Conflict, Confusion, Congenbills and Confucius – Why Change ?

Anglo-Chinese Maritime Law & Practice

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1. Ladies and gentlemen, I am most honoured to be asked to give this keynote address at such a distinguished gathering and thank you to Southampton University law School for inviting me to be here today.

2. We will during this conference, be considering interesting issues on reform of maritime law, from the perspectives of English law and Chinese law.

3. As lawyers we are trained in detail and analysis. But before plunging into clauses of codes or statutes, or nuances of judicial pronouncements in reported cases, can I reflect a little, and ask you to reflect a little with me, on some of the bigger questions. These are questions which lawyers ought to consider, but which often get squeezed out by the demands of deadlines, policy papers, drafts and briefs.

4. Some 2,500 years ago the Greek philosopher Heraclitus noted that "*the only thing constant is change*" and that is true of the law as of other things, although many lament the fact that change in the law often lags too far behind change in other matters such as commerce, technology and geopolitics.

5. But for those of us who seek to effect change, what are we doing and why ? What can we learn from each other ?

6. We can probably all agree that the law should reflect national or international socio-economic policy, and that rule of law is a good thing but beyond that many questions remain unresolved.

7. First what is the role of the law ? The law and its rationalisation is something that appeals to the intellect, and the same instinct for tidiness that make people wants to straighten pictures hanging on a wall, mow their lawns, or arrange their socks in a drawer by colour, but the law is about more than neatness for its own sake. Second what is meant by rule of law and is it the same as rule by law ? Third, as lawyers, are we, to borrow from the title of my colleague Joss Saunders' forthcoming book "just lawyers" or "just lawyers" Are we primarily technocrats and bureaucrats only implementing the policies of others, or do we see ourselves more broadly as agents of change for a better national and global world order, as lawyers have been over the centuries ?

8. I will not seek to answer these, but just note that tt is impossible to separate these questions from even more fundamental ones, such as the relationship between state and citizens, and the competing demands of, on the one hand, individuals' and corporations' liberties and, on the other, the interests of state or groupings within it.

9. If you ask people what is the rule of law, some will say it is the means by which the state seeks to maintain order and conformity with social norms, ethics and morals. If you ask others, they will say it is not mainly about such state holding individuals to account, but individuals and civil society holding state and non-state actors to account, for wrongs or violations of rights (not always the same thing). For me the encapsulation of the English approach comes best in the words of Lord Denning, one of our greatest judges whose

work spanned both private and public law with equal distinction, when he said "*Be you ever so high, the law is above you*". [2]

10. But the role of law and the rule of law is about more than just whether the lawyer looks through the lens of empowerment or of maintaining power.

11. These sorts of questions depend of course on may factors, including the role of judges, state officials, and the degree of their independence and separation from other branches of the state.

12. It is no secret that in recent times Western thought and policy, and especially Anglo-American thought, has been informed by values which include a strong notion of individual liberty. Winston Churchill drew contrasts in his perception of certain national tendencies (which did not extend to China) when he said

> "*In England, everything is permitted except what is forbidden. In Germany, everything is forbidden except what is permitted. In France, everything is permitted, even what is forbidden. In the USSR, everything is forbidden, even what is permitted."*

13. It is unsurprising that our law, and especially our private mercantile law follows this approach. We as English lawyers tend to be proud of it – but are we right to be ?

14. A law reformer needs however not only and understanding of the role of law but also wisdom. He or she may therefore wish to start by considering a saying of Confucius *"By three methods we may learn wisdom: First, by*

[2] *Gouriet v Union of Post Office Workers* [1977] QB 929, 761-2, quoting Thomas Fuller's words in the 17th Century

reflection, which is noblest; Second, by imitation, which is easiest; and third by experience, which is the bitterest."

15. But the English legal tradition has been to avoid overmuch reflection, and, certainly in the formative years of 18th and 19th Century, it was made little effort at imitation. Rather English law with its common law traditions, was built on experience; legal principles fashioned in the course of deciding actual disputes.

16. Of course English lawyers sometimes imagine that they are the inventors of maritime law. But although the dominant private law of international trade has been for over 200 years, and remains, English law, that is a remarkably short sighted or short memoried approach. Indeed in the time of the Song dynasty in China (960-1271) when there was no maritime law in England, the *Shi Bo Tiaio Fa* sea laws were enacted. It is of regret to me that no copy of these survives, as it would be fascinating to see whether issues of liability and responsibility for various types of misfortune were the prevalent theme then, as they are today.

