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**ARRESTING THE RIGHT SHIP:
PROCEDURAL THEORY, THE IN PERSONAM LINK
AND CONFLICT OF LAWS**

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I. INTRODUCTION

There is a great Atlantic divide in international maritime law. In the United States, the personification doctrine still provides the conceptual foundation for in rem admiralty jurisdiction. At the heart of the personification doctrine lies the legal fiction that the ship has ‘rights and obligations separate from those of its owner’.¹ By contrast, Anglo-Common Law jurisdictions have largely moved away from the personification doctrine, preferring instead to explain in rem admiralty jurisdiction in terms of the procedural theory.² In procedural theory, the statutory right of action in rem is regarded as a procedural device to flush out the liable shipowner, rather than as an action primarily aimed at the ‘wrongdoing’ personified ship.³ Where the shipowner enters an appearance, he or she is considered to have submitted to the jurisdiction of the court,⁴ and the proceedings continue as an action in personam as well as an action in rem.⁵

¹ M. Davies, ‘In Defense of Popular Virtues: Personification and Ratification’ (2000) 75 TUL. L. REV. 337, 338.

² The historical pedigrees and relative merits of the personification and procedural theories continue to be hotly contested: see, for example, F.L. Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800* (CUP, London, 1970), Chapter 6; Davies, supra n. 1, pp. 341-350; M. Johnsson, ‘The Nature of the Action in Rem’ (2001) 75 Australian L.J. 105.

³ W. Tetley, *Maritime Liens and Claims* (2nd edn, Les Éditions Yvon Blais Inc, Montréal, 1998), pp. 977-978.

⁴ *The Dictator* [1892] P. 304; *The Gemma* [1899] P. 285 (E.W. C.A.).

⁵ This is a statement of the traditional understanding of the nature of the action in rem in terms of procedural theory: see, for example, *The Beldis* [1936] P. 51, 75-76 (E.W. C.A.); *Monte Ulia (Owners) v. Banco (Owners), The Banco* [1971] P. 137, 151 (E.W. C.A.); *Bank of Nakhodka v. The Ship ‘Abruka’* (1996) 10 P.R.N.Z. 219; *International Factors Marine (Singapore) Pte. Ltd. v. The Ship ‘Komtek II’* [1998] 2 N.Z.L.R. 108. In *Republic of India v. India Steamship Co. Ltd., The Indian Grace (No. 2)* [1998] A.C. 878, 913 (H.L.), however, the House of Lords per Lord Steyn controversially adopted a more extreme proceduralist position, stating that ‘an action in rem is an action against the owners from the moment that the Admiralty Court is seized with jurisdiction. The jurisdiction of the Admiralty Court is invoked by the service of a writ, or where a writ is deemed to be served, as a result of the acknowledgement of the issue of the writ by the defendant before service From that moment the owners are parties to the proceedings in rem.’ (Emphasis added.) For a compelling critique of this (re)formulation of the action in rem in

This is, of course, an over-simplification. In rem admiralty jurisdiction does not entirely ‘fit’ a pure personification or procedural paradigm in the United States or in Anglo-Common Law countries.⁶ Admiralty jurisdiction is not a neat creature of theory, but is rather the product of centuries of political and institutional skirmishes and compromises, and pragmatic decisions by commercial judges. It is, therefore, hardly surprising that admiralty law on both sides of the Atlantic has finished up as an amalgam of different characteristics and theoretical elements.⁷

Nonetheless, certain fundamental differences between the United States and the Anglo-Common Law admiralty jurisdictions flow from their adherence to the personification or the procedural theory. This paper focuses on one of these differences: the role of ownership or control of the vessel in establishing in rem admiralty jurisdiction. In accordance with the procedural theory, Anglo-Common Law admiralty courts usually⁸ require the plaintiff to establish a link of ownership or

The Indian Grace, see N. Teare, ‘The Admiralty Action *In Rem* and the House of Lords’ (1998) L.M.C.L.Q. 33, 34-37.

⁶ Tetley, *supra* n. 3, pp. 53-54, describes how maritime liens have ‘been pushed and pulled by the procedural theory and the personification theory’.

⁷ For example, although Anglo-Common Law jurisdictions follow the procedural theory, the action in rem continues against, and is enforced against, the defendant ship itself if the shipowner does not enter an appearance. Maritime lien claims in Anglo-Common Law jurisdictions are also commenced and enforced against the defendant ship itself, regardless of subsequent changes of ownership or personal liability. Maritime liens simply cannot be satisfactorily explained in terms of procedural theory: even Lord Steyn had to concede in *Republic of India v. India Steamship Co Ltd., The Indian Grace (No. 2)* (1998) A.C. 878, 908 (H.L.) that maritime liens ‘may be regarded as distant echoes of the personification theory’. Conversely, there are aspects of admiralty practice in the United States that do not fully accord with the personification doctrine: Davies, *supra* n. 1, pp. 369-371.

⁸ There is no in personam link requirement for claims based on maritime liens (in the narrower Anglo-Common Law sense), as opposed to statutory rights of action in rem. Furthermore, the plaintiff is not required to establish an in personam link in respect of maritime claims relating to ownership or possession of a ship, ship mortgages, or forfeiture, presumably because the focus of such claims is on the status of the vessel itself rather than (necessarily) the in personam

control (the ‘in personam link’)⁹ between the relevant person who would incur in personam liability on the claim (the ‘in personam defendant’) and the ship against which the action in rem is brought. Part II of this paper discusses this requirement to establish an in personam link.

It has been argued that the requirement to establish an in personam link is the Achilles’ heel of the procedural theory, because it inevitably gives rise to problems of discovery of information and identification of the in personam defendant:¹⁰

Forced to rely on limited publicly available information, an in rem plaintiff under the procedural theory always ends up shooting in the dark to some extent, unsure of whether the shipowner is indeed the person who would be liable in personam. The plaintiff is not the only one affected by the resulting uncertainty. If the court’s in rem jurisdiction is challenged, the court must decide whether the shipowner would be liable in personam at a time when none of the relevant evidence or documents have been brought before the court.

Part III of this paper identifies and analyzes another problem that arises in relation to the in personam link, namely jurisdictional disputes over the ownership of arrested vessels, and especially foreign-flagged vessels. Such disputes can generate complex factual and conflict of laws issues at a very early stage of the proceedings. If the admiralty court does not adopt an appropriate conflict of laws approach in dealing with such disputes, the basic rationale of procedural theory (to get the right ship, and therefore, hopefully, the right in personam defendant, before the court) will be lost,

defendant’s liability: see, for example, section 20(2)(a),(b),(c), and (s) of the Supreme Court Act 1981 (U.K.); D.C. Jackson, *Enforcement of Maritime Claims* (3rd edn, LLP Ltd., London, 2000), p. 249.

⁹ On which, see Jackson, *supra* n. 8, pp. 242-249.

¹⁰ Davies, *supra* n. 1, pp. 349-350, who argues that the personification doctrine is therefore preferable for ‘purely functional reasons ... because it assigns the task of identifying the liable parties to those best able to perform it’.

and the integrity of the admiralty jurisdiction asserted by the court will be undermined. Part IV of this paper evaluates the different conflict of laws approaches that Anglo-Common Law jurisdictions have adopted in dealing with this problem. Finally, Part V contrasts the position in Anglo-Common Law jurisdictions with United States admiralty law, which, consistent with the personification doctrine, does not require the plaintiff to prove an in personam link to establish in rem jurisdiction. This begs the question, does the personification doctrine provide a panacea for the problem of ownership disputes involving foreign-flagged vessels?

II. THE IN PERSONAM LINK

In the late nineteenth century the English admiralty courts increasingly distanced themselves from the personification doctrine,¹¹ and embraced the procedural theory. Sir Francis Jeune (in)famously concluded in *The Dictator*¹² that, when shipowners enter an appearance, an action in rem is:

... a means of enforcing against the appearing owners, if they could have been personally liable in the Admiralty Court, the complete claim of the plaintiff so far as the owners are liable to meet it.

This statement of procedural theory was further elaborated on and refined in *The Tervaete*.¹³ Scrutton L.J. observed:

¹¹ *Harmer v. Bell (The Bold Buccleugh)* (1851) 7 Moo. P.C. 267; 13 E.R. 884 (P.C.) is generally regarded as representing the high-water mark of the personification theory in English admiralty law.

¹² [1892] P. 304, 320.

¹³ [1922] P. 259, 270 (E.W. C.A.). (Emphasis added.) See also *id.*, p. 274 per Atkin L.J.: 'The action in rem is an action in which the owners of the ship are named as parties to the proceedings and in which, according to our procedure, if they appear, subject to the statutory right to limit liability, they will be made liable personally for the full damage regardless of the value of the res.'

[I]t is now established that procedure in rem is not based upon wrongdoing of the ship personified as an offender, *but is a means of bringing the owner of the ship to meet his personal liability by seizing his property.*

The procedural theory has subsequently been endorsed by a number of land-mark English decisions.¹⁴ This adoption of the procedural theory by the English courts was to some extent rendered inevitable by jurisdictional changes, and by the extension in the nineteenth and twentieth centuries of English admiralty jurisdiction beyond the limited number of traditional maritime lien claims to new categories of statutory rights of action in rem. These new statutory rights of action in rem were clearly creations of the procedural theory.

Indeed, the very existence of modern in rem admiralty jurisdiction in most Anglo-Common Law countries is expressly predicated upon the relationship between the action in rem and the relevant shipowner's personal liability. Before an action in rem may be brought in admiralty, the plaintiff is required to establish not only that its maritime claim falls within the recognized heads of jurisdiction but also that:¹⁵

the person who would be liable on the claim in an action in personam ('the relevant person') was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

in which case, an action in rem may be brought against:

¹⁴ For example, *The Jupiter* [1924] P. 236 (E.W. C.A.); *Compania Naviera Vascongada v. S.S. Cristina, The Cristina* [1938] A.C. 485 (H.L.); *The Arantzazu Mendi* [1939] A.C. 256 (H.L.); *Republic of India v. India Steamship Co Ltd., The Indian Grace (No. 2)* [1998] A.C. 878 (H.L.).

¹⁵ Section 21(4) of the Supreme Court Act 1981 (U.K.). Its predecessor was section 3(4) of the Administration of Justice Act 1956 (U.K.). Prior to the 1956 Act, English Admiralty statutes simply listed the heads of jurisdiction and provided that the Court's admiralty jurisdiction 'may be exercised either by proceedings in rem or by proceedings in personam': see, for example, section 35 of the Admiralty Court Act 1861 (U.K.).

- (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
- (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

This formulation of the in personam link, or variations upon it, forms part of the admiralty statutes of most Anglo-Common Law countries nowadays.¹⁶

The in personam link thus involves two elements. First, the plaintiff must identify the person who would incur in personam liability on its claim.¹⁷ In other words, the plaintiff is required to identify who the 'normal' human defendant would be, leaving aside any questions of in rem admiralty jurisdiction. Second, the plaintiff must demonstrate that a sufficient and ongoing nexus of ownership or control exists between the in personam defendant and the relevant ship or its surrogate, in order to justify bringing an action in rem.

The in personam link would appear to have two purposes. The first, pragmatic purpose is to translate procedural theory into effective practice. The requirement to establish an in personam link ensures that an action in rem may only be brought against a ship in a direct ownership or control relationship with the person who would incur in personam liability on the maritime claim. In other words, it is designed to

¹⁶ For example, section 5 of the Admiralty Act 1973 (N.Z.); sections 17 and 19 of the Admiralty Act 1998 (Cth. Austl.); section 4 of the High Court (Admiralty Jurisdiction) Act 1961 (Sing.).

¹⁷ This does not mean that the plaintiff is required to prove in personam liability at the jurisdictional stage. The purpose of this requirement is to identify the person whose ship may be arrested, rather than to determine in personam liability on the merits: *Schwarz & Co. (Grain) Ltd. v. St. Elefterio ex Arion (Owners), The St. Elefterio* [1957] P. 179, 186; *Smith's Dock Co. Ltd. v. The St. Merriel (Owners), The St. Merriel* [1963] P. 247, 258; *Reef Shipping Co. Ltd. v. The Ship 'Fua Kavenga'* [1987] 1 N.Z.L.R. 550, 560-562; *Ocean Industries Pty Ltd. v. Owners of the Ship 'M.V. Steven C'* [1994] 1 Qd. R. 69 (Qd. S.C.); *The Yuta Bondarovskaya* [1998] 2 Lloyd's Rep. 357.

match up the right in personam defendant with the right ship or ships against which an action in rem may potentially be brought. If the right in personam defendant is matched up with the right ship, the chances of encouraging the in personam defendant to enter an appearance — and thereby ‘meet his personal liability’ — will be greatly increased. If this occurs, the procedural device of the action in rem will have successfully served its purpose. However, if there is a mismatch between in personam defendant and ship, the in personam defendant will either not be persuaded to enter an appearance to defend someone else’s vessel; or, having entered an appearance, will be found not to be personally liable on the claim.

I would argue that the in personam link also has a second, more fundamental theoretical purpose: to justify, and determine the legitimate ambit of, actions in rem in Anglo-Common Law jurisdictions.¹⁸ Leaving aside the issue of maritime liens, modern procedural theory roundly rejects all notions of the ship as a source of liability or as a ‘wrongdoer’. The action in rem is thus simply a means to an end. The real focus is on the in personam defendant’s personal liability. Therefore, although arresting a ship does provide the plaintiff with an independent means of founding jurisdiction and providing security for its maritime claims, the arrest of a ship can only ever be explicable or justifiable in terms of procedural theory if there is a sufficiently close nexus of ownership or control between the ship and the human defendant who would incur personal liability on the claim. If admiralty courts in Anglo-Common Law jurisdictions were to allow ships to be arrested without regard to the nexus between the ship and the in personam defendant, this would necessarily amount to a re-embracing of the legal fictions inherent in the personification doctrine, or a sanctioning of the seizure of the property of innocent third parties. Applying the in personam link correctly to sift out which ships may legitimately be arrested and which may not, therefore lies at the heart of justifying any conceptually coherent and legitimate exercise of admiralty jurisdiction based on the procedural theory.

