

THE FORWARDING SHIPPING AND BAGUSIA CASES: A PERILOUS APPROACH BY THE MALAYSIAN JUDICIARY TO 'PERILS OF THE SEAS' IN MARINE INSURANCE?

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1 Introduction

There has been a dearth of reported marine insurance cases in Malaysia. However, in 2005 three cases were reported by one of Malaysia's oldest and arguably most prestigious law reports series, the *Malayan Law Journal*.¹ Prior to 2005, the last reported domestic case on substantive marine insurance was *Lin Lin Shipping Sdn Bhd v Govindasamy Mahalingam*,² a decision by Judicial Commissioner Richard Malanjum (as he then was),³ more than ten years ago. In chronological order, the three cases reported in 2005 are *Forwarding Shipping Sdn Bhd v Nusantara Worldwide Insurance (M) Bhd*,⁴ *Bagusia Sdn Bhd v Malaysia Assurance Alliance Bhd*,⁵ and *Kotak Malaysia (KOM) Sdn Bhd v Perbadanan Nasional Insurans Sdn Bhd (Formerly Known as Union Insurance Malaysia Sdn Bhd)*.⁶ As the subject matter of this article is confined to the issue of 'perils of the seas', only the *Forwarding Shipping* and *Bagusia* cases will be subjected to critique. The *Kotak Malaysia* case concerns marine open cover. In this article, the decisions of Abdul Aziz J and Abdul Wahab J in *Forwarding Shipping* and *Bagusia* respectively will be examined in the context of a claim for losses due to 'perils of the seas' and the impact of the importation of a codifying Act such as the *Marine Insurance Act 1906* (UK) ('MIA 1906') directly into Malaysian law, as well as the Malaysian judiciary's preference for case law from various Commonwealth jurisdictions. A further analysis will also be made of the impact of previously reported Malaysian cases on the litigation in *Forwarding Shipping* and *Bagusia*, the important evidentiary requirements and the relevance of seaworthiness in both these cases.

2 Forwarding Shipping Sdn Bhd v Nusantara Worldwide Insurance (M) Bhd

2.1 The Facts

The plaintiff owned a dumb barge named *Autorex 6* which was 140 ft long, 40 ft wide and about 10 ft in depth. On board, she was equipped with a P and H 330 crane⁷ that was positioned in the centre of the barge and occupied about 20 ft of deck space. The *Autorex 6* was insured for RM 200,000 and her crane for RM 180,000 under a Marine Hull Insurance Policy No 99BTDH000004/HHHI/R100 dated 26 March 1999. The marine risks for this policy were 'perils of the seas, river, lake or other navigable waters'. On 24 October 1999, timber logs were loaded on board the *Autorex 6* over a period of six hours at Bintulu, Sarawak, for delivery to a ship that was anchored at Kuala Semanok.⁸ The logs were stacked in two compartments on board the flat deck of the *Autorex 6*. Large logs were stacked up to 14 ft in the front deck, while the shorter ones were stacked up to 16 ft at the hind deck. The logs were lashed with ropes and tied to six stentions at the front deck and seven stentions at the hind deck. In order to prevent the logs from rolling, the stentions were extended by using log poles up to 18ft in height. The crane remained on board the *Autorex 6* after the loading as it would be needed for loading the logs onto the ship anchored at Kuala Semanok.

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¹ Reported cases in the *Malayan Law Journal* predate Malaysia's independence in 1957 by more than 20 years.

² [1993] 2 MLJ 474 (High Court, Kuching, Sarawak). The author does not regard the case of *Kementrian Pertahanan Malaysia v Malaysia International Shipping Corp Bhd* [2003] 2 MLJ 226; [2007] 5 MLJ 393 (Court of Appeal, Putrajaya) as a 'marine insurance' case. The matter in *Kementrian Pertahanan Malaysia* concerned striking out proceedings where subrogation was not pleaded and is therefore more accurately classified as a case on civil procedure.

³ His Lordship was promoted to the Court of Appeal, then to the Federal Court, and is now one of the most senior members of the Malaysian judiciary, after being appointed as the Chief Judge of Sabah and Sarawak. (For non-Malaysian readers of this article, a Judicial Commissioner is a person who is under probation pending a formal appointment to the High Court bench. Appeals from the High Court are made to the Court of Appeal, and appeals from the Court of Appeal are heard by the highest court of Malaysia, the Federal Court. When a judge is appointed to the High Court, he is known as a Justice of the High Court, or simply as 'J'. Those who sit on the bench of the Court of Appeal are known as Justices of Appeal, or 'JA'. Members of the judiciary at the Federal Court are identified as Federal Court Judges, or 'FCJ').

⁴ [2005] 1 MLJ 373 (High Court, Bintulu, Sarawak).

⁵ [2005] 2 MLJ 605 (High Court, Kuala Lumpur).

⁶ [2005] 4 MLJ 402 (High Court, Kuala Lumpur).

⁷ This is a heavy duty crane manufactured by a subsidiary of Hamischfeger Industries.

⁸ For non-Malaysian readers of this article, Kuala Semanok is an anchorage place close to Bintulu.

On 25 October 1999, she was towed by Tug Boat Mark No 5 across open sea on a voyage that would take about three hours. The weather was fine when the towage commenced at 3 pm. However, about two hours later, the weather deteriorated considerably. The *juragan* (master) of the tug said that there were very strong winds and big waves. In his testimony in court, he described the weather as ‘exceptionally bad’ and had never encountered such bad weather at that time of the year. The master called his *towkay* (boss) to ask for the assistance of another tugboat. Before help could arrive in the form of a tugboat named *Kompas 2*, the barge sank at around 6.30 pm.

According to another witness, a weatherman, the weather was usually fine around October and November, with the month of December being particularly bad. On 25 October 1999, however, according to general meteorological reports there was no thunderstorm or rain over Kuala Semanok. The weatherman admitted that there was no data for the weather at the specific time and place where the *Autorex 6* sank. The master’s testimony was not contradicted or discredited by the weatherman’s evidence because the events described by the master could have happened. The weatherman said that the bad weather could have been localised as satellite photos showed there were clouds over the spot where the *Autorex 6* sank. If a storm had indeed occurred, the waves would have been between 6 to 9 ft and wind speeds up to 40 knots.⁹

A third witness, the crane operator of the P and H 330 crane on board the *Autorex 6*, testified that the weather changed suddenly and that he had never experienced such bad weather. When the *Autorex 6* encountered bad weather, the crane operator said that she started rolling and suddenly listed to the portside. A fourth witness, the Managing Director of the plaintiff company, told the court that when the master of the *Autorex 6* asked for help due to the bad weather, he informed the master that turning back to Bintulu was an option. However, the master did not take advantage of that opportunity because he could not turn the tug and barge around in such bad weather.

