanka has not ratified the Salvage Convention 1989. The ratification of an international convention is an important decision that has to be taken by the executive branch of the Government of Sri Lanka. The constitution of Sri Lanka is supreme and is based on the principle of separation of powers. Unlike in the United Kingdom, the constitution is supreme and separates the powers of the legislature that of the judiciary and of the executive. It is only the Executive President, in consultation with the cabinet of Ministers, who has the power to decide the ratification of an international convention. Thus it would be disastrous to admit an international convention in the country's legal system through the Civil Law Ordinance, without the consent of the executive or the legislative branches of the Government.

A convention may not be adopted or ratified by a country for a number of reasons and it has to be decided with utmost care as the ratification creates international obligations. The issue is not limited to the Salvage Convention 1989. The most important factor is that the sovereignty of the state is undermined by a process where laws enacted in another country creep through the back door even without the knowledge of any branch of the state.

On the other hand, the United Kingdom is now a member of the European Union and there can be several maritime and shipping related laws the UK would have enacted by virtue of being a EU member. It is needless to elaborate the adverse consequences Sri Lanka would have to face internally and internationally if such laws are to be considered part of the local legal system.

Arrest of ships

The provisions relating to arrest of ships in Sri Lanka are contained in the Admiralty Jurisdiction Act. Section 7(1) of the said Act states:

> *"where an action has been instituted under this Act, and the judge is satisfied that the vessel or property to which the action relates will be moved out of the jurisdiction of the court before the plaintiff's claim is satisfied, it shall be lawful for the judge to issue, in accordance with the rules made under this Act, a warrant for the arrest and detention of that vessel or property."*

The arrest is, however subjected to the defendant or any person entering an appearance in court and providing sufficient security for the claim in reference.
Section 2 of the said Act lists the heads of claims recognized in law where there is a right to institute an action in rem initially and where the ordinary remedy of action in personam could be converted into an action in rem under certain special circumstances.

The origin of arrest of ships that is now contained in the Admiralty Jurisdiction Act of Sri Lanka is the English law of Admiralty, which is finally settled in the UK Supreme Court Act of 1981. The English common law recognizes only five claims to constitute maritime liens that may eventually lead to an arrest of a ship. These claims are; damage caused by a ship, salvage, seamen's wages, master's wages and disbursements and bottomry and respondentia. The significance of a claim's classification as a maritime lien is that the claim will attach to the res from the date of the claim and will be unaffected by subsequent changes in its ownership. The grounds on which an action in rem could be instituted increased gradually from the Admiralty Court Act 1840 to the Act of 1861. However, English Admiralty law always favoured a limited closed list, although from time to time the list got expanded. Civilian tradition always demanded an open list as pre-trial attachment in a civil law

jurisdiction was not limited to maritime claims but with regard to all other debts. The Arrest Convention 1952 was drafted and introduced to remedy this situation. The Arrest Convention of 1952 was seen as a compromise between common law and civilian traditions by many writers. In 1952, there was no general form of Pre-trial attachment in England and the Mareva Injunction was only developed after 1975. In any event, even in the 1952 convention, the lists of claims were relatively narrow and there was no necessity to supply security by the arrestor. The demand of the day was to expand the list of claims where ships could be arrested on one hand and on the other hand to provide counter security for unjustified arrests and claims.

The 1952 convention indeed appeared to be a satisfactory compromise at that time it also introduced a completely new concept allowing the arrest of sister ships in the same ownership as the ship in respect of which the original maritime claim arose.

The provisions of the 1952 convention were incorporated into English Law by the Administration of Justice Act 1956, and today they are found in the UK Supreme Court Act of 1981. Therefore with regard to the arrest of ships the provisions contained in the laws of the United Kingdom and in the laws of Sri Lanka are almost identical.

The Arrest Convention 1999

The legal regime for arrest of ships in Sri Lanka as explained above is English Admiralty law as modified by the 1952 Arrest of Ships Convention, though Sri Lanka did not ratify this Convention. A new Convention on arrest of ships was unanimously adopted by an IMO-UNCTAD diplomatic conference in March 1999, in Geneva. Sri Lanka participated in the aid drafting committee but no steps have been taken yet to ratify and incorporate the said convention in the national legislation.

The Arrest Convention 1952, when compared with the Arrest of Ships Convention 1999 has only remedied few deficiencies of the former such as extension of the right of attest to claims with regard to environmental damage, wreck removal, insurance premiums, commissions, brokerage and agency fees and ship sale contracts. The remainder of the 1999 convention contains nothing revolutionary for the common lawyers and English Admiralty Law.