¹⁸ This demarcation and legitimation function became particularly necessary after the introduction of sister ship arrests.

III. VESSEL OWNERSHIP DISPUTES IN THE CONTEXT OF ADMIRALTY JURISDICTION

The in personam link requirement can cause significant practical difficulties for both plaintiffs and admiralty courts in Anglo-Common Law jurisdictions. It is generally accepted that the issue of the in personam link, being an essential prerequisite to in rem admiralty jurisdiction, must be resolved at the outset or at a very early stage of the proceedings (usually when the defendant shipowner enters a conditional appearance to protest jurisdiction). The burden of establishing the necessary factual and legal elements justifying the court's exercise of in rem admiralty jurisdiction falls upon the plaintiff, and the normal civil standard of proof of a balance of probabilities applies.¹⁹ In the absence of conflicting allegations, admiralty courts have been willing to confine their jurisdictional investigations to the affidavit evidence, but a plaintiff in an action in rem may nonetheless be required urgently to access a great deal of information that is not readily available to it. A plaintiff may encounter problems obtaining discovery of (particularly foreign) vessel ownership structures,²⁰ or may find that its action in rem has been thwarted by a transfer of ownership of the vessel

¹⁹ *Schwarz & Co. (Grain) Ltd. v. St. Eleferio ex Arion (Owners), The St. Eleferio* [1957] P. 179; *I Congreso del Partido* [1978] 1 Q.B. 500; *The Aventicum* [1978] 1 Lloyd's Rep. 184; *The Nazym Khikmet* [1996] 2 Lloyd's Rep. 362 (E.W. C.A.). This approach has been followed in New Zealand (*Baltic Shipping Co. Ltd. v. Pegasus Lines S.A.* [1996] 3 N.Z.L.R. 641 (N.Z. C.A.); *Vostok Shipping Co. Ltd. v. Confederation Ltd.*; *The Kapitan Lomaev* [2000] 1 N.Z.L.R. 37 (N.Z. C.A.)), Australia (*The Owners of the Motor Vessel 'Iran Amanat' v. KMP Coastal Oil Pte. Ltd.* (1999) 161 A.L.R. 434 (H.C. Ausl.); *The Owners of the Ship 'Shin Kobe Maru' v. Empire Shipping Co. Inc.* (1994) 181 C.L.R. 404, 426 (H.C. Austl.)) and Singapore (*Far East Oil Tanker S.A. v. Owners of the Ship or Vessel 'Andres Bonifacio', The Andres Bonifacio* [1993] 3 S.L.R. 521 (Sing. C.A.); *The Jarguh Sawit* [1998] 1 S.L.R. 648 (Sing. C.A.)). Cf. *Ssangyong Australia Pty. Ltd. v. The Looiersgracht* (1995) 85 F.T.R. 265 (F.C. Can.).

²⁰ H. Staniland, 'The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa' (1987) L.M.C.L.Q. 462, 472: 'The ultimate ownership or control of ships may be very difficult to trace, especially where complex share structures have been set up.' See also P. Myburgh, "'Sister Ships": The South African Experience' (1988) 9 *Queensland Lawyer* 84, 92-93; Davies, *supra* n. 1, pp. 363-364.

after the cause of action arose but before the action in rem was commenced,²¹ or by the use of ‘one ship’ or corporate shell structures.²² Issues may also arise of whether a transfer of the vessel was a sham effected to avoid in rem liability, in which case the plaintiff bears the onus of persuading the court to pierce the corporate veil and reverse the sham transfer.²³ Such practical difficulties of discovery and proof may be dramatically increased when the ship is under foreign ownership or control, or is flagged to a foreign jurisdiction.

Disputes over who actually owns or controls the ship against which the action in rem is brought may also arise in the jurisdictional context.²⁴ In such cases, either the person who would be personally liable on the claim (the in personam defendant) or a third party intervenor will usually enter a conditional appearance to challenge the court’s assumption of in rem admiralty jurisdiction. This challenge to jurisdiction will be grounded on arguments that the in personam link has not been satisfied, because the plaintiff has not established the required ownership or control link between the in personam defendant and the ship at the relevant times. The plaintiff will then be put to the proof of establishing that the in personam link has indeed been satisfied. If the plaintiff discharges its burden of proof, the defendant shipowner’s application to set aside the action in rem will fail. However, if the plaintiff does not discharge its burden

²¹ See, for example, *Kareltrust v. Wallace & Cooper Engineering (Lyttelton) Ltd.* [2000] 1 N.Z.L.R. 401 (N.Z. C.A.); transfer of fishing vessel between two related Russian companies while the vessel was subject to forfeiture.

²² *The Eypo Agnic* [1988] 2 Lloyd’s Rep. 411 (E.W. C.A.); *The Glasnost* [1991] 1 Lloyd’s Rep. 482.

²³ *The Aventicum* [1978] 1 Lloyd’s Rep. 184; *The Maritime Trader* [1981] 2 Lloyd’s Rep. 152; *The Saudi Prince* [1982] 2 Lloyd’s Rep. 255.

²⁴ Disputes about ownership or possession of a vessel may, of course, also arise on the merits; in other words, the ownership status of the vessel may be the subject matter of the maritime claim itself: see the discussion in n. 110 infra. In such cases, the plaintiff is not required to establish an in personam link between the relevant person and the vessel, but is nonetheless required to demonstrate at the jurisdictional stage that the court has subject-matter jurisdiction; in other words, that the claim relates to the legal category of ‘ownership disputes’: *The Owners of the Ship 'Shin Kobe Maru' v. Empire Shipping Co. Inc.* (1994) 181 C.L.R. 404, 426 (H.C. Austl.); *Baltic Shipping Co. Ltd. v. Pegasus Lines S.A.* [1996] 3 N.Z.L.R. 641 (N.Z. C.A.).

of proof, the defendant shipowner's application to set aside the action in rem will succeed and the vessel will be released from arrest.

Jurisdictional disputes involving foreign-owned, -controlled or -registered vessels are rather more complicated. They are highly likely to give rise to conflict of laws issues because there is no uniform international legal definition of vessel ownership. What 'ownership' of the vessel means for the purposes of admiralty jurisdiction will depend on specific rules of maritime law and concepts of ownership in general domestic law that will differ from country to country. For example, unlike most Common Law jurisdictions, Civil Law countries typically have no concept of beneficial or equitable ownership²⁵ and do not recognize the institution of trusts. Further, the institution of property ownership in Socialist or post-Socialist economies is very different from, and difficult to compare meaningfully with, legal concepts of ownership in both Common Law and Civil Law jurisdictions. In Socialist and post-Socialist systems, property relationships tend to be defined not in terms of relatively static and clear-cut legal rights but with reference to changeable and extrinsic economic and political factors affecting the management or exploitation of property, in accordance with national economic plans and principles of operative management, or post-reform principles of full economic management.²⁶ This wide variance in understandings of what legally constitutes ownership of vessels in different countries and legal traditions provides fertile ground for comparative conflict of laws issues.

Even as between Anglo-Common Law jurisdictions, different tests may be applied in deciding whether the in personam link has been satisfied.²⁷ So, for example, the first

²⁵ In *Far East Oil Tanker S.A. v. Owners of the Ship or Vessel 'Andres Bonifacio'*, *The Andres Bonifacio* [1991] 1 S.L.R. 694, 704; [1993] 3 S.L.R. 521, 525 (Sing. C.A.) it was argued that the concept of beneficial ownership was not known or recognized at Philippine law.

²⁶ E. Haslam, 'The Odessa File: Post Socialist Property Rights in English Courts' (1997) 60 M.L.R. 710, 711, 714-715; E. Haslam, 'Post Soviet Property Rights in English Courts' [1999] L.M.C.L.Q. 491, 492-493.

²⁷ See L. Collins (ed.), *Dicey & Morris on the Conflict of Laws* (13th edn, Sweet & Maxwell, London, 2000), vol. 1, p. 458.

limb of the in personam link requires that the in personam defendant be the owner or charterer or in possession or control of the relevant ship when the cause of action arose. In England, it has been held that ‘owner’ in this context means ‘registered owner’, and does not include the unregistered beneficial owner of a ship.²⁸ This interpretation has been followed in Hong Kong.²⁹ By comparison, the Singapore Court of Appeal has adopted a broader construction of ‘owner’, including an unregistered beneficial owner with the right to sell, dispose of or alienate the ship.³⁰ A similar conclusion has been reached in Australia.³¹ There has also been a similar debate (now largely settled) about the meaning of the word ‘charterer’.³² The second limb of the in personam link requires the relevant person to be either the charterer of the relevant ship, or the ‘beneficial owner’ of the relevant ship or a sister ship as respects all the shares in it when the action in rem is commenced. Anglo-Common Law admiralty statutes generally do not define what ‘beneficial ownership’ means, and the term has been variously interpreted. The broader interpretation, adopted by Brandon J. in *The Andrea Ursula*,³³ is that the expression is not restricted to legal or equitable ownership, but includes the interests of a charterer by demise or any other person with similar full lawful possession and control over the ship who might incur liability in an action in rem. This broader interpretation has been followed in

²⁸ *The Evpo Agnic* [1988] 2 Lloyd’s Rep. 411 (E.W. C.A.); *Haji-Ioannou v. Frangos* [1999] 2 Lloyd’s Rep. 337 (E.W. C.A.).

²⁹ *The Tian Sheng No. 8* [2000] 2 Lloyd’s Rep. 430 (H.K. Ct. of Final Appeal).

³⁰ *The Ohm Mariana (ex Peony)* [1993] 2 S.L.R. 698 (Sing. C.A.).

³¹ See *Malaysia Shipyard & Engineering Sdn. Bhd. v. The Ship ‘Iron Shortland’* (1995) 59 F.C.R. 535 (Fed. Ct. Austl.); *Kent v. S.S. ‘Maria Luisa’ (No. 2)* (2003) 130 F.C.R. 12 (Fed. Ct. Austl.); *Tisand (Pty) Ltd. v. The Owners of the Ship M.V. ‘Cape Morton’ (ex ‘Freya’)* [2005] F.C.A.F.C. 68 (Fed. Ct. Austl.); M. Davies, ‘What is “Ownership” for the Purposes of Ship Arrest under the Admiralty Act 1988 (Cth)’ (1996) 24 Australian Business L.R. 76; M. Davies, ‘International Perspectives on Admiralty Procedures’ <[http://www.mlaanz.org/docs/Martin Davies.doc](http://www.mlaanz.org/docs/Martin%20Davies.doc)>, 2003 (accessed on 10 May 2005).

³² See, for example, *The Span Terza* [1982] 1 Lloyd’s Rep. 225 (E.W. C.A.); *The Tychy* [1999] 2 Lloyd’s Rep. 11 (E.W. C.A.); *Laemthong International Lines Co. Ltd. v. B.P.S. Shipping Ltd.* (1997) 190 C.L.R. 181 (H.C. Ausl.); *Reef Shipping Co. Ltd. v. The Ship ‘Fua Kavenga’* [1987] 1 N.Z.L.R. 550; *The Permina 108* [1978] 1 Lloyd’s Rep. 311 (Sing. C.A.).

³³ [1973] Q.B. 265.

Singapore³⁴ and New Zealand.³⁵ However, the narrower interpretation of Robert Goff J. in *I Congreso del Partido*³⁶ to the effect that the expression ‘beneficial owner’ means equitable ownership, whether or not accompanied by legal ownership, and does not include possession and control (however full and complete), now appears to have won out in England.³⁷ Even amongst Anglo-Common Law jurisdictions, therefore, variations in the statutory formulation and judicial interpretation of the in personam link requirement have the potential to generate very different outcomes in jurisdictional disputes over vessel ownership.

In addition, the recording in writing, publication³⁸ or registration³⁹ of vessel ownership may have different legal effects in different countries, and may be regarded

³⁴ *The Permina 3001* [1979] 1 Lloyd’s Rep. 327 (Sing. C.A.); *The Ohm Mariana (ex Peony)* [1993] 2 S.L.R. 698 (Sing. C.A.); *Far East Oil Tanker S.A. v. Owners of the Ship or Vessel ‘Andres Bonifacio’, The Andres Bonifacio* [1993] 3 S.L.R. 521 (Sing. C.A.).

³⁵ *Colombo Drydocks v. The Ship ‘Om Al-Quora’* [1990] 1 N.Z.L.R. 608.

³⁶ [1978] 1 Q.B. 500.

³⁷ *The Nazym Khikmet* [1996] 2 Lloyd’s Rep. 362 (E.W. C.A.).

³⁸ Publication of ownership details in the *Lloyd’s Register of Shipping* is regarded as particularly significant by the courts. *Far East Oil Tanker S.A. v. Owners of the Ship or Vessel ‘Andres Bonifacio’, The Andres Bonifacio* [1991] S.L.R. 694, 701-702: ‘[A]lthough total reliance cannot be placed on the information it contains, it cannot also be ignored. In my view any divergence in the information contained in the *Lloyd’s Register of Shipping* and that obtained from the vessel’s port of registry needs to be further investigated to ascertain the true beneficial ownership before proceeding in rem in a jurisdiction such as ours.’