2.2 The Judgment of Abdul Aziz J

The matter was heard by Abdul Aziz J¹⁰ at the High Court in Bintulu, Sarawak. His Honour referred to the MIA 1906, Sch 1, r 7, which defines ‘perils of the seas’ as referring ‘only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the wind and waves.’ In order to understand the subtleties of this definition, Abdul Aziz J sought the guidance of a few reported cases from Canada and England, as well as one case from Malaysia. The first case that his Honour referred to¹¹ was *The La Pointe*,¹² where the unintentional ingress of seawater was due to the corroded steel caps of the sea suction valve which functioned to keep the flange watertight. Although the ingress of seawater is evidence of loss or damage from ‘perils of the seas’, in *The La Pointe* the court looked for the cause of the ingress of seawater. The evidence adduced in court showed that the corroded steel cap screws were the cause of the loss. The unintentional ingress of seawater was merely the effect of that occurrence.¹³

Abdul Aziz J also referred *The Bamcell II*,¹⁴ a case that was cited with approval in *The La Pointe*. His Honour noted¹⁵ that the Court of Appeal in *The Bamcell II* held that that the accident must be fortuitous: first, in the sense that it is not caused intentionally by the assured; and second, in the sense that it is not the inevitable result of deterioration caused by normal action of wind, waves and time. After a study of *The La Pointe*, his Honour observed¹⁶ that a court would have to examine whether ‘perils of the seas’ was the proximate cause of the loss. His Honour also approved¹⁷ the speech of Lord Shaw in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Soc Ltd*,¹⁸ another case cited in *The La Pointe*.

Next, Abdul Aziz J quoted¹⁹ the famous speech of Lord Herschell in *The Xantho*²⁰ and examined *The Inchmaree*,²¹ a case which one commentator has described as providing the most comprehensive judicial

⁹ About 40 miles per hour.

¹⁰ His Honour is now a judge of the Court of Appeal.

¹¹ [2005] 1 MLJ 373, 381.

¹² *The ‘La Pointe’*; *CCR Fishing Ltd & Ors v Tomenson Inc* [1989] 2 Lloyd’s Rep 536.

¹³ *Ibid*, 543.

¹⁴ *Note Case Existological Laboratories Ltd v Century Insurance Co of Canada* [1986] 2 Lloyd’s Rep 528

¹⁵ [2005] 1 MLJ 373, 381.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ [1918] AC 350.

¹⁹ [2005] 1 MLJ 373, 381-382.

²⁰ *The Xantho*; *Thomas Wilson, Sons & Co v The Owners of the Cargo Per The ‘Xantho’* (1887) 12 App Cas 503, 509.

²¹ *Thames & Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co* (1887) 12 App Cas 484.

definition of 'perils of the seas'.²² His Honour was of the view²³ that the court in *The Inchmaree* held that, whether the injury occurred through negligence or accidentally without negligence, it was not covered by the policy. Such a loss fell neither within the phrase 'perils of the seas' nor under the general expression 'all other perils, losses, and misfortunes that have or shall come to the hurt detriment or damage the subject matter of insurance'. Abdul Aziz J also quoted with approval the views of Lopes LJ in *Pandong v Hamilton*.²⁴ The *Pandong* case was cited in *The Inchmaree* and Lopes LJ held that where the ship was seaworthy and the action of the sea during transit caused damage to the goods, the proximate cause of the loss was the fault of no one and thus due solely to perils of the seas.²⁵

After an examination of the cases above, Abdul Aziz J concluded that 'to come within the ambit of perils of the seas the cause of the accident must be due to something extraordinary or the unexpected conditions of the sea. It is not a peril of the sea if the accident is caused by the ordinary action of the winds and waves.'²⁶ His Honour then referred²⁷ to *The Melanie*,²⁸ and referred with approval to the following judgment of the Chief Judge of Malaya, Salleh Abas:²⁹

that the unexpectedness of the peril due to the action of the sea is the main element of the concept and that perils of the seas is a peril due to the sea and it refers only to fortuitous accidents or casualties of the sea so that damage could not be expressly guarded against. Thus the accident is not due to the peril of the sea if the vessel sank due to poor handling or navigation under normal and ordinary condition of the sea. Nor is the accident caused by perils of the seas if the vessel sank due to sea water entering the vessel in normal condition of the sea owing to the defective character of the seams which goes to the conditions of the vessel.

On the evidence adduced in court to establish the facts of the case, Abdul Aziz J accepted that 'there was a sudden change of sea conditions at Kuala Semanok at about or around 5.30pm to 6.30pm on the 25 October 1999 from the usual calm and normal sea conditions to a heavy storm' and 'if there is a localised storm, the weather report would not be able to show it because such incidents are unable to be captured by satellite'.³⁰ His Honour also found that the unexpectedly bad weather at that time of the year caused the *Autorex 6* to roll and pitch, thus causing the logs to break loose, the crane to topple overboard and the barge to finally sink.³¹

Abdul Aziz J proceeded to examine³² the House of Lords decision in *Mountain v Whittle*,³³ a case which concerned the *Dorrington*, a tugboat that was towing a houseboat, the *Dorothy*. As the tug was considerably larger and more disproportionate in size and power to the tow, an unusually high breast wave thrown up by the *Dorrington* caused water to reach the top side seams of the *Dorothy*, thus invading the interior through the seams and causing her to sink. His Honour noted that the Law Lords in *Mountain v Whittle* were unanimous in their conclusion that waves of unusual character and size, even if not caused by high winds, could constitute a peril of the sea, and his Honour therefore concluded that 'so long as the waves are not the result of ordinary action of winds or waves it could amount to a fortuitous casualty of the seas'.³⁴ Applying this to the facts of the *Forwarding Shipping* case, Abdul Aziz J found that the kind of weather experienced by the *Autorex 6* was 'beyond the ordinary or normal action of winds and waves' and his Honour therefore ruled that 'the rough sea and bad weather condition with wind speeds about 20-40 knots and big waves as high as between 6-9ft that caused the *Autorex 6* to roll and pitch heavily is the proximate cause of the sinking. Therefore ... the *Autorex 6* sank because of the perils of the seas'.³⁵

As to the burden of proof in a marine insurance claim by an assured for a loss due to 'perils of the seas', Abdul Aziz J accepted³⁶ a submission based on *The Marel*³⁷ by counsel for the assured. His Honour held that the

²² Hodges, S, *Law of Marine Insurance* (1st Ed, 1996), 175.

