

## CONFLICT OF LAWS AND VESSEL OWNERSHIP

*Tisand (Pty) Ltd v. The Owners of the Ship MV Cape Moreton (ex Freya)*

### Introduction

In *The Cape Moreton*<sup>1</sup> the Full Court of the Federal Court of Australia recently considered two important and interesting issues: the meaning of the concept “owner” in the context of the Admiralty Act 1988 (Cth); and which law should govern the question of the ownership status of foreign vessels. The court’s treatment of the first issue has already been discussed elsewhere in this issue of the *Quarterly*.<sup>2</sup> This note focuses solely on the second issue.

The plaintiffs brought an action *in rem* against the *Cape Moreton*, a Liberian-registered vessel, claiming damage to a cargo of zircon sand carried from South Africa to China. Alico Marine Limited, a Marshall Islands company, entered an appearance as the owner of the vessel and applied to have the writ *in rem* set aside for want of jurisdiction. It was common cause that Freya Navigation Ship Holding Limited, a Liberian company, was the “relevant person” in relation to the carriage claim. Freya had been the owner of the vessel when the plaintiffs’ cause of action arose, and remained the registered owner at all relevant times. However, Alico submitted that, as the vessel had been sold by Freya to Alico before the *in rem* proceedings commenced, and Alico was in the process of transferring the vessel from the Liberian to the Hong Kong register, Freya was no longer the owner of the vessel when proceedings commenced. Alico argued that the *in personam* link requirement in s 17 of the Admiralty Act 1998 (Cth)<sup>3</sup> had therefore not been met.

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<sup>1</sup> *Tisand (Pty) Ltd v. The Owners of the Ship MV Cape Moreton (ex Freya)* [2005] FCAFC 68, 29 April 2005.

<sup>2</sup> Cross-reference to Stuart Hetherington’s case note.

<sup>3</sup> Broadly equivalent to the Supreme Court Act 1981 (UK), s 21(4).

Allsop J had already foreshadowed in his preliminary judgment on security in September 2004 that deciding the ownership status of a foreign-registered ship like the *Cape Moreton* in the context of admiralty jurisdiction might raise “questions of private international law”.<sup>4</sup> In the decision of the Full Court, Ryan and Allsop JJ returned to these questions and considered them in some depth.<sup>5</sup>

## Characterisation

The court first sought to characterise which rule of law should govern the issue of the ownership status of the *Cape Moreton* at the time the proceedings commenced. Leaving aside special statutory requirements and the role of bills of sale, the court concluded that the sale of ships should be characterised as a sale of chattels; or, in conflicts terminology, a sale of movables. Although noting that the sales agreement was governed by English law,<sup>6</sup> the court appropriately drew a clear distinction between the contractual and property aspects of the sale agreement. In this case the contractual validity and consequences of the sale agreement were not at issue.

The essential question for the court was whether the more appropriate characterisation is that of a transfer of property rights in movables, or of jurisdiction. If the former conflicts category is adopted, it is generally accepted that the *lex situs* at the time of the sale governs the transfer of property rights in the vessel.<sup>7</sup> However, if the

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<sup>4</sup> *Tisand Pty Ltd v. Owners of the Ship MV Cape Moreton (Ex Freya)* (2004) 210 ALR 601, 606. For a more detailed discussion of conflicts issues and ownership in the context of admiralty jurisdiction, see P. Myburgh, “Arresting the Right Ship: Procedural Theory, The *In Personam* Link and Conflict of Laws”, ch 8 of M. Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law* (Kluwer Law International, forthcoming), 283-320.

<sup>5</sup> At [129] *et seq.*

<sup>6</sup> Norwegian Saleform 1993, cl 16; see [24], [130].

<sup>7</sup> See eg L. Collins (ed), *Dicey & Morris on the Conflict of Laws*, 13th ed, (London, 2000), vol 2, ch 24; P. North and J.J. Fawcett (eds), *Cheshire & North’s Private International Law*, 13th ed, (London, 1999), ch 30;

latter conflicts category is adopted, matters of jurisdiction are often categorised as procedural rather than substantive, and thus governed by the *lex fori*.<sup>8</sup> The manner in which this characterisation problem is solved may therefore have a significant impact on the outcome of such cases, especially where concepts of ownership and property rights are very different at the *lex fori* and the *lex situs*.<sup>9</sup>

Noting, with a degree of understatement, that there appeared to be “some divergence” in the case-law,<sup>10</sup> the court embarked on a comparative survey of the relevant authorities in Singapore, England and New Zealand to decide on the correct conflicts approach.