17. Maritime law and the need for it follows from the existence of trade by sea. Because in the last 300 years there has been a huge amount of trade by sea effected by English merchants and English ships, there has been a corresponding need for a body of law to enable and regulate that trade.

18. I would like to think that the nature of maritime law is shaped by the character of those indulging in such trade. So for example the typical seafarer of two hundred years ago (compared say to a shoemaker sitting in the perhaps cramped but secure conditions of his village workshop) had to be bold and enterprising, in physical and financial terms. Maritime trade was dangerous; high on risk and high on reward. It attracted those who were used to taking responsibility for themselves and wanted freedom of action. Their daily life was on the High Seas, beyond the control of any state agents. When they reached their destination they had to deal with those of a different culture and language, with, in practice, no protection for themselves, their ships of their cargoes afforded by the laws or government of home state. Merchants had to solve for themselves the problem of international sale and carriage of goods, and in particular the conundrum for the seller of parting with control over goods before payment, and the corresponding conundrum for the buyer in paying for the goods before he could possess or even inspect them. Driven by the need to answer such question the bill of lading developed.

19. The English attitude towards maritime trade veered between, at least, a laissez faire attitude to its regulation, and often a positive encouragement of imperialistic tendencies, sometimes bordering on state sponsored piracy or plunder.

20. Thus, English shipping law is characterised by two particular and related features, first that its development was driven by merchants and not by those

with urges to promulgate codes, and secondly, that development took place with a lack of state interference.

21. Also and importantly, the development of maritime law at common law was only possible because the Judges were sufficiently trusted both by the state and litigants before them. This was at a time when judicial policy was based not on volumes of training manuals as today, but on a mix of inherent human instinct for fairness, truth, and - to use a term which is perhaps meaningless in the abstract - "justice", underpinned by Christian morality but seasoned with a strong dose of imperialism and nationalism.

22. Proud as English lawyers are of one of their best exports, maritime law, development of the law in this way has disadvantages, which those of us interested in reform might well bear in mind.

23. First, whatever the benefits of the system of precedent, it makes the law inaccessible except to the most expert lawyers. It may take the law down a wrong turning, as reflected in the maxim "*hard cases make bad law*". Conversely an important issue may remain undecided unless a real dispute arises on actual facts which the parties have the means and inclination to litigate to judgment. Secondly it allows an incremental change only, when sometimes what is required is more revolutionary than evolutionary. Thirdly, whilst a much talked of benefit of the system is certainty, this is an illusion in many instances. Although English contract law turns up its nose at the general idea of a duty of good faith as too uncertain for businessmen to use

as the basis of dealing, value judgements abound. I will give just two examples. One of these is in the area of contract construction, including both what the words which are there mean, and what implied terms might be put in for words which are not there. In these cases, the Judges try to imagine what a hypothetical reasonable businessman would have thought, a task which they are generally ill suited to undertake, especially in the usual case where there is no relevant evidence to assist. Another is in the area of illegality, to which I will return later, but where a series of attempts to avoid value judgements make them only more entrenched and uncertain in scope.

24. Fourthly the laissez faire approach sounds good when couched in terms of freedom of contract between business people, but perhaps inevitably it favours those with greater economic power. This can be seen in two particular respects in the development at the English law.

25. One of these is in the carriage of goods by sea context. The great power of English shipowners led to charterparties and bills of lading which excepted the carrier from almost any conceivable type of liability. The well-known case of *Glyn v Margetson*,[3] reminds me of G.K Chesterton's poem about going to Birmingham by way of Beachy Head. It concerned a perishable cargo of oranges was to be carried from Malaga in Spain to Liverpool. The carriers sought to rely, in justifying a substantial deviation from the normal and obvious route and via African ports, on a clause which read

"now lying in the port of Malaga, bound for Liverpool, with liberty to proceed to and stay at any port or ports, in any rotation, in the Mediterranean, Levant,

[3] [1893] AC 351

Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever."

Although the court construed this restrictively, it illustrates the type of clause which often could be invoked by shipowners to leave cargo interests without a remedy.

26. One finds a similar picture in the law of Marine Insurance. This has at common law been, at least in my opinion, unduly favourable to the insurer, particularly where the common-law doctrines of non-disclosure and breach of warranty are concerned. Whilst insurers might say that the "knowledge asymmetry" justified this, and that they only seek to rely on the full suite of remedies in cases of suspected fraud, the fact is that many assureds have felt extremely hard done by, when for example they are deprived of cover by a minor non-causative breach of warranty or their policy is avoided for an innocent non-disclosure.