²³ [2005] 1 MLJ 373, 382.

²⁴ 16 QBD 629, 633.

²⁵ *Ibid.*

²⁶ [2005] 1 MLJ 373, 382.

²⁷ *Ibid.*

²⁸ *United Oriental Assurance Sdn Bhd v W M Mazzarol* [1984] 1 MLJ 260 (Federal Court, Kuala Lumpur).

²⁹ *Ibid.*, 263.

³⁰ [2005] 1 MLJ 373, 382.

³¹ *Ibid.*, 383.

³² *Ibid.*, 385.

³³ [1921] All ER 626 (HL).

³⁴ [2005] 1 MLJ 373, 385.

³⁵ *Ibid.*

³⁶ [2005] 1 MLJ 373, 386.

³⁷ [1994] 1 Lloyd's Rep 624.

assured did not have to establish that the *Autorex 6* was seaworthy when she set out in order to make a claim for loss due to ‘perils of the seas’ under a marine insurance policy because it was enough that ‘the plaintiff had established that the loss was a fortuitous accident in that it met adverse weather conditions that was totally unexpected and sudden’.³⁸ His Honour also noted that in *The Marel* the court was entitled to make a presumption that the loss was caused by ‘perils of the seas’ as the ship was seaworthy when she set out on her voyage.³⁹ Abdul Aziz J then held that:⁴⁰

neither the plaintiff nor the defendant pleaded the fact of seaworthiness or otherwise of the *Autorex 6* in the pleadings. Therefore, this fact is a non-issue and the presumption in *The Marel* does not apply. In any case, the attempt to show the unseaworthiness of the *Autorex 6* through cross-examination of PW4 fails miserably. There is hardly any evidence to show that the *Autorex 6* was unfit for seas on the material day.

Thus, his Lordship concluded:⁴¹

the plaintiff[’s] burden in the instant case is to show that the proximate cause of the sinking of the *Autorex 6* is due to ‘perils of [the] sea[s]’. In this regard I am of the view that this burden has been discharged through the evidence of ... the exceptionally bad weather and rough conditions of the sea coupled with the size of the waves and the speed of the winds which were extraordinary and uncharacteristic of that normally experienced at Kuala Semanok at [a] similar time of the year.

Abdul Aziz J therefore allowed the assured to claim on the hull and machinery policy for the loss of the seaworthy *Autorex 6* as it was established by the assured on a balance of probabilities that ‘perils of the seas’ was a proximate cause of the loss.

3 Bagusia Sdn Bhd v Malaysia Assurance Alliance Bhd

3.1 The Facts

The plaintiff purchased a barge named the *Gonzaisho Go No 8* for RM1.36 million and then changed her name to the *Bagusia PB 2*. The plaintiff then insured her for RM 1,760,000 thus over-insuring her above her purchase price. The policy contained the usual marine risk clause for ‘perils of the seas’. The *Bagusia PB 2* has a piling boom attached to her. She was being towed on a voyage from Japan to Malaysia when her piling boom totally detached off her bracket and fell into the sea. When the loss occurred, the *Bagusia PB 2* was subject to force 6 winds on the Beaufort scale, which meant very strong winds, coupled with rough seas and bad weather. The total costs of the repairs to the piling barge was RM2,172,286,28 and the assured made a claim on the policy for the full insured amount.

3.2 The Judgment of Abdul Wahab J

The dispute was heard by Abdul Wahab J at the High Court in Kuala Lumpur. The main issue in contention was whether the insurer could unilaterally issue a new cover note with different terms to replace an earlier cover note. On the issue of whether the loss was caused by ‘perils of the seas’, his Honour found for the assured, because the piling boom did not just fall off and damage the barge in calm weather.⁴² Abdul Wahab J held that ‘the wind force of 6 on the Beaufort scale means that the wind is strong and coupled with rough seas and bad weather. This means that the damage suffered by the piling barge was a result of perils of the seas’.⁴³ Towards the end of his written judgment, his Honour said that he was ‘satisfied that the plaintiff (assured) has demonstrated and proven on a balance of probabilities that the damage to the piling barge was a result of perils of the seas’ and that ‘[t]he decision in *The Benoi VI*’⁴⁴... supported the plaintiff’s case’.⁴⁵

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ [2005] 1 MLJ 373, 387.

⁴¹ Ibid.

⁴² [2005] 2 MLJ 605, 613-614.

⁴³ Ibid, 614.

⁴⁴ [1987] 2 MLJ 123.

⁴⁵ [2005] 2 MLJ 605, 615.

4 A Critique of the Forwarding Shipping and Bagusia Cases

4.1 Application of the Marine Insurance Act 1906

Malaysia does not have its own legislation on marine insurance and applies the MIA 1906 by virtue of the *Civil Law Act* 1956 (Malaysia) ('CLA 1956').⁴⁶ Under the CLA 1956, s 5 provides that '... with respect to the law of ... marine insurance ... and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England'. The option of incorporating the English law on marine insurance directly into Malaysia is an attractive one for three obvious reasons. First, upon gaining independence from the British on 31 August 1957, Malaysia did not have a rich common law heritage. Hence, a legislative measure in the form of the CLA 1956 was put in place to ensure that there was a legal framework so that commerce would not have to operate in a legal vacuum. Second, if Malaysia had to borrow laws from a foreign country, the law of England would be a clear favourite as there was degree of familiarity with such laws dating back to days prior to independence. Third, the English law on marine insurance consists of tried and tested rules, thus providing stakeholders in the maritime industry with the comforting certainty of an established legal framework.