Reasons for the reluctance of the Sri Lankan Government to adopt the Arrest Convention could be several. One of the most important considerations would be whether it really achieved its purpose as the demand and the outcry was for providing counter security for the arrest. The convention does not impose any obligation in that regard and leaves it to the discretion of State Parties. At Present, Sri Lanka does not require counter security, and for this reason alone, the Sri Lankan forum has been very attractive for claimants who seek to arrest ships to satisfy their claims. The ship suppliers also have a right to arrest ships that do not honour their claims in Sri Lanka due to specific provisions found in the Admiralty Jurisdiction Act. In Sri Lanka the Merchant Shipping Act section 83 defines what maritime liens are and sections 84 and 85 deals with the order of priority of maritime liens.

Article 4(1) of the Arrest Convention makes release from arrest mandatory when sufficient security has been provided in a satisfactory form. What is a satisfactory form has not been clarified. Sri Lanka's main port Colombo, being a hub port in the region. Relies quite heavily on ship supplies and would not want to liberalize the legal regime of pursuing the claims in relation to supplies and arrest of ships.

It is also learnt that the United Kingdom in the near future will take steps to incorporate the Arrest Convention 1999 into national legislation with provisions to introduce mandatory counter security for the arrest of ships. Further, it should be remembered that the United Kingdom is very much influenced by the obligations towards the EU. When such legislation is brought in it is likely to have disturbing effects in the Sri Lankan legal regime for the reasons discussed in the last chapter.

The Mareva Injunction

The injunction is an equitable remedy originated in the English Chancellor's Court. The very basis of an injunction is the prevention of injury or prevention of greater injury, sometimes by an interim order pending final determination of an action. The Sri Lankan law of injunctions has been greatly influenced by English law. The modern English law governing interlocutory injunctions, as interim injunctions are called there, has developed from the application of section 25(8) of the English Supreme Court of Judicature Act 1873 which reads as follows:

> *"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear just and convenient."*

This provision was replaced in 1925 by section 45(1) of the Supreme Court of Judicature (consolidation) Act 1925, in substantially the same words. For the exercise of the very wide discretion conferred upon them by the statute to issue injunctions where it was just or convenient so to do, the courts in England evolved over the years three main guidelines in the form of three sequential questions:

1. Has the applicant made out a prima facie case?
2. Where does the balance of convenience lie?
3. Do equitable considerations favour the grant of an injunction?

"Our early judges trained in the English traditions were quick to import the English approach to our country without paying over much attention to the verbal niceties of the provisions of out statute law which at that time were embodied in section 86 and 87 of the old Court Ordinance. On a broad consideration of the English approach, which is now ours too, can be said to fit the stipulations of our statute law."

The charter of 1833 created one Supreme Court for the entire island: the Supreme Court of Ceylon. The Supreme Court was empowered inter alia, to grant and issue mandates in the nature of Writs of Mandamus, Procedendo and Prohibition, Habeas Corpus and Injunctions. The Supreme Court was authorized by section 20 of the Courts Ordinance to grant and issue injunctions to prevent any irremediable mischief which might ensue before the applicant for the injunction could prevent the same by bringing an action in an original court. In a fit case the Supreme Court had the power to grant an injunction after only ex-parte hearing and without prior notice to the opposite party. However, before granting the injunction it must appear to the Supreme Court that an action would lie on the facts placed before it for an injunction in an original court.

The provisions for injunctions are now contained in section 54 of the Judicature Act No.2 of 1978 amended by Act No.16 of 1989. While the courts Ordinance (now the Judicature Act) created jurisdiction of the courts to rant injunctions, sections 662-

667 of the Civil Procedure Code prescribes the procedure to be adopted in applications for injunctions.

The Mareva injunction, although of a very much recent origin, has become an important tool in maritime legislation in many common law countries. In the circumstances it is useful to examine the development and the extent of its applicability to Sri Lanka. It all started with Nippon Yusen Kaisha Vs. Karageorgis. The plaintiff, Nippon Yusen Kaisha, a big shipping owner in Japan let three ships on charter to two Greek Charterers, George and Johan Karageorgis, the defendants. Defendants, after making some part of the hire, de faulted the balance. The defendants were untraceable and the office at Piraeus was closed. However, the plaintiffs rightly believed that the defendants have money in their bank in London. While claiming liquidated damages for the breach of contract, the plaintiffs also made an ex-parte application for an interlocutory injunction to restrain the defendants from removing any of their assets within the jurisdiction of the court. Donaldson J (Master of Rolls) dismissed the ex-parte application based on the principles laid down by the old English authorities. The plaintiff appealed to the Court of Appeal and Lord Denning MR allowed the appeal stating:

> *"It seems to me that the time has come when we should revise our practice. There is no reason why the High Court or this court should not make an order such as is asked for here. It is warranted by section 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which states that the High Court may grant a mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to court be just or convenient so to do. It seems to me that this is just such a case. There is a strong prima facie case that the hire is owning and unpaid. If an injunction is not granted, this money may be removed out of jurisdiction and the ship owners will have the greatest difficulty in recovering anything."*

However, the legal principle crystallized only after the second case, which came up four weeks after the Nippon case and which also gave the injunction its name; Mareva Compania Naviera S.A. vs. International Bulk Carriers Ltd. It was a case involving the vessel "Mareva" sub-chartered on a voyage charter but defaulted by the charterers to pay the instalments although the sub-charterer paid due payments

to the charterer. An injunction was issued preventing the transfer of money lying in a London bank belonging to defendants.

Thereafter the Mareva injunction was subjected to great developments and was freely used in maritime matters, especially where the claim does not fall within the meaning of maritime lien. In Sri Lanka, though this remedy is not widely used probably due to its relatively new emergence here appears to be a willingness among the judges to apply this principle in Sri Lankan courts. Justice Soza, in his article titled "Law of Injunctions", thus states:

> *"In Sri Lanka we have a close parallel in the procedure of arrest and sequestration before judgement set out in section 650 and 661 of the Civil Procedure Code, but here fraud must be proved....the courts here are not invested with such a wide discretion as in England. There is no just or convenient rule."*

Yet on equitable grounds, Justice Soza is of the view that the Mareva injunction can be issued by Sri Lankan courts. He further adds:

> *"I do not see why it is not then Mareva injunction can be issued to prevent the removal or disposal of assets (like money in a bank) which do not constitute the subject matter of the suit when the defendant himself is not within the jurisdiction; for otherwise the plaintiff may not be able to obtain satisfaction of judgement.....with the prolification of foreign enterprises in Sri Lanka, Mareva Injunction will, I have no doubt, be a very serviceable remedy"*

Thus the influence of English law in the legal system of Sri Lanka has been felt in all corners of maritime law. However such influence has not always been adverse but mostly beneficial. The dilemma of the legal luminaries would be to control the influence of English law and apply useful developments of the English law while finding out measures to prevent the undesirable.

Law of Partnership, Corporation, Banks and Banking, Principals and Agents, Carriers By Land, Life And Fire Insurance

Section 3 of the Civil Law Ordinance reads as follows;

> " In all questions or issues which may hereafter arise or which may have to be decided in Ceylon with respect to the law of Partnership, Corporation, Banks and Banking, Principals and agents, carriers by land, life and fire insurance, the law to 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 enactment now enforce in Ceylon or hereafter to be enacted;
>
> Provided that nothing herein contained shall be taken to introduce in to Ceylon any part of the law of England relating to the tenure or conveyance or assurance of, or succession to any land or other immovable property, or any estate, right or interest therein".

It should be noted that the Ordinance in its original form covered bills of exchange, promissory notes and cheques as well. These areas were omitted after the introduction of Bills of Exchange Ordinance of 1927. The Bills of Exchange Ordinance and the Sales of Goods Ordinance of 1869 contain rules of English Law and are almost near reproduction of the then English statutes.

It is important to note that The Civil Law Ordinance does not introduced English procedural law, but only the substantive law in England in the like case at the corresponding period.
(*Mudalihamy Vs. Punchi Banda* 15 NLR 350, *Government of United States of America Vs. The Ship "Valiant Enterprise".* 63 NLR 337 at page 343*).*

Several issues arise out of Section 3, especially in respect of the law relating to financial service. The general terms in which the section I phrased indicates that the English Law so introduced is not only the Common Law of England but entire body of

English Law, including the English statue Law prevailing at the relevant date (Weeramantry C.G. The Law of Contracts, Vol. 1 – 46).

Another issue that may arise is weather the Common Law of Sri Lanka i. e. the Roman Dutch Law, could be applied successfully to the subjects not covered by the Civil Law Ordinance. This problem is well demonstrated in the case of Motor Insurance, Personnel Accident Insurance and other Miscellaneous Indemnity Insurance, where the Common Law principles do not adequately address the issues, which arise.

