REFINING UTILITY AND CONFIDENCE IN MALAYSIAN LAWS ON THE PASSING OF PROPERTY IN SALES OF BULK GOODS

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> *Underlying every maritime transaction, whether relationship between crew and shipowner, cargo interest and vessel owner, insurer and insured, ship repairer and shipowner, ship financer and ship / cargo purchaser, are rights and responsibilities undertaken by each party. Although commerce works largely on goodwill and trust, this is always against the bedrock of laws that nurture the firm confidence that trust, goodwill and expectations between the parties are backed by legally enforceable rights.*[1]

Laws have long been the foundation of civilized society. They can be likened to rules under which the game of life is played, and such rules need to be clear and practical in order for this game to be played fairly and confidently. In order for this to happen, the law needs to be suitable to the conditions under which the actions of society are carried out.

The same may be said of commercial laws, particularly the laws governing sale of goods transactions. The ultimate purpose of the contract for sale is to pass property in the goods from one party to another upon the performance of the contractual obligations of payment and delivery. The law therefore ought to facilitate this by being practical and suitable to the conditions of trade, lest the parties lose belief, goodwill and, ultimately, trust in the law. In the words of one

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[1] Sitpah Selvaratnam, 'Particular Aspects of Legal Reform in Malaysia: Some Comparative Studies' [2007] 4 MLJ cxv, cxvi.

commentator - 'A mismatch between the expectations of commercial men and the redress afforded by the law quickly brings the law into disrepute.'[2]

The Issue at Hand

As a general rule, parties expect that the performance of their contractual obligations shall lead to the passing of property. Therefore under a contract of sale, once payment has been tendered and delivery has taken place, the property in the goods should pass from the original owner (the seller) to the new owner (the buyer). This is the effect of the transfer theory, whereby 'the contract itself effects a transfer of rights and entitlements.'[3]

The performance of contractual obligations is also the necessary mixing of labour in the property which transfers ownership in it. Under Locke's labour theory of property, when a property owner takes or allows actions (i.e. labour) to be taken on the property or part thereof, the extent of these actions of the property shall indicate how much ownership is transferred (i.e. the extent of appropriation of the property).[4] It follows that delivery by the seller in exchange for payment by the buyer is the required labour to transfer ownership in the goods. The amount of goods delivered and paid for also determines how much of the seller's goods become the buyer's.

Malaysian law, therefore, requires the seller to take two actions in order to firstly ascertain the relevant goods under the contract of sale before appropriating such goods to the contract.[5] Firstly, the seller must physically separate the goods

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[2] *Ibid.*

[3] David Pearce, 'Property and contract: where are we?' in Alistair Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2004) 87, 102.

[4] John Locke, *The Second Treatise of Civil Government and a Letter Concerning Toleration* (OUP 1946) para 27, in James Penner, *The Idea of Property in Law* (OUP 2000) 189.

[5] Sale of Goods Act 1957, s 18.

from his general stock.[6] Such physical identification is required to avoid any misunderstandings on which of the seller's goods are subject to the contract of sale. As one commentator puts it, '…the buyer cannot become an owner until it is known which are the goods he is to own.'[7] The seller must then take actions which demonstrate his or her intention to attach the goods irrevocably to the contract of sale. For example, the seller may place the goods beyond his control by delivering them to a carrier for transmission to the buyer.[8] The reason the second requirement of appropriation exists is because the seller may still wish to exercise ownership rights over the ascertained goods by exchanging them with similar goods from his general stock.[9] This means that the buyer cannot gain exclusive ownership over the goods until and unless they pass beyond the seller's control.

In bulk sales, however, appropriation normally happens before ascertainment. For economic and practical purposes, a seller of commodities such as grains or petroleum would ship the goods to multiple buyers *en masse* before the buyers' individual shares are segregated.[10] Consequently, the bulk of goods which are appropriated to the contract(s) of sale may be known to be "intermediately ascertained". This means that, on one hand, the seller has put the enough of his general stock beyond his control by delivering the bulk to the carrier and has therefore appropriated the goods to the contract of sale. At the same time, the exact ownership of the goods has yet to be conclusively determined as each buyer's goods continues to be comingled with those of other buyers and/or the seller's original stock.