In *Forwarding Shipping*, Abdul Aziz J referred directly to the MIA 1906, Sch 1, r 7, whereas in *Bagusia*, Abdul Wahab J did not even mention the MIA 1906. Both judges failed to acknowledge the reason for the MIA 1906 applying directly in Malaysia. This could be due to English law being such an integral part of Malaysian law that judges take the application of the CLA 1956 for granted. There are only two reported cases on marine insurance in Malaysia where the judiciary acknowledges the application of the CLA 1956, s 5. In *Leong Brothers Industries Sdn Bhd v Jerneh Insurance Corp Sdn Bhd*,⁴⁷ Wan Adnan J referred to the MIA 1906, s 30 and Sch 1 after stating that the MIA 1906 applies in Malaysia by virtue of the CLA 1956. Similarly, in *The Melanie*,⁴⁸ the Chief Justice of Malaya, Salleh Abas, referred to the CLA 1956 and then applied the concept of constructive total loss as stated in the MIA 1906, s 60. Since these two cases were reported by the *Malayan Law Journal* more than a decade ago, no Malaysian judge has expressly acknowledged in a reported judgment that, without the CLA 1956, s 5, it would not be possible for the MIA 1906 to apply in Malaysia.⁴⁹ The closest to this happening was in the earlier case of *Boon & Cheah Steel Pipes Sdn Bhd v Asia Insurance Co Ltd*⁵⁰ where Raja Azlan Shah J (as he then was) merely held that 'English Law applied i.e., the English Marine Insurance Act, 1906 applied subject to any express terms in the contract of insurance',⁵¹ thus failing to mention that this application was due to the application of the CLA 1956, s 5.

4.2 The Use of Case Law Authorities from England and Other Commonwealth Jurisdictions

4.2.1 The use of case law in a codifying Act

As the CLA 1956, s 5 permits the application of English law, if a Malaysian judge were to look at case law for guidance on the definition of 'perils of the seas', reference should be made to reported cases from England. The drafter of the MIA 1906, the late Sir Mackenzie D Chalmers, codified common law principles relating to marine insurance into a Bill that was finally passed as the MIA 1906. Commenting on the MIA 1906, Chalmers said that:⁵²

[t]he object of that Bill was to reproduce as exactly as possible the existing law, without making any attempt to amend it. Lord Herschell, who originally took charge of the Bill, was strongly of the opinion that a codifying Bill, in its inception, ought to be a mere reproduction of existing law. ... The law of marine insurance rests almost entirely upon common law. Only a few isolated points are dealt with by statute. The reported cases are very numerous.

As the MIA 1906 is a codifying Act, Lord Herschell's views in the renowned case of *Bank of England v Vagliano Bros*⁵³ are also pertinent. His Lordship said that a codifying Act must be construed according to its

⁴⁶ Revised 1972 (Act 67).

⁴⁷ [1991] 1 MLJ 102 (High Court, Penang).

⁴⁸ *United Oriental Assurance Sdn Bhd, Kuantan v W M Mazzarol* [1984] 1 MLJ 260 (Federal Court).

⁴⁹ For further information on this, see Ooi, I U J, and Joseph, J, *Halsbury's Law of Malaysia: Insurance and Marine Insurance*, (Vol 20, 2006), 357 n 1, [490.589].

⁵⁰ [1973] 1 MLJ 101.

⁵¹ *Ibid.*

⁵² Ivamy, *Chalmers' Marine Insurance Act 1906*, (10th Ed, 1993), vii.

⁵³ [1891] 1 AC 107 (HL).

natural meaning without regard to the previous state of the law because it is only in the case of doubt that resort to the previous law is legitimate.⁵⁴ In the light of the views of both Lord Herschell and Sir Mackenzie D Chalmers, a Malaysian judge seeking to arrive at the true meaning of ‘perils of the seas’ should start by investigating the definition of that phrase in the MIA 1906 and not by looking at case law first.

There are three parts to the definition of ‘perils of the seas’ in the MIA 1906, Sch 1, r 7. The first requirement under r 7 is that the event be ‘fortuitous’, hence excluding predictable events such as ordinary wear and tear.⁵⁵ The second requisite is that the loss must be ‘of the sea’ as opposed to ‘on the sea’.⁵⁶ A renowned commentator⁵⁷ on marine insurance has rightly pointed out that this distinction has its roots in Lord Ellenborough’s logical reasoning in *Cullen v Bullen*.⁵⁸ According to Lord Ellenborough, this distinction is necessary because if there:⁵⁹

be a loss by perils of the seas, merely because it is a loss happening upon the sea ... all other causes of loss specified in the policy are upon that ground, equally entitled so to be considered; and it would be unnecessary as to them ever to assign any other cause of loss, than a loss by perils of the seas.

The third requirement imposed by r 7 is exclusionary in nature. The definition of ‘perils of the seas’ excludes the ‘ordinary action of wind and waves’. Commenting on this, Mustill J⁶⁰ in *The Miss Jay Jay*⁶¹ said that the ‘principal object of this definition is to rule out losses resulting from wear and tear’.⁶²

Upon a close examination of the *Forwarding Shipping* and *Bagusia* cases, it is interesting to note that neither Abdul Aziz J nor Abdul Wahab J dealt systematically with these three requisites in the definition of ‘perils of the seas’ as laid down in the MIA 1906, Sch 1, r 7. As the MIA 1906 is a codifying Act, both judges should have started by examining these legal requirements as these are the plainly drafted statutory provisions. In *Forwarding Shipping*, Abdul Aziz J dived straight into an examination of case law cited to him by counsel, whilst in *Bagusia*, Abdul Wahab J started by looking at the severity of the weather and then concluded that, as wind force six was recorded on the Beaufort scale, the loss must be due to a peril of the sea. It is in this latter case that Abdul Wahab J failed to make any reference to the definition found in the MIA 1906, Sch 1, r 7. This is not the approach that should be adopted by a judge when dealing with a codifying Act such as the MIA 1906.