27. Another related aspect of the freedom of contract approach is the lack of statutory control. In the carriage of goods by sea context there was nothing until the Bills of Lading Act 1855, which did little more than add a gloss to the common-law position on bills in any event.

28. In Marine Insurance, nothing until 1906, and the Marine Insurance Act was in any event a consolidating statute rather than anything heralding change. It took until 2015 for an Act to be passed which sought to redress the balance of power.

29. When pressure for change in the carriage of goods by sea regime did emerge, the results had both of the usual defects of an attempt at internationally recognised law reform. The first is that compromise almost always comes at the expense of clarity, with parties preferring to have a deliberately ambiguous phrase rather than agree to the suggestions of opposing interests for a clear one. The second is that the wording bears the load of historical baggage. Although their supporters would say that they have stood the test of time, some parts of the Hague Rules, for example Article IV rule 2, can only be described as a mess. The content of that Article, in isolation and in combination with Article III, owes everything to history and nothing to logic. It remains a fertile source of dispute, as illustrated by the recent reversal by the Supreme Court of the Court of Appeal in *Volcafe CSAV*.[4] In essence the Court held that even where it was for cargo interests to assert a breach of Article III rule 2, it was for the carrier as a bailee to disprove negligence. The same applied in the context of Art IV r. 2 exceptions, such as inherent vice, where the carrier must prove that the damage occurred despite it having taken reasonable steps to prevent it.

30. There are other consequences of maritime law being seen as needed only to serve trading interests. It is all very well to have a system which smoothly oils the wheels of private commerce, but what about such matters of broader public and social interest, such as safety, and the welfare of seafarers. And, in modern times, of increasing importance is the environmental impact of

[4] [2019] AC 358

shipping whether in terms of pollution, climate change or otherwise. If the aim of private trade, or at least its consequence, is to maximise profit and externalise cost, how are these issues to be addressed ? Whilst these subjects might be seen as outside the remit of maritime codes, different aspects of the trade cannot in any rational system be kept in separate silos.

31. If one takes the example of a perfectly ordinary commercial vessel on a trading voyage across the Pacific Ocean, it is the subject of a bewildering array of different legal regimes. These might include

- Public International Law, including UNLCOS
- The general law of states through whose territorial waters its passes or the different laws which may apply in EEZs
- A number of international conventions, including SOLAS, MARPOL
- The law of the place of shipment of the cargo and the law at the place of its discharging, together with the Port State Control regime of intermediate ports
- The law of the flag of the vessel
- The provisions of international sanctions
- The applicable law of a number of contracts which may affect the vessel. It is not uncommon for such a vessel to the subject to a bare boat charter, one more time charters, one or more voyage charters and bill of lading contracts, even ignoring other contracts relevant to the operation of the ship, such as bunker supply contracts. These are typically between parties of different nationalities, concluded in different

places, governed by different laws and subject to different jurisdiction or arbitration clauses.

32. Against this background of complexity and historical baggage, can I respectfully suggest six specific areas in which those seeking to improve and reform the law might focus.

(1) Harmonisation or Interface

33. Electrical sockets are, as we all know, different in different countries. What is the solution for the intrepid traveller ? One solution, which might be attractive to a certain school of reform, is to call for an International Convention on the Harmonisation of Electrical Sockets. Given several years and sufficient goodwill, and aided by expert reports, it might achieve a degree of success. Meanwhile a more pragmatic solution lends itself, in the form of the humble travel adapter. It provides a simple, relatively fool proof and cheap interface. The same principle holds good in relation to different national laws. Unification is unlikely to be a sensible goal and even harmonisation is often impossible; regulating foreign interface is however difficult but still achievable. The Brussels Convention and its successors dealing with jurisdiction and enforcement of judgements within the EU provide an object lesson in how hard it is to achieve an apparently simple and noble goal. Nothing is more certain to have an English shipping lawyer snorting with rage, than the mention of the so-called “Italian torpedo” type cases such as *Gasser v Misat* [5]

[5] [2005] Q.B. 1

or *The Front Comor*.[6] In the former case the European Court held that where there was alleged to be an EJC in favour of one court, the court first seised of an action should decide on the applicability of that clause and not the court referred to in the EJC. In the latter, the European Court held that the remedy of an anti-suit injunction was not available in relation to proceedings in another European Court (sought in that case to prevent Italian proceedings brought in breach of a London arbitration clause).