### **A *lex fori* approach**

The Singapore courts have adopted an uncompromising *lex fori* approach to this issue. In *The Andres Bonifacio*<sup>11</sup> the Singapore Court of Appeal refused to allow foreign law to play any role in determining the ownership status of a Phillipine-registered vessel, holding instead that “the determination by the court of its own jurisdiction *in rem* depended on Singapore law as the *lex fori*”.<sup>12</sup> The Singapore Court of Appeal’s conflicts analysis appears to be based on the majority approach in *The Halcyon Isle*, and in particular on the following dicta:<sup>13</sup>

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but cf E.I. Sykes and M.C. Pryles, *Australian Private International Law*, 3rd ed (Sydney, 1991), 669-672, who argue for the application of the “proper law of the assignment”.

<sup>8</sup> See, eg, *Bankers Trust International Ltd v. Todd Shipyard Corp (The Halcyon Isle)* [1981] AC 221; [1980] 2 Lloyd’s Rep 325 (PC).

<sup>9</sup> For examples of such differences, see Myburgh, *supra*, fn 4, at 290-292.

<sup>10</sup> At [132].

<sup>11</sup> *Far East Oil Tanker SA v. Owners of the Ship or Vessel Andres Bonifacio* [1993] SLR 521 (Sing CA).

<sup>12</sup> *Id.*, at 529-530.

<sup>13</sup> [1981] AC 221, 235; [1980] 2 Lloyd’s Rep 325, 330.

[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 exclusive *lex fori* approach adopted in *The Andres Bonifacio* was later confirmed in *The Jarguh Sawit*.<sup>14</sup> The Singapore Court of Appeal again held that the ownership status of foreign vessels in the context of admiralty jurisdiction should be characterised as procedural, and should therefore be governed by the *lex fori*.<sup>15</sup>

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.

Although the exclusive *lex fori* approach of the Singapore courts has its supporters,<sup>16</sup> in my view it is deeply problematic. It involves a simplistic and artificial application of the substance/procedure dichotomy in conflict of laws theory. It relies heavily on obiter dicta in *The Halcyon Isle*, which were far too broadly stated to begin with, and uses them well outside of their original context.<sup>17</sup> Even if it is accepted that, by and large, conflicts issues relating to admiralty jurisdiction should be characterised as procedural and should be governed by the *lex fori*, the blanket procedural characterisation adopted by

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<sup>14</sup> [1998] 1 SLR 648 (Sing CA).

<sup>15</sup> *Id.*, at 656. See also *The Kapitan Temkin* [1998] 3 SLR 254.

<sup>16</sup> See, for example, K.S. Toh, *Admiralty Law and Practice* (Singapore, 1998), 107-108, 111.

<sup>17</sup> See *Dicey & Morris*, *supra*, fn 7, vol 1, 16, fn 40: Lord Diplock's view "cannot be supported".

the Singapore courts fails to consider whether the issue of the foreign-registered vessel's ownership status raises a substantive incidental question that should properly be referred to its own *lex causae*.<sup>18</sup> The exclusive *lex fori* approach generates inconsistent and arbitrary results, encourages forum shopping, and interferes with legitimate foreign property rights. It also arguably undermines the very purpose of the *in personam* link, which is to ensure an ownership or control relationship between the arrested vessel and the "relevant person" who would be liable on the maritime claim.<sup>19</sup>

Given these problems, Ryan and Allsop JJ's unequivocal rejection in *The Cape Moreton* of the exclusive *lex fori* approach is to be welcomed. Having examined "the proposition that the law of the forum (as domestic law only and not including its rules of private international law) applies", they concluded that there was no justification for thus limiting the role of the *lex fori*. They recognised that an exclusive application of the *lex fori* would necessarily distort the conflicts analysis "by leaving out of account in the assessment of the proprietary question any foreign law relevant to the assignment of the ship".<sup>20</sup> They also clearly appreciated the absurd consequences that would inevitably follow if they were to adopt an exclusive *lex fori* approach:<sup>21</sup>

[I]f 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

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<sup>18</sup> Such incidental questions are not unique to admiralty jurisdiction. Challenges to the courts' exercise of general civil 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 eg P. Myburgh and E. Schoeman, "Jurisdiction in Transnational Cases" [2004] NZLJ 403.