4.2.2 Choosing between reported English cases and case law from other Commonwealth countries

As the definition of ‘perils of the seas’ in the MIA 1906, Sch 1, r 7 is technical one, from the guidance laid down by Lord Herschell in *Bank of England v Vagliano Bros*,⁶³ case law may be resorted to shed light on the exact scope of the statutory definition. When these guidelines to statutory interpretation are read together with the CLA 1956, s 5, Malaysian judges interpreting the MIA 1906 must first resort to English case law. Curiously in *Forwarding Shipping*, Abdul Aziz J instead chose to start by looking at two reported Canadian cases. The first case is *The La Pointe*,⁶⁴ and the second is *The Bamcell II*,⁶⁵ a case that was cited with approval in *The La Pointe*. His Lordship appears to have forgotten that the CLA 1956, s 5 unmistakably states that English law shall apply. If cases from other Commonwealth jurisdictions are to be resorted to, this should only be done in circumstances where English law fails to provide an answer. In the context of the MIA 1906, this is highly unlikely as the 1906 Act is a codification of previous common law and those cases, the principles from which form the basis for drafting the MIA 1906, can be looked at by the Malaysian judiciary to clarify the statutory requirements. In *Forwarding Shipping*, Mr. Justice Abdul Aziz should not have made the Canadian cases his case law of choice in interpreting the definition of ‘perils of the seas’ when statutorily, English law was applicable under the CLA 1956, s 5 in Malaysia.

⁵⁴ Ibid, 145.

⁵⁵ *The Inchmaree; Thames & Mersey Marine Insurance Co v Hamilton, Fraser & Co* (1887) 12 App Cas 484 (HL) per Lord Bramwell, 492. This is also reinforced by the MIA 1906, s 55(2)(c).

⁵⁶ Emphasis added.

⁵⁷ Hodges, above n 21, 178-179.

⁵⁸ (1816) 5 M & S 461.

⁵⁹ Ibid, 464.

⁶⁰ As he then was. His Lordship has since been elevated to the Court of Appeal and then to the House of Lords.

⁶¹ *The Miss Jay Jay* [1985] 1 Lloyd’s Rep 264. This view has subsequently been endorsed by the Court of Appeal at [1987] 1 Lloyd’s Rep 32.

⁶² Ibid, 271.

⁶³ [1891] 1 AC 107 (HL).

⁶⁴ *The ‘La Pointe’; CCR Fishing Ltd & Ors v Tomenson Inc & Ors* [1989] 2 Lloyd’s Rep 536.

⁶⁵ *Note Case Existological Laboratories Ltd v Century Insurance Co of Canada and Others* [1986] 2 Lloyd’s Rep 528.

There is also one further puzzle when Abdul Aziz J refers to principles enunciated in *The Bamcell II*. The case referred to by his Honour at [1986] 2 Lloyd's Rep 528 is the reported decision of the Canadian Court of Appeal. However, *The Bamcell II* went on appeal to the Supreme Court of Canada, and the decision of the Supreme Court of Canada is reported two years later at [1991] 1 Lloyd's Rep 89. In his judgment, Abdul Aziz J failed to provide any explanation for this. One can only speculate as to whether his Honour knew of the later decision of the Supreme Court of Canada and merely failed to take note of it due to an oversight, or whether both counsel and the bench were unaware of the fact that *The Bamcell II* had in fact gone on appeal to the Supreme Court of Canada.

Disappointingly, only after much fanfare over both the Canadian cases of *The La Pointe* and *The Bamcell II* did Abdul Aziz J finally examine English case law in the form of *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Soc Ltd*,⁶⁶ *The Xantho*,⁶⁷ *Pandong v Hamilton*⁶⁸ and *The Inchmaree*.⁶⁹ Subsequently in his judgment, his Lordship drew an analogy between the House of Lords decision in *Mountain v Whittle*⁷⁰ and concluded that on the facts of *Forwarding Shipping*, the kind of weather experienced by the *Autorex 6* was 'beyond the ordinary or normal action of winds and waves'. Although events caused by humans such as collisions at sea have long been accepted as falling within the definition of 'perils of the seas',⁷¹ the unusual human tragedy in *Mountain v Whittle*, ie an unusually powerful tug boat generating a large wave, are obviously not analogous to the facts in *Forwarding Shipping*. A more appropriate analogy could have been made with cases where bad weather at sea generated waves that caused damage to the subject matter insured.⁷²

An altogether more serious problem can be seen in *Bagusia*. As mentioned earlier, Abdul Wahab J quickly concluded that the loss must have been due to 'perils of the seas' because the severe storm measured force 6 on the Beaufort scale. In addition to failing to refer to the MIA 1906, his Honour commits an even bigger oversight by not referring to any case law on marine insurance. It is not even possible to say that principles relating to 'perils of the seas' are magically plucked out of the air and a decision arrived at, because his Honour does not make any attempt to discuss the relevant principles. What is amazing is that his Honour came to the conclusion that the loss was caused by 'perils of the seas' solely on the ground of the severity of the weather afflicting the *Bagusia PB 2* on that fateful day. Once again, one can only speculate whether his Honour and counsel appearing before him were unaware of the applicable statutory definition in the MIA 1906, Sch 1, r 7, or whether his Honour thought that the relevant principles were so well-known that no discussion was required, and thus a mere exercise of judicial wisdom would suffice. In the absence of any evidence of the former, it is submitted that the benefit of the doubt should be extended to both counsel and the bench.

4.2.3 Reported Malaysian cases on 'perils of sea'

The Hague Rules apply in Malaysia,⁷³ and one of the exceptions available to a carrier of goods by sea is 'perils of the seas'. The concept of 'perils of the seas' in the context of carriage of goods by sea is very similar to that found in marine insurance. Hence, case law interpreting this exception can be examined to shed some light on the similar phrase describing a marine risk covered by a marine insurance policy, and vice versa. Commenting on 'perils of the seas', Professor Wilson in his popular textbook on carriage of goods by sea,⁷⁴ notes that 'it covers any damage to cargo caused by risks peculiar to the sea, or to the navigation of a ship at sea, which cannot be avoided by the exercise of reasonable care'.⁷⁵ Wilson even uses *The Xantho*,⁷⁶ a marine insurance case, in his discussion of the exception.

⁶⁶ [1918] AC 350.

⁶⁷ *The Xantho*; *Thomas Wilson, Sons & Co v The Owners of the Cargo Per The 'Xantho'* (1887) 12 App Cas 503, 509.

⁶⁸ 16 QBD 629, 633.

⁶⁹ *Thames & Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co* (1887) 12 App Cas 484.