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6 *Pemunya Kargo atas Kapal 'Istana VI' v Pemilik Kapal atau Vesel 'Filma Satu' dari Pelabuhan Jakarta Indonesia and other actions* [2011] 7 MLJ 145, [41]. For English authorities on this point, see *Philip Head & Son Ltd v Showfronts Ltd* [1970] 1 Lloyd's Rep 140; *Re Goldcorp Exchange Ltd* [1995] 1 AC 74.

7 Peter Nicol, 'The Passing of Property in Part of a Bulk' (1979) 42 MLR 129, 129.

8 This is deemed to amount to delivery to the buyer; Sale of Goods Act 1957, s 23(2).

9 *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep 240, 255 (*per* Pearson J).

10 Michael Bridge, *The International Sale of Goods* (3rd edn, OUP 2013) Para 7.16.

In the meantime, the contract of sale of bulk goods continues to be performed based on the "intermediate ascertainment" position. Under the current practice of "cash for documents",[11] the parties exchange payments – often through financial institutions – for bills of lading which describe the buyers' goods as a share of a bulk on a named vessel i.e. goods which have been "intermediately ascertained". In futures trading, payment is even exchanged for such documents of title before the bulk goods have been loaded onto the ship, and multiple sub-sales along a chain of contracts are even agreed upon during this period.[12] It must however be noted that any trade in future goods only means that the seller consents to the sale *in personam* and has yet to take actions *in rem*, which are only effected by delivery.[13]

The sum of these transactions means that by making payment, the pre-paying buyer has mixed the necessary labour with the bulk goods in order to gain a proprietary interest in them. However, the lack of physical distribution – and sometimes even appropriation of the bulk to the contract in the case of futures trading – also means that sufficient actions have yet to be taken to complete the transfer of ownership of the goods. Such actions are beyond the control of either party as the seller has relinquished control of the bulk upon delivery to the carrier while the buyer has to wait for ascertainment of his individual share to take place.

This gives rise to the problem whereby the passing of property in the goods lies beyond the control of either party – a position not remedied by the existing law in Malaysia.[14] This may last for weeks or even months until the goods are unloaded at the destination port and/or distributed to each individual buyer. During this prolonged period, the pre-paying buyer in particular is exposed to the

[11] *Ibid.*
[12] *Ibid.*
[13] The labour theory of property requires the consent of the owner before proprietary rights to arise by mixing of labour; see John Penner, *The Idea of Property in Law* (OUP 2000) 187-188.
[14] (n 5) s 18. Prevents any property in goods from passing until and unless the goods are ascertained.

risk of damage or loss to the goods – an unusual position, given that risk usually passes with property.[15] For example, where a seller goes bankrupt before the buyer's share can be ascertained, pre-paying buyers may lose both the purchase price and the goods.[16] This is because damages would not be an adequate remedy and the buyer is unable to obtain specific performance of unascertained goods.[17] This patently unfair outcome is caused by the *lacuna* in the law which does not anticipate the "intermediate ascertainment" position inherent to bulk sales.

The current law in Malaysia is therefore in a state of limbo due to the existence of a rule which becomes impractical in current commercial realities. Such uncertainty is anathema to the facilitative intentions of the law and can easily bring it into disrepute. This needs to be rectified lest there be serious economic repercussions due to a loss of confidence in the law among commercial players. Indeed, the Malaysian position has been described as 'a threat to the Malaysian trading community' and 'obviously out of touch with commercial reality, serving only to impede business efficacy and stymie the needs of commerce.'[18]

To put things into perspective, Malaysia is the 25th largest trading nation in terms of registered fleets, with the 5th largest container port throughput in the world.[19] It exported more than US$228 billion worth of merchandized goods in 2013, amounting to 1.21% of total world exports, and this made up approximately 73% of its gross domestic product of more than US$312 million in 2013.[20] Bulk goods also make up a significant portion of this trade, particularly for raw