THE LAW RELATING TO BANKS AND BANKING:

Applicability of English Law

Section 2 of Ordinance No: 5 of 1852 in **its original form** read as follows:

> "The law to be hereafter administered in this Colony in respect of all contracts and questions arising within the same upon or relating to bills of exchange, promissory notes, and cheques and in respect of all matters connected with any such instruments, shall be the same in respect of the said matters as would be administered in England in the like case at the corresponding period, if the contract had been entered into or if the act in respect of which any such question shall have been arisen had been done in England, unless in any case other provision is or shall be made by any Ordinance was in force in this Colony or hereafter be enacted".

At the time of this enactment of this section, the law of England concerning contracts upon bills of exchange, promissory notes and cheques was the common law including the law of merchant as developed at that stage and therefore at the time section 2 referred to only English Common Law.

In England thereafter The Bills of Exchange Act of 1882 and the Sale of Goods Act of 1893 were enacted. Soon thereafter identical laws on the above two subjects were introduced in Ceylon namely, Sale of Goods Ordinance of 1896 and Bills of Exchange Ordinance of 1927.

The Civil Law Ordinance was amended to its present form only thereafter and now commercial matters are dealt with in section 3 wherein all reference to " bills of exchange, promissory notes, and cheques" have been omitted and "banks and banking" has been inter alia included. The matters now covered being partnership, corporation, Banks and Banking, Principals and Agents, carriers by land, Life and Fire Insurance.

Does English Statute Law Apply

The present section 3 of the Civil Law Ordinance as well as the Original Section 2 contained the words "…… the law to be administered shall be the same as would be administered in England in like case, at the corresponding period". The phrase indicates the English Law so introduced is not only the common law, but the entire body of English Law prevailing at the relevant date. Thus, for 45 years, the provisions of the English Bills of Exchange Act was applied in Ceylon until the introduction of the 1927 Ordinance. However, it is interesting to note that section 98(2) of the Bills of Exchange Ordinance (savings) reads as follows;

" The rules of the common law of England including the law merchant, save in so far as they are inconsistent with the express provisions of this ordinance, or any other enactment for the time being in force shall be apply to bills of exchange, promissory notes and cheques".

This certainly has omitted the statute law and refers only to common law. The 'savings' section of the Sale of Goods Ordinance (Section 58), though similar to that of the Civil Law Ordinance, omits the words "common law" and refers to the "rule of the English Law".

De Cost Vs Bank of Ceylon (72 NLR 453)

The issue that arose in De Costa was, what law (English Law and Roman Dutch Law) applied to a question relating to wrongful conversion of a cheque or a dividend

warrant. The matter was referred to a bench of five judges, as there was several conflicting judgments on this issue at that time.

The counsel for the Bank contented that the English doctrine of conversion is a doctrine which relates to all dealings with chattels inconsistent with the rights of the true owner and is not therefore a law in respect of questions relating to cheques within the contemplation of section 2 at the Civil Law Ordinance.

When and after the Bills of Exchange Act was passed in England in 1882, to amend and codify the law relating to negotiable instruments, the effect of section 2 of our Ordinance of 1852 was that the liability of a collecting Bank had to be determined in Ceylon under the English Act. It was observed by H.N.G. Fernando CJ that, accordingly the collecting Bank could rely on section 80 of the English Act and would not be liable to the true owner of a cheque if it could discharge the burden of proving that it had acted in good faith and without negligence.

Sirimanne J summed up the law applicable to conversion and Banks and Banking matters as follows;

> "It was conceded at the argument that a Banker in England placed in the position of the Defendant in this case would be liable to make good, the Plaintiff's lost without proof of fault or bad faith. By section 3 of the Civil Law Ordinance of 1953 (Chapter 79) the English Law relating to Banks and Banking was introduced into Ceylon. ……. It was argued for the Defendant Respondent that the liability of the Banker in English Law was based on the doctrine of conversion and had nothing to do with the law of Banks and Banking.
>
> I am unable to accept this argument.
>
> Different branches of the law often overlap, and cannot be looked at in separate watertight compartments. Conversion has been adopted, modified, and applied to bankers and the business carried on by them, so much so that no book on the; aw of banking can be complete

without a discussion on this subject. It has grown with the law of banks and banking and become part of the law ……..”

Thus, it could be contended that in general, English Law including the English Statute Law could be applied to all matters which are closely associated with Banks and Banking.

In a parallel development in Maritime Law a similar decision was arrived at by the Supreme Court.

The Civil Law Ordinance by section 2 thereof also made the English Law, “in the like case at the corresponding period” applicable to all contracts or question arising relating to ships and to the property therein, and to the owners thereof, the behavior of the Master and Mariners and their respective rights, duties and liabilities relating to,

(a) The carriage of passengers and goods by ships
(b) Stoppage in transit.
(c) Freight, demurrage, insurance, salvage, average, collision between ships
(d) Bills of lading, and
(e) Generally to all maritime matters,

unless ofcourse any other provisions were extanted by reason of any law in force in Sri Lanka on the subject.