³⁹ Cf. *Kawasaki Kisen Kaisha Ltd. v. Owners of the Ship or Vessel ‘Able Lieutenant’, The Able Lieutenant* [2002] 6 M.L.J. 433, 452: ‘the ship register is conclusive except for error or fraud’; *The Tian Sheng No 8* [2000] 2 Lloyd’s Rep. 430 (H.K. Ct. of Final Appeal): absent exceptional circumstances such as fraud, registration of ownership in the port of registry is ‘virtually conclusive’ of ownership of the vessel; *Neptune Orient Lines, Ltd. v Halla Merchant Marine Co., Ltd.*, 1998 WL 419507 *6, No. Civ. A. 97-3828 (E.D. La., July 20, 1998): ‘Korean law honors the vessel registry: the external owner of the vessel possesses title which is good against the world...’; *Vostok Shipping Co Ltd. v. Confederation Ltd., The Kapitan Lomaev* [2000] 1 N.Z.L.R. 37, 44 (N.Z. C.A.): ‘It is true that [the plaintiff] may not have knowledge of arrangements concerning ownership which have not been placed on the shipping register but it can point to the register and the evidential onus will then shift to the other party requiring it to

as more or less conclusive proof of vessel ownership. Lack of registration of vessel ownership, conversely, may mean in some countries that ownership rights are not recognized at all, or are unenforceable against third parties.

In sum, these differences mean that most admiralty actions in rem involving foreign-owned, -controlled or -registered ships are likely to involve complex conflict of laws questions. The essential conflicts issues which have to be addressed in such cases are, first, how the issue of satisfying the in personam link should be characterized; and, second, whether the issue, once characterized, should be governed by the lex fori or by an appropriate foreign legal system connected to the vessel (the lex causae).

IV. CONFLICT OF LAWS APPROACHES TO VESSEL OWNERSHIP DISPUTES

A. Comparative Survey of the Case Law

Despite the fact that jurisdictional disputes over the ownership of foreign vessels should routinely raise conflict of laws issues, there are surprisingly few maritime law decisions from Anglo-Common Law jurisdictions that squarely address characterization and choice of law issues in relation to the in personam link requirement.

There are a number of possible reasons for the paucity of case law on this issue. First, conflicts cases always represent the tip of an iceberg, in the sense that counsel and courts often do not recognize conflicts issues raised by the facts. Second, the dominant approach of admiralty courts in Anglo-Common Law jurisdictions has been to view admiralty jurisdiction and the right to proceed in an action in rem as a procedural matter for the lex fori, rather than as an issue relating to the plaintiff's

prove its contrary assertions about ownership, and if it does not do so the register will provide sufficient proof for the plaintiff on the balance of probability.'

substantive rights. This perspective means that genuine conflicts issues are often camouflaged, or overlooked in a blanket application of the *lex fori* to all jurisdictional issues. This may be contrasted to the approach of United States courts, which have characterized the right to proceed in admiralty as a substantive issue. This approach has tended to throw conflicts issues into sharper relief.

However, conflicts issues in relation to the *in personam* link have been considered in a handful of decisions from Singapore, England, New Zealand, Hong Kong and Australia. In most of these decisions either an exclusive *lex fori* or a modified *lex fori* conflicts approach has been applied. Only the Hong Kong and Australian Courts appear to have taken seriously the proposition that foreign law should determine the legal issue of whether the *in personam* link has been satisfied to establish *in rem* admiralty jurisdiction.

1. Singapore

In *The Andres Bonifacio*⁴⁰ the Singapore High Court was called upon to set aside an action *in rem* on the ground that the Court's admiralty jurisdiction had not been properly invoked. The plaintiffs, Far East Oil Tanker SA (FEOT), were the owners of another vessel, the *Feoso Ambassador 2*, chartered to the Philippine National Oil Company (PNOC). FEOT's maritime claim was based on issues arising from the *Feoso Ambassador 2* charterparty with PNOC. FEOT commenced proceedings *in rem* against the *Andres Bonifacio*, a Philippine-registered oil tanker, on the ground that PNOC was also the registered owner and beneficial owner of the *Andres Bonifacio*. A writ of arrest was issued on 3 June 1989, and the *Andres Bonifacio* was arrested in Singapore on 17 October 1989.

The defendants, PNOC Oil Carrier Inc (POCI), argued that the *in personam* link was not satisfied: the person who would be liable in an action *in personam* was not the

⁴⁰ *Far East Oil Tanker S.A. v. Owners of the Ship or Vessel 'Andres Bonifacio', The Andres Bonifacio* [1991] 1 S.L.R. 694.

beneficial owner of the *Andres Bonifacio* when the action in rem was brought. The registered ownership status of the *Andres Bonifacio* was not in dispute. The Philippine Coast Guard, the registration authority of merchant vessels in the Philippines, certified that the *Andres Bonifacio* was registered as owned by PNOC throughout the relevant period until 9 August 1989, when POCI, a wholly owned subsidiary of PNOC, was formally registered with the Philippine Coast Guard as the owner of the *Andres Bonifacio*. However, POCI argued that it, rather than PNOC, had been the beneficial owner of the *Andres Bonifacio* since 1980, when the vessel, together with its related costs, revenues and expenses, was assigned by PNOC to POCI. FEOT and POCI both produced expert evidence as to the effect of the assignment of the *Andres Bonifacio* from PNOC to POCI in 1980 under Philippine law. The Court accepted POCI's expert evidence that the assignment was valid and resulted in POCI becoming the beneficial owner of the vessel.

In holding that the Court's admiralty jurisdiction had not been properly invoked, Karthigesu J. stated that he was accepting POCI's expert evidence 'because it is not only manifestly correct but also because it accords with the principles of our law. I have to determine the question of beneficial ownership not by the concepts of Philippine law but by Singapore law.'⁴¹ The issue of which law should govern the determination of the in personam link issue does not appear to have been specifically argued by counsel, and Karthigesu J. did not elaborate further on his reasons for adopting an exclusive lex fori approach.

The issue of which law should determine the in personam link issue was argued at length on appeal before the Singapore Court of Appeal.⁴² FEOT attempted a more sophisticated conflicts analysis, submitting that the issue of who was the beneficial owner of the *Andres Bonifacio* raised two distinct issues. First, what was meant by the expression 'beneficially owned' as a matter of legislative interpretation? FEOT conceded that 'it was ... a matter for Singapore law [the lex fori] to decide what was

⁴¹ Id., p. 706.

⁴² *Far East Oil Tanker SA v. Owners of the Ship or Vessel 'Andres Bonifacio', The Andres Bonifacio* [1993] 3 S.L.R. 521 (Sing. C.A.).

meant by the phrase “beneficially owned””.⁴³ Second, who, as a matter of fact, was the beneficial owner of the ship? FEOT’s primary argument on this point was that the factual issue of the identity of the beneficial owner should be determined by Philippine law. This was because, according to Singapore’s conflicts rules, the validity and effect of a transfer of a tangible movable such as the *Andres Bonifacio* fell to be determined by the *lex situs* at the time of the alleged transfer.⁴⁴ This, in turn, raised the further issue of how to determine the *situs* of the vessel. The general rule in Dicey and Morris is that a movable is situated in the country where it is at any given time.⁴⁵ FEOT invoked the exception to this general rule, which states that a ‘merchant ship may at some times be situate at her port of registry’.⁴⁶ FEOT submitted that the *lex situs* should be regarded as the law of the port of registry of the *Andreas Bonifacio*, in other words, Philippine law, ‘for it was difficult to see any other relevant law’.⁴⁷ Assuming that Philippine law did apply as the *lex situs* to govern the essential validity of the purported transfer of ownership of the *Andreas Bonifacio* from PNOC to POIC in 1980, the assignment of the vessel was invalid, as the Philippine Code of Commerce required the transfer to be registered in order to be effective against third parties, and this had not been done.⁴⁸

⁴³ *Id.*, p. 526.

⁴⁴ Although the Singapore Court of Appeal at p. 529 simply referred to the issue being determined by the *lex situs* in the abstract.

⁴⁵ See discussion in the text accompanying n. 112 et seq. *infra*.

⁴⁶ *Dicey & Morris*, *supra* n. 27, vol. 2, pp. 936-937; see also discussion in the text accompanying n. 117 et seq. *infra*.

⁴⁷ *Far East Oil Tanker SA v. Owners of the Ship or Vessel ‘Andres Bonifacio’, The Andres Bonifacio* [1993] 3 S.L.R. 521, 529 (Sing. C.A.).

⁴⁸ *Ibid.*, citing Article 573 of the Philippine Code of Commerce, which provides as follows: ‘Merchant vessels constitute property which may be acquired and transferred by any of the means recognized by law. *The acquisition of a vessel must appear in a written instrument, which shall not produce any effect with respect to third persons if not recorded in the registry of vessels...*’. (Emphasis added.) Cf. the wording of Article 743 of the Korean Commercial Code, quoted in the text following n. 77 *infra*.

The Court of Appeal rejected this argument. Lai Kew Chai J., delivering the judgment of the Court, confirmed the High Court's decision that 'the determination by the court of its own jurisdiction in rem depended on Singapore law as the *lex fori*'.⁴⁹ As authority for this proposition, the Court of Appeal relied on the majority approach of the Privy Council in *The Halcyon Isle*,⁵⁰ and in particular on the following dictum:

[A]ny question as to who is entitled to bring a particular kind of proceedings in an English court, like questions of priorities in distribution of a fund, is a question of jurisdiction. It, too, under English rules of conflict of laws falls to be decided by English law as the *lex fori*.

Their Lordships therefore conclude that, in principle, the question as to the right to proceed in rem against a ship as well as priorities in the distribution between competing claimants of the proceeds of its sale in an action in rem in the High Court of Singapore falls to be determined by the *lex fori*, as if the events that gave rise to the claim had occurred in Singapore.

The Court of Appeal concluded that both the meaning of the statutory concept of beneficial ownership and the factual issue of who actually was the vessel's beneficial owner fell to be determined exclusively by the *lex fori* as part and parcel of the Court's control over the administration of its own jurisdiction: '[T]he appellants had come to arrest a ship here and it was surely right that the court would not allow it to do so unless it was beneficially owned as understood under Singapore law.'⁵¹

FEOT's alternative argument was that, even if the second factual issue of identifying the beneficial owner fell to be determined by Singapore law as the *lex fori*, 'that did

⁴⁹ *Id.*, pp. 529-530.

⁵⁰ *Bankers Trust International Ltd. v. Todd Shipyards Corp., The Halcyon Isle* [1981] A.C. 221, 235 (P.C.).

⁵¹ *Far East Oil Tanker SA v. Owners of the Ship or Vessel 'Andres Bonifacio', The Andres Bonifacio* [1993] 3 S.L.R. 521, 530 (Sing. C.A.).

not mean that the court would only be concerned with Singapore law as Singapore law included conflict of laws'.⁵² On this approach, there might still be a role for foreign law in certain circumstances. For example, if there was a question as to the legal status of a shipowning company, this had to be decided by the law of the place of incorporation.⁵³ So too, if the question of validity of a sale of a ship was raised and the proper law of the sale contract was a foreign law, the court would have to consider the validity and effect of the sale contract by reference to its proper law. In the present case, where the question arose as to the validity and proprietary consequences of the purported transfer of beneficial ownership to POCI, this question fell to be determined by the *lex situs*.⁵⁴

The Court of Appeal gave this alternative argument short shrift, stating simply that these submissions were 'irrelevant' in the context of the *in personam* link. The only context in which the Court seemed willing to contemplate that foreign law might conceivably be relevant was where the maritime claim itself concerned disputed ownership or co-ownership; in other words, where the ownership dispute related to the merits of the case, rather than to the jurisdictional *in personam* link requirement.⁵⁵

The exclusive *lex fori* approach adopted in *The Andres Bonifacio* was subsequently confirmed in *The Jarguh Sawit*,⁵⁶ where the Singapore Court of Appeal again refused to characterize a dispute over admiralty jurisdiction as substantive. According to the

⁵² *Id.*, p. 526.

⁵³ Citing *The Saudi Prince* [1982] 2 Lloyd's Rep. 255.

⁵⁴ *Far East Oil Tanker SA v. Owners of the Ship or Vessel 'Andres Bonifacio', The Andres Bonifacio* [1993] 3 S.L.R. 521, 532 (Sing. C.A.).

⁵⁵ *Id.*, p. 530: 'It is not inconceivable that some jurisdictions might not have a concept of beneficial ownership similar to the Singapore concept. Counsel conceded that, in a different context, Filipino [sic] law might be relevant as, for example, in a situation where there were two rival owners in the Philippines and ownership was disputed. In such a situation, however, the ship would be arrested under a different section.'

⁵⁶ [1998] 1 S.L.R. 648 (Sing. C.A.).

Court, issues of jurisdiction should invariably be characterized as procedural and should therefore be governed by the *lex fori*:⁵⁷

To classify a jurisdictional dispute as a substantive issue is to accept the possibility that the law governing a jurisdictional dispute is the *lex causae* and not the *lex fori*, a proposition which merely begs the question as to what would be the connecting factor in such a case. Clearly, the scope of judicial power must be determined by the law of the state which confers the power, ie the *lex fori*, and cannot be determined by reference to the laws of another state.

Similarly, in *The Kapitan Temkin*⁵⁸ the Singapore High Court held, with reference to *The Andres Bonifacio*, that ‘questions relating to jurisdiction must be decided by applying the *lex fori*. This is especially so when jurisdiction is a statutory conferment since interpretation of a statute is governed by the *lex fori*’.⁵⁹

2. England

The English courts have also had to consider whether the *lex fori* or *lex causae* should determine the in personam link issue in respect of foreign registered vessels for the

⁵⁷ Id., p. 656.

⁵⁸ [1998] 3 S.L.R. 254.