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[15] (n 5) s 26.
[16] See e.g. *Re Wait* [1927] 1 Ch 606.
[17] Michael Bridge, *The International Sale of Goods* (3rd edn, OUP 2013) Para 7.03.
[18] Vilmah Balakrishnan, 'Passing of property in goods forming part of a bulk – the best way forward for Malaysia' (2007) 2 HLR 24, 28.
[19] UNCTAD Review of Maritime Transport 2014, 44, 64 <http://unctad.org/en/PublicationsLibrary/rmt2014_en.pdf> accessed 23 June 2015.
[20] <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Country=MY&Language=F> accessed 9 August 2015.

materials and commodities such as palm oil, a major Malaysian export.[21] If commercial traders and investors were to lose confidence in the ability of Malaysian laws to safeguard their transactions, Malaysia could lose a significant amount of its primary source of income, and recent events affecting investor confidence merely serve to highlight this reality.[22] It is therefore imperative for Malaysia to ensure that its laws cater to the requirements of international trade rather than act as an obstacle to it.

Non-Legal Solutions: A Viable First Option?

Given that the 'intermediate ascertainment' position is not recognized by law as passing property in the goods, a possible bottom-up approach would be for Malaysian traders to adapt their practices to fit the existing law. For example, sellers of bulk goods could ensure that the shares sold to buyers as described in the bills of lading match the compartments of the ships or other vessels containing them. This was the case in *Pemunya Kargo atas Kapal 'Istana VI'*[23] where the buyer's entire share of palm oil was stored separately according to the compartments in the ship, and property accordingly passed upon delivery to the carrier. However, this may only be possible in smaller-scope operations involving ships and goods familiar to sellers and buyers. In trade transaction which involve multiple contracts of sale before the goods are appropriated or have even come into existence, this is clearly impractical.

Another solution would see parties specify their sales in percentage shares of the bulk instead of undivided quantities. This would take advantage of a loophole in the law whereby buyers are allowed to own percentage shares in property even

[21] (n 1).
[22] Izwan Idris, 'Slide continues despite efforts to address fall' (*The Star*, 8 August 2015) <http://www.thestar.com.my/Business/Business-News/2015/08/08/Slide-continues-despite-efforts-to-arrest-fall/?style=biz> accessed 9 August 2015.
[23] (n 6).

before ascertainment and appropriation.[24] If this were done, property in the goods would pass upon payment and delivery to the carrier. However, the disutility of this solution is obvious whereby traders would prefer to deal in fixed quantities rather than having to sit down with a calculator every time a transaction is made. Such complexity is also anathema to commercial traders who require rapid and efficient procedures to complete transactions in ever-changing market conditions.[25]

Other non-legal solutions involve indirectly returning any price paid by the buyer. These include insuring the risk of losing the goods, placing the money paid for future goods in trust for the buyer, and arranging for a performance bond where a financial institution guarantees repayment should the seller become insolvent.[26] All these arrangements, however, are complicated and costly, and are difficult to implement on a day-to-day basis. They also do not solve the root cause of the problem and merely shift the risk around.[27] It is therefore clear that expecting traders to take matters into their own hands will backfire in the long run.

Could Traders Choose More Facilitative Laws?

Prima facie, it would appear if parties expressly agree that laws which recognize the buyers' proprietary ownership during the "intermediate ascertainment" position would govern the law of the contract, this would be a "magic bullet" solution to the problem. In practice, however, this is not so straightforward. The passing of property is determined by the *lex situs* i.e. the law of the place where

[24] Law Commission and Scottish Law Commission, *Sale of Goods Forming Part of a Bulk* (Law Com No. 215, Scots Law Com. No. 145) Para 2.5.
[25] Tom Burns, 'Better Late than Never: The Reform of the Law on the Sale of Goods Forming Part of a Bulk' (1996) 59 MLR 260, 263.
[26] *Ibid.*
[27] (n 24) Para 3.7.

the property is located,[28] and this rule has been held to take precedence even over an express choice of law clause.[29] This is because the *lex situs* rule '…accords with the natural expectations of reasonable men and facilitates business', and it is most practical and of sound policy to determine property issues in the country where the property is situated.[30] Consequently, an express choice of law to govern a contract for goods sold in bulk would only be effective if the *lex situs* corresponds to the chosen law. This would not make much sense as Malaysian law does not provide for the 'intermediate ascertainment' position.