⁷⁰ [1921] All ER 626 (HL).

⁷¹ *The Xantho*; *Thomas Wilson, Sons & Co v The Owners of the Cargo Per The 'Xantho'* (1887) 12 App Cas 503.

⁷² See for example *The Melanie*; *United Oriental Assurance Sdn Bhd v W M Mazzarol* [1984] 1 MLJ 260 (Federal Court, Kuala Lumpur).

⁷³ For West Malaysia, see the *Carriage of Goods by Sea Act 1950* (Act 527). For Borneo, see the *Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960* (Sarawak) and the *Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961* (Sabah). Both of these regulations also apply the Hague Rules.

⁷⁴ Wilson, *Carriage of Goods by Sea*, (5th Ed, 2004).

⁷⁵ *Ibid*, 258.

⁷⁶ *The Xantho*; *Thomas Wilson, Sons & Co v The Owners of the Cargo Per The 'Xantho'* (1887) 12 App Cas 503, 509.

In the context of carriage of goods by sea, the Malaysian judiciary has a rather relaxed attitude when dealing with ‘perils of the seas’. For example, in *The Viva Ocean*,⁷⁷ Richard Malanjum J (as he then was), held that there was no admissible evidence to support assertions of perils of the seas, but His Honour did not examine what the elements of the ‘perils of the seas’ exception are.⁷⁸ If the judiciary does not lay down what are the fundamental requirements in the first place, it is very difficult to justify a conclusion that there is no evidence in support of such an assertion when goods are lost or damaged. Once again, this leads to the inevitable question of whether the judiciary is of the view that the concept of ‘perils of the seas’ is so well-known within the maritime industry that there is no need to provide a judicial definition. However, providing judicial guidelines should not be difficult because the CLA 1956, s 5 allows Malaysian judges to adopt an established definition of ‘perils of the seas’ as formulated by learned English judges in cases such as *The Xantho*.⁷⁹

This judicial reluctance to provide a detailed explanation of exactly what ‘perils of the seas’ mean in the context of carriage of goods by sea can also be seen in *Polar Light Sdn Bhd v The Owners of the Ship ‘MV Soon Yu’*.⁸⁰ Judicial Commissioner Sulaiman Daud skirted around the issue by holding that the exception was not available because, on the facts in dispute, the sea carrier was a common carrier.⁸¹ This lackadaisical treatment can also be seen in Ian Chin J’s judgment in *Sarawak Electricity Supply Corp v M S Shipping Sdn Bhd*.⁸² His Honour merely held that there was evidence from the logbook that, on a balance of probabilities, the vessel met with a ‘perils of the seas’, without making any effort at identifying the legal elements of that exception.⁸³

Due to the dearth of Malaysian authorities on exactly what is encapsulated within the definition of ‘perils of the seas’, it is not surprising that in *Forwarding Shipping*, Abdul Aziz J chose to refer mainly to English cases⁸⁴ and a couple of Canadian cases.⁸⁵ The only Malaysian case that his Lordship examined was *The Melanie*.⁸⁶ The judgment of the Federal Court on ‘perils of the seas’ in this case is not entirely helpful as Chief Justice Salleh Abas adopted a very familiar simplistic approach by saying that:⁸⁷

There are many decided cases on the meaning and concept of perils of the seas. It is not necessary for us to go into the details of these cases as it is sufficient for our purpose to state here that peril of the sea is peril due to the sea and that it refers only to fortuitous accidents or casualties of the sea so that the damage could not be expressly guarded against. It is not a peril of the sea if the accident is caused by ordinary action of the winds and waves. Thus the unexpectedness of the peril due to the action of the sea is the main element of the concept.

It is not clear why in *Forwarding Shipping*, Abdul Aziz J did not examine *The Melanie* first. It is only after referring to a couple of Canadian cases and then a string of English cases, that his Lordship turned his attention to *The Melanie*. One would have thought that with the application of the doctrine of precedent, his Honour’s initial point of reference should have been *The Melanie*. Although the Federal Court in *The Melanie* dealt mainly with constructive total loss, the point on ‘perils of the seas’ was also crucial because one has to question whether ‘perils of the seas’ caused the constructive total loss. Hence, the issue of ‘perils of the seas’ is unquestionably linked to the issue of constructive total loss.

At least in *Forwarding Shipping* Abdul Aziz J made an effort to refer to a previously reported Malaysian case on marine insurance. By contrast, in *Bagusia* no such effort was made by Abdul Wahab J. The only case on ‘perils of the seas’ that his Honour examined is *The Benoi VI*.⁸⁸ There are a number of important observations that can be made here. First, *The Benoi VI* is not a Malaysian case. Although it is reported in the *Malayan Law Journal*, it is in reality a decision of the Singaporean Court of Appeal with a bench made up of Wee Chong Jin CJ, and Thean and Chua JJ. Abdul Wahab J should have looked at Malaysian cases such as *The Melanie* first

⁷⁷ *The Owners of the Cargo Lately Laden on Board the Ship or Vessel MV ‘Viva Ocean’ v The Owners or Demise Charterers of the Ship or Vessel MV ‘Viva Ocean’* [2004] 6 MLJ 134 (High Court, Tawau)

⁷⁸ *Ibid*, 144-149.

⁷⁹ *The Xantho; Thomas Wilson, Sons & Co v The Owners of the Cargo Per The ‘Xantho’* (1887) 12 App Cas 503, 509.

⁸⁰ [2001] 5 MLJ 339 (High Court, Miri).

⁸¹ *Ibid*, 343-346.

⁸² [2000] 5 MLJ 721 (High Court, Kuching)

⁸³ *Ibid*, 740.

⁸⁴ *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Soc Ltd* [1918] AC 350, *The Xantho; Thomas Wilson, Sons & Co v The Owners of the Cargo Per The ‘Xantho’* (1887) 12 App Cas 503, *The Inchmaree; Thames and Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co* (1887) 12 App Cas 484; *Pandong v Hamilton* 16 QBD 629, 633, [1921] All ER 626 (HL) and *The Marel* [1994] 1 Lloyd’s Rep 624.

⁸⁵ *The La Pointe; CCR Fishing Ltd v Tomenson Inc* [1989] 2 Lloyd’s Rep 536 and *The Bamcell II; Note Case Existological Laboratories Ltd v Century Insurance Co of Canada* [1986] 2 Lloyd’s Rep 528.