<sup>19</sup> See further Myburgh, *supra*, fn 4, at 306-311.

<sup>20</sup> At [140].

<sup>21</sup> At [148]. For an example of similar absurd consequences resulting from an inflexible application of the *lex fori* to a foreign registered ship mortgage, see *The Betty Ott v. General Bills Ltd* [1992] 1 NZLR 655 (NZ CA), noted [1992] LMCLQ 155.

with registration and its legal consequences. The [Ship Registration] Act would be irrelevant because it only deals with Australian-owned ships.

### **A modified *lex fori* approach**

In *The Nazym Khikmet*<sup>22</sup> the English Court of Appeal formulated a somewhat different conflicts approach to determine the ownership status of a Ukrainian-registered vessel after the dissolution of the Soviet Union:<sup>23</sup>

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.

The approach in *The Nazym Khikmet* thus recognised the relevance of differences between concepts of ownership at the *lex fori* and the *lex situs* of the vessel (USSR/Ukrainian law), and accorded some weight to foreign law. However, English law, as the *lex fori*, ultimately determined the issue of the vessel's ownership status. The relevance of foreign law was limited to testing whether the foreign legal and factual context met the yardstick of the *lex fori*. Because of this, the approach in *The Nazym Khikmet* is probably best described as a modified *lex fori* approach.

The conflicts approach in *The Nazym Khikmet* could undoubtedly have been better formulated. The relevant connecting factor was not clearly identified. As the court in *The Cape Moreton* pointed out,<sup>24</sup> references to the law to which BLASCO "was

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<sup>22</sup> [1996] 2 Lloyd's Rep 362 (EW CA).

<sup>23</sup> *Id.*, at 374. See also *Hamilton & Co Ltd v. Owners of The Ship MV Inessa Armand* (3 July 1997) Unreported, (QB (Adm), Carswell LCJ); *The Guiseppe di Vittorio* [1998] 1 Lloyd's Rep 136 (EW CA).

<sup>24</sup> At [137], [139], [147].

subject”, or to the law “governing” BLASCO could be taken to refer an application of the law of the domicile of the operator or registered owner of the ship, which would have amounted to a less than orthodox conflicts approach. The better interpretation, it is suggested, is that USSR/Ukrainian law was examined in *The Nazym Khikmet* as the law of the ship’s port of registry, and thus as the *lex situs* of the ship.

In *The Kapitan Lomaev*<sup>25</sup> the New Zealand Court of Appeal similarly had to determine the ownership status of a Russian-registered vessel. Stating that they were following the approach adopted in *The Andres Bonifacio*, Richardson P and Blanchard J held that:<sup>26</sup>

[A]s 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.

As in *The Nazym Khikmet*, there are difficulties with the conflicts terminology. Again, it is unclear whether the reference to “the law to which a company operating the ship was subject” (in this case, Russian law) should be taken as a reference to the law of the port of registration (the *lex situs* of the vessel), or to some other connecting factor. To add to this puzzle, Richardson P and Blanchard J also considered, apparently in the alternative, the effect of Russian law as the *lex situs* of the vessel, and decided that the result was the same.<sup>27</sup> Moreover, the court did not seem to appreciate that the conflicts

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<sup>25</sup> *Vostok Shipping Co Ltd v. Confederation Ltd* [2000] 1 NZLR 37 (NZ CA).

<sup>26</sup> *Id.*, at 45-46. Gault J posited a similar test in a concurring judgment at 48.

<sup>27</sup> *Id.*, at 47.

approaches in *The Andres Bonifacio* and *The Nazym Khikmet* are in fact different. Nevertheless, the practical effect of the approach adopted by the New Zealand Court of Appeal in *The Kapitan Lomaev* seems broadly similar to that of the modified *lex fori* approach in *The Nazym Khikmet*.