Judicial Innovation: The [British] Empire Strikes Back – and a New Hope

Given that parties' efforts to take the law into their own hands would prove futile, the next possible solution would lie in a permissive interpretation of the existing law. The best option would be for the Malaysian courts – which have yet to decide on a scenario involving the 'intermediate ascertainment' position – to use equity to fill the gap in the law. However, the existing English precedent of *Re Wait*[31] may leave little room for such a facilitative interpretation.[32] Here, the buyer had paid for 500 tonnes of wheat, which was part of a bulk of 1000 tonnes on a vessel named in the contract. The ship was *en route* to the port of delivery when the seller was adjudicated bankrupt. It was therefore crucial for the buyer to demonstrate that he had become the owner of the goods so that he could recover them, failing which he would only be able to claim a pittance as an unsecured creditor.

The buyer failed in the County Court but later succeeded in the Divisional Court. However, the Court of Appeal reversed this decision by a 2:1 majority. In

[28] *Cammell v Sewell* (1860) 5 H&N723 Exch Chamber; *Winkworth v Christie & Ors* [1980] 1 Ch 496.
[29] *Glencore International AG v Metro Trading International* [2001] CLC 1372.
[30] *Ibid* 1744E-H (Moore-Bick J).
[31] [1927] 1 Ch 606.
[32] This decision would apply directly to Malaysia by virtue of Sections 3 and 5 of the Civil Law Act 1957.

dismissing the buyer's claim for specific performance, Lord Hanworth MR ruled that the goods were 'never appropriated',[33] that the buyer admitted that property did not pass, and there was no ascertainment or identification of the goods. In doing so, Lord Hanworth MR examined the definition of specific or ascertained goods under Section 52 of the English Sale of Goods Act 1893 (currently, 1979) and concluded that it was only meant to cater to the difficulties and hardships of a buyer in respect of specific goods.[34] Lord Hanworth MR further rejected the buyer's contention that there was an equitable assignment of the 500 tons of wheat to the buyer on the grounds that specificity and certainty was required for the assignment to be absolute.[35] This reasoning clearly leaves equity out in the cold as far as the passing of property in bulk goods is concerned.

In a similar vein, Atkin LJ who delivered the second majority judgment commented that '…no 500 tons of wheat have ever been ear-marked, identified or appropriated as the wheat to be delivered to the claimants under the contract'.[36] Atkin LJ further declared that as the Sale of Goods Act 1893 had come into effect at the time when equitable rights and remedies had been recognized by the English courts, the Act was therefore a comprehensive set of rules governing commercial relationships, and any inconsistent equitable principles were therefore not intended to be part of the Act.[37] The lack of leeway given to equity by these majority judgments means that if they were to be applied directly, Malaysian courts would have little room to interpret the law in a permissive manner.

By contrast, a wider perspective was provided by the dissenting judgment of Sargant LJ. It would be fraudulent, according to His Lordship, for the seller who

[33] (n 31) 617.
[34] *Ibid.*
[35] *Ibid* 623.
[36] *Ibid* 629.
[37] *Ibid* 635-636.

has received full payment to sell more goods than were due to the buyer, and therefore equity would intervene to create an equitable lien on the buyer's share of the goods.[38] In other words, Sargant LJ's understanding was that the law should protect the buyer's share of the goods from being unjustly sold off given the payment and general ascertainment of the goods. This fairer solution would therefore be of greater appeal to Malaysia as it would better recognize the labour invested by the parties in the goods during the 'intermediate ascertainment' position. The question therefore arises as to whether the Malaysian courts could be persuaded to adopt the dissenting judgment of Sargant LJ over the binding majority judgments in *Re Wait* to improve the utility of the law.