⁸⁶ *United Oriental Assurance Sdn Bhd v W M Mazzarol* [1984] 1 MLJ 260 (Federal Court, Kuala Lumpur).

⁸⁷ *Ibid*, 263-264. In essence, his Lordship was quoting 25 *Halsbury’s Laws of England*, (4th Ed), 93 [153].

⁸⁸ [1987] 2 MLJ 123 (Singapore CA).

and before jumping straight into a case from another jurisdiction. Second, *The Benoi VI* centres on carriage of goods by sea. Although the concept of ‘perils of the seas’ in a cargo document is similar to that of ‘perils of the seas’ in respect of marine risks within a marine insurance policy, his Honour should have examined authorities relating specifically to marine insurance first, for example *The Melanie*, before referring to case law in analogous areas of shipping law. Third, when Abdul Wahab J referred to *The Benoi VI*, he neither examined the merits nor details of the case. His Lordship abruptly concluded that ‘[t]he decision in *The ‘Benoi VI’*⁸⁹... supported the plaintiff’s case’.⁹⁰ Hence readers of his Honour’s judgment are assumed to be psychics and have the uncanny ability to look into a crystal ball to figure out how *The Benoi VI* is specifically relevant to the facts in dispute in *Bagusia*. At this juncture, it is important to note that *The Benoi VI* was concerned with the issue whether a carrier could exclude liability for damage to goods caused by ‘perils of the seas’ under the Hague Rules.⁹¹

4.3 The Categories of Bad Weather

Hodges has commented that ‘[t]he term ‘perils of the seas’ conjures up in one’s mind a picture of a turbulent sea, violent storms, forceful gales, hurricanes, excessive squalls, large washes of waves, tempestuous weather and the like’.⁹² In *Bagusia*, the bad weather was measured at wind force of 6 on the Beaufort scale. Abdul Wahab J hastily concluded that this was sufficiently severe to fall within the definition of ‘perils of the seas’. In *Forwarding Shipping*, Abdul Aziz J merely held that unexpectedly bad weather caused the loss, without specifying at what point bad weather would amount to ‘perils of the seas’. This is a missed opportunity in both *Forwarding Shipping* and *Bagusia* because their Honours could have examined the various categories of bad weather, thus providing judicial guidelines as to exactly how bad Malaysia’s unique monsoon weather had to be before it would in law amount to ‘perils of the seas’. For example, although *Bagusia* is now authority for the legal proposition that bad weather of force 6 and above on the Beaufort scale would amount to ‘perils of the seas’, it does not provide any help on whether weather less severe than that would be so regarded as well. No guidelines on this were forthcoming from the judge. Although the definition of ‘perils of the seas’ in the MIA 1906, Sch 1, r 7 specifically stipulates that the ‘ordinary action of the wind and waves’ are excluded,⁹³ Hodges cautions that ‘[t]his however does not mean that the action of the wind and waves must be “extraordinary” to be considered fortuitous, for the word “ordinary” qualifies “action” and not “wind and waves”’.⁹⁴

Abdul Aziz J and Abdul Wahab J in *Forwarding Shipping* and *Bagusia* respectively could have relied on the CLA 1956, s 5 and adopted the guidelines laid down by Mustill J (as he then was)⁹⁵ in *The Miss Jay Jay*.⁹⁶ According to Mustill J⁹⁷ the types of weather which a ship may be exposed to can be categorised as follows: Abnormally bad weather; adverse weather; favourable weather; and perfect weather.⁹⁸ The distinction between ‘abnormally bad’ and ‘adverse’ weather lies in the fact that ‘abnormally bad’ weather falls ‘outside the range of conditions which the assured could reasonably foresee that the vessel might encounter on the voyage in question’, whilst ‘adverse’ weather falls ‘within the range of what could be foreseen, but at the unfavourable end of that range’.⁹⁹ Hence in both *Forwarding Shipping* and *Bagusia*, if Abdul Aziz J and Abdul Wahab J respectively had used *The Miss Jay Jay* guidelines, the weather conditions experienced by the subject matter insured would have fallen within the category of ‘abnormally bad’ weather. Both judges reached the correct conclusion on the facts, but rather disappointingly, neither judge provided reasons as to how they arrived at this conclusion.

4.4 The Relevance of Seaworthiness

There is a very fine dividing line between a loss due to ‘perils of the seas’ and a loss caused by the vessel being unseaworthy and thus not being sufficiently fit to encounter the ‘ordinary perils of the seas’. In *Samuel v Dumas*¹⁰⁰ Viscount Finlay pointed out that:

⁸⁹ [1987] 2 MLJ 123.

⁹⁰ [2005] 2 MLJ 605, 615.

⁹¹ The Hague Rules used to apply in Singapore. The nation has now adopted the Hague-Visby Rules which is applicable via the Carriage of Goods by Sea Act 1994 (Singapore).

⁹² Hodges, above n 21, 175.

⁹³ Emphasis added.

⁹⁴ Hodges, above n 21, 382. In support of this contention, Hodges cites *Skandia Insurance Co v Skoljarev* [1979] 142 CLR 375 (HCA).

⁹⁵ His Lordship was first elevated to the Court of Appeal and then subsequently to the House of Lords.

⁹⁶ [1985] 1 Lloyd’s Rep 264

⁹⁷ *Ibid*, 264.

⁹⁸ This summary of Mustill J’s guidelines are taken from Hodges, above n 21, 175-176.

⁹⁹ *Ibid*.

¹⁰⁰ (1924) 18 Lloyd’s Rep 211 (HL).

[w]hen the vessel is unseaworthy and the water consequently gets into the vessel and sinks her, it could never be said that the loss was due to the perils of the sea. It is true that the vessel sank in consequence of the inrush of water, but this inrush was due simply to the unseaworthiness. The unseaworthiness was the proximate cause of the loss.

Similarly in *Sassoon & Co v Western Assurance Co*,¹⁰¹ after Lord Mersey held that the proximate cause of the loss was unseaworthiness, his Lordship made the following observation:¹⁰²

There was no weather, nor any other fortuitous circumstance, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea.