(2) Conflict of laws

34. One vitally important area of law is known to most English lawyers as "Conflict of Laws", but to other scholars as the rather more polite "Private International Law".

35. I would venture to suggest that there is much more conflict in the "conflict of laws" than is necessary. English shipping law has traditionally taken a long arm if not positively imperialistic view to matters such as incorporation of law, jurisdiction and arbitration clauses in bills of lading. The basic approach in cases such as *The San Nicholas*[7] means that the wording on the reverse of a bill (such as in Congenbill 1994) is effective to incorporate Charterparties which are not actually mentioned or identified by date or otherwise anywhere in the bill. In that case the bill referred to the terms of a "*Charter dated ---- at ------- between ------ and -----*". Indeed even where the wording is on a literal interpretation insufficient to incorporate the clause, the presumed intentions of the parties may prevail: The *Channel Ranger* [2015]. In practice this means

[6] [2009] 1 AC 1138
[7] [1976] 1 Lloyd's Rep. 8

that the bill of lading holder becomes subject to the terms of a charterparty whose terms he may well not be able to ascertain before or even after becoming holder of the bill. Even if the cargo owner has copies of all the charters which might apply, there is considerable further uncertainty over how one ascertains which one is incorporated, with fact sensitive prima facie "rules" such as that it is the headcharter unless this is a time charter and the sub-charter a voyage charter, and that where there are a sub and sub-sub-voyage charter it is the (head) (i.e. sub not sub sub charter) incorporated.[8]

36. Other systems of law, including Chinese law, take a more restrictive approach, for example by requiring reference to the incorporating clause on the front of the bill and clear identification of the charterparty.

37. This leads to the consequence that an English court may have jurisdiction under its own conflict rules in relation to a cargo claim in China where the Chinese court also has jurisdiction under its conflict rules. Each court seeks to enforce its orders and judgement as best it can (as the English Court did in *OT Africa Line v Magic Sportswear* [9]). This is not a happy or harmonious outcome.

38. A further point which has vexed even the best lawyers is the question of which rules are mandatory in a particular forum and which are matters of the applicable law or chosen forum. *The Hollandia* [10] sparked much debate in this context, with COGSA 1971 ultimately triumphing in that case over the EJC in

[8] *Voyage Charters* (4th Edn) § 18.61 and the cases there cited
[9] [2005] 2 Lloyd's Rep. 170
[10] [1983 1 AC 565

favour of the Dutch Courts, which would have applied a lower limit of damages than that provided for in the Hague-Visby Rules.

(3) Interface between arbitration and the courts.

39. It is common for reformers to focus on substantive law and ignore dispute resolution provisions. In my opinion this is fraught with danger. The Brussels Convention and its successors have taught us another lesson in this respect and how difficult it is to ascertain what is to be for the courts and what is to be for an arbitral tribunal. Most national systems of law recognise the importance of upholding arbitration agreements and allowing party autonomy, whilst realising the need for at least some supervisory court involvement, specifically in matters of jurisdiction, serious procedural unfairness, appeals and enforcement. These raise remarkably difficult questions of law and tensions between the English emphasis on the seat of arbitration and the theory of delocalised international arbitration more in favour in continental civil law systems. A whole separate series of lectures could be devoted to these issues. For now let me make two simple observations and refer briefly to two English cases.

40. The first observation is that whilst the essence of arbitration is independence from state courts, and indeed an ouster of its substantive jurisdiction, an attempt at absolute independence free from any court role is probably as impossible as it is undesirable to achieve. The second is that I think that this is

a point of great practical importance for Chinese lawyers as they formulate dispute resolution provisions for maritime aspects of Belt and Road.

41. The first case is not a maritime one at all, but *C v D* [11], concerned with liability insurance and arbitration under the Bermuda form. It is a matter of debate how much a system of law should allow appeals from an arbitration award. I refer to the case as an illustration that the parties can exclude such appeals under English arbitral law, not only by express agreement, but by choosing a substantive law other than English law.

42. The second case, *RBRG v Sinocore*,[12] concerns a CIETAC arbitration. The Chinese sellers of steel coils used a forged misdated bill of lading. When the buyers committed a separate breach of contract, sellers successfully sued for damages, with the tribunal holding that the use of forged bills was not causally relevant. The English Court upheld enforcement of the award here, dismissing suggestions that this would be against public policy. This they said, was a matter which the Tribunal had addressed and which could not be raised again at the enforcement stage.