Developing Malaysia's Own Jurisprudence: The Return of Equity?

Before discussing further, it must be noted that many Malaysian judges have been inclined to forge Malaysia's own common law in line with local values instead of depending wholesale on English cases.[39] In addition, it has been argued that, contrary to common perception, equity lends more certainty and credence to the law as it supplements and enforces the traditional principles of freedom of contract and equality of bargaining power.[40] As a result, there exists the possibility that Malaysian courts could be persuaded to uphold the utility of the law by considering prior English decisions which had recognized that pre-paying buyers of bulk or intermediately ascertained goods acquired equitable co-ownership in them.[41]

There is also the possibility that Malaysian courts may adopt decisions from other Commonwealth jurisdictions to aid a more practical interpretation. Indian

[38] *Ibid* 645-646.
[39] See *Saad bin Marwi v Chan Hwan Hwa & Anor* [2001] 3 CLJ 98.
[40] Malik Imtiaz Sarwar, 'Equity and Commerce: An Alternative Perspective' [1997] 3 MLJ cxlix, cl.
[41] *Tailby v Official Receiver* (1886-90) All ER Rep 486; *Holroyd & Ors v Marshall & Ors* [1861-73] All ER 414.

jurisprudence would not be useful here, as its Supreme Court has preferred to keep things conservative by keeping physical ascertainment of individual shares as a prerequisite for property to pass.[42] By contrast, the New Zealand High Court has taken a more progressive approach in recognizing that their equivalent law does not prevent co-ownership from arising in sales of bulk goods, even though such property cannot pass absolutely.[43] This would be of greater practical importance as pre-paying buyers would gain a proprietary interest in the bulk goods in line with the transfer and labour theories.

The lack of a decisive reason in English and Commonwealth jurisprudence leaves Malaysian courts as the final arbiter on whether equity can play a role in determining the passing of property in bulk goods. This leads us to the only Malaysian case on this matter to date – the decision in *Pemunya Kargo atas Kapal 'Istana VI' v Pemilik Kapal atau Vesel 'Filma Satu' dari Pelabuhan Jakarta Indonesia and other actions*.[44] In this case, the High Court considered Section 18 of the Sale of Goods Act 1957 and reasoned that the goods, subject to the three contracts of sale between the plaintiff buyer and the defendant seller, had been ascertained as they were stored separately from another consignment of palm oil shipped on the same vessel.[45] Consequently, it was held that the property in the goods had passed to the plaintiff buyer, given that they had already been appropriated to the contract upon delivery to the carrier.[46] In addition, the fact that the goods were not segregated according to the proportions described in each individual contract of sale did not prevent property from passing as there was no practical reason to do so under the principle of ascertainment by exhaustion.[47]

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[42] *PSNS Ambalavana Chettiar & Company Ltd and another v Express Newspapers Ltd Bombay* (1968) 2 MLJ 34.
[43] *Swindle v Matakana Estate Ltd (in liquidation)* [2012] 1 NZLR 806.
[44] [2011] 7 MLJ 145.
[45] *Ibid* 168.
[46] *Ibid.*
[47] *Ibid* 170-171.

This decision sends out mixed signals. On one hand, it is clear that the High Court preferred a literal and direct approach to the application of English precedent in interpreting Malaysian statutory provisions on the passing of property, and this leaves little room for equity to manoeuvre. On the other hand, the High Court has still left the door open for equity by recognizing the function of practicality in contracts of sale. In any event, the fact that the buyer's share of the goods was segregated upon loading meant that no detailed consideration of the statutory provision was necessary in this case, and the precise application of equity therefore remains to be decided. In the meantime, the clearest remaining solution to improve the utility of the law would be for Parliament to formally recognize co-ownership in bulk goods by amending the Sale of Goods Act 1957.