### **A *lex situs* approach**

Having conducted this comparative survey, Ryan and Allsop JJ decided that they favoured a conflicts approach which, they said, was similar to that adopted by the English Court of Appeal in *The Nazym Khikmet*.<sup>28</sup> On closer examination, however, they appear to have gone further than *The Nazym Khikmet* in advocating the application of the *lex situs* to determine the ownership status of foreign vessels in the context of admiralty jurisdiction.

Thus, although Australian law as the *lex fori* provided the starting-point for the conflicts analysis, because the process involved “applying an Australian statute dealing with authority to commence a suit in an Australian court to the facts as found”, these facts were significantly said to include “rights created or recognised by the foreign law mandated by the applicable Australian rule of private international law”.<sup>29</sup> In particular, Ryan and Allsop JJ emphasised that the “existence, nature and extent” of any proprietary rights created or recognised by the sale of a foreign-registered vessel “will be governed or affected by any law that Australian rules of private international law regard as relevant”.<sup>30</sup>

Having preferred a conflicts characterisation of transfer of property rights, Ryan and Allsop JJ concluded that the applicable law was the *lex situs* at the time of the sale

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<sup>28</sup> At [140].

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* See also *The Halla Liberty* [2000] 1 HKC 659, where the Court of First Instance adopted a similar approach, applying Korean law as the *lex situs* to determine the ownership status of the vessel.

of the vessel. However, as they noted, the question of the *situs* of merchant ships is not settled.<sup>31</sup> *Dicey & Morris* favours an exception to the general *lex situs* rule in terms of which the ship's *situs* may "at times" be deemed to be the port of registry and not where the ship is physically situated, but envisages that this exception will only apply while the ship remains on the high seas.<sup>32</sup> When the ship is within territorial waters, the actual *lex situs* will apply because "the reasons for ascribing her a *situs* at her port of registry are not compelling".<sup>33</sup> But other cases and commentators argue that the law of the port of registry should apply as the deemed *lex situs* at all times.<sup>34</sup> It was this view that found favour with the court. Ryan and Allsop JJ thought that (subject to any overriding mandatory rules at the *lex fori* and considerations of public policy) there were cogent reasons to give effect to the law of the port of registry as the *lex situs* in relation to questions of title, property and assignment of ships:<sup>35</sup>

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. This is especially so if, as is likely, the national register and registration laws of the port in question are directed to ships of that country. If a law of a country other than the country of registration is chosen to deal with the assignment of property in a ship, it is likely that there will be no statute dealing with registration that is made relevant. ... Particularly for reasons of clarity and certainty in commercial dealings and conformity with notions of ship nationality, there is much to be said for regarding the *situs* of a merchant ship as its country of registry.

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<sup>31</sup> See [141]-[148].

<sup>32</sup> *Dicey & Morris, supra*, fn 7, at 936-937.

<sup>33</sup> *Id.*, at 937. See also G.A. Zaphiriou, *The Transfer of Chattels in Private International Law: A Comparative Study* (London, 1956), 209-215.

<sup>34</sup> See, eg, *Hooper v. Gumm* (1867) LR 2 Ch App 282; P.A. Lalive, *The Transfer of Chattels in the Conflict of Laws* (Oxford, 1955), 190-191.

<sup>35</sup> At [146], [148].

This approach seems more sensible than the limited *lex situs* exception advocated by *Dicey & Morris*. It also involves a pragmatic recognition of the reality that any decision on the ownership status of a foreign vessel not according with the rules and policies of the authorities and courts of the port of registry may well amount to a *brutum fulmen*.<sup>36</sup>

The conflicts analysis in *The Cape Moreton* was ultimately theoretical, as neither party adduced proof of foreign law. In something of an irony, given its earlier rejection of the *lex fori* approach, the court was thus constrained to presume that Liberian law was the same as Australian law, and then apply Australian law, as best it could, to the issue at hand. Nevertheless, the court's meticulous and sophisticated analysis of the characterisation and choice of law issues, and its adoption of a principled, common-sense and internationalist conflicts approach, sets a new benchmark for the treatment of foreign vessel ownership disputes in the context of admiralty jurisdiction.

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<sup>36</sup> Cf *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 ...".

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