(4) The effect of illegality on private contracts

43. The English doctrine of unenforceability on public policy grounds is an object lesson in how not to develop a rule of law. The problem arises because there

[11] [2008] 1 Lloyd's Rep. 239
[12] [2018] 2 Lloyd's Rep. 133

is injected into what is otherwise an exclusively private arrangement, concerned with the rights obligations and interests of the contracting parties elements of a higher purpose, namely the public interest in laws or even moral is being enforced.

44. In *Saunders v Edwards* [1987] 1 WLR 1116 , 1134, Bingham LJ said*:*

> *"Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct."* (as cited in *Mirza v Patel*[13] [106]).

45. I have rarely seen a party so bewildered and frustrated as a Chinese client of mine seeking to enforce a refund guarantee where the underlying shipbuilding contract had been cancelled. The problem was that the contract had been backdated at the Yard's request to avoid application of the PSPC regulations. On the basis that it had gone along with a transaction which was "structured to deceive" a public authority, my client was held unable to recover despite having paid for a vessel which was never delivered. The thought that such a result might discourage others or uphold general standards of behaviour was unsurprisingly of little comfort.

46. Even where the underlying policy of the law is clear, its application is far from certain or predictable. In the *Versloot* [14] case, the court had to consider the

[13] [2017] AC 467
[14] [2017] AC 1

rule on forfeiture of all benefits in the case of fraudulent insurance claims. This had been extended to claims which were entirely genuine but whose quicker payment had sought to be induced by a lie (or strictly a reckless untruth) by the assured. Whilst I am grateful that the Supreme Court accepted my submissions that forfeiture of the claim would be a disproportionate sanction, and believe that the result was "correct", it was ultimately not a matter of correctness but a policy decision which could have gone either way, such is the uncertainty of the scope of the English law of illegality. Cases such as *Mirza v Patel* have in my opinion done little to clarify this. This is apparent from the reporter's headnote summary which reads

> *"…a person should not be allowed to profit from his own wrongdoing, and the law should be coherent, not self-defeating, and should not condone illegality. Whether allowing a claim would be harmful to the integrity of the legal system depended on whether the purpose of the prohibition that had been transgressed would be enhanced by denying the claim; whether denying the claim might have an impact on another relevant public policy; and whether denying the claim would be a proportionate response to the illegality. Within that framework, a range of factors might be relevant and it was not helpful to prescribe a definitive list. That said, the courts could not decide cases in an undisciplined way and a principled and transparent assessment had to be made. Potentially relevant factors included the seriousness of the conduct, its centrality to the contract, whether it was intentional, and whether there was disparity in the parties' respective culpability."*

(5) International in name only or in outlook

47. I have always practised in an area with international parties, the interplay of international laws, and dramas starring an international cast. However like many others for many years I saw these matters through a very Anglo- centric lens. It is now increasingly recognised that an international outlook requires

the understanding of different policies and cultures, and of the need to be a global citizen. This must be both an opportunity and a challenge for a state such as China embarking on its ambitious and important Belt and Road initiative. One of the most interesting and encouraging phrases that I have come across recently is the idea of an "ecological civilisation", something that China aspires to both within its borders and within its wider sphere of influence. I await with keen interest how it will progress this civilisation including through wise formulation and implementation of its international maritime laws. I have been heartened in this respect by hearing distinguished Chinese commentators citing, as one reason for the need to reform the Chinese Maritime Code, the absence of provisions on environmental matters.

(6) Follow in the Footsteps

48. I observed earlier that the law nearly always lags behind change in the world at large. This presents a paradox for those who seek to optimise and reform laws. On the one hand it is unsatisfactory when the time lag is too great. On the other hand trying to be ahead of the curve is a dangerous game. One of the few things that can be said with some degree of confidence about predictions for the future is that they will turn out to be wrong. How does the Law reform try to achieve at one and the same time both future proofing and formulating laws based on real events and problems ?

49. I have no suggested silver bullets as to how to achieve this. What I will say is that it is clear that the change in electronic communication and documentation, already significant, is only just beginning. For reasons discussed by many more expert commentators, blockchain and associated

technologies are well suited to many aspects of international trade, including the carriage of goods and the facilitation of payments and transfers of property. It is to be hoped that those making our laws will be able to keep up, or at least not stay too far behind, in this respect.

Conclusion

50. In conclusion I commend to law reformers all three of Confucius' suggested means of acquiring wisdom: reflection, imitation and experience.

** Thank you. **