Legislative Amendment: Reform of the UK Position

Such reform has already taken place in English law. The restrictive interpretation to the English equivalent of Section 18[48] in *Re Wait* and the publicity given to its risky nature by the case of *The Gosforth*[49] saw the Law Commissions of England and Scotland survey more than 100 members of commodity and other trade associations to judge their reactions to the same.[50] The Law Commissions found that approximately 10% of traders had experienced not receiving their goods due to the seller's insolvency, post-payment.[51] This shows the serious ramifications of failing to recognize co-ownership of intermediately ascertained bulk goods.

The Law Commissions were also unable to comprehend the need to prevent a purchaser of a share of bulk goods from having common ownership of the entire bulk.[52] This corresponds with academic opinions on the previous English law on which Malaysian law is based. One commentator described Section 16 of the

[48] (n 5) s 16.
[49] S en S 1985 Nr 91.
[50] (n 24).
[51] *Ibid* Para 1.3.
[52] *Ibid* Para 2.7.

Sale of Goods Act 1893 (currently, 1979) as '…a mandatory rule which took no account of the intentions or expectations of the parties.'[53] Another noted that *Re Wait*'s exclusion of equity in the operation of this provision clearly leads to injustice, as it prevents a pre-paying buyer from utilizing the full range of contractual remedies for intermediately ascertained bulk goods.[54] Indeed, it has been submitted that the previous law would force the parties into a completely different bargain from what was initially expected![55] This manifest absurdity was echoed by most traders, who felt it was 'unjust and anomalous' for a purchaser to lose both payment and the goods.[56]

Perhaps one of the most interesting reasons for reform was the need to preserve English law as an internationally accepted law of choice. The Law Commissions highlighted that English law is generally perceived favourably and is generally accepted as legitimate and effective in regulating trade between nations.[57] Indeed, when some traders considered changing their contractually agreed law, this threatened not only English shipping and insurance industries but also related legal businesses such as litigation and arbitration.[58] The consequences of the previous law – which operated more as a hindrance than a help – were perhaps the tipping point in the decision for reform.

Accordingly, the Law Commissions recommended that a pre-paying buyer should acquire a proprietary interest in goods sold as part of an identified bulk in order to facilitate trade and relationships between co-purchasers.[59] These suggestions were synthesized into the Sale of Goods (Amendment) Act 1995

[53] (n 25) 261.
[54] Sinead Eaton, 'Protecting Prepaying Buyers of Unascertained Goods: Why 'Pay Before You Go' May be Bad for You' [2007] 36 CLWR 50.
[55] Iwan Davies, 'Continuing Dilemmas with Passing of Property in Part of the Bulk' (1991) JBL 111, 126-127.
[56] (n 24) Para 3.6.
[57] *Ibid* Para 3.5.
[58] (n 53).
[59] (n 24) Para 4.1.

which recognized co-ownership for bulk goods.[60] Consequently, the passing of property has been returned to the control of the contracting parties in accordance with both the transfer and labour theories. This improves the utility of English law as well as lends traders greater confidence in its operation. The question therefore remains as to whether the same would apply for Malaysia.

The Utility of the English Reform to the Malaysian Position

Prima facie, the English reform appears tailor-made for Malaysia. Given that the Malaysian Sale of Goods Act 1957 originates from the English Sale of Goods Act 1893, all that is required is for the Malaysian Parliament to table the equivalent of the Sale of Goods (Amendment) Act 1995. There is also the added advantage of uniformity - harmonizing Malaysia's commercial law with its English equivalent would make business between Commonwealth countries more straightforward by ensuring continuity. It also helps that the reasons for the English amendment have been thoroughly explained and examined by the Law Commissions and would readily apply to Malaysia.[61] There should therefore be little difficulty for Malaysian lawmakers to adopt the English reforms accordingly.

That said, it would be imprudent to stop here and declare that English law is the best and only solution for Malaysia. The ever-changing nature of international trade means that there may well be other solutions which are better suited to transnational commercial transactions. As such, this article shifts its consideration to another widely accepted source of international commercial law - the Vienna Convention on the International Sale of Goods (CISG, in short).

[60] (n 5) s 20A.
[61] (n 1).