⁵⁹ Id., p. 257. Despite this general dictum in favour of exclusive application of the *lex fori*, the Court in *The Kapitan Temkin* seems not to have regarded the *lex causae* (the law of the port of registry — in this case, Ukrainian law) as wholly irrelevant: ‘Further as we are concerned with a concept of law unknown to Ukraine, namely ‘beneficial ownership’, the relevance of Ukrainian law on the issue will be very limited. Moreover, what is admissible as evidence to determine whether a claim is within the jurisdiction of the court is also determined by the *lex fori*. So, what the Republic of Ukraine or a department of its government states as conclusive evidence of ownership is not binding on this court as it cannot supplant the function of this court. This of course does not exclude expert evidence of relevant Ukrainian law or the law of former USSR as facts for consideration by this court.’

purpose of determining admiralty jurisdiction in a number of cases involving ships formerly registered in the Union of Soviet Socialist Republics.⁶⁰

For example, in *The Nazym Khikmet*⁶¹ the plaintiffs, owners of cargo carried on the *Nazym Khikmet*, commenced an action in rem against the *Zorinsk* on the ground that Black Sea and Shipping Company (BLASCO), the relevant person liable in personam, was the beneficial owner of *Zorinsk* at the time the action in rem was brought. The Republic of Ukraine intervened. The Republic and BLASCO both contended that *Zorinsk* was beneficially owned by the Republic, rather than by BLASCO, and that the in personam link for establishing admiralty jurisdiction was therefore not proven. In the High Court, Clarke J. held that the Republic of Ukraine was the legal and beneficial owner of the *Zorinsk* at the material time. The Court of Appeal agreed with this conclusion:⁶²

It is accordingly necessary to enquire whether, when action was brought, BLASCO was, under the law to which it was subject, what *English law would regard* as the beneficial owner as respects all the shares in the vessel *Zorinsk*. ... It is ... clear beyond argument that BLASCO was at no time what *English law would recognise* as the legal owner of *Zorinsk*. Legal ownership is a matter of title, and title to the vessel at all times belonged to the state. It is also ... clear that the state did not own the vessel as legal owner for the benefit of BLASCO.

⁶⁰ For a discussion of which, see generally the articles cited in n. 26 supra; D.R. Thomas 'State Reconstruction and Ship Arrest' (1998) *International Journal of Shipping Law* 236.

⁶¹ [1996] 2 Lloyd's Rep. 362 (E.W. C.A.); cf. *The Guiseppe di Vittorio* [1998] 1 Lloyd's Rep. 136 (E.W. C.A.).

⁶² *Id.*, p. 374 (emphasis added).

In the Northern Irish case *The Inessa Armand*,⁶³ which involved a similar fact pattern, the approach adopted in *The Nazym Khikmet* was followed and further elaborated upon:

[T]he issue in determining [beneficial] ownership is whether the defendant sued as the owner is, under the law to which it is subject, what in our law would be regarded as the beneficial owner as respects all the shares in the vessel. Since concepts of ownership vary between legal systems, this involves examination of the fasciculus of rights conferred upon the defendant by the law of its country in order to determine whether they would be sufficient to constitute beneficial ownership under the law applying in this jurisdiction. It is necessary accordingly in the present case to consider the extent of the proprietary rights conferred by Ukrainian law upon BLASCO.

The approach adopted by the English courts thus differs to some extent from the more uncompromising *lex fori* approach of the Singapore courts, in that the English courts at least seem willing to recognize the relevance of differences between concepts of ownership at the *lex fori* and foreign law, and to accord some weight to foreign law. The approach adopted by the English courts falls far short of a full-measure *lex causae* approach, however, in that foreign law in no real sense ultimately governs or determines the *in personam* link issue. The English courts' examination of the foreign legal and factual context is limited to testing how this matches up to the 'home' test of beneficial ownership. The ultimate yardstick in both characterization and choice of law is English law as the *lex fori*, rather than foreign law.

In this regard, the English approach is better described as a modified *lex fori* approach. Indeed, the approach seems to involve a variation on the conceptual sleight of hand employed in the majority *Halcyon Isle* decision, of deeming the foreign

⁶³ *Hamilton & Co Ltd. v. Owners of The Ship M.V. 'Inessa Armand', The Inessa Armand*, Unreported, Q.B. (Adm.), July 3, 1997.

factual matrix to have occurred within the forum jurisdiction so that the substantive conflicts issue can be evaluated and determined by reference to the *lex fori*.⁶⁴ Here, at least, the factual matrix of ownership, *as understood at the lex causae*, is taken into consideration, which might avoid the more absurd results of applying the majority *Halcyon Isle* approach without any regard to the legal consequences attached to the foreign factual matrix by foreign law.⁶⁵ But the English approach nonetheless falls short of an application of the *lex causae* to determine the issue.

The English approach is also unfortunately formulated. The English cases do not identify clearly the relevant choice of law rule. On a literal reading, references to the law to which the defendant owner 'is subject', or to the law of the defendant owner's 'country', suggest an application of the law of domicile of the defendant shipowner to determine the issue of vessel ownership.⁶⁶ Such a choice of law approach would be less than orthodox.⁶⁷ From the broader context of the judgments in *The Nazym Khikmet* and *The Inessa Armand*, however, it appears that Ukrainian law was examined as the law of the ship's port of registry (in other words as the *lex situs* of the ship), rather than as the law of domicile of the defendant shipowner.

3. New Zealand

⁶⁴ *Bankers Trust International Ltd. v. Todd Shipyards Corp., The Halcyon Isle* [1981] A.C. 221, 235 (P.C.) per Lord Diplock: 'the question ... falls to be determined by the *lex fori*, *as if the events that gave rise to the claim had occurred in Singapore*'. (Emphasis added.)

⁶⁵ See, for example, *The Betty Ott v. General Bills Ltd.* [1992] 1 N.Z.L.R. 655 (N.Z. C.A.), where the New Zealand Court of Appeal wholly disregarded the legal significance of registration of a foreign ship mortgage. See also P. Myburgh, 'Recognition and Priority of Foreign Ship Mortgages' (1992) L.M.C.L.Q. 155.

⁶⁶ See *Tisand (Pty) Ltd. v. The Owners of the Ship M.V. 'Cape Moreton' (ex 'Freya')* [2005] F.C.A.F.C. 68 (Fed. Ct. Austl.), paras. 137, 139, 147.

⁶⁷ See Part IV.C. *infra*.

In *The Kapitan Lomaev*⁶⁸ Vostok Shipping Company Limited ('Vostok'), a South Korean company, commenced an action in rem against the *Kapitan Lomaev* in New Zealand for the price of goods and services supplied by Vostok to Primorskaya Rybopromyshlennaya Kompaniya Orka ('Orka'), a Russian company, in respect of the *Kapitan Lomaev* and a sister ship. Confederation Limited ('Confederation') entered a conditional appearance and applied to have the proceeding in rem set aside, alleging that it, rather than Orka, was the beneficial owner of the vessel at the relevant time. The vessel was registered on the Russian shipping registry in the name of Orka. Ownership of the vessel was transferred to Confederation while the vessel was on the high seas. The vessel was provisionally registered on the Belize registry. Permanent registration was subject to production of a bill of sale and a certificate evidencing the cancellation of registration on the Russian registry and removal of the vessel from that register. The *Kapitan Lomaev* arrived in New Zealand two weeks later and the next day Orka executed a bill of sale and had it notarized. However, the Russian registration was not terminated and the vessel did not become fully registered on the Belize register until well after the action in rem had commenced.

Vostok argued that the essential validity of the transfer of ownership of the *Kapitan Lomaev* should be determined by the *lex situs* of the ship when the critical events occurred. Because the ship was on the high seas, the *lex situs* of the ship should be deemed to be the law of its port of registry, in other words, Russian law. Vostok's expert evidence was to the effect that Russian law characterized ships as immovable property rather than movables, and that Russian law did not recognize equitable or beneficial ownership. Instead, at Russian law, registration was conclusive as to ownership. On this analysis, the relevant person Orka was still the owner of the *Kapitan Lomaev* at the time the cause of action was brought, and the admiralty jurisdiction was properly invoked.⁶⁹

⁶⁸ *Vostok Shipping Co. Ltd. v. Confederation Ltd., The Kapitan Lomaev* [2000] 1 N.Z.L.R. 37 (N.Z. C.A.).

⁶⁹ *Id.*, p. 45.

Confederation, however, argued that any question of jurisdiction of the New Zealand Court under the Admiralty Act 1973 (N.Z.) should be determined by reference to the *lex fori*. Under New Zealand law, Confederation would have been regarded as the equitable or beneficial owner of the ship before it arrived in New Zealand. Confederation, relying on both the majority in *The Halcyon Isle* and *The Andres Bonifacio*, argued that the dispute was properly characterized as relating to the jurisdictional requirements to bring an action, and therefore choice of law rules were not relevant.⁷⁰

The New Zealand Court of Appeal generally accepted Confederation's arguments. Stating that they were following the approach adopted in *The Andres Bonifacio*, Richardson P. and Blanchard J. held that:⁷¹

as the issue of ownership goes to a condition precedent to the jurisdiction of the New Zealand Court, it falls to be determined under New Zealand law. ... A question of the right to invoke jurisdiction can also be seen as a matter of procedure and as such governed by the *lex fori*. New Zealand law necessarily has to look to the Russian register as a means of beginning the process of determining the ownership of the ship, for the register is the root of title. The proper approach, it seems to us, is broadly that which was followed by the English Court of Appeal in *The "Nazym Khikmet"* which is to ask whether under the law to which a company operating the ship was subject (Ukrainian law) it was what English law would regard or recognise as the beneficial owner of all the shares in the vessel.

Richardson P. and Blanchard J. went on to find, apparently in the alternative, that even if Russian law as the *lex situs* were to govern this issue, it would not disturb the High Court Judge's finding that Russian law afforded to Confederation rights 'akin to

⁷⁰ Ibid.

⁷¹ Id., pp. 45-46.

beneficial ownership' under New Zealand law.⁷² On either approach, therefore, Confederation, rather than Orka, was the beneficial owner at the relevant time.

In a separate concurring judgment, Gault J. said:⁷³

The issue in dispute is whether the New Zealand Court has jurisdiction. That is a matter of determining the applicability of the New Zealand statutory provision. That is for the domestic law. In order to resolve that issue it is necessary to address the matter of ownership both with respect to the material facts and their legal significance. That necessarily involves the law of Russia where the ship's ownership is registered. ... I agree also that in determining whether Orka was the beneficial owner at the relevant date the correct approach is that adopted in *The "Nazym Khikmet"* It is necessary to inquire whether, when the proceeding was brought Orka was, under the law to which it was subject (Russian law), what New Zealand law would regard as the beneficial owner as respects all the shares in the ship.

There are two major difficulties with this reasoning. First, it is inconsistent and confusing. The New Zealand Court of Appeal does not seem to have appreciated that the conflicts approaches in *The Andres Bonifacio* and *The Nazym Khikmet* are different. Thus, although it was adamant that the issue was a procedural matter for the *lex fori* alone, the Court was at the same time willing to accord some role to foreign law. The exact nature of this role is not made entirely clear in the judgments in *The Kapitan Lomaev*, but foreign law and the legal effects of foreign registration seem to have been degraded to a mere 'starting point' or element in the factual matrix. As in *The Nazym Khikmet*, foreign law did not ultimately govern the issue of vessel ownership in *The Kapitan Lomaev*. Instead, this issue was determined by whether Confederation or Orka had the rights of a beneficial owner under New Zealand law.

⁷² Id., p. 47.

⁷³ Id., p. 48.

Second, the New Zealand Court of Appeal, like the English Court of Appeal in *The Nazym Khikmet*, referred to ‘the law to which a company operating the ship was subject’. This gives rise to the same confusion: was the Court actually suggesting that the issue was to be governed by the law of the shipowner’s domicile?⁷⁴ Or, as would seem to be more likely from the references to the necessity to ‘look to the Russian register’, was this simply an inexact formulation of the *lex situs* rule, and the Court meant to refer to Russian law as the law of the ship’s registry?

4. Hong Kong

*The Halla Liberty*⁷⁵ concerned an action in rem brought by Dongnama Shipping Company (Dongnama) against the *Halla Liberty*, a Korean registered vessel, for alleged breaches by Halla Merchant Marine Company Limited (Halla), a Korean company, of a time and slot charter arrangement concluded between Dongnama and Halla. Dongnama arrested the *Halla Liberty* on the ground that Halla was the registered and beneficial owner of the vessel at all relevant times.

Donghwa Leasing Company Limited (Donghwa), the holder of a Korean kun mortgage⁷⁶ over the vessel, intervened and asked the Hong Kong Court of First Instance to set aside the action in rem on the basis that the Court had no jurisdiction. Donghwa accepted that, at the date the action in rem was brought, Halla was registered in the Pusan ship registry as the owner of the *Halla Liberty*. However,

⁷⁴ See *Tisand (Pty) Ltd. v. The Owners of the Ship M.V. ‘Cape Moreton’ (ex ‘Freya’)* [2005] F.C.A.F.C. 68 (Fed. Ct. Austl.), paras. 137, 139, 147.

⁷⁵ [2000] 1 H.K.C. 659 (Court of First Instance).

⁷⁶ Article 357 of the Korean Civil Code defines a kun mortgage as a type of mortgage designed to secure multiple undetermined debts arising out of continuous dealings between the mortgagee and mortgagor up to a certain maximum amount at some closing point in the future: see *Neptune Orient Lines, Ltd. v Halla Merchant Marine Co., Ltd.*, 1998 WL 128993 *3 n.7, No. Civ. A. 97-3828 (E.D. La., March 20, 1998).