In *M.A. Razeek & Company Ltd. Vs Lanka Walltiles Ltd.* SC appeal 39/39, SC Minutes of 8th December 1999, the Supreme Court held that during a period where there was no substantive enactment with regard to Admiralty Law, the corresponding English Law applied by reason of the Civil Law Ordinance. The period of question was 1979 to 1983.

Applicability of Roman Dutch Law:

The continuance of the systems of law that obtained in Ceylon at the capitulation of the maritime provinces to the British is based on a settled principle of English Law and policy that Colonies acquired cession or by conquest retain their old law so long

and so far as it remains unaltered by the new ruling power. This continuance was later guaranteed by the proclamation of 23rd September, 1799.
The Roman Dutch introduced by such Ordinance was not absolute but subject to a power expressly given to the court to deviate from the Common Law. Thus English Law became part of our legal system not merely by tacit adoption by the courts over long period of time, but also by virtue of express legislative authorization in that regard.

Weeramantry J. in *De Costa Vs. Bnk of Ceylon* stated;

> "for all these reasons, I conclude that in terms of the proclamation of 23rd September, 1799 the Common Law of Ceylon was the Roman Dutch law, subject to such deviation and alteration and the specified authorities might determine but that the authorities thus expressly empowered to make deviations did not include the Courts……
>
> The Roman Dutch Law was thus firmly enthroned has the Common Law of this Country subject to such deviation as might be legislatively ordained"

Weeramantry J in his treatise on Law of Contracts (Vol.1, 49) also cautions the reader as to the residuary applicability of Common Law. "An example would be a case where a creditor agrees to waive the amount due on a decree entered in an action brought by him on a promissory note. In such a case the question weather there should be consideration for the agreement must be decided according to the Roman Dutch Law, as the debts due on the decree is a new debt quit distinct from and independent of the debt on the promissory note. The promissory note, while it exists, is governed by English Law, but when the decree is entered the note is merged in the decree and losses its identity". Therefore, it should be noted that there is no clear-cut boundary between the applicability of Roman Dutch Law and English Law.

The Law Relating to Insurance

In terms of section 3 of the Civil Law Ordinance of 1852, all questions or issues with respect to the law of Life and Fire Insurance will have to be decided in accordance

with the law to be administered in England in like case at the corresponding period. As discussed above, English Law would include English Common Law and Statute Law. The Insurance industry in Sri Lanka is fast developing after the liberation and privatization programmes of the Government. Today industry in liberalized to the extent that even foreign investment in the two State owned Insurance Companies have been permitted.

In England the Common Law is generally applied in Life as well as in Fire Insurance. Most of the Statutes found in England on these two subjects are either procedural or regulatory in nature. In deciding issues relating to Life and Fire Insurance, our Courts have not encountered serious problems due to this reason. Moreover litigation in the field of Insurance had not been very significant to date but this situation is likely to change with the anticipated development of this industry.

The Law applicable to Motor, Personal Accident and other miscellaneous Indemnity Insurance:

On the Judicial interpretation given to Raman Dutch Law Ordinance and the Civil Law Ordinance, Roman Dutch Law should be applied in deciding issues of law relating to Motor, Personal accident and other Miscellaneous Indemnity Insurance. However, it is difficult to answer the question whether we have a distinctly identifiable Roman Dutch Law regime on these subjects.

Today we have a system where, especially with regard to insurance, there is a merger of English Law principles and Roman Dutch Law principles. Dr.A.R.B. Amarasinhe J in his paper 'Insurance Low' (National Low Conference, 2nd December,1995-Colombo), commented upon this merger in the following words:

> "[O]ne would be hardly surprised to find British Judges of the Colonial Service and Lawyers trained in England, or trained for the application of English Law, somewhat at sea in dealing with matters of this sort. Even later on, they seem to have been somewhat uncomfortable and resorted to English decisions equating the concept of "*culpa*" with "faults" and regarding the standard of care expected of the *bonus pater familias* as that of the reasonable man*".*

Dr. Amarasinghe in his paper refers to numerous problems in the existing law and recommends several improvements to it. We would not be doing Justice Dr. Amarasinghe's paper if any attempt is made to summarize the contents, but we feel that it is timely that a new and independent research be undertaken to look into the possibility of revising and codifying the law relating to Marine Insurance, Motor Insurance, Personal Accident insurance and other Miscellaneous Indemnity Insurance.

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