The Utility of the CISG to the Malaysian Position

At first instance, it would appear that the CISG is of little use in deciding proprietary matters. While it deals extensively with contractual obligations, it intentionally shies away from determining the effect which these obligations have on property.[62] Instead, as per conflict of law rules, the *lex situs* governs the rules under which property may be transferred.[63] This is of no utility to the *lacuna* in the Malaysian position.

Some commentators have nonetheless submitted that proprietary matters are not entirely excluded from the CISG. Professor Ferrari interprets the wording in Article 4 to suggest that if the CISG expressly provides for a contractual obligation which has a proprietary impact, this should be given effect.[64] Similarly, the Secretariat Commentary on Article 4 suggests that the CISG still provides for several contractual rules linked to the passing of property.[65] Given that the CISG is intended to be widely acceptable among nations in order to promote the development of international trade,[66] a wide and purposive interpretation of its provisions is required to determine whether it can be of any utility to closing the gap in Malaysian law.

The main provision in the CISG which appears to be of utility here is the explicit duty on the seller to transfer property in the goods.[67] This goes further than the contractual obligations under both Malaysian and English law, which do not provide for any explicit duty to do so. This is additionally reflected by the

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[62] Convention on the International Sale of Goods, Article 4(b).

[63] P Schlechtriem and P Butler, *UN Law on International Sales: The UN Convention on the International Sale of Goods* (2009, Springer-Verlag Berlin Heidelberg), 36.

[64] Franco Ferrari, 'Assumption of Debts as a Subject Matter Excluded from the UN Sales Convention (Commentary on OGH, April 24, 1997)' <http://www.cisg.law.pace.edu/cisg/biblio/ferrar.html> accessed 30 June 2015.

[65] Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat <http://www.globalsaleslaw.org/index.cfm?pageID=644#Article 4> accessed 30 June 2015.

[66] (n 62) Preamble.

[67] *Ibid* Article 30.

CISG's rules favouring specific performance, which require the parties to carry out the purpose of the contract of sale by ensuring that property in the goods is transferred.[68] Consequently, any shortcoming in the performance of the obligation to deliver the goods – such as the non-transfer of ownership in bulk sales – can entitle the buyer to the remedy of specific performance.[69]

In addition, it is submitted that if a seller becomes insolvent prior to ascertainment, the goods would suffer from a defect in title due to claims by third parties such as the Official Receiver and secured creditors. Under the CISG, it can be argued that this defect in title is a fundamental breach which can be remedied by specific performance.[70] While it may appear harsh to link the seller's insolvency to a fundamental breach of contract, this would be necessary as the seller's insolvency is the reason why the buyer does not get good title to the goods. Furthermore, where there is a defect in title, a pre-paying buyer may sue for delivery of substitute goods under the CISG.[71] This means that the buyer is entitled to obtain the same or similar goods from the seller in order to fulfil the contract of sale even if property in the goods does not pass. As a result, pre-paying buyers will be more fairly compensated for any proprietary shortcomings, thereby improving the utility of and confidence in the law. Indeed, it has been suggested that the delivery of replacement goods (i.e. specific performance of the contract of sale) ought to be the default remedy for sales of unascertained goods.[72]

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[68] *Ibid* Articles 46, 62.

[69] Kourosh Majdzadeh Khandani, 'Does the CISG, compared to English law, put too much emphasis on promoting performance of the contract despite a breach by the seller?' (2012) 1 Manchester SLR 98, 117 <http://www.humanities.manchester.ac.uk/medialibrary/law/main_site/Research/Student_Law_Review1/MSLR_Vol1_9(Khandani).pdf> accessed 30 June 2015.

[70] M Zahraa and A Ghith, 'Specific Performance under the Vienna Sales Convention, English Law and Libyan Law' (2000) 15(3) ALQ 304, 310.

[71] (n 62) Article 46(2).

[72] (n 69) 122.