Donghwa contended that it, rather than Halla, was the beneficial owner of the vessel on that date by virtue of a leasing agreement entered into between it and Halla.

Stone J. concluded that:⁷⁷

evidence of Korean law is relevant both as the proper law of the leasing ... agreements, under which it is said that Halla agreed to transfer to Donghwa ownership in the *Halla Liberty* ..., and as the *lex situs* to determine the proprietary effects of such alleged unregistered transfer.

Stone J. then considered expert evidence on Korean law. On the first issue of the essential validity and legal effect of the leasing agreements, Stone J. found an objective intention to convey legal title from Halla to Donghwa. As to the second issue of the proprietary effect of the transfer of title to the vessel under the leasing agreements, the Court considered the effect of Article 743 of the Korean Commercial Code, which reads as follows:

Transfer of title to a vessel shall be effective simply by an agreement between the parties thereto. However, unless registered in the ship registry and stated in the certificate of the ship's nationality, such title shall not be insisted upon against any third party.

The issue turned on the effect of the second limb in Article 743. Donghwa accepted that, if the proceedings had been brought in South Korea, the second limb of Article 743 would have operated to prevent either Halla or Donghwa from setting up an unregistered title to the vessel as against the plaintiff Dongnama. However, Donghwa argued that the second limb of Article 743 had no relevance to proceedings in Hong Kong, because it operated as a statutory estoppel, which should be characterized as a rule of evidence and therefore as procedural. As such, the Hong Kong court should not apply foreign procedural rules.

⁷⁷ Id., p. 674.

Dongnama, however, submitted that the second part of Article 743 was just as important a part of the *lex situs* as the first in determining the proprietary effects of the transfer of the vessel from Halla to Donghwa. Donghwa could not ‘cherry pick’, but was required to satisfy the Hong Kong court, by reference to Korean law in its entirety, that Donghwa was the owner of the *Halla Liberty*. Dongnama relied upon the second limb of Article 743, not to found an estoppel, but to show that under Korean law (as the *lex situs*/law of the port of registry) Donghwa could not enforce ownership rights over the vessel against third parties. Further, Dongnama denied that Article 743 operated as a statutory estoppel. Rather, it was ‘an important and substantive provision of law which circumscribed the rights of an unregistered transferee’. In the alternative, Dongnama argued that, even if it was a rule of evidence, it ought not to be characterized as a rule of foreign procedure, thus to be disregarded by the *lex fori*.⁷⁸

Stone J. accepted Dongnama’s arguments, and held that its admiralty jurisdiction had been properly invoked:⁷⁹

[I]n the case of a foreign ship, the Hong Kong court admits evidence of the relevant foreign law to enable it to determine who, in its eyes, is to be regarded as the beneficial owner of the vessel (applying the dictum of Sir Thomas Bingham MR in *The Nazym Khikmet* ...), and that after due consideration of the relevant foreign law to which the vessel was subject, Donghwa enjoyed no more than what would be regarded under our system as a bare legal title to the *Halla Liberty*, devoid of the characteristics of beneficial ownership as we understand that concept.

I further specifically reject the argument that the second sentence of art 743 should be regarded by the *lex fori* as procedural rather than substantive; in my view the latter element of art 743 possesses real

⁷⁸ Id., p. 677.

⁷⁹ Ibid.

substantive effect in that, notwithstanding transfer by Halla to Donghwa, it enables creditors of Halla to attach the ship and third parties to obtain good title from Halla, and that, as such, this is to be regarded as a substantive provision of the relevant foreign law. In my judgment, it is inappropriate to approach this issue by praying in aid the first sentence of art 743 in isolation and to divorce it from the remainder of that article, and I accept the argument that the intervener's submission as to the effect of art 743 seeks unjustly to deflect the impact of that article upon the nature of Donghwa's proprietary interest in the vessel – and this in a situation in which ... Donghwa would fail in such an argument had this issue been debated in Korea.

The decision in *The Halla Liberty* stands in stark contrast to the Singapore Court of Appeal's treatment of Article 573 of the Philippine Code of Commerce in *The Andres Bonifacio*.⁸⁰ Article 573 is of similar effect to Article 743 of the Korean Commercial Code, providing that 'Merchant vessels constitute property which may be acquired and transferred by any of the means recognized by law. The acquisition of a vessel must appear in a written instrument, which shall not produce any effect with respect to third persons if not recorded in the registry of vessels... .' Nonetheless, the Singapore Court of Appeal dismissed Article 573 as 'irrelevant'.

Whilst the decision in *The Halla Liberty* is couched in much the same terms as the modified lex fori approaches of the English and (on one reading) the New Zealand courts, a closer reading suggests that the decision involves a different perspective, in the sense of according the lex causae a genuinely determinative role. The Hong Kong Court did not merely call in aid the lex causae in a narrow and subsidiary sense to interpret foreign facts so that the lex fori could be applied to them, but rather treated the lex causae as determinative of all substantive legal issues relating to foreign vessel ownership. Significantly, all of the relevant provisions of the lex causae were taken into account in determining the proprietary consequences of the transfer and the

⁸⁰ [1993] 3 S.L.R. 521, 529 (Sing. C.A.)

ownership status of the foreign vessel before the Court decided whether the position under the *lex causae* was broadly comparable to its category of ‘beneficial ownership’ at the *lex fori*. And, perhaps most importantly, the Court was concerned to ensure that its decision was consistent with that which would have been reached if the matter had been heard by a court of the port of registry applying its own law.

By contrast, the English and New Zealand courts appear to be paying lip service only to the relevance of the *lex causae*. This can be demonstrated by comparing the different results in *The Halla Liberty* and *The Kapitan Lomaev*. If the New Zealand Court of Appeal had adopted the more *lex causae*-centred approach of the Hong Kong Court, it would not have merely undertaken a narrow factual examination of whether Confederation had rights of physical control, alienation and disposal of the vessel, but would have accorded proper weight to the substantive legal consequences at Russian law of lack of registration of the transfer from Orka to Confederation. If Russian law, rather than New Zealand law, had been properly investigated and fully applied to determine all the proprietary consequences of the informal transfer to Confederation, the New Zealand Court of Appeal would probably have had to conclude that the informal transfer of ownership was not effective under Russian law as against third parties like Vostok, and would thus have allowed the action in rem to proceed.

5. Australia

In *The Cape Morton*⁸¹ the Full Court of the Federal Court of Australia had to decide whether an action in rem had been properly brought by the plaintiffs against the *Cape Morton*, a Liberian-flagged motor vessel, for damage to a cargo of zircon sand carried from Richards Bay in South Africa to Shanghai in China. The vessel was arrested on the basis that Freya Navigation Shipholding Limited (‘Freya’), a Liberian company, was the relevant person and owner of the vessel both at the time the cause of action arose and at the time that proceedings were commenced.

⁸¹ *Tisand (Pty) Ltd. v. The Owners of the Ship M.V. ‘Cape Morton’ (ex ‘Freya’)* [2005] F.C.A.F.C. 68 (Fed. Ct. Austl.).

However, Alico Marine Limited ('Alico'), a Marshall Islands company, entered an appearance as the owner of the vessel and sought to have the writ in rem set aside for lack of jurisdiction. Alico argued that, whilst Freya was the registered owner on the Liberian register at all relevant times, the vessel had been sold to Alico, and Alico had obtained provisional registration with the Hong Kong register, before proceedings were commenced. Permission had been granted to transfer registration from the Liberian to the Hong Kong register, subject to the surrender of the vessel's certificate of registry, ship radio station licence, and submission of three executed copies of the bill of sale. However, these conditions had not been fulfilled prior to the vessel's arrest.

The Court rejected the plaintiffs' submissions that, for the purposes of satisfying the in personam link, the registered owner is necessarily always the 'owner' in the context of the Admiralty Act 1988 (Cth. Austl.). The Court held that the concepts of 'owner' and 'ownership' must be interpreted in a broad contextual and proprietary sense. On this interpretation, the 'owner' of a ship at Australian law is that person who has 'the right or power to have and dispose of dominion, possession and enjoyment of the ship'. Whether that person is the registered owner will depend on all the circumstances, for the rights or powers of ownership 'may arise from the legal effect of dealings between parties with the ship, under general law or statute'.⁸²

The Court then had to decide which law should govern the issue of ownership. The Court acknowledged that there was 'some divergence' between the approaches adopted in Singapore, England and New Zealand.⁸³ After examining these approaches, the Court decided that it favoured an approach — which it regarded as similar to that adopted in *The Nazym Khikmet* — in terms of which:⁸⁴

⁸² Id, paras. 118-120.

⁸³ Id., para. 132. The Court did not refer to *The Halla Liberty*.

⁸⁴ Id., para. 140.

the law of Australia will govern the question of the characterisation of such rights (and their existence, nature and extent) as are derived by Freya or Alico from the transaction of transfer or assignment of the ship. The existence, nature and extent of such rights created or recognised by the transaction will be governed or affected by any law that Australian rules of private international law regard as relevant. The characterisation of those rights as ‘ownership’ or not and of either Freya or Alico as ‘the owner’ is then undertaken by reference to Australian law. The process involves applying an Australian statute dealing with authority to commence a suit in an Australian court to the facts as found, those facts including the rights created or recognised by the foreign law mandated by the applicable Australian rule of private international law. The approach that we favour entails a rejection of the proposition that the law of the forum (as domestic law only and not including its rules of private international law) applies. We see no justification for limiting the role of the law of the forum in this regard. To do so would, by necessity, leave out of account in the assessment of the proprietary question any foreign law relevant to the assignment of the ship.

The Court then went on to identify the relevant choice of law rule, concluding that there were powerful reasons favouring an application of the law of the port of registry as the *lex situs* of the vessel.⁸⁵ However, because no evidence of foreign law was adduced, the Court was obliged to presume, in the absence of proof to the contrary, that the *lex causae* was the same as Australian law.⁸⁶ This application of this presumption, in turn, raised the thorny question of whether the Shipping Registration Act 1981 (Cth. Austl.), which in its terms regulates registration of Australian-owned ships only, should be applied *mutatis mutandis* to a Liberian-registered vessel. The Court, although not without doubt, reached the pragmatic conclusion that the Act should apply.⁸⁷ The Court held that, on an application of Australian law including the Shipping Registration Act, Freya had already transferred the ship and all shares in her

⁸⁵ Id., para. 146; and see Part IV.C. *infra*.

⁸⁶ Id., para. 148.

⁸⁷ Id., paras. 148-151.

to Alico. However, as the registered owner, Freya remained vested with a statutory power absolutely to dispose of the ship.⁸⁸ This, the Court conceded, strongly supported the conclusion that Freya was still the owner of the vessel at the relevant time.⁸⁹ However, the Court held that Freya could no longer honestly or lawfully exercise its statutory power to dispose of the ship without Alico's consent, because the parties had intended property to pass at the time of payment, delivery of the bill of sale, and delivery of the ship.⁹⁰ Accordingly, Freya was no longer the owner of the vessel when proceedings commenced, the in personam link was not satisfied, and the writ in rem was set aside for lack of jurisdiction.

The decision in *The Cape Morton* amounts to an unequivocal rejection of the exclusive lex fori approach, and a clear formulation of a more internationalist approach, in terms of which the characterization of the ownership issue falls to be determined by the lex fori, but the substantive 'existence, nature and extent' of ownership rights over vessels are governed by the lex causae. As such, the approach advocated by the Court in *The Cape Morton* is broadly similar to that adopted by the Hong Kong Court in *The Halla Liberty*.

B. The Conflict of Laws Approaches Evaluated

Although the exclusive lex fori approach has its supporters,⁹¹ I would argue that it is deeply flawed and problematic, for a number of reasons. A simplistic, overly general and mechanical reliance on the substance/procedure dichotomy in conflict of laws theory does not provide a convincing justification for applying the lex fori to all

⁸⁸ Id., paras. 152-160.

⁸⁹ Id., paras. 161-162.

⁹⁰ Id., paras. 164-168.

⁹¹ See, for example, K. S. Toh, *Admiralty Law and Practice* (Butterworths Asia, Singapore, 1998) pp. 107-108, 111. Toh also advocates the extension by analogy of the lex fori approach in *The Andres Bonifacio* to jurisdictional disputes involving foreign mortgages or charges (id., pp. 45-46; but cf. id., pp. 327-328 for a critical analysis of *The Betty Ott*).

jurisdictional issues. Even if it may once have been ‘axiomatic that all questions of jurisdiction are governed by the *lex fori*’,⁹² this is certainly no longer the case. Rather, the current trend in private international law in Anglo-Common Law countries is to treat both rights to sue and remedies as substantive, to be governed by the *lex causae* as indicated by the forum’s rules.⁹³ Appealing to the procedure/substance distinction is, in any event, usually the last resort of desperation or dogmatism in attempting to resolve an intractable conflicts issue or to thwart the application of an unpalatable conflicts rule.⁹⁴ It is almost always preferable to fashion a solution informed by appropriate conflicts policy and ‘geared to the issue before the court in its commercial context ... rather than artificial legal categories’.⁹⁵

Further, both the exclusive *lex fori* and the modified *lex fori* approaches rely to a greater or lesser extent on the discredited obiter view of the majority in *The Halcyon Isle*⁹⁶ that ‘any question as to who is entitled to bring a particular kind of proceeding in an English court ... is a question of jurisdiction ... to be decided by English law’. Lord Diplock’s obiter dictum is far too broadly stated. Even if it is still good law, it should be strictly confined to the facts of *The Halcyon Isle*, which had nothing whatsoever to do with the in personam link requirement.⁹⁷

⁹² Id., p. 107.

⁹³ E. Crawford, ‘The Adjective and the Noun: Title and Right to Sue in International Private Law’ (2000) *Juridical Review* 347, 354-355; *Dicey & Morris*, supra n. 27, vol. 1, ch. 7 passim.

