

MARITIME LIENS IN THE CONFLICT OF LAWS

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MARITIME LIENS IN THE CONFLICT OF LAWS

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I. Preface - Homage to Arthur T. von Mehren

I am honoured to contribute to Prof. Arthur von Mehren's *festschrift*. On occasion, I have leaned upon and even borrowed (with great benefit and I hope with complete citation), his writings and, for example, have admired his "functional interest analysis", and his system of weighing the strengths of conflicting policies without Brainerd Currie's emphasis on the *lex fori*.¹ His early opposition to *renvoi* has also been especially comforting to us in Québec, where in our revised Civil Code, which came into force in 1994,² we rejected *renvoi*.³ Von Mehren's observation criticizing *renvoi* as incompatible with any rational system of private international law, and countering Erwin N. Griswold's defence of the concept, is classic:⁴

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¹ Arthur T. von Mehren and Donald T. Trautman, *The Law of Multistate Problems*, Little, Brown & Co., Boston, 1965, cited in W. Tetley, *International Conflict of Laws: Common, Civil and Maritime*, Les Éditions Yvon Blais, Inc., Montreal, 1994 at p. 13 [hereinafter cited as "Tetley, *Int'l Conflict*, 1994"].

² The *Civil Code of Québec* was enacted by the National Assembly of Québec on December 18, 1991, by S.Q. 1991, c. 64, but came into force only on January 1, 1994. It replaced the former Civil Code of Lower Canada, as amended, which was enacted by *An Act respecting the Civil Code of Lower Canada*, Stat. Prov. Can. 1865, c. 41, and which came into force on August 1, 1866, eleven months before Canadian Confederation took effect, on July 1, 1867, pursuant to the coming into force of the *British North America Act*, U.K. 30 & 31 Vict., c. 3 (renamed the *Constitution Act, 1867* by the *Canada Act*, U.K. 1982, c. 11).

³ Art. 3080 c.c. (Québec 1994) provides, in its French version: "*Lorsqu'en vertu des règles du présent livre la loi d'un État étranger s'applique, il s'agit des règles du droit interne de cet État, à l'exclusion de ses règles de conflits de lois.*" In its English version, the provision provides: "Where, under the provisions of this Book, the law of a foreign country applies, the law in question is the internal law of that country, but not its rules governing conflict of laws." The "Book" concerned is Book X of the Civil Code of Québec, on "Private International Law", comprising arts. 3076-3168 c.c. (Québec 1994).

⁴ A.T. von Mehren, "The Renvoi and its Relation to Various Approaches to the Choice-of-Law Problem in *XXth Century Comparative and Conflicts Laws: Legal Essays in honor of Hessel E. Yntema*, (K.H. Nadelmann, A.T. von Mehren, J.N. Hazard, eds.), A.W. Sijthoff, Leyden, 1961, 380 at p. 387. Griswold was concerned with the rigidities of the territorial theory of conflicts of laws, as embodied in the First Restatement of the Conflict of Laws, adopted by the American Law Institute, May 11, 1934.

"Dean Griswold thinks he has found in the renvoi analysis a technique through which rigidities of the Restatement can be mitigated without, at the same time, abandoning the system."

To honour Professor von Mehren, I have chosen a private international law matter (international maritime law), where the conflicts approach of the United States, Canada and the United Kingdom (as well as of some other jurisdictions) are compared in respect of foreign maritime liens. The Americans and the Canadians recognize the foreign maritime lien, while the English courts apply the *lex fori* (i.e. their own law). This controversy still causes uncertainty in, and has had effect on, the rights of international ship suppliers. It is hoped that the Canadian/American solution will prevail. The result has had considerable effect on world shipping.

II. Introduction - Maritime Liens

1) Civilian origins of maritime liens

Maritime liens constitute a distinctive and historic feature of modern admiralty law. Their roots stretch far back to the maritime law of the ancient world⁵ and particularly to the medieval European *lex maritima*, which, as part of that body of customary, transnational mercantile law (the *lex mercatoria*), governed the relations of merchants who travelled by sea with their goods in the Middle Ages.⁶ Originally purely oral, this

⁵ Ancient maritime law can be traced back to that primitive, oral body of customary sea law known as the "Rhodian Law" of c. 800 B.C., some elements of which are recorded in Justinian's Digest. See W. Tetley, *Maritime Liens and Claims*, 2 Ed., Les Éditions Yvon Blais, 1998 at pp. 7-8 [hereinafter cited as "Tetley, *M. L. & C.*, 2 Ed., 1998]. The Byzantine Rhodian Sea-Law, prepared at Byzantium in the seventh or eighth century A.D., contained provisions on maritime liens and ship mortgages. See W. Ashburner, *The Rhodian Sea-Law*, 1909; Tetley, *M. L. & C.*, 2 Ed., 1998 at pp. 10-11.

⁶ On the *lex mercatoria* of the Middle Ages and its intimate relationship to the medieval *lex maritima*, see generally Leon Trakman, *The Law Merchant: The Evolution of Commercial Law*, F.B. Rothman & Co., Littleton, Colorado, 1983, at p. 8, who notes that the "cosmopolitan Law Merchant" which gained ascendancy in the twelfth and thirteenth centuries resulted from the "needs of sea-borne traffic". See also

customary sea law was gradually committed to writing in the medieval sea codes, which were generally collections of judgments rendered by merchant judges, accompanied by some loosely-formulated principles thought to be useful in future cases of the same kind.

Of these early codifications, the most important was probably the *Rôles of Oléron*, dating from the late twelfth century and composed on the Island of Oléron (off Bordeaux), then the centre of the wine trade between Aquitaine and England.⁷ The influence of the *Rôles* gradually extended along the whole Atlantic coast of Europe, southwards to Spain, northwards to England and Scotland and eastwards to the ports of Flanders and the Hanseatic League, as far as the Baltic coast.⁸ Two other important codifications were the *Consolato del Mare*,⁹ a collection of judgments rendered by consuls who dispensed maritime justice in the Western Mediterranean, and the *Laws of Visby*, which rely heavily on the *Rôles of Oléron* and were first printed in Copenhagen in 1505. These three major Rules eventually influenced the drafting of the *Ordonnance de*

Trakman, "The Evolution of the Law Merchant: Our Common Heritage" (1980) 12 JMLC 1; W. Tetley, "The General Maritime Law - the *Lex Maritima*" (1994) 20 Syracuse J. Int'l L. & Com. 105.

⁷ On the *Rôles* generally, the best work is that of James Shephard, *Les Origines des Rôles d'Oléron*, an unpublished Masters thesis, Université de Poitiers, 1983, and *Les Rôles d'Oléron: Étude des Manuscrits et Édition du Texte*, unpublished D.E.A. thesis, Université de Poitiers, 1985. Shephard's intensive research on the various surviving manuscripts of the *Rôles* has cast much light on their origin and date of composition (which he identifies as c. 1190-1216) and has debunked several older theories, including the long-held view that they were composed at the command of Queen Eleanor of Aquitaine, wife of King Henry II of England (1154-1189), on her return from the Holy Land, or possibly on the orders of her son, King Richard I of England, on his return from the same place. It is to be hoped that Shephard's brilliant studies will one day be published.

⁸ The *Rôles of Oléron* were translated into Flemish as the *Judgments of Damme* (The *Laws of Westcapelle*) by the end of the fourteenth century. They also spread to Hanseatic towns, including Hamburg, Lübeck and Bremen, and later to Rostock, Stralsund, Danzig and Visby, where they influenced the compilation known as the *Rules of Visby* (or *Laws of Visby*), first printed in Copenhagen in 1505. See Tetley, *M. L. & C.*, 2 Ed., 1998 at pp. 18 and 20-21.

⁹ The major ports concerned were Barcelona, Valencia and Marseilles. The *Consolato* dates from the end of the fourteenth century, but the earliest surviving text is a Catalan version from 1494. See Tetley, *M. L. & C.*, 2 Ed., 1998 at p. 21.

la Marine of 1681 under Louis XIV, and later the later commercial codes of France and other civilian jurisdictions.¹⁰

These early sea codes contained provisions relating to what today are known as maritime liens.¹¹

Even in England, the civil law origin of admiralty law, including the law of maritime liens, was recognized at Doctors' Commons, the admiralty court, where doctors of civil law trained at Oxford and Cambridge decided maritime cases until Doctors' Commons was dissolved in 1858.¹²

2) Characteristics of maritime liens

Maritime liens became clearly defined in the civil law as "maritime privileges" ("*privilèges maritimes*" in French) and this character was recognized in common law courts. Sir John Jervis in *The Bold Buccleugh*, accordingly defined "maritime lien" in the following terms in 1851:¹³

"Having its origin in this rule of the Civil law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story... explains that process to be a proceeding *in rem*... This claim or privilege travels with the

¹⁰ See generally Tetley, *M. L. & C.*, 2 Ed., 1998 at pp. 24-25.

¹¹ The *Rôles of Oléron*, for example, describe what is now "bottomry", an early form of ship mortgage, as well as what today is "*respondentia*" (the pledge of cargo as security for a loan), and perhaps a lien on cargo for salvage. See Sir Travers Twiss, *Black Book of the Admiralty*, vol. 3, H.M.S.O., London, 1874 at pp. 6-33, reproducing the Liber Horn Manuscript (the earliest known manuscript of the *Rôles*). The *Consolato del Mare*, for example, granted seamen a preference for wages on cargo and a further preference for wages on the ship. See Twiss, *ibid.*, vol. 3, 1874 at pp. 162-165, 198-199, and 261-263. The *Laws of Visby* also contemplate bottomry. See Twiss, *ibid.*, vol. 4, 1876 at pp. 268 (art. XIII) and 278 (art. XLV).

¹² As late as 1835 it was pleaded by Sir D. Dodson, K.C. (assisted by his "junior", Dr. Lushington) in *The Neptune* 3 Knapp. 94 at p. 103, 12 E.R. 584 at pp. 587-588 (1835) that:

"By the civil law, and the laws of Oleron, which have been generally adopted by the nations of Europe as the basis of their maritime law, whoever repaired or fitted out a ship had a lien on that ship for the amount of his demand. It is useless to cite authorities on this head, for they are undoubted, and are collected in a note in Lord Tenterden's "Treatise on Shipping", Part 2, cap. 3, s. 9.

"The United States of America have in great measure followed the civil law (see the authorities cited in a note to this case, 3 Hag. Adm. P. 14). In England the same law prevailed." On Doctors' Commons, see also G.D. Squibb, *Doctors' Commons: A History of the College of Advocates and Doctors of Law*, Clarendon Press, Oxford, 1977.

¹³ (1851) 7 Moo. P.C. 267 at p. 284, 13 E.R. 884 at p. 890 (P.C.).

thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

In the United States, the great Justice Joseph Story had been the first to use the term "maritime lien" twenty years earlier in *The Nestor*.¹⁴

As a privilege, the maritime lien was recognized to be a right in the property of another. Gorell Barnes, J., in *The Ripon City*, declared:¹⁵

"... a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another - a *jus in re alienâ*. It is, so to speak, a subtraction from the absolute property of the owner in the thing."

An even more complete characterization of maritime liens was given by Scott, L.J. in *The Tolten*, who, also alluding to its nature as a civilian *privilege*, continued:¹⁶

"The essence of the 'privilege' was and still is, whether in Continental or in English law, that it comes into existence automatically without any antecedent formality, and simultaneously with the cause of action, and confers a true charge on the ship and freight of a proprietary kind in favour of the 'privileged' creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages."

In consequence, one may say that a traditional maritime lien is a secured right in the "*res*", i.e., in the property of another (ordinarily the ship, but sometimes the cargo, freight and/or bunkers as well), deriving from the *lex maritima* and the civil law; which arises with the claim, without registration or other formalities; which travels with the vessel surviving its conventional sale (although not its judicial sale); which remains

¹⁴ 18 Fed. Cas. 9 (Case No. 10, 126) at p. 11 (C.C. D. Me. 1831).

¹⁵ [1897] P. 226 at p. 242.

inchoate until it is enforced by an action *in rem*; and which, when so enforced, gives the lienor's claim priority in ranking over most other claims, notably ship mortgages.¹⁷ In this sense, the maritime lien is a very different animal from the common law possessory lien, (or the similar possessory lien of the shipbuilder and ship repairer) which are purely a rights of retention of another's property until a debt relating to that property retained is paid. Those rights are lost if the creditor loses possession of the property in question.

III. Maritime Liens as Sources of Conflicts of Law

In order to understand conflicts of law in the realm of maritime liens and related maritime claims, one must first become a "comparativist", in order to grasp the differences between the competing national laws. In fact, *any* study of the conflict of laws presupposes a comparative law analysis. Similarly, comparative law cannot be studied exhaustively without examining the conflicts rules of the jurisdiction in question, because those rules are themselves part and parcel of that national law.¹⁸ Conflicts of maritime lien laws are easy to perceive through the lens of comparative law.

1) The differing scope of "maritime liens"

In England and Commonwealth countries, the term "maritime lien" applies only to a select group of maritime claims, being seamen's wages, master's wages, master's disbursements, salvage, damage (caused by the ship), bottomry and respondentia. These are known as "traditional maritime liens".¹⁹

¹⁶ [1946] P. 135 at p. 150 (C.A.).

¹⁷ Tetley, *M. L. & C.*, 2 Ed., 1998 at pp. 59-60.

¹⁸ In this regard, it is noteworthy that Dicey's first edition of 1896 was not entitled *Conflict of Laws*, but rather *A Digest of the Law of England with Reference to the Conflict of Laws*, Stevens & Sons, London, 1896.

¹⁹ See this classic enumeration given by Gorrell Barnes, J. in *The Ripon City* [1897] P. 226 at p. 242. See also Tetley, *Int'l Conflict*, 1994 at p. 539. Bottomry and respondentia are obsolete today, however, because

Other maritime claims resulting from services supplied to the ship or damages done by the ship, notably claims for "necessaries" provided to the vessel (e.g. bunkers, supplies, repairs, and towage), as well as claims for cargo damage, for breaches of charterparty and for contributions of the ship in general average, do not give rise to "traditional maritime liens" in the U.K. and Commonwealth countries, but only to "statutory rights *in rem*".²⁰ The latter are simply rights granted by statute to arrest a ship in an action *in rem* for a maritime claim. Unlike traditional maritime liens, statutory rights *in rem* do not arise with the claim; they do not "travel with the ship" (i.e. they are expunged if the vessel is sold in a conventional sale before the action *in rem* is commenced on the claim concerned); and they rank *after*, rather than *before*, the ship mortgage in the distribution of the proceeds of the vessel's judicial sale.²¹

In the United States and civil law jurisdictions (e.g. France), however, claims for necessaries, cargo damage and general average, among others, are granted full status as maritime liens by the relevant national legislation,²² and/or by international conventions

modern communications normally make it unnecessary for the master of the vessel to borrow money on the credit of the ship (bottomry) or of the cargo (respondentia) while away from the ship's home port in order to preserve the ship or complete the voyage.

²⁰ Tetley, *Int'l Conflict*, 1994 at p. 539; Tetley, *M. L. & C.*, 2 Ed., 1998 at pp. 445-446 (general average contributions); pp. 555-562 (necessaries - U.K.) and pp. 577-578 (necessaries - Canada), p. 646 (repairs - U.K.) and p. 652-654 (repairs - Canada); pp. 703-708 (towage); pp. 732 and 739 (cargo damage), p. 732 (breach of charterparty).

²¹ See Tetley, "Arrest, Attachment and Related Maritime Law Procedures" (1999) 73 Tul. L. Rev. 1895 at pp. 1910-1911.

²² Necessaries claims are secured by a maritime lien in U.S. maritime law, by virtue of the *Commercial Instruments and Maritime Liens Act*, 46 U.S.C. 31301 *et seq.*, at sect. 31301(4) and 31342(a). Where they arise before the filing of a "preferred ship mortgage" on the vessel in question, claims for necessaries constitute "preferred maritime liens" by virtue of 46 U.S.C. 31301(5)(A) and as such outrank the preferred ship mortgage by virtue of 46 U.S.C. 31326(b)(1). Cargo damage gives rise to a "preferred maritime lien" under 46 U.S.C. 31301(5)(B) ("damage arising out of maritime tort"). General average claims are secured by a preferred maritime lien by 46 U.S.C. 31305(E). For necessaries claims in France, see Law No. 67-5 of January 3, 1967, art. 31(6). Note, however, that in France, in order to give rise to a "*privilège maritime*" (maritime lien), necessaries must be ordered by the master, within the scope of his authority, while the vessel is away from its home port, and for the purpose of preserving the ship or continuing the voyage. A maritime lien for cargo damage are granted by art. 31(5), and a lien for general average by art. 31(4).

binding those States,²³ thus resulting in conflict of laws when such claims are asserted in maritime proceedings before United Kingdom and Commonwealth courts, where they have no maritime lien status according to the *lex fori*.

2) Other maritime claims

To understand maritime lien conflicts, one must also be familiar with a few other categories of maritime claim.

First come "special legislative rights", a category of claim (not always recognized by maritime law authors) arising under modern national statutes, particularly with respect to harbour and dock dues, wreck removal and pollution.²⁴ These statutes confer upon governments or their agencies special rights such as detention and sale of the ship, often coupled with a right of priority on the sale proceeds. In other cases, the statutes provide expressly for certain claims to be secured by a maritime lien with a very high priority. Such rights usually outrank even the costs of arresting and selling the ship, as well as the "traditional" maritime liens. They are also sanctioned by international conventions on maritime liens and mortgages.²⁵

²³ The International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1926, 120 L.N.T.S. 187, adopted at Brussels, April 10, 1926, and in force June 2, 1931, provides a list of maritime liens at art. 4. France, as a party to that Convention, provides for similar maritime liens at art. 31 of its Law No. 67-5. Many other civilian countries (including, *inter alia*, Argentina, Belgium, Brazil, Italy, Portugal, Spain and Turkey) are also party to that Convention, or have legislation modeled on it, and therefore have similar maritime liens. For the text of the Convention, see Tetley, *M.L. & C.*, 2 Ed., 1998, Appendix "A" at pp. 1413-1420.

²⁴ For examples of "special legislative rights", see Tetley, *M. L. & C.*, 2 Ed., 1998, chap. 2 ("Special Legislative Rights"), chap. 3 ("Dock, Harbour and Canal Charges"), chap. 4 ("Wreck Removal") and Chap. 5 ("Pollution"). Another type of "special legislative right" is the right of governments to confiscate vessels, which is a penal sanction frequently imposed for the violation of national laws on subjects such as narcotics trafficking, fisheries, customs, immigration, piracy and arms trading. See Tetley, *ibid.*, chap. 6 ("Forfeiture for Drug and Related Offences").

²⁵ The Maritime Liens and Mortgages Convention 1926, *supra*, note 23, provides, at para. I(2) of its Protocol of Signature, that it is understood that the legislation of each State remains free "to confer on the authorities administering harbours, docks, lighthouses and navigable ways, who have caused a wreck or other obstruction to navigation to be removed, or who are creditors in respect of harbour dues, or for damage caused by the fault of a vessel, the right, in case of non-payment, to detain the vessel, wreck or other property, to sell the same and to indemnify themselves out of the proceeds in priority to other

Another type of maritime claim consists of the costs of seizing or arresting the ship and of preserving it pending the completion of the suit and its judicial sale. In France, such law costs (*frais de justice*), as well as the costs of the judicial sale and the distribution of the proceeds, and the costs of maintenance of the vessel under seizure (*custodia legis*), are treated as conferring a *privilège maritime* (maritime lien) superior to other maritime liens enumerated in Law No. 67-5.²⁶ In the U.K., Canada and the U.S., on the other hand, costs of arrest and sale and expenses in *custodia legis* do not constitute "traditional" maritime liens, but are understood as a separate class of maritime claim, outranking such liens.

And, of course, there are ship mortgages, which almost always compete with the other categories of maritime claim for priority when a ship is sold in a judicial sale.

3) Different ranking of maritime liens and claims

The ranking of maritime liens *inter se*, and with respect to other categories of maritime claims, differs from country to country and is the principal cause of the conflicts of law in this field.

The traditional ranking of maritime liens in the U.K. and Canada is as follows:

claimants." The International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1967, adopted at Brussels, May 27, 1967, but not in force (for text, see Tetley, *M.L. & C.*, 2 Ed., 1998, Appendix "B" at pp. 1421-1428), grants a maritime lien on the vessel for port, canal and other waterway dues and pilotage dues (art. 4(1)(ii)), as well as for claims for wreck removal (art. 4(1)(v)). Pollution claims would also fall under the maritime lien granted by art. 4(1)(iv), securing claims against the owner based on tort. The International Convention on Maritime Liens and Mortgages, 1993, adopted at Geneva, May 6, 1993, but not in force, (for text, see Tetley, *ibid.*, Appendix "C" at pp. 1429-1438) also grants a maritime lien for claims for port, canal, and other waterway dues and pilotage dues (art. 4(1)(d)), permits maritime liens by national law (art. 6) to secure claims not mentioned in art. 4, and recognizes the right of States party to the Convention to provide in their laws for a right to be paid, in priority to other maritime lien claims, out of the proceeds of the "forced sale" (i.e. judicial sale) of a stranded or sunken vessel following its removal by a public authority in the interest of safe navigation or the protection of the marine environment (art. 12(3)).

²⁶ *Loi no. 67-5 portant statut des navires et autres bâtiments de mer* of January 3, 1967 (J.O. January 4, 1967 at p. 106) at art. 31(1) and (2). For text of Law No. 67-5 and accompanying Decree No. 67-967 of October 27, 1967, see Tetley, *M.L. & C.*, 2 Ed., 1998, Appendix "G" at pp. 1479-1486.

- 1) Special legislative rights;
- 2) Court costs (e.g. costs of seizure and judicial sale) and *custodia legis*;
- 3) Maritime liens (i.e. "traditional" maritime liens):
 - salvage,
 - damage (e.g. collision),
 - wages (masters' and seamen's and master's disbursements).
- 4) Ship mortgages (registered);
- 5) Necessaries give statutory rights *in rem*:
 - a) Do not follow the ship when sold,
 - b) Only the owner or the "beneficial owner" may bind the ship in Canada for statutory rights *in rem*.
 - c) In U.K., the owner, beneficial owner or demise charterer may bind the ship for statutory rights *in rem*.
 - d) For bunkers, repairs, supplies, towage, etc.
 - e) There is no statutory right *in rem* for stevedores in the U.K., but there is in Canada.
 - f) Necessaries in Canada extend to goods and materials as well as services and insurance. Necessaries in the U.K. extend to goods and materials.
- g) Statutory rights *in rem* arise in U.K. upon issue of the writ (now called an "in rem claim form").
- h) Statutory rights *in rem* arise in Canada upon arrest of the ship.

By comparison, the United States has its own original ranking system, which is out of step with the rest of the world. Under the American system, the priorities in maritime claims are as follows:

- 1) Special legislative rights (of governments) (wreck removal; St. Lawrence Seaway and Panama Canal tolls and damages; rights of detention, removal and destruction for pollution); rights of forfeiture and sale for various federal statutory offences (e.g. drug trafficking, illegal immigration, etc.);
- 2) *Custodia legis* and some court costs (e.g. costs of seizure and judicial sale and attorney's fees);
- 3) Preferred maritime liens:
 - a) Wages of master and crew (including maintenance and cure),
 - b) Salvage (including contract salvage) and general average (cargo against the ship)
 - c) Maritime torts (e.g. collision), including personal injury and death, property damage and cargo tort liens;
 - d) Longshoremen (individuals, not stevedore company).
 - e) U.S. contract maritime liens (necessaries) entered into *before* the filing of a U.S. preferred mortgage. This includes repairs, supply of bunkers, supplies, stevedores, towage, contract cargo damage

- liens and charterer's liens, etc. (and also including statutory maritime liens, e.g. for civil penalties);
- 4) Preferred U.S. ship mortgage liens, as of the date of filing, as well as preferred ship mortgages on foreign ships whose mortgages have been guaranteed under Title XI of the *Merchant Marine Act, 1936* (46 U.S. Code Appx. sect. 1101 *et seq.* at sect. 1271 *et seq.*);
 - 5) U.S. contract liens (necessaries) arising *after* the filing of the U.S. preferred ship mortgage (these are *not* preferred maritime liens);
 - 6) Foreign ship mortgages (not guaranteed under Title XI of the *Merchant Marine Act, 1936*);
 - 7) U.S. contract liens (other than necessities) (e.g. contract cargo damage liens and charterers' liens) accruing after foreign ship mortgages;
 - 8) Unregistered (i.e. non-preferred) mortgages and perfected, non-maritime liens (including tax liens and other Government claims which are subordinate to maritime liens); state chattel mortgages and liens and liens for maritime attachment; and foreign contract liens (e.g. U.K. or Canadian statutory rights *in rem*).

Because of these different systems of priorities, a court confronted with a claim that, under its proper law, is a maritime lien but is not a maritime lien under the law of the forum, has two fundamental decisions to take. The court must first decide whether or not to recognize that foreign maritime lien as a maritime lien, despite the fact that a corresponding claim arising within the court's own territorial jurisdiction would not constitute a maritime lien. Secondly, if the court decides to recognize the foreign maritime lien as a maritime lien, it must then decide how to rank the underlying claim in the distribution of the judicial sale proceeds.

The solutions given these two questions in national conflict of law rules differ radically as between countries, and notably as between the United Kingdom, on the one hand, and the United States and Canada, on the other.

IV. The United Kingdom - The *Lex Fori*

1) *The Halcyon Isle* decision

As a result of the Privy Council's 1980 decision in *The Halcyon Isle*,²⁷ it is now settled that the *lex fori* alone governs the recognition and ranking of foreign maritime liens in the United Kingdom. The decision arose out of the repair of a British ship subject to a ship mortgage in a Brooklyn, New York shipyard. The vessel sailed away without paying for the repairs. The mortgage was then registered, no notice of the mortgage ever having been given to the repairman. The mortgagee ordered the ship to Singapore, where English law prevailed, and had it arrested, resulting in competing claims by the mortgagee and the repair yard to the proceeds of the judicial sale.

The majority three of the five Law Lords who decided the case, reversing the Singapore Court of Appeal, refused to recognize as maritime liens any claims which differed from the six "traditional" maritime liens recognized in England. In consequence, the ship repairer's claim ranked below that of the mortgagee, because the repairman's U.S. maritime lien for repairs (being one type of "necessaries" supplied to a ship) was not a maritime lien in England, but was secured there by a mere statutory right *in rem* which did not travel with the ship and which ranked after the mortgage. One senses in this attitude a quest for an easy and predictable solution, perhaps mixed with a tinge of traditional English disdain for foreign law.

From a more juridical standpoint, the majority decision was based on the notion that maritime liens, in the conflict of laws, are "procedural" remedies, rather than "substantive" rights. Speaking for the majority in *The Halcyon Isle*, Lord Diplock held that maritime liens involve "... rights that are procedural or remedial only, and

²⁷ *The Halcyon Isle (Bankers Trust International Limited v. Todd Shipyards Corporation)* [1981] A.C. 221, [1980] 2 Lloyd's Rep. 325, 1980 AMC 1221 (P.C.) [hereinafter cited as "*The Halcyon Isle*"].

accordingly the question whether a particular class of claim gives rise to a maritime lien or not [is] one to be determined by English law as the *lex fori*."²⁸

Very different is the minority view of the Lords Salmon and Scarman who dissented. Citing various precedents, and in particular the English Court of Appeal's decision in *The Colorado*²⁹ (which involved a conflict of ranking between a French ship *hypothèque* and a claim for repairs done in Wales), they held:³⁰

"A maritime lien is a right of property given by way of security for a maritime claim. If the Admiralty court has, as in the present case, jurisdiction to entertain the claim, it will not disregard the lien. A maritime lien validly conferred by the *lex loci* is as much part of the claim as is a mortgage similarly valid by the *lex loci*. Each is a limited right of property securing the claim. The lien travels with the claim, as does the mortgage and the claim travels with the ship. It would be a denial of history and principle, in the present chaos of the law of the sea governing the recognition and priority of maritime liens and mortgages, to refuse the aid of private international law."

The substantive character of maritime liens was thus properly understood as grounded in the very nature of the concept itself as a property right, emanating from the *lex maritima* and the civil law. The two dissenting Law Lords therefore held that the proper law (or *lex causae*) of the foreign maritime lien merited recognition, even if the domestic law denied maritime lien status to the equivalent claim arising in England. They cited various authorities for their view, including the decision of the Supreme Court of Canada in *The Ioannis Daskalelis*,³¹ which will be reviewed below.

²⁸ *Ibid.* A.C. at p. 238, Lloyd's Rep. at p. 331, AMC at p. 1233.

²⁹ *Hills Dry Docks & Engineering Company, Ltd. v. Colorado* [1923] P. 102, (1923) 14 Ll. L. Re. 251 (C.A.).

³⁰ [1981] A.C. 221 at p. 250, [1980] 2 Lloyd's Rep. 325 at p. 339, 1980 AMC 1221 at p. 1248.

³¹ *The Ioannis Daskalelis (Todd Shipyards Corporation v. Altema Compania Maritima, S.A.)* [1974] S.C.R. 1248, [1974] 1 Lloyd's Rep. 174, 1973 AMC 176 (Supr. Ct. of Can.) [hereinafter cited as "*The Ioannis Daskalelis*"]. Lords Salmon and Scarman cited *The Ioannis Daskalelis* with approval as being "very persuasive" in *The Halcyon Isle* [1981] A.C. 221 at p. 250, [1980] 2 Lloyd's Rep. 325 at p. 339, 1980 AMC 1221 at p. 1248.

2) Weaknesses of the *lex fori* rule

To a large extent, this procedural/substantive debate about maritime liens reflects the fact that in England, maritime claims are not codified. No statute expressly states that such and such a maritime claim gives its creditor a maritime lien. Rather, the pertinent statute, the *Supreme Court Act 1981*,³² at sect. 20(1) and (2), merely sets forth a list of maritime claims subject to the Admiralty jurisdiction of the High Court of Justice, some of which are secured by maritime liens and others of which are secured, if at all, by mere statutory rights *in rem*. This fixation with jurisdiction-oriented statutory drafting harkens back to the centuries of conflict between the High Court of Admiralty and the common law courts in England, as well as to the historic importance of the forms of action in that country. Such a "jurisdictional" approach reinforces the "procedural" view of maritime liens in the conflicts thinking of English jurists.³³

In addition to the misconstruing the maritime lien as a procedural remedy rather than a substantive property right, the majority decision invites forum shopping. It also defeats the expectations of necessariesmen, who should be entitled to assume that when they conclude and perform contracts for supplying or repairing a vessel in a jurisdiction like America that grants them the status and priority of maritime lienors, their claims, arising out of such contracts, will be honoured as full-fledged maritime liens throughout the world, even in countries where the same claim would have a different character and a

³² U.K. 1981, c. 54. For the relevant provisions, see Tetley, *M.L. & C.*, 2 Ed., 1998, Appendix "F" at pp. 1466-1473.

³³ On the centuries-long conflict between the High Court of Admiralty and the courts of common law in England, see F.L. Wiswall, Jr., *The Development of Admiralty Jurisdiction and Practice since 1800*, Cambridge University Press, 1970; *Hale and Fleetwood on Admiralty Jurisdiction* (M.J. Prichard & D.E.C. Yale, eds.), Selden Society, vol. 108 for 1992 London, 1993, at p. xlvii to cxxxvi.

lower priority.³⁴ The *lex fori* rule of *The Halcyon Isle* rather thinly veils an exaggerated solicitude for protecting mortgagees (usually large banks) from the claims of ship suppliers.³⁵ New conflicts rules should not, however, be crafted so as to favour banks at the expense of other claimants against the proceeds of the "forced sale" of an arrested vessel. Nor should the *lex fori* be permitted to displace the law of the jurisdiction most closely connected with the parties and their transaction, which in this case was quite clearly American law.³⁶

3) **The influence of *The Halcyon Isle***

The Halcyon Isle has had an unfortunate effect on judicial thinking outside the U.K., particularly in some of the countries of the Commonwealth and in some former British colonies, where English admiralty law still prevails.

In South Africa, for example, in *Transol Bunker B.V. v. M.V. Andrico Unity*,³⁷ a Panamanian ship obtained supplies in Argentina at the request of the charterers (thus giving rise to a maritime lien in Argentina). When the vessel was later arrested in South Africa, that country's Supreme Court, Appellate Division, held that it lacked jurisdiction *in rem* (which went even further than the Privy Council in *The Halcyon Isle*, where at least jurisdiction was accepted), because English law as at November 1, 1983 (as

³⁴ As the minority decision points out, refusal to recognize the repairman's U.S. maritime lien in England would work an injustice: "The ship-repairers would be deprived of their maritime lien, valid as it appeared to be throughout the world, and without which they would obviously never have allowed the ship to sail away without paying a dollar for the important repairs upon which the ship-repairers had spent a great deal of time and money and from which the mortgagees obtained substantial advantages." See [1981] A.C. 221 at pp. 246-247, [1980] 2 Lloyd's Rep. 325 at pp. 336-337, 1980 AMC 1221 at p. 1244 (P.C.).

³⁵ See the highly debatable case comment supporting the majority decision, by M.M. Cohen, "In defense of the Halcyon Isle" [1987] LMCLQ 152 at pp. 154-155. See also in reply Tetley, "In Defence of the Ioannis Daskalelis" [1989] LMCLQ 11.

³⁶ For a comprehensive critique of the majority decision in *The Halcyon Isle*, see generally Tetley, *Int'l Conflict*, 1994 at pp. 570-573.

³⁷ 1989 (4) S.A. 325, 1989 AMC 1561 (Supr. Ct. of S. Africa, Appellate Div.). See also commentary by H. Staniland, [1989] LMCLQ 174 and [1990] LMCLQ 491.

declared in *The Halcyon Isle*) did not recognize a maritime lien for necessities.³⁸ The closer connection of the case to Argentina was ignored, in reliance on a jurisdictional incorporation of a foreign (English) law based on the narrow (and controversial) three-to-two ruling of the Privy Council.³⁹

The Cyprus Supreme Court, in *Hassanein v. The Hellenic Island*,⁴⁰ found, again relying on *The Halcyon Isle*, as well as earlier precedents,⁴¹ that a claim for bunkers supplied to the vessel in Egypt, which claim enjoys maritime lien status there under national law, could not be recognized in preference to the claim of a Singapore-registered first preferred mortgage against a Singapore ship. The reason was because the Cypriot *Courts of Justice Act 1960*⁴² imported into Cyprus English Admiralty law as of August 15, 1960, which law then recognized no such lien.

In *The Betty Ott v. General Bills Ltd.*,⁴³ New Zealand's Court of Appeal also invoked *The Halcyon Isle* in refusing to recognize an Australian ship mortgage as equivalent to a ship mortgage registered in New Zealand, simply because the mortgage had not been registered in New Zealand (and this, despite the very similar terms and conditions governing ship mortgages and their registration in Australia). In consequence, the Australian mortgage was subordinated to an equitable charge resulting from a

³⁸ English law as at November 1, 1983 was the basis of South African Admiralty jurisdiction and admiralty law under South Africa's *Admiralty Jurisdiction Regulation Act 1983*, No. 105 of 1983, sect. 6(1)(a).

³⁹ See also the decision of the Appellate Division in *Brady-Hamilton Stevedoring v. Kalantiao* 1989 (4) S.A. 355, 1989 AMC 1597 (Supr. Ct. of S. Africa, Appellate Div.), where *The Halcyon Isle* was also followed, and the court actually acknowledged, together with the two parties, that "the proper law of the contract is the Federal Law of the United States." See the first instance decision of the Durban and Coast Local Division, 1987 (4) S.A. 250 at p. 252; in appeal 1989 AMC 1597. See also *Banco Exterior de Espana S.A. v. Government of Namibia* 1999 (2) S.A. 434 (Namibia High Ct.).

⁴⁰ [1989] 1 C.L.R. 406 (Cyprus Supr. Ct.).

⁴¹ *The Milford* (1858) Swab. 362, 166 E.R. 1167; *The Tagus* [1903] P. 44; *The Zigurds* [1932] P. 113; *The Tolten* [1946] P. 135 at p. 161 (C.A.).

⁴² Law No. 14 of 1960.

⁴³ [1992] 1 N.Z.L.R. 655 (N.Z. C.A.). See also the critical commentary on this decision by P. Myburgh, "Recognition and Priority of Foreign Ship Mortgages" [1992] LMCLQ 155.

debenture issue. *The Betty Ott* judgment underlines to what absurd lengths the principle of *The Halcyon Isle* can lead.⁴⁴ The Privy Council's majority decision nevertheless continues to be invoked in New Zealand's case law.⁴⁵

Unfortunately, Australia itself joined the club of *Halcyon Isle* jurisdictions in 1997, when its Federal Court, in *Morlines Maritime Agency Ltd. & Ors v. The Skulptor Vuchetich*,⁴⁶ rejected the necessary claim of a U.S. container lessor under a lease agreement, although the contract itself expressly provided for a maritime lien to secure the claim. No such lien could qualify for recognition in Australia, where, as the Court held, only the six "traditional" English maritime liens existed.⁴⁷

Singapore⁴⁸, as well as Malaysia,⁴⁹ have also referred to *The Halcyon Isle* in recent decisions, some of which, however, are purely domestic maritime law judgments not involving any conflicts.

V. The United States - The Proper Law

⁴⁴ Following the decision in *The Betty Ott*, the New Zealand Parliament enacted the *Ship Registration Act 1992*, No. 89 of 1992, providing, by sect. 70, for the recognition in New Zealand of foreign "instruments creating securities or charges" on ships, provided that such instruments were duly registered under the law of the vessel's flag. The same section accorded such securities and charges the same priority as duly registered New Zealand ship mortgages. But the statute, by treating all foreign-registered charges as if they were New Zealand ship mortgages, wrongly ignored the differing nature of these various foreign charges, thus doing a disservice to the conflict of laws. See P. Myburgh, "The New Zealand Ship Registration Act 1992" [1993] LMCLQ 444.

⁴⁵ See *ABC Shipbrokers v. The Offi Gloria* [1993] 3 N.Z.L.R. 576 (N.Z. High Ct.) and *Fournier v. The Margaret Z* [1999] 3 N.Z.L.R. 111 (N.Z. High Ct.).

⁴⁶ 1998 AMC 1727 (Fed. Ct. Aust. 1997).

⁴⁷ *Ibid.* at p. 1733.

⁴⁸ *The Andres Bonifacio* (1993) 3 S.L.R. 521 (Singapore C.A.). The Singapore High Court, in a non-conflicts case, also cited *The Halcyon Isle* in declaring the categories of maritime liens in that country to be the same as those recognized in England. See *The Ohm Mariana ex Peony* (1992) 2 S.L.R. 623 (Singapore High Ct.).

⁴⁹ See *Ocean Grain Shipping Pte Ltd. v. The Dong Nai* (1996) 4 MLJ 454 (Malaysian High Ct. - Johor Bahru) (Malaysia and Singapore share the same English admiralty jurisdiction and maritime law); *The Ocean Jade* (1991) 2 MLJ 386 (Malaysian High Ct.) (categories of maritime liens in Malaysia same as in England).

In the United States, foreign maritime liens are treated with greater respect than in the United Kingdom and the other jurisdictions that follow *The Halcyon Isle*. In the U.S., where the law of a foreign jurisdiction is found to be the "proper law", according to the conflicts rules of the forum, either because it is expressly so declared in the contract, or because of the "contacts" (connecting factors) linking the case to that other jurisdiction, foreign maritime claims are recognized, even where the rights they confer differ in character from those which would arise from the equivalent maritime claim under American law. The ranking of the foreign claims in distributing the proceeds of the ship's judicial sale, however, is effected according to the American system of priorities. The "substantive/procedural" dichotomy thus works with more logical and equitable results than the more chauvinistic law-of-the-forum straight-jacket applied in the U.K.

The American approach to foreign maritime liens has much to do with what may be termed the "civilian heritage" of American admiralty law. Departing from the "jurisdictional" approach to maritime law drafting typical of the common law tradition of England,⁵⁰ the United States,⁵¹ much like civilian countries,⁵² has codified its maritime lien law. The relevant statute (46 U.S.C. 31301 *et seq.*) expressly declares certain maritime claims to be "maritime liens" or "preferred maritime liens" and also provides rules on the ranking of all maritime claims. That the United States, generally regarded as a common law country, has codified its maritime lien law in civilian fashion is but one

⁵⁰ *Supra*, discussion surrounding notes 32 to 33.

⁵¹ The U.S. statute, the *Commercial Instruments and Maritime Liens Act* 46 U.S.C. 30101, 31301-31309, 31321-31330 and 31341-31343 is sometimes also called the "Maritime Commercial Instruments and Liens Act", the "Federal Maritime Lien Act" or the "Ship Mortgage Act of 1920 as amended". For text, see Tetley, *M.L. & C.*, 2 Ed., 1998, Appendix "E" at pp. 1449-1465.

⁵² See *Loi no 67-5 portant statut des navires et autres bâtiments de mer* of January 3, 1967 (J.O. January 4, 1967, p. 106), and *Décret no. 67-967 portant statut des navires et autres bâtiments de mer* of October 27, 1967 (J.O. November 4, 1967 at p. 10836).

aspect of the rich civil law heritage still present in the fabric of American admiralty law.⁵³ Indeed, the first Congress, in the first *Process Act* of 1789, provided that "the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction (a) shall be according to the course of the civil law."⁵⁴ Codification of the many U.S. maritime liens in turn helps to reinforce the "substantive" understanding of those security rights in the U.S., and thus the equally "substantive" character of corresponding foreign rights.

Typical of the American approach is the decision of the Fourth Circuit in *Ocean Ship Supply v. The Leah*.⁵⁵ A Greek ship obtained necessities in Quebec City, Canada, thus giving rise to a statutory right *in rem* (and not a maritime lien) under Canadian maritime law. The vessel was later sold and registered in Honduras, which, under Canadian maritime law, expunged the statutory right. When the ship was eventually arrested in Charleston, South Carolina, the American court accepted that the supply of necessities to the vessel in Canada did not confer on the claimant a maritime lien the way a similar provision of necessities would have done had the vessel been so supplied in a U.S. port. The Fourth Circuit thus rightly refused to acknowledge any lien and released the ship from arrest. The *lex loci contractus* and contact theory were properly applied.

⁵³ On the many civilian elements still discernible in American maritime law, see W. Tetley, "Maritime Law as a Mixed Legal System" (1999) 23 Tul. Mar. L.J. 317. On the codification of maritime lien law as one such element, see pp. 331-332.

⁵⁴ *An Act to Regulate Processes in the Courts of the United States*, Act of September 29, 1789, Stat. 1, ch. 21, sect. 2. The same Congress three years later enacted the second Process Act, entitled *an Act for Regulating Processes in the Courts of the United States and Providing Compensations for the Officers of the said Courts, and for Jurors and Witnesses*, Act of May 8, 1792, Stat. 1, ch. 36, requiring: "That the forms of writs, executions and other process... shall be the same as are now used in the said courts... of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law."

⁵⁵ 729 F.2d 971, 1984 AMC 2089 (4 Cir. 1984).

American courts have frequently utilized conflict of law theories associated with the "American conflicts revolution", notably the "most significant relationship" (involving contact analysis based on the "*Lauritzen/Rhoditis* factors"),⁵⁶ as well as governmental interest analysis, in deciding whether or not to recognize foreign maritime claims. In *Exxon Corp. v. Central Gulf Lines*,⁵⁷ for example, a ship was arrested in the U.S. on a claim relating to bunkering performed in Saudi Arabia under a contract entered into in the U.S. The shipowner, charterer and ship were American, as was the supplier. Applying the proper law and governmental interests analysis, the Federal District Court for the Southern District of New York (one of the most experience admiralty courts in America) held:

"Plaintiff Exxon contends that American law should govern whether maritime liens exist in this case. Defendant does not oppose this contention. I agree that this case should be decided according to American law. The United States has a significant interest in this case. The shipowner, the charterer, the ship and the plaintiff were all American. On the other hand, Saudi Arabia has no interest in having its law apply in this case. The only foreign participant in this transaction, Arabian marine, was not injured. See *Lauritzen v. Larsen*, 345 U.S. 571, 582-590, 1953 AMC 1210, 1218-25 (1953); *Rainbow Line, Inc. v. M/V Tequila*, 1973 AMC 1431, 1434-35, 480 F.2d 1024, 1026-27 (2 Cir. 1973)."

Many other American precedents may be cited, where either express choice of law or contacts (connecting factors) have led to the enforcement in the U.S. of foreign

⁵⁶ This theory, enshrined in the Restatement Second of the Conflict of Laws, adopted by the American Law Institute, Washington, D.C., 1969, as applied in U.S. maritime law, is particularly to be found in the famous "*Lauritzen/Rhoditis*" choice-of-law factors emanating from the famous "trilogy" of U.S. Supreme Court decisions: *Lauritzen v. Larsen* 345 U.S. 571, 1953 AMC 1210 (1953); *Romero v. International Terminal Operating Co.* 358 U.S. 354, 1959 AMC 832 (1959); and *Hellenic Lines, Ltd. v. Rhoditis* 398 U.S. 306, 1970 AMC 994 (1970). These factors are: 1) place of the wrongful act, 2) law of the flag, 3) allegiance or domicile of the injured party, 4) allegiance of the shipowner, 5) place of the contract, 6) inaccessibility of the foreign forum, 7) law of the forum, and 8) shipowner's base of operations. They have been held to apply as choice-of-law factors in all U.S. maritime conflicts cases, including both contract and tort cases.

⁵⁷ 707 F. Supp. 155, 1989 AMC 2467 (S.D. N.Y. 1989), reconsideration denied, 717 F. Supp. 1029, 1989 AMC 2943 (S.D. N.Y. 1989), aff'd 904 F.2d 33, 1990 AMC 1816 (2 Cir. 1990), rev'd on other grounds,

maritime claims, whether maritime liens or statutory rights *in rem* or others, even in cases where those foreign rights differ from those which would arise in corresponding purely U.S. cases.⁵⁸ American law always governs the ranking of the foreign claims, however.⁵⁹

500 U.S. 603, 1991 AMC 1817 (1991), summary judgment granted, 780 F. Supp. 191, 1992 AMC 1663 (S.D. N.Y. 1991).

⁵⁸ *State of Israel v. M/V Nili* 435 F.2d 242, 1971 AMC 428 (5 Cir. 1970), cert. denied 401 U.S. 994, 1971 AMC 1325 (1971) (recognition of foreign shipbuilder's mortgage, with U.S. ranking applied to competing claims); *Gulf Oil v. Creole Supply* 596 F.2d 515, 1979 AMC 585 (2 Cir. 1979), rehearing denied, 596 F.2d 522, 1979 AMC 1163 (2 Cir. 1979) (foreign judicial sale and foreign ranking recognized as terminating U.S. supplier's maritime lien); *Forsythe International v. Ruth Venture* 633 F.Supp. 74, 1986 AMC 621 (D. Ore. 1985) (English law applied to bunker supply to Liberian ship in S. Africa, on basis of *Lauritzen/Rhoditis* factors, resulting in refusal of any lien); *Cantieri Navali Riuniti v. M/V Skyptron* 802 F.2d 160, 1987 AMC 463 (5 Cir. 1986) (recognition that foreign mortgagee, by mortgage deed, had waived its preference over foreign maritime lienors, under art. 2 of Liens and Mortgages Convention 1926); *Chantier Naval Voisin v. M/Y Daybreak* 677 F.Supp. 1563, 1989 AMC 151 (S.D. Fla. 1988) (French law applied to French repair claim); *Swedish Telecom Radio v. M/V Discovery I* 712 F.Supp. 1542, 1990 AMC 85 (S.D. Fla. 1988); on reconsideration 712 F.Supp. 1547, 1990 AMC 93 (S.D. Fla. 1989) (Swedish law applied to Spanish repair claim re repairs done in Spain); *Trinidad Foundry v. M/V Kas Camilla* 776 F.Supp. 1558, 1991 AMC 2166 (S.D. Fla. 1991), affirmed, 966 F.2d 613, 1992 AMC 2636 (11 Cir. 1992) (English law applied, as per contract, to Trinidad repair claim); *North End Oil v. Ocean Confidence* 777 F.Supp. 12, 1992 AMC 1067 (C.D. Cal. 1991) (English law, applicable by contract, governed U.S. bunker supplier's claim); *Sembawang Shipyard v. Charger* 955 F.2d 983, 1993 AMC 1341 (5 Cir. 1992) (Singapore law applied to Singapore repair claim); *North End Oil v. Norman Spirit* 1993 AMC 88 (C.D. Cal. 1992) (English law, applicable by contract, governed U.S. bunker supplier's claim); *Isbrandtsen Marine Services, Inc. v. M/V Inagua Tania* 93 F.3d 728, 1997 AMC 912 (summ.) (11 Cir. 1996) (foreign seamen allowed to intervene to assert foreign wage lien against U.S. judicial sale proceeds of ship); *First Marine Distributors, Inc. v. M/V Marylou II* 1997 AMC 22 (D. Md. 1996) (English law, applicable by contract, governed claim for bunkers supplied in Egypt); *Heidmar, Inc. v. Anon. Ravennate* 993 F.Supp. 990, 1998 AMC 47 (S.D. Tex. 1997), vacated in part on other grounds, 132 F.3d 264, 1998 AMC 982 (5 Cir. 1998) (English law, applicable by contract, defeated claim of U.S. maritime lien for breach of charterparty); *KLLM Transport Services, Inc. v. M/V Sea Eagle* 1997 AMC 2045 (S.D. Fla. 1996) (Panamanian master's maritime wage lien recognized under Panamanian law, despite U.S. statute which grants U.S. maritime wage lien only to masters of U.S. documented vessels); *Garcia v. M/V Kubbar* 4 F. Supp. 2d 99, 1998 AMC 893 (N.D. N.Y. 1998) (Guatemalan law held applicable and recognized as granting no maritime lien for personal injury to Guatemalan longshoreman injured on Kuwaiti ship in Guatemala); *Ost-West-Handel Bruno Bischoff G.m.b.H. v. Project Asia Line, Inc.* 970 F.Supp. 471, 1998 AMC 989 (E.D. Va. 1997), aff'd 160 F.3d 170, 1999 AMC 380 (4 Cir. 1998) (foreign ship mortgage found valid under Liberian law and therefore entitled to priority as foreign preferred ship mortgage under U.S. ranking); *Lion de Mer v. M/V Loretta D* 1998 AMC 1410 (D. Md. 1998) (no maritime lien recognized, under either Greek or Liberian law, re supply of bunkers to time charterer of a Liberian ship in Greece); *Madredeus Shipping Co., Ltd. v. Century Bridge Chartering Co. Ltd.* 2000 AMC 957 at p. 960 (S.D. Fla. 2000) (no maritime lien for unpaid bunkers, where bunker supply contract specified Hong Kong law, because that law, based on substantive English maritime law, recognizes only a statutory right *in rem*, and not a maritime lien, for supply of bunkers); *Bender Shipbuilding & Repair Co., Inc. v. Drive Ocean V* 2000 AMC 1958 at pp. 1965-1967 (S.D. Cal. 1998), aff'd 221 F.3d 1348, 2000 AMC 1973 at p. 1974 (9 Cir. 2000-Editor's Note) (no maritime lien for misrepresentation and related tort claims concerning negotiation and performance of a time charterparty, where charterparty was subject to the "laws of the Province of British Columbia" (i.e. Canadian maritime law), which grants no such lien); *Galehead, Inc. v. M/V Liman* 2000 AMC 2689 (E.D. La. 2000) (no maritime lien for bunkers supplied in Pakistan, despite contrary

In other cases, U.S. courts have applied American law to foreign maritime liens and claims because of the significance of the American contacts or because the foreign law invoked was insufficiently proven, and was therefore displaced by the *lex fori*.⁶⁰ In still other decisions, where the interests of justice have so indicated, American judges have dismissed or stayed conditionally the suits before them and, applying the doctrine of *forum non conveniens*, have sent the cases to jurisdictions where the litigation could apparently be disposed of more conveniently.⁶¹

VI. Canada

Canada has been affected by American thinking in its characterization of maritime liens as substantive rights for conflict of law purposes. That characterization

judgment of a Belgian court, where bunker supply contract (not discovered at time of Belgian proceedings) provided for English law, which grants no such lien).

⁵⁹ *Mobile Marine Sales, Ltd. v. M/V Prodomos* 776 F.2d 85, 1986 AMC 1337 (3 Cir. 1985); *Oil Shipping (Bunkering) B.V. v. Royal Bank of Scotland* 817 F. Supp. 1254, 1993 AMC 1774 (E.D. Pa. 1993); *Banco de Credito Industrial, S.A. v. Tesoreria General* 990 F.2d 827 at p. 832, 1993 AMC 2029 at p. 2034 (5 Cir. 1992); *Sunrise Shipping Ltd. v. M/V American Chemist* 1999 AMC 2906 at p. 2918 (E.D. La. 1999); *Bender Shipbuilding & Repair Co., Inc. v. Drive Ocean V* 221 F.3d 1348, 2000 AMC 1973 at p. 1974 (9 Cir. 2000) (Editor's Note) and other decisions cited there.

⁶⁰ *Payne v. Tropic Breeze* 423 F.2d 236, 1970 AMC 1850 (1 Cir. 1970), cert. denied sub nom. *Samadjopoulos v. National Western Life Insurance Co.* 400 U.S. 964, 1971 AMC 818 (1970); *Rainbow Line Inc. v. M/V Tequila* 480 F.2d 1024, 1973 AMC 1431 (2 Cir. 1973); *Potash Co. of Canada v. M/V Raleigh* 361 F.Supp. 120, 1973 AMC 2658 (D.C.Z. 1973); *Sasportes v. Sol de Copacabana* 581 F.2d 1204, 1980 AMC 791 (5 Cir. 1978); *Rayon Y Celanese v. M/V PHGH* 471 F.Supp. 1363 (D. Ala. 1979); *Gulf Trading & Transportation Co. v. Hoegh Shield* 658 F.2d 363, 1982 AMC 1138 (5 Cir. 1981), cert. denied 457 U.S. 1119, 1982 AMC 2108 (1982); *Gulf Trading & Transportation Co. v. M/V Tenta* 694 F.2d 1191, 1983 AMC 872 (9 Cir. 1982), cert. denied 461 U.S. 929, 1983 AMC 2109 (1983); *Cardinal Shipping v. Seisho Maru* 744 F.2d 461, 1985 AMC 2630 (5 Cir. 1984); *Tramp Oil v. Mermaid I* 743 F.2d 48, 1985 AMC 459 (1 Cir. 1984), on remand, 630 F.Supp. 630, 1987 AMC 129 (D. P.R. 1986), affirmed 805 F.2d 42, 1987 AMC 866 (1 Cir. 1986); *Castelan v. M/V Mercantil Parati* 1991 AMC 2141 (D. N.J. 1991); *Arochem Corp. v. Wilomi* 962 F.2d 496, 1992 AMC 2347 (5 Cir. 1992); *Espirito Santo Bank v. M/V Tropicana* 1992 AMC 1672 (S.D. Fla. 1990), affirmed without opinion, 958 F.2d 1083 (11 Cir. 1992), cert. denied 506 U.S. 906 (1992); *Ryan-Walsh, Inc. v. M/V Ocean Trader* 930 F.Supp. 210, 1996 AMC 1225 (D. Md. 1996); *Nikko Shipping Co. v. M/V Sea Wind* 941 F. Supp. 587, 1997 AMC 399 (D. Md. 1996); *Sunrise Shipping, Ltd. v. M/V American Chemist* 1999 AMC 2906 at p. 2918 (E.D. La. 1999).

⁶¹ *Comoco Marine v. El Centroamericano* 1984 AMC 1434 (D. Or. 1983); *Belcher Co. v. Maratha Mariner* 724 F.2d 1161, 1984 AMC 1679 (5 Cir. 1984); *Forsyth International (U.K.) Ltd. v. S.S. Penavel* 630 F.Supp. 61 (S.D. Ga. 1985), affirmed without opinion, 786 F.2d 1180 (11 Cir. 1986); *Perez & Co. v. Mexico I* 826 F.2d 1449, 1988 AMC 1930 (5 Cir. 1987).

may also be attributable, at least in part, to the influence of the civil law tradition of the Province of Québec, and to the presence of justices trained in that legal system, in the Supreme Court of Canada.

The seminal decision on the point in Canada is no doubt *The Ioannis Daskalelis*,⁶² decided by Canada's Supreme Court in 1972, nearly eight years before the Privy Council decided *The Halcyon Isle*. A Greek ship, owned by a Panamanian company and burdened with a Greek registered mortgage, was repaired in Brooklyn, New York, and then sailed away leaving the repair bill unpaid, avoiding both the ship repair yard's possessory lien and the U.S. maritime lien for repairs, as well as arrest in the U.S. When the ship was later arrested and sold judicially in Vancouver, the Canadian courts were confronted by the competing claims of the unpaid U.S. necessities provider (the shipyard) and the Greek mortgagee.

Looking at prior British decisions, notably *The Colorado*,⁶³ as well as earlier Canadian precedents such as *The Strandhill v. Walter W. Hodder Co. Inc.*,⁶⁴ Ritchie, J. first determined that Canadian courts had the requisite jurisdiction to enforce foreign maritime claims, and then, on the recognition/priorities problem, held as follows:⁶⁵

"I do not find it necessary to go further than the decision in *Strandhill* to find authority for holding that the necessary repairs furnished by Todd Shipyards Corporation in New York gave rise to a maritime lien against the defendant ship which is enforceable in this country, but the further question to be determined in this case is whether that lien takes precedence over the respondent's mortgage claim, and in my view this question must be determined according to the law of Canada (i.e., the *lex fori*). In this regard, it appears to me that the law of England is correctly summarized in

⁶² [1974] S.C.R. 1248, [1974] 1 Lloyd's Rep. 174, 1973 AMC 176 (Supr. Ct. of Can.).

⁶³ [1923] P. 102, (1923) 14 Ll. L. Rep. 251 (C.A.).

⁶⁴ [1926] S.C.R. 680, [1926] 4 D.L.R. 801, 1927 AMC 244 (Supr. Ct. of Can.). Also cited was *Marquis v. The Astoria* [1931] Ex. C.R. 195 (Ex. Ct. of Can.).

⁶⁵ [1974] S.C.R. 1248 at p. 1254, [1974] 1 Lloyd's Rep. 174 at p. 177, 1973 AMC 176 at p. 180.

the following passage of CHESHIRE'S *Private International Law* (8th ed.), at page 676 where the learned author says:

'Where, for instance, two or more persons prosecute claims against a ship that has been arrested in England, the order in which they are entitled to be paid is governed exclusively by English law.

'In the case of a right *in rem* such as a lien, however, this principle must not be allowed to obscure the rule that the substantive right of the creditor depends upon its proper law. The validity and nature of the right must be distinguished from the order in which it ranks in relation to other claims. Before it can determine the order of payment, the court must examine the proper law of the transaction upon which the claimant relies in order to verify the validity of the right and to establish its precise nature. When the nature of the right is thus ascertained the principle of procedure then comes into play and ordains that the order of payment prescribed by English law *for a right of that particular kind* shall govern.' The italics are my own."

Accordingly, the ship repairer's U.S. maritime lien was enforced in Canada against the proceeds of the vessel's sale, as a "substantive" right in the shipowner's property, in accordance with the proper (American) law of that claim, and the claim was assigned a ranking under the Canadian *lex fori* which gave it priority over the Greek ship mortgage, even though had the same repair claim arisen in Canada, it would have ranked as a statutory right *in rem* after the mortgage.

The true, historic nature of the maritime lien as a *jus in re aliena* was thus acknowledged, together with the proper character of ranking rules as remedial and thus properly subject to the *lex fori*. The Supreme Court's decision was also equitable, because the repairs added to the value of the mortgaged vessel, so that that added value benefited the mortgagee. The legitimate expectations of the U.S. repairman that its contractual claim, connected with the U.S. and no other country, would be enforced according to its nature as a maritime lien in other countries at which the vessel might call,

was not disappointed. The recognition of the proper law of the contract also accorded with a fundamental principle of private international law enunciated by English scholars of the calibre of Cheshire, whom Ritchie, J. cited, while also discouraging forum shopping. *The Ioannis Daskalelis* is thus, in the opinion of this author, a far wiser and better founded precedent than the subsequent decision of the Privy Council in *The Halcyon Isle*.

Canadian courts have consistently followed *The Ioannis Daskalelis*,⁶⁶ in preference to *The Halcyon Isle*, thus standing somewhat alone in comparison with courts in other Commonwealth countries such as Australia, New Zealand, South Africa and Singapore.⁶⁷ In *Marlex Petroleum v. The Har Rai*,⁶⁸ for example, an Indian ship was supplied in the U.S. with bunkers ordered by a time charterer who lacked authority to incur liens on the vessel. The Federal Court of Appeal, upheld by the Supreme Court of Canada, applied American law, under which the time charterer is *presumed* to have such authority, and so enforced the U.S. maritime lien, although Canadian maritime law,

⁶⁶ See, for example, *Metaxas v. The Galaxias (No. 2)* [1989] 1 F.C. 386, (1988) 19 F.T.R. 108 (Fed. Ct. of Can.); *Sembawang Reefer Lines (Bahamas) Ltd. v. Lina Erre* (1990) 30 F.T.R. 31, [1990] ETL 35 (Fed. Ct. of Can.), rev'd on other grounds, (1990) 114 N.R. 270, (1991) 38 F.T.R. 240 (note) (Fed. C.A.); *Shibamoto & Co. v. Western Fish Producers Inc.* [1991] 3 F.C. 214, (1991) 43 F.T.R. 1 (Fed. Ct. of Can.), upheld (1993) 145 N.R. 91 (Fed. C.A.); *Frisol Bunkering B.V. v. M/V Alexandria* (1992) 47 F.T.R. 3 (Fed. Ct. of Can.); *Holt Cargo Systems Inc. v. ABC Containerline N.V.* [1997] 3 F.C. 187 at p. 202, (1997) 146 D.L.R. (4th) 736 at p. 745, 1997 AMC 1815 at pp. 1833-1834 (Fed. Ct. of Can.), upheld (1999) 239 N.R. 114, (1999) 173 D.L.R. (4th) 493, 1999 AMC 1486 (Fed. C.A.); *Fraser Shipyard and Industrial Centre Ltd. v. Expedient Maritime Co. Ltd. (The Atlantis Two)* (1999) 170 F.T.R. at pp. 13-15, 23-24, 26-29 and 31-36, 2000 AMC 543 at pp. 550-551, 563-565, 567-570 and 573-580 (Fed. Ct. of Can. per Prothonotary Hargrave), varied by (1999) 170 F.T.R. 57, 2000 AMC 28 (Fed. Ct. of Can. per Rouleau, J.); *Holt Cargo Systems Inc. v. ABC Containerline N.V.* (2001) 207 D.L.R. (4th) 577 (Supr. Ct. of Can.); *Bank of Scotland v. The Nel* (2000) 189 F.T.R. 230 at p. 237, [2001] 1 F.C. 408 at p. 420 (Fed. Ct. of Can. per Hargrave, P.). But see also *Imperial Oil Ltd. v. Petromar Inc.* [2001] F.C.J. No. 1900, 2001 FCA 391 (Fed. C.A.), where the predominance of Canadian contacts led the Federal Court of Appeal to refuse to recognize and enforce the American maritime lien claim and to reverse the Federal Court of Canada's decision, reported at (2000) 187 F.T.R. 208.

⁶⁷ See *supra*, discussion surrounding notes 37 to 49.

⁶⁸ [1984] 2 F.C. 345, 1984 AMC 1649 (Fed. C.A.), upheld [1987] 1 S.C.R. 57 (Supr. Ct. of Can.).

having no such presumption, does not even grant a statutory right *in rem* where necessaries are ordered by a party lacking authority to bind the ship.

VII. Some Other Jurisdictions

The problem of the recognition and priority to be assigned to foreign maritime liens and claims differing from those securing the same claims at domestic law has arisen elsewhere in the world. It has been addressed by either legislation or judge-made law in various jurisdictions other than those mentioned above.

1) China

The People's Republic of China, in its Maritime Code of 1993,⁶⁹ at art. 272 makes the "law of the place where the court hearing the case is located" apply "to matters pertaining to maritime liens." In other words, the P.R.C. follows the *lex fori* principle of *The Halcyon Isle*.

2) Israel

Some countries appear quite confused by the *Halcyon Isle/ Ioannis Daskalelis* dichotomy. The three justices of the Israeli Supreme Court, for example, in *The Nadja S. (Griffin Corp. v. Koor Sachar*⁷⁰), split into three camps. The President of the Court held that the foreign maritime lien for necessaries was a substantive right which should be governed by the *lex situs* (the law of the place where the necessaries were supplied), with priorities subject to the *lex fori* (i.e. the Canadian approach). A second justice held that

⁶⁹ The Maritime Code of the People's Republic of China was adopted by the 28th Meeting of the Standing Committee of the Seventh National People's Congress of the People's Republic of China on November 7, 1992, by Order No. 64 of the President of the People's Republic of China. The Code came into force on July 1, 1993. See the English translation prepared by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the P.R.C., Beijing, 1993. See also the relevant conflicts rules (Chap. XIV) of the Code reproduced in English in Tetley, *Int'l Conflict*, 1994, Appendix "J" at pp. 1076-1078 with a "Brief Commentary" at pp. 1078-1081.

⁷⁰ 44 (3) P.D. 45 (1990). See also P.G. Naschitz, "Maritime Liens and Mortgages in Israel - Who has First Priority?" (1992) 23 JMLC 123.

both recognition and ranking should be the *lex causae* (the proper law of the necessary contract), and that if those laws differed, the *lex fori* should regulate priorities. The third justice decided that the *lex fori* should apply to both recognition and priorities *à la Halcyon Isle*.

3) **Greece**

Greece is one of a number of civilian countries whose conflict rules require that the law of the ship's flag (the law of the ship's registry) determine questions of recognition and ranking of foreign maritime claims. In Greece, the relevant provision is art. 9 of the Greek Code of Private Maritime Law.⁷¹

4) **Sweden**

Under the Swedish Maritime Code 1994 (similar codes were adopted the same year by Denmark, Finland and Norway), Swedish law governs maritime liens and rights of retention on Swedish-registered vessels when the lien or right is invoked before a "Swedish Authority".⁷² In the case of other vessels, the effect of a maritime lien, right of retention or similar right is determined by the law of the vessel's registry. Nevertheless, such rights rank after any maritime lien or right of retention provided for in Chap. 3 of the Code and after any hypothec (ship mortgage) complying with the Liens and Mortgages Convention 1967.⁷³

5) **The Netherlands**

⁷¹ See A.M. Antapassis, *Les Codes maritimes Grecs*, XXIII Bibliothèque de Droit maritime, Fluvial, Aérien et Spatial, Librairie Générale, Paris, 1983 at p. 114. See the text in English by T.B. Karatzas and N.P. Ready, *The Greek Code of Private Maritime Law*, Martinus Nijhoff, The Hague, 1982 at p. 6.

⁷² Swedish Maritime Code, chap. 3, sect. 51. See the Swedish and English text, published by Juristförlaget, Stockholm, 1995.

⁷³ *Supra*, note 25.

By the Netherlands *Conflict of Maritime Laws Act* of 1993,⁷⁴ art. 3(2), the law of the ship's registry (flag) governs the question of whether a maritime claim is protected by a lien, as well as the scope and consequences of such a lien. Even if the lien exists under the law of the flag, however, it will outrank a mortgage only if an equivalent lien would have done so under Netherlands law.

The ship's flag or registry is no longer appropriate or satisfactory as a conflict rule in our contemporary world, where flags of convenience, double-flagging and "flagging out" are so prevalent, and where there is frequently no genuine link between the flag or registry and the owners or operators or insurers of vessels. The flag or registry today is but one contact among others, and is rarely a decisive connecting factor. It should certainly not be relied upon as the final word on what law governs the recognition and enforcement of foreign maritime claims.⁷⁵

VIII. The Rome Convention 1980

The Rome Convention 1980,⁷⁶ now in force and binding on courts in all States of the European Union, should change *The Halcyon Isle* rule. By arts. 3 and 4 of the Convention, express and implied choice of law point to the applicable law in contract, rather than the *lex fori*. Procedure as a principle is reduced in importance by arts. 1(2)(h) and 14. Most importantly, however, art. 10(1)(c) subjects to the applicable law, *inter alia*,

⁷⁴ *Wet van 18 maart 1993, houdende enige bepalingen van internationaal privaatrecht met betrekking tot het zeerecht en het binnenvaartrecht* (Law of March 18, 1993 containing certain provisions on private international law with regard to maritime law and inland navigation law). See English translation in Tetley, *Int'l Conflict*, 1994, Appendix "I" at pp. 1069-1072, with a "Brief Commentary" at pp. 1073-1075.

⁷⁵ On the law of the flag generally in conflicts of maritime law, see Tetley, *Int'l Conflict*, 1994, Chap. VII at pp. 175-224.

⁷⁶ Convention on the Law Applicable to Contractual Obligations, No. 80/924, O.J.E.C. 1980, No. L 266/1, adopted at Rome, June 19, 1980 and in force April 1, 1991. See English text in Tetley, *Int'l Conflict*, 1994, Appendix "F" at pp. 1032-1045, with a "Brief Commentary" at pp. 1045-1048.

the "consequences of breach" of the contract. Foreign maritime liens and related maritime rights surely fall within this term. If *The Halcyon Isle* were to be decided by the Privy Council today, it is easily arguable that the U.S. ship repair maritime lien would have to be recognized as such, even if it were ranked under English rules of ranking. This is particularly so now that the Rome Convention is part of U.K. internal law by the *Contracts (Applicable Law) Act 1990*.⁷⁷

IX Conclusion

We all resist change. Robert Browning even said "I hate change." Nevertheless, the simplicity and convenience of the *lex fori*, as seen particularly in United Kingdom maritime lien law, is probably