The relationship between unseaworthiness and ‘perils of the seas’ is nicely summed by Hodges who explains that “‘unseaworthiness’, like “ordinary wear and tear”, is an obvious defence against a claim for a loss by perils of the seas’.¹⁰³ She concludes that ‘[a]s in ordinary wear and tear, there is no element of fortuity in unseaworthiness, and, therefore, a loss so caused is not recoverable as a loss by a peril of the seas’.¹⁰⁴

In *Forwarding Shipping Abdul Aziz J* found that the *Autorex 6* was overloaded.¹⁰⁵ However, his Honour did not pursue this matter any further and curiously held that attempts to adduce evidence on unseaworthiness through cross-examination of a witness had failed miserably.¹⁰⁶ Counsel for the insurer did not put any submissions before his Honour regarding the possibility that the overloading may have caused the *Autorex 6* to be unseaworthy for her voyage. English shipping law recognised that overloading might result in an otherwise perfectly seaworthy vessel being unseaworthy as long ago as *Reed & Co v Page, Son & East*.¹⁰⁷ In *Reed*, the court held that ‘wrong loading, excessive loading, can amount to unseaworthiness, and constitute unseaworthiness, if the vessel is at the end of the loading stage so overloaded as to be a danger to herself and her cargo’.¹⁰⁸ This proposition of law has also been accepted in Canada by the Exchequer Court (Quebec Admiralty District) in *Falconbridge Nickel Mines Ltd, Janin Construction Ltd and Hewitt Equipment Ltd v Chimo Shipping Ltd, Clarke Steamship Co Ltd and Munro Jorgensson Shipping Ltd*.¹⁰⁹ Unfortunately, this crucial issue of the *Autorex 6* being overloaded was not explored any further in *Forwarding Shipping*, although it could potentially have tipped the case in favour of the underwriter. Abdul Aziz J noted that unseaworthiness was not pleaded by counsel for the insurer,¹¹⁰ and even though his Honour found as a matter of fact that the *Autorex 6* was overloaded, he could not rule that the barge was unseaworthy.¹¹¹

By contrast, in *Bagusia*, the litigating parties were mostly pre-occupied with whether the insurer could unilaterally issue a new cover note with a change of the terms and conditions of cover after the first cover note had been issued. Counsel for the insurer neither pleaded the defence of unseaworthiness nor raised it before Abdul Wahab J. The subject matter of the marine policy in *Bagusia* was a barge called the *Bagusia PB 2* with a large piling boom attached. She was designed primarily for piling work in calm waters. The fact that her piling boom totally detached off her bracket and fell into the sea after being subjected to force 6 winds on the Beaufort scale should have at least raised suspicion on the part of the insurer. At that time, she had just left Japan and was on a voyage on the high seas to Malaysia. Counsel for the insurers should have sought expert advice on whether she was seaworthy for a long and arduous ocean voyage, as barges of that design are normally used relatively close to the coastline. Questions should have been asked as to why the piling boom was not prepared for a potential encounter with bad weather and whether the assured was privy to this. From the judgment of Abdul Wahab J, there is no indication that special measures were taken to prepare the *Bagusia PB 2* for the voyage to Malaysia.

¹⁰¹ [1912] AC 561 (PC).

¹⁰² *Ibid.*, 563.

¹⁰³ Hodges, above n 21, 379.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Forwarding Shipping Sdn Bhd v Nusantara Worldwide Insurance (M) Bhd* [2005] 1 MLJ 373 (High Court, Bintulu, Sarawak), 383.

¹⁰⁶ *Ibid.*, 387.

¹⁰⁷ [1927] 1 KB 743.

¹⁰⁸ *Ibid.*, 754.

¹⁰⁹ [1969] 2 Lloyd’s Rep 277.

¹¹⁰ [2005] 1 MLJ 373, 387.

¹¹¹ See Rules of the High Court 1980 (Malaysia), Order 18.

5 Conclusion

From the discussion above, it is apparent that English law is so ingrained in the psyche of the Malaysian judiciary that no effort is made to acknowledge that the MIA 1906 is only applicable in Malaysia through the CLA 1956, s 5. Even where there are reported Malaysian cases such as *The Melanie* on ‘perils of the seas’, judges such as Abdul Aziz J in *Forwarding Shipping* referred to cases from other jurisdictions first and largely ignored domestic precedent. There is also a disregard for the statutory framework as his Honour starts by looking at Canadian cases such as *The La Pointe* and *The Bamcell II*, although the CLA 1956, s 5 requires him to examine English cases first where there is no Malaysian precedent available. There is also a degree of sloppiness with the legal research as *The Bamcell II* has gone on appeal to a higher court, but reference is still made to the lower court decision without providing any explanation. When English cases on ‘perils of the seas’ are finally examined in *Forwarding Shipping*, more often than not, Abdul Aziz J simply quotes principles without applying those principles specifically to elements of the marine risk in dispute. Sometimes, an English case is merely quoted, without any explanation, for example, this is the treatment that his Honour meted out to *The Xantho*. By comparison, the examination of relevant case law is almost non-existent in *Bagusia*. Abdul Wahab J only refers to one case, *The Benoi IV*, which is not even a marine insurance case but rather one interpreting the ‘perils of the seas’ exception under the Hague Rules. His Honour does not examine the principles laid down in that case, but rather simply concludes in a fairly minimalist judgment that the case supports the plaintiff insurer’s claim.

Counsel for the insurers in *Forwarding Shipping* and *Bagusia* have both overlooked the possibility of raising the defence of unseaworthiness. In *Forwarding Shipping*, Abdul Aziz J found that the *Autorex 6* was overloaded but his Honour could not rule that she was unseaworthy as this defence was not specifically pleaded. In *Bagusia*, the *Bagusia PB 2* was a barge that was normally used in calm waters close to shore, but counsel for the insurer did not examine the possibility that she was unfit for the long sea voyage from Japan to Malaysia. Instead, counsel was pre-occupied in establishing that the insurer had a right to issue a second cover note with different terms to replace the first cover note issued earlier. The rather haphazard manner in which the facts in dispute have been dealt with in both *Forwarding Shipping* and *Bagusia* is symptomatic of similar uneven treatment in many other maritime law cases in Malaysia. In its very own unique and chaotic way, Malaysia is still clinging on to the English law of marine insurance via the CLA 1956, s5.