⁹⁴ *Dicey & Morris*, supra n. 27, vol. 1, p. 157; see also W. Tetley, *International Conflict of Laws: Common, Civil and Maritime* (Les Éditions Yvon Blais Inc, Montréal, 1994), pp. 49-60, describing the substance/procedure dichotomy as an ‘unrealistic distinction’.

⁹⁵ Jackson, supra n. 8, p. 682, commenting on the decision in *The Halcyon Isle*. See also W. Tetley, ‘Maritime Liens, Mortgages and Conflict of Laws’ (1993) 1 U.S.F. MAR. L.J. 46: ‘Invoking the ancient substantive/procedural dichotomy ... is no solution for conflicts of law for England, let alone the other countries of the world.’

⁹⁶ *Bankers Trust International Ltd. v. Todd Shipyards Corporation; The Halcyon Isle* [1981] A.C. 221, 235 (P.C.) per Lord Diplock.

⁹⁷ So also *Dicey & Morris*, supra n. 27, vol. 1, p. 161 n. 40: Lord Diplock’s view ‘cannot be supported’.

Even if it can be argued that conflicts issues relating to admiralty jurisdiction should, in the main, be characterized as procedural and therefore governed by the *lex fori*, such a blanket characterization fails to consider whether the *in personam* link requirement raises a substantive incidental question or subsidiary conflict of laws issue.⁹⁸ The traditional view has been that a ‘true’ incidental question only arises in conflict of laws where: (1) the law applying to the principal question is a foreign law; (2) a subsidiary issue exists that is capable of arising in its own right and for which choice of law rules are available; and (3) the forum’s choice of law rules select a different system to settle the subsidiary issue than would the choice of law rules of the country chosen to apply to the main question.⁹⁹

However, it is now accepted that the scope of the incidental question in conflict of laws is far broader than this.¹⁰⁰ Commentators extend the incidental question concept to cover cases where the domestic law provides the rule of decision on the main issue.¹⁰¹ For example, Gotlieb argues that, even in cases where the principal question is governed by *lex fori*, the forum should consider whether to apply its conflict of laws rule to the incidental issue at hand, or whether it should apply its own domestic substantive rules to the issue.¹⁰² In such cases, the forum has three options. It can:¹⁰³

⁹⁸ Such incidental questions are not unique to admiralty jurisdiction. Challenges to the courts’ exercise of general jurisdiction based on service out of the jurisdiction may also require a preliminary examination of foreign law to resolve substantive incidental questions relating to whether service out of the jurisdiction was valid: see P. Myburgh, ‘Shipping Law’ [2001] N.Z.L.R. 105, 112; P. Myburgh and E. Schoeman, ‘Jurisdiction in Transnational Cases’ [2004] N.Z.L.J. 403.

⁹⁹ *Dicey & Morris*, supra n. 27, vol. 1, p. 46.

¹⁰⁰ See generally R. Schuz, *A Modern Approach to the Incidental Question* (Kluwer Law International, London, 1997); A.E. Gotlieb, ‘The Incidental Question Revisited’ in K.R. Simmonds, *Contemporary Problems in the Conflict of Laws: Essays in Honour of John Humphrey Carlile Morris* (A.W. Sijthoff, Leyden, 1978), p. 38; Crawford, supra n. 93, p. 354.

¹⁰¹ Gotlieb, supra n. 100, p. 45, citing Von Mehren and Trautman.

¹⁰² *Id.*, pp. 64-65.

¹⁰³ *Id.*, pp. 68-69.

1. recognize that the issue falls to be determined by the foreign law selected by the conflict of laws rule of the forum ‘and do so without significant variations’;
2. recognize that the issue falls to be determined by the foreign law selected by the conflict of laws rule of the forum ‘but ignore the results or incidents’ of applying foreign law, applying, instead, a domestic rule of decision to determine the results or incidents; or
3. ignore the foreign law selected by the forum’s conflict of laws rules and apply the domestic rule of decision without regard whatsoever to foreign law.

The exclusive *lex fori* approach adopted by the Singapore courts in cases like *The Andres Bonifacio* in effect amounts to Gotlieb’s third category. However, the Singapore courts’ refusal to recognize that the in personam link issue might raise a substantive incidental question means that this approach is not even based on an informed consideration of conflicts policy. The modified *lex fori* approach adopted by the English and (on one reading) the New Zealand courts in cases like *The Nazym Khikmet* and *The Kapitan Lomaev* roughly equates to Gotlieb’s second category, in the sense that this approach at least concedes the possibility that the ownership link issue will raise incidental questions that should be referred to the *lex causae*. However, because the choice of law questions referred to the *lex causae* are confined to a very specific, limited level of factual investigation, the modified *lex fori* approach fails to give effect to the substantive ‘results or incidents’ of the ownership status of the ship as determined by the *lex causae*. Instead, the concept of ‘ownership’ under the *lex causae* is forced to fit the Procrustean bed of the *lex fori*,¹⁰⁴ an exercise that is highly likely to result in distortion, mutilation or mistranslation of foreign legal rights. Only the approaches of the Hong Kong Court in *The Halla Liberty* and the Federal

¹⁰⁴ This apposite metaphor was coined by O. Kahn-Freund, *General Problems of Private International Law* (A.W. Sijthoff, Leyden, 1976) 297; see also C. Forsyth, ‘Characterisation Revisited: An Essay in the Theory and Practice of the English Conflict of Laws’ (1998) 114 L.Q.R. 141, 151.

Court of Australia in *The Moreton Cape* can be said to come close to Gotlieb's first category of application of the *lex causae* 'without significant variations'.

By ignoring the *lex causae*, the exclusive *lex fori* approach to the *in personam* link also fails to take into account the legal and administrative consequences of registration of foreign vessel ownership. This has the potential to produce anomalous or absurd results.¹⁰⁵ The courts and authorities of the country of the ship's registry are unlikely to recognize, or co-operate in enforcing, foreign judgments *in rem*, judicial sales, or any subsequent title arising from judicial sales that run counter to their general rules of property law and specific rules of vessel ownership and registration.¹⁰⁶ Use of the exclusive *lex fori* approach may thus have a negative effect on both the efficacy of ship registration systems, and the integrity of judicial sales of vessels in admiralty. The exclusive *lex fori* approach will also inevitably generate inconsistency in international decisions, encourage forum shopping, and undermine substantive foreign rights. The net effect of the exclusive *lex fori* approach is to render the vessel's ownership status contingent on where it happens to be arrested.

Moreover, the exclusive *lex fori* approach fundamentally undermines the legitimacy of the procedural theory itself. An application of the exclusive *lex fori* approach may result in real injustice, either to plaintiffs or to parties with a proprietary interest in the relevant ship. As discussed above, by ensuring an appropriate nexus between the in

¹⁰⁵ *Tisand (Pty) Ltd. v. The Owners of the Ship M.V. 'Cape Morton' (ex 'Freya')* [2005] F.C.A.F.C. 68 (Fed. Ct. Austl.), para. 148: 'if Australian law governs the question solely, as the law of the forum, ... the question of who was "the owner" in the proprietary sense would be determined without regard to any statute dealing with registration and its legal consequences'.

¹⁰⁶ *The Lakhta* [1992] 2 Lloyd's Rep. 269, 274: '[A] judgment of this Court is not binding upon the harbour master of St Petersburg. Accordingly, the harbour master would not feel compelled to alter the register or make a change in the ship's certificate by reason of any judgment of this Court'; *Tisand (Pty) Ltd. v. The Owners of the Ship M.V. 'Cape Morton' (ex 'Freya')* [2005] F.C.A.F.C. 68 (Fed. Ct. Austl.), para. 148: 'Given the importance of the register in the workings of international maritime law and commerce and the importance of the law of the flag state in many contexts, it would be odd to decline to give effect to a statute of the flag state governing the transfer, or not, of rights created or recognized by the statute of that country.'

personam defendant and the ship against which an action in rem may be brought, one of the functions of the in personam link is to demarcate the bounds within which in rem admiralty jurisdiction may be legitimately exercised in accordance with procedural theory. Whilst it may be argued that it is for the lex fori exclusively to define this nexus between in personam defendant and ship, this loses sight of the ultimate purpose of the in personam link, which is to match the right in personam defendant with the right ship, to ensure that the defendant appears and incurs personal liability. Where the lex fori regards A as owning the relevant ship, but B is the owner at the lex causae, this matching device is bound to fail. This will inevitably lead to one of two unfortunate results. If B is the person who would be liable on the claim in personam, a court following the exclusive lex fori approach will conclude that the action in rem has been wrongly brought and release the relevant ship, despite the fact that the hapless plaintiff would undoubtedly have succeeded in the jurisdiction of registry, or indeed in any other jurisdiction following a lex causae approach. Alternatively, if A is the person who would be liable on the claim in personam, a court following the exclusive lex fori approach will uphold the action in rem, despite the fact that the vessel is recognized as being owned by B at the lex causae. If A bothers to appear at all, A is unlikely to enter more than a conditional appearance to argue that it is, in fact, not the owner. B is more likely to intervene and argue for the ship's release on the basis that B, rather than A, is the owner. The court then has the difficult choice of ignoring B and continuing with the action in rem, or finding that B is the rightful owner on the merits, and releasing the vessel. If the court does not release the vessel, it is difficult to see how its assumption of admiralty jurisdiction and seizure of the vessel can be legitimate in terms of procedural theory.¹⁰⁷ If the court

¹⁰⁷ Or indeed personification theory, if the targeted vessel is a 'sister ship' of the 'wrongdoing ship' owned by A according to the lex fori, but not recognized as such at the lex causae. In such a case, the arresting forum would presumably disregard the lex causae and apply a conflicting lex fori ownership test in respect of both limbs of the in personam link to a foreign 'sister ship', thus making it doubly unlikely that the 'sister ship' will be regarded by the jurisdiction of registry as being owned by either A or B! See also P. Myburgh, 'New Zealand Transport Law' in R. Blanpain (ed.) *International Encyclopaedia of Laws* (Kluwer Law International, The Hague, 2002), pp. 107-109.

does release the vessel, it will have to concede that its assumption of admiralty jurisdiction was unlawful, or make the Alice-in-Wonderland argument that a ship may, at once, and on the same facts, have one beneficial owner (A) for the purposes of jurisdiction, and another beneficial owner (B) on the merits! Admittedly, ownership disputes in the jurisdictional context and ownership disputes on the merits are unlikely to occur in the same proceedings,¹⁰⁸ and the two issues are dealt with under different sections of the admiralty statute.¹⁰⁹ But these are hardly satisfactory answers to the problem. Admiralty jurisdiction should be conceptually coherent and consistent,¹¹⁰ and grounded in commercial common sense.

C. *Which Lex Causae?*

¹⁰⁸ *Vostok Shipping Co. Ltd. v. Confederation Ltd., The Kapitan Lomaev* [2000] 1 N.Z.L.R. 37, 45 (N.Z. C.A.): the issue of vessel ownership ‘does not arise in the substantive proceeding, if and when jurisdiction is established’. It is not inconceivable, however, that the rightful owner at the lex causae (B, in our example) would intervene and, in addition to challenging jurisdiction, seek either a stay of proceedings on the basis of forum non conveniens, or an order declaring B the rightful owner of the ship; either of which strategies would force the court squarely to confront the issue of ownership on the merits.

¹⁰⁹ *Far East Oil Tanker S.A. v. Owners of the Ship or Vessel ‘Andres Bonifacio’, The Andres Bonifacio* [1993] 3 S.L.R. 521, 530 (Sing. C.A.): ‘in a situation where there were two rival owners ... and ownership was disputed ... the ship would be arrested under a different section’.

¹¹⁰ In this regard, the approach of Anglo-Common Law admiralty courts to ownership disputes on the merits involving foreign-flagged or foreign-owned ships is instructive. Such ownership claims are often stayed on the grounds of forum non conveniens, one of the relevant factors being that they will necessarily involve questions of foreign law with which the forum is not familiar: see *The Lakhta* [1992] 2 Lloyd’s Rep. 269, 272: ‘many questions of Russian law arise and there will be nuances with which this Court is not familiar’; *The Jupiter (No. 2)* [1925] P. 69 (E.W. C.A.); *The Courageous Colocotronis* [1979] W.A.R. 19 (W.A. S.C.). See also Jackson, *supra* n. 8, p. 48: ‘[S]ubstantive questions relevant to ship ownership will be referred to the state of registration of the ship. Formalities of any sale transaction may be referred to the law of the place of the transaction, and any dealings in an unregistered ship should, it is suggested, be referred to the law most closely connected with the transaction.’

If, as I have argued, a *lex causae* conflicts approach is preferable when determining conflicts issues arising from the *in personam* link, the question remains: which foreign law should govern? It seems clear that issues relating to the *in personam* link will generally be characterized as falling within the broad conflicts category of property.¹¹¹ Most commentators on Anglo-Common Law conflict of laws agree that the essential validity and proprietary consequences of transfers of tangible movables should, as a general rule, be governed by the law of the *situs* at the time of the relevant transaction.¹¹² The *lex situs* rule is regarded as combining the merits of simplicity, objectivity and certainty.¹¹³ The *lex situs* rule also amounts to a pragmatic recognition of the reality that any conflicts rule that does not accord with the rules and

¹¹¹ This will not invariably be the case. If the second limb of the *in personam* link is in dispute, the issue may turn, for example, on the validity of a demise charter at the time the action *in rem* was brought, or on whether the relevant charter had the legal effect of a demise charter under its proper law. *In personam* link disputes will, however, typically concern aspects of vessel ownership.