That said, a limitation in the CISG must be pointed out, that is, a court may not order specific performance unless it would do so under its own domestic laws.[73] *Prima facie*, therefore, domestic law will prevail where a conflict exists between domestic and CISG provisions on specific performance. This means that the requirement in Malaysian law for the goods to be ascertained before specific performance can be obtained will still prevail.[74] While this provision has been explained as a compromise between the civil law preference for specific performance and the common law preference for damages as default contractual remedies, [75] it has also been suggested that to interpret the CISG in this manner would go against the CISG's goal of uniformity in sales contracts.[76] Instead, it has been suggested that the wording of the provision may still allow the court the discretion to choose to enforce specific performance under the CISG, notwithstanding that such a remedy would not be available under national law.[77]

It is submitted that a Malaysian court may be persuaded to adopt such discretion, as what is best for the parties is that the buyer of bulk goods, having paid the purchase price, receives a proprietary interest in the entire bulk. This is the co-ownership recognized by the transfer and labour theories, equity, and the Sale of Goods (Amendment) Act 1995. Ultimately, though, the discretionary nature of specific performance means that there are no guarantees that it will be granted, even under the CISG. As such, the utility of adopting the CISG to improve confidence in Malaysian law remains to be seen.

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[73] (n 62) Article 28.
[74] (n 5) s 58.
[75] (n 69) 120.
[76] Peter Pilounis, 'The Remedies of Specific Performance, Price Reduction and Additional Time (*Nachfrist*) under the CISG: Are these worthwhile changes or additions to English Sales Law?' (1999) <http://www.cisg.law.pace.edu/cisg/biblio/piliounis.html> accessed 30 June 2015.
[77] Amy H Kastely, 'The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention' (1988) 63 Wash L Rev 613, 638.

Nevertheless, it has been suggested that the CISG ought to adopt a common international rule on the passing of property in order to truly fulfil its purpose as a globally applicable trade law.[78] Such a rule would include, *inter alia*, a requirement that goods are sufficiently identified to the contract for property to pass.[79] This would recognize co-ownership of bulk goods and would therefore be of greater utility to Malaysia. However, it is unclear whether the CISG will be amended to accommodate such a uniform property rule. As such, the CISG may not be the best option for Malaysia to improve the utility of its sale of goods laws, for the moment at least.

Closing Remarks

> *In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.*[80]

The ultimate aim of a sale of goods contract is to allow the buyer to own the goods upon payment of the purchase price, with the seller's consent to transfer such ownership evidenced by delivery. If the law fails to ensure the same in practice, this may erode the confidence of traders in the law and the economy of a nation, with potentially serious repercussions on countries like Malaysia which rely heavily on international trade. As things stand, Malaysian law does not recognize co-ownership of bulk goods – an anomaly, given the position of theory, equity and the law in other jurisdictions. This is also impractical and unnecessarily exposes the parties to risk during the "intermediate ascertainment" position.

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[78] Tran Quoc Thang, 'Passing of Property Under Contracts for the International Sale of Goods: Should the CISG Regulate the Transfer of Property?' (2004) <http://www.cisg.law.pace.edu/cisg/biblio/thang.html> accessed 6 May 2015.
[79] *Ibid.*
[80] *Vallejo v Wheeler* (1774) 98 ER 1012, 1017 (Lord Mansfield), cited in (n 1).

There is little that traders can do about this on their own. It is also uncertain whether Malaysian courts will be willing to forge their own jurisprudence in interpreting the relevant law progressively, or will fall back on existing restrictive precedent. Consequently, the best option for Malaysia is legislative intervention. For this, the English Sale of Goods (Amendment) Act 1995 which recognizes co-ownership of bulk goods is tailor-made to the Malaysian position, given the shared historical and legal links between the countries and the thorough studies already undertaken by the Law Commissions. In addition, the uncertainty inherent in other alternatives such as the CISG makes the English reform a more attractive option.

As such, it would make common and commercial sense for Malaysia to enact a statutory amendment with regard to the passing of property in sales of bulk goods in order to maintain and improve its position as a major player in international trade. This would show Malaysia's good faith in catering to the needs of traders, and it is only by showing such trust that Malaysia can expect the same in return. The time for refining utility and confidence, therefore, is the present.