¹¹² *Dicey & Morris*, supra n. 27, vol. 2, ch. 24; P.M. North, *Private International Law Problems in Common Law Jurisdictions* (Kluwer Academic Publishers, Dordrecht, 1993), Chapter VII. E.I. Sykes and M.C. Pryles *Australian Private International Law* (3rd edn, Law Book Co., Sydney, 1991), pp. 669-672 argue for the application of the 'proper law of the assignment' to govern property issues, but this is problematic. The proper law of the assignment may be unclear, for example, where there is no express choice of law in the sale contract; or have little or no connection with the property, as the parties are free to agree on any proper law of the sale contract. The use of the proper law of the assignment to determine ownership of property may also give rise to strategic choice of law clauses to circumvent the application of law(s) more closely connected with the property. The potential pitfalls of this approach are well illustrated by the facts of *Vostok Shipping Co. Ltd. v. Confederation Ltd., The Kapitan Lomaev* [2000] 1 N.Z.L.R. 37 (N.Z. C.A.), where a Russian-registered vessel was sold by a Russian company on the high seas to the nominee of a Russian bank incorporated in Vanuatu, but the sales agreement incorporated a New Zealand choice of law clause.

¹¹³ *Dicey & Morris*, supra n. 27, vol. 2, p. 964; P.A. Lalive *The Transfer of Chattels in the Conflict of Laws* (Clarendon Press, Oxford, 1955), p. 105, 112-115; *Re Anziani* [1930] 1 Ch. 407, 420, per Maugham J.: 'I do not think that anyone can doubt that, with regard to the transfer of goods, the law applicable must be the *lex situs*. Business could not be carried on if that were not so.'

policy of the jurisdiction having actual physical control over the property in question is likely to be a *brutum fulmen*.¹¹⁴

Ships present special difficulties, however, in that they are particularly mobile, and go upon the high seas. An application of the general conflicts rule would therefore cause problems where the *situs* of the ship is casual or temporary, or there is no *lex situs* to govern the proprietary consequences because the relevant transfer takes place on the high seas.¹¹⁵ For this reason, it is universally acknowledged that a ship 'is not like an ordinary personal chattel' for conflicts purposes.¹¹⁶ However, whilst the commentators and cases propose broadly similar solutions, they do not speak with entirely the same voice.

Dicey and Morris favour an exception to the general *lex situs* rule to the effect that the *situs* of a ship may 'at times' be deemed to be the port of registry and not where the ship is physically situated.¹¹⁷ Dicey and Morris envisage, however, that this exception will only apply while the ship remains on the high seas. The law of the actual *situs* will displace the deemed *situs* whenever the ship is within territorial waters, because then 'the reasons for ascribing her a *situs* at her port of registry are not compelling'.¹¹⁸ Zaphiriou is of a similar view to Dicey and Morris regarding the ambit of the exception, but argues that, where the ship has an actual *situs*, the law of the flag should govern to determine the essential validity of the transfer of ownership, and the law of the ship's 'effective situation' should govern the contents and incidents of ownership rights over the vessel.¹¹⁹

¹¹⁴ Whilst this argument is less compelling in respect of movables (especially highly mobile movables like ships) than in respect of immovables, the 'control' of the state of registry is nonetheless a relevant policy factor: see nn. 105 and 106 *supra*.

¹¹⁵ As occurred in *Vostok Shipping Co. Ltd. v. Confederation Ltd., The Kapitan Lomaev* [2000] 1 N.Z.L.R. 37 (N.Z. C.A.).

¹¹⁶ *Hooper v. Gumm* (1867) L.R. 2 Ch. App. 282, 290 (E.W. C.A.).

¹¹⁷ *Dicey & Morris*, *supra* n. 27, vol. 2, pp. 936-937.

¹¹⁸ *Id.*, p. 937.

¹¹⁹ G.A. Zaphiriou, *The Transfer of Chattels in Private International Law: A Comparative Study* (London, The Athlone Press, 1956), pp. 209-215.

By comparison, Lalive notes that in ‘most legal systems merchant vessels are governed by the law of the flag which is, when the flag covers more than one law, as in the case of the Red Ensign or the Stars and Stripes, the law of the place of registry’,¹²⁰ but seems to treat the law of the flag as a rule applying at all times, rather than an exception. A court ‘sitting outside ... the country of the law of the flag ... must consult the *lex situs* in order to determine the validity of transfer of a ship’.¹²¹

Lalive’s view that the law of the port of registry should govern all conflict of laws issues relating to the ownership status of ships as the deemed *lex situs*, regardless of the ship’s physical location, is to be preferred. The more limited exception propounded by Dicey and Morris is productive of uncertainty, and does not reflect the realities of international commerce. Transfers of ships may take place at any time, and the ship’s physical location at the time of transfer will usually be fortuitous.¹²² Shipowners cannot realistically be expected to time transfers of ownership to coincide with an appropriate moment in the ship’s schedule; nor would shipowners reasonably expect the proprietary consequences of their transfer to depend on which country’s territorial waters the ship happened to be passing through.

Further, the Dicey and Morris view does not take into account the significance of ship registration. As discussed above,¹²³ although the jurisdiction of registry may not always be able to exercise physical control over its vessels, it will invariably have the power to approve or veto changes to vessel registration, and is unlikely to recognize

¹²⁰ Lalive, *supra* n. 113, pp. 190-191.

¹²¹ *Id.*, p. 191.

¹²² *Tisand (Pty) Ltd. v. The Owners of the Ship M.V. ‘Cape Morton’ (ex ‘Freya’)* [2005] F.C.A.F.C. 68 (Fed. Ct. Austl.), para. 146: ‘The chance location of a working merchant ship in a port within its range of sailing or on the high seas appears to introduce an element of arbitrariness to the legal analysis.’

¹²³ See nn. 105 and 106 *supra*.

or register any purported transfers of ownership that do not meet its criteria.¹²⁴ Also, the courts and authorities in the state of registry may be unwilling to recognize the validity of a foreign judicial sale following an action in rem brought contrary to the state of registry's notions of ownership, or the clean title of a purchaser in such a judicial sale. These would indeed seem to be compelling reasons for always determining the ownership status of the ship with reference to the law of the port of registry, regardless of the ship's physical location at the time of transfer.¹²⁵

Applying the law of the port of registry is not, however, without its difficulties. As Tetley points out, the rise of flags of convenience, double flagging, and the use of foreign shell corporations as intermediaries, have made the law of the port of registry a less attractive connecting factor.¹²⁶ However, even if an application of the law of the port of registry will sometimes be artificial, more complex or removed from the day-to-day operation of the ship, it is still preferable in terms of conflicts theory and policy to a mechanical and arbitrary application of the *lex fori*. Instead of the law of the flag, Tetley argues for a 'most significant connection' test where the 'flag can only be one indicator of many, other factors including the place of ship's registry, the other flag in case of double flagging, the addresses and principal places of business of the shipowner, of the ship operator, of the ship management'.¹²⁷ The difficulty, though, as Tetley himself concedes, is to ensure that any closest and most real connection test is 'applied in a uniform methodology'¹²⁸ and in a sufficiently transparent and certain fashion to assist international commerce. A presumption that the law of the port of registry governs all conflicts issues relating to vessel ownership status under the in

¹²⁴ North, *supra* n. 112, p. 192: 'Furthermore, it may be necessary, even with movables, to involve the power of the authorities in the *situs* to ensure that the transfer of title is made or that the formalities necessary to complete it are finalised.'

¹²⁵ So too Jackson, *supra* n. 8, p. 48; *Tisand (Pty) Ltd. v. The Owners of the Ship M.V. 'Cape Morton' (ex 'Freya')* [2005] F.C.A.F.C. 68 (Fed. Ct. Austl.), paras. 146-147.

¹²⁶ Tetley, *supra* n. 95, pp. 44-45; Tetley, *supra* n. 94, pp. 212-219, 582-583.

¹²⁷ Tetley, *supra* n. 95, p. 46.

¹²⁸ *Ibid.*

personam link, unless there are compelling factors to the contrary, would seem to be a more appropriate and workable solution.

V. UNITED STATES LAW: PERSONIFICATION AS PANACEA?

Given the problems generated by the in personam link, it is tempting to regard United States admiralty law, with its adherence to the personification doctrine, as having the better of both maritime worlds. Certainly, United States admiralty in rem procedure under Supplemental Rule C of the Federal Rules of Civil Procedure¹²⁹ seems a model of comparative simplicity and clarity. The personification doctrine slices through the Gordian knot of problems generated by the need to match the right in personam defendant and the right ship by declaring the entire issue to be irrelevant.

Rule C permits the arrest of any ship or other maritime property situated within the territorial jurisdiction of the relevant federal court when the suit is filed or during the pendency of the action, to enforce any maritime lien (as understood in the United States), or any statutory maritime action in rem. There is no requirement of a nexus between the person who would incur in personam liability on the claim and the arrested ship. Indeed, an action in rem may be brought against the ‘wrongdoing ship’, regardless of the fact that the shipowner is *not* liable in personam.¹³⁰ In terms of the personification doctrine, it follows that the shipowner cannot enter an appearance in the Anglo-Common Law sense, because it is not, and cannot be, a party to the in rem proceedings.¹³¹ The ship (and only the ‘wrongdoing ship’, not a sister ship) is in

¹²⁹ On Rule C, see generally Davies, *supra* n. 1; Davies, ‘International Perspectives’, *supra* n. 31, p. 5; R. Force, *Admiralty and Maritime Law* (Federal Judicial Center, Washington D.C., 2004), pp. 29-31, 33; W. Tetley, ‘Arrest, Attachment, and Related Maritime Law Procedures’ (1999) 73 *TUL. L. REV.* 1895, 1928-1934.

¹³⁰ For example, where the claim in personam against the shipowner is barred, but an action in rem is permitted against the ship; or where the ship is held to have ratified a bill of lading issued by a party other than the shipowner: see Davies, *supra* n. 1, pp. 338 n. 2, 339 n. 4, 374 *et seq.*

¹³¹ Davies, ‘International Perspectives’, *supra* n. 31, p. 5 n. 25. Under Rule C(6)(b)(i) the shipowner may submit to personal jurisdiction by filing a verified statement asserting ‘a right of possession

reality the defendant. As a result of the personification doctrine, the conflict of laws problems encountered by courts in Anglo-Common Law jurisdictions in relation to the in personam link simply do not present themselves for consideration when foreign-flagged or foreign-owned ships are arrested in the United States under Rule C.

This is, however, only half of the picture. Supplemental Rule B of the Federal Rules of Civil Procedure permits a plaintiff with an admiralty or maritime claim in personam to apply to the court ‘to attach the defendant’s tangible or intangible personal property – up to the amount sued for – in the hands of garnishees named in the process’, provided the in personam defendant is ‘not found within the district’.¹³² Rule B maritime attachment, which has been described as resembling ‘the *saisie conservatoire*, or conservatory attachment of the civil law’,¹³³ shares some of the general characteristics of the Anglo-Common Law action in rem in the sense that, unlike Rule C arrest, it is predicated upon in personam liability, does not involve personification of the vessel as the defendant, and is designed to ensure ‘the defendant’s appearance and satisfaction in the event the suit succeeds’.¹³⁴ It also allows for the attachment of sister ships, but goes considerably further than sister ship arrest in Anglo-Common Law jurisdictions by permitting attachment of any of the defendant’s maritime or non-maritime personal property.¹³⁵

or any ownership interest’ to the ship, but this practice is not, per se, inconsistent with the personification doctrine, as the owner does so ‘to be the mouthpiece through which the ship speaks’: Davies, supra n. 1, pp. 368-371. Cf. *Bank of Nakhodka v. The Ship ‘Abruka’* (1996) 10 P.R.N.Z. 219, where the New Zealand High Court, striking out a memorandum of appearance filed on behalf of the ship rather than the shipowner, held that the res itself cannot enter an appearance in an action in rem because New Zealand maritime law follows procedural theory rather than the personification doctrine.

¹³² On Rule B, see Davies, supra n. 1; Davies ‘International Perspectives’, supra n. 31, pp. 5-11; Force, supra n. 129, pp. 31-33; Tetley, supra n. 129, pp. 1934-1937.

¹³³ Tetley, supra n. 129, p. 1934.

¹³⁴ Ibid.

¹³⁵ Davies ‘International Perspectives’, supra n. 31, p. 6. Rule B maritime attachment does not, however, permit attachment of ships on demise or bareboat charter to the in personam defendant: see *Schiffahrtsgesellschaft Leonhardt & Co. v. A Bottacchi S.A. De Navegacion*,

Most importantly, for the purposes of this paper, Rule B only permits maritime attachment of the *in personam* defendant's property. It is thus a necessary prerequisite of Rule B maritime attachment that the in personam defendant must own the vessel or other property attached.¹³⁶ A plaintiff seeking maritime attachment must aver both that the defendant cannot be found within the district and that the property to be attached belongs to the defendant.¹³⁷ Where the defendant denies ownership in the property sought to be attached, the plaintiff has the burden of proof to show that the property is indeed owned by the in personam defendant, in order to sustain jurisdiction.¹³⁸

There seems to be little sustained theoretical analysis¹³⁹ in the United States case law on Rule B maritime attachments as to whether disputes over foreign-owned attached property should be governed by the *lex fori* or the *lex causae*. Such discussion as there

773 F.2d 1528, 1986 AMC 1 (11th Cir. 1985); cf., e.g., Section 21(4)(b)(i) of the Supreme Court Act 1981 (U.K.).

¹³⁶ *Interpool Ltd. v. Char Yigh Marine (Panama) S.A.*, 890 F.2d 1453, 1990 AMC 1, 11 UCC Rep. Serv.2d 426 (9th Cir. 1989); *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 693, 94 L. Ed. 1206, 70 S. Ct. 861 (1949).

¹³⁷ *International Marine Consultant, Inc. v. Karavias*, 1985 WL 1515 *4, No. 82 Civ. 8296 (CMM) (S.D.N.Y. June 3 1985); *Seawind Compania, S.A. v. Crescent Lines, Inc.*, 320 F.2d 580, 582 (2d Cir. 1963).

¹³⁸ *Limonium Maritime, S.A. v. Mizushima Marinera, S.A.*, 961 F. Supp. 600, 1997 AMC 2938 (S.D.N.Y. 1997); *International Marine Consultant, Inc. v. Karavias*, 1985 WL 1515 *4, No. 82 Civ. 8296 (CMM) (S.D.N.Y. June 3, 1985); *Maryland Tuna Corp. v. MS Benares*, 429 F.2d 307, 322 (2d Cir. 1970); *American Anthracite & Bituminous Coal Corp. v. Amerocean S.S. Co.*, 131 F. Supp. 244, 248 (E.D. Pa. 1955); *Isbrandtsen Co. v. Lenaghan*, 128 F. Supp. 662, 664 (S.D.N.Y. 1954).

¹³⁹ As one would expect, given the nature of Rule B proceedings, many of the judgments canvassing ownership disputes over attached foreign-owned or foreign-registered ships involve fairly summary findings of fact or evidentiary findings on the documentary evidence: see, e.g., *20th Century Fox Film Corp. v. M.V. Ship Agencies, Inc.*, 992 F. Supp. 1423, 1998 AMC 2514 (M.D. Fl. 1997); *Navieros Inter-Americanos, S.A., Inc. v. M/V 'Vasilias Express'*, 930 F. Supp. 699, 1997 AMC 678 (P.R. 1996).

is, however, suggests that the United States courts favour a *lex causae* approach to such questions.

*Interpool Ltd. v. Char Yigh Marine (Panama) S.A.*¹⁴⁰ involved ‘a Bahamian plaintiff who seeks to attach a Panamanian ship arrested in California but leased by a Panamanian company (under a charter purporting to be governed by Hong Kong Law) from another Panamanian company owned by a Hong Kong subsidiary of a Japanese Bank’.¹⁴¹ As the United States Court of Appeals for the Ninth Circuit wryly noted, it was therefore confronted with choice of law issues at the outset.¹⁴² The defendant argued that the ownership status of the vessel should be determined by reference to Hong Kong law (the proper law of the charterparty), but neither party offered any evidence of foreign law or how it should apply. The Court therefore had little choice but to hold that ‘the parties have acquiesced in the application of the law of the forum’.¹⁴³

The issue of ownership of fuel oil bunkers attached under Rule B arose in *Great Prize, S.A. v. Mariner Shipping Pty. Ltd.*¹⁴⁴ The United States Court of Appeals for the Fifth Circuit affirmed an order of the District Court for the Eastern District of

¹⁴⁰ 890 F.2d 1453, 1990 AMC 1, 11 UCC Rep. Serv. 2d 426 (9th Cir. 1989).

¹⁴¹ *Id.*, p. 1458.

¹⁴² *Ibid.*

¹⁴³ *Ibid.* The District Court had applied California law, but as the *lex causae* rather than as the *lex fori*. The District Court judge used ‘a situs test to determine the proper law to apply to secured transaction questions. The C.C. San Francisco was in California at the time of attachment, and the security substituted for the ship is in California. Thus, California law dictates that we apply California law.’ (*Ibid.*, at n. 10 (citations omitted).) This rather peculiar reasoning (which will invariably result in the nonsensical application of the local law of the attaching forum as the ‘*lex situs*’ in each and every case) underlines the point that ships are different. It is therefore important to refer issues of foreign vessel ownership to the law of the vessel’s port of registry as the deemed *lex situs* to ensure uniformity of outcome, regardless of the place of arrest or attachment. See also discussion in text accompanying n. 122 et seq.

¹⁴⁴ 967 F.2d 157, 1993 AMC 72 (5th Cir. 1992).

Louisiana¹⁴⁵ dismissing the plaintiff's claim on the ground of forum non conveniens and vacating the writ of maritime attachment. Intercontinental Shipping Pty Ltd ('ICS') alleged that the bunkers had been transferred from the in personam defendant Mariner to ICS as part of a sub-time charterparty fixed before Mariner and ICS before the bunkers were seized. The plaintiff argued that this transaction between two related Australian companies was suspect, and was in fact a fiction concocted after the bunkers were seized. Although the question of ownership of the bunkers was addressed only in the context of the forum non conveniens, both the District Court¹⁴⁶ and the Court of Appeals noted that a significant factor in deciding to dismiss the proceedings was that 'the ownership issue require[d] interpretation of time charters ostensibly governed by English law, obliging the district court to "untangle problems ... in law foreign to itself" '.¹⁴⁷ It is clear from these dicta that the Courts thought that the substantive issue of whether Mariner had owned the bunkers at the time of attachment should be governed by foreign law.

The clearest indications favouring a *lex causae* approach are to be found in *Neptune Orient Lines, Ltd. v Halla Merchant Marine Co., Ltd.*¹⁴⁸ In this case, there was some considerable uncertainty as to whether the attached Korean-flagged vessel was owned by the defendant Halla, or by the intervenor, Hanmi Leasing Co. Ltd. Hanmi held a *kun* mortgage over the vessel, was described as the 'owner' of the vessel in a ship leasing agreement between Halla and Hanmi, and held provisional registration of the vessel in its name. The District Court for the Eastern District of Louisiana considered expert evidence on Korean law regarding the legal significance of these commercial arrangements at Korean law, before finding that Halla was in fact the owner of the

¹⁴⁵ *Great Prize, S.A. v. Mariner Shipping Pty. Ltd.*, 764 F. Supp. 69, 1991 AMC 2156 (E.D. La. 1991).

¹⁴⁶ *Id.*, p. 72: '[T]he relationship between ICS and Mariner under the sub-time charter ... involve[s] English law and [is] likely subject to arbitration in London. As such, the Court finds that there is little or no public interest in this dispute, especially inasmuch as foreign law will likely predominate if jurisdiction is retained.' (Emphasis added.)

¹⁴⁷ *Great Prize, S.A. v. Mariner Shipping Pty. Ltd.*, 967 F.2d 157, 160 (5th Cir. 1992) (citations omitted).

¹⁴⁸ 1998 WL 128993 *3-*5, No. Civ. A. 97-3828 (E.D. La., March 20, 1998).

ship under Korean law, and recognizing a preferred foreign ship mortgage in favour of Hanmi.¹⁴⁹ The same Court later confirmed its finding that Hanmi could obtain summary judgment on its kun mortgage against Halla, despite the fact that it, rather than Halla, was identified as the owner in the lease agreement.¹⁵⁰ Duval J. held that the ownership of the vessel was “a question of Korean law”, and embarked on a detailed analysis of concepts of vessel ownership and the legal effects of ship registration at Korean law in order to determine the issue.¹⁵¹

VI. CONCLUSION

If in rem admiralty jurisdiction is to be exercised lawfully, coherently and effectively in Anglo-Common Law jurisdictions, it is crucial that admiralty courts match up the right in personam defendant and the right ship. The linking of personal liability to in rem action lies at the very heart of the procedural theory, and provides the justification for ship arrest in Anglo-Common Law jurisdictions. The in personam link thus serves the crucial functions of determining the scope of the Anglo-Common Law courts’ legitimate exercise of admiralty jurisdiction in rem, and of providing the practical litmus test of whether ship arrest is lawful under the procedural theory. These functions cannot be fulfilled if admiralty courts do not apply the in personam link properly.

Where Anglo-Common Law admiralty courts determine the ownership status of foreign-owned or foreign-registered vessels by referring to the lex fori solely, or by considering foreign law in a limited or selective manner, they have arguably lost sight of the practical and theoretical functions of the in personam link. Where there is no

¹⁴⁹ The fact pattern in *Neptune Orient Lines* was very similar to that in *The Halla Liberty*. Interestingly, the United States and Hong Kong Courts, applying a lex causae approach, interpreted Korean law in the same way, and reached broadly similar conclusions.

¹⁵⁰ *Neptune Orient Lines, Ltd. v Halla Merchant Marine Co., Ltd.*, 1998 WL 419507, No. Civ. A. 97-3828 (E.D. La., July 20, 1998).

¹⁵¹ *Id.*, at *4-*6.

link between the in personam defendant and the arrested ship, judged by the most relevant yardstick of the law of the foreign vessel's port of registry, the action in rem will surely fail to achieve its practical purpose of compelling the appearance of the in personam defendant. Furthermore, the integrity of the arresting forum's exercise of admiralty jurisdiction will inevitably be called into question, as it cannot be justified according to the tenets of its own procedural theory.

Critics of the personification doctrine often speak in metaphors of hewing away at the dead wood,¹⁵² or tearing down the scaffolding,¹⁵³ of the personification fiction. Procedural theory, we are told, strips away such unnecessary and unhelpful fictions, and exposes the 'reality' of the action in rem.¹⁵⁴ It is thus highly ironical that Anglo-Common Law courts, when applying procedural theory to foreign vessels, might base their entire assumption of in rem admiralty jurisdiction upon a fictional 'ownership' at the lex fori, an artificial 'ownership' constructed solely for the purposes of jurisdiction, whilst totally ignoring the reality that the courts and authorities at the port of registry of the foreign ship recognize someone else as the owner of the vessel.

Conflict of laws exists 'to fulfil foreign rights, not to destroy them'.¹⁵⁵ This is particularly true of maritime conflict of laws, which should promote uniformity and certainty in international maritime law. However, the exclusive lex fori and the modified lex fori approaches to the in personam link, rather like the majority approach

¹⁵² D.M. Collins, 'Comments on the American Rule of In Rem Liability' (1985) 10 *Maritime Lawyer* 71, 90; cf. Davies, supra n. 1, p. 408.

¹⁵³ *Republic of India v. India Steamship Co. Ltd., The Indian Grace (No. 2)* [1998] A.C. 878, 913 (H.L.); cf. Davies, supra n. 1, pp. 408-409.

¹⁵⁴ See, for example, *Republic of India v. India Steamship Co. Ltd., The Indian Grace (No. 2)* [1998] A.C. 878, 908 (H.L.) per Lord Steyn: 'In *The Cristina* [1938] A.C. 485 the House of Lords unambiguously rejected the personification theory, and adopted the realist view that in an action in rem the owners were the defendants.'

¹⁵⁵ P.M. North and J.J. Fawcett, *Cheshire & North's Private International Law* (13th edn, Butterworths, London, 1999), p. 69. Cf. P. Myburgh, 'The New Zealand Ship Registration Act 1992' (1993) L.M.C.L.Q. 444, 450: 'choice of law rules should not skew the nature of foreign rights'.

in *The Halcyon Isle*, give rise to the problematic prospect of a vessel's ownership status being in a constant state of flux as she sails from port to port. They also have the effect of undermining and interfering with the international ship registration framework, and increase the risk of non-recognition and non-enforcement of judgments in rem, judicial sales, and any title conferred pursuant to judicial sales.

When deciding whether the in personam link has been satisfied, admiralty courts in Anglo-Common Law jurisdictions should therefore determine the ownership of foreign ships by reference to the appropriate foreign law, along the lines of the *lex causae* approach adopted in *The Halla Liberty* and *The Cape Moreton*, and apparently also by United States courts in relation to Rule B maritime attachment ownership issues.

Anglo-Common Law admiralty courts could also usefully take another leaf out of the United States conflicts book, by rejecting the traditional English conflicts approach (exemplified most extremely by the majority decision in *The Halcyon Isle*) of characterizing issues relating to admiralty jurisdiction as procedural. Admittedly, statutory rights of action in rem, unlike maritime liens, are created by court process. But it does not follow that statutory rights of action in rem should therefore be characterized as purely procedural or remedial for conflicts purposes. For, like maritime liens, they give rise to substantive legal rights. Thus, wherever an admiralty action in rem involves a foreign element, it is important that the appropriate *lex causae* be applied to any substantive conflicts issues, such as ownership of a foreign vessel, with as little distortion as possible.

This is not to suggest that foreign law can, or should, supersede the requirements of the forum's admiralty jurisdiction statute. Jackson likens the heads of jurisdiction of the forum's admiralty statute to a 'gate'¹⁵⁶ through which any foreign elements must pass. The same would seem to be true of any other jurisdictional prerequisites, such as establishing ownership of the vessel under the in personam link. It is important,

¹⁵⁶ Jackson, *supra* n. 8, p. 643.

however, that admiralty courts do see their statutes as gates, and not as walls to keep out foreign law. Where there is genuinely no functionally equivalent concept at the *lex causae*, foreign law clearly cannot be admitted through the gate of the forum's admiralty statute, and the jurisdictional requirements of the *lex fori* must, and will, prevail. However, where there is a functionally equivalent concept at the *lex causae*, admiralty courts should take a broad view of the gate of their statutory admiralty jurisdiction, and should adopt an 'enlightened' characterization¹⁵⁷ of the maritime conflicts issues before them. If they do so, the right foreign ship will be brought before them via the *lex causae*, and the right in personam defendant will follow behind.

¹⁵⁷ See Kahn-Freund, *supra* n. 104, pp. 227 et seq.; Forsyth, *supra* n. 104, pp. 153-154; *Cheshire & North*, *supra* n. 155, p. 38: "[A] judge must not rigidly confine himself to the concepts or categories of English internal law for, if he were to adopt this parochial attitude, he might be compelled to disregard some foreign concept merely because it was unknown to his law. The concepts of private international law ... must be given a wide meaning in order to embrace "analogous legal relations of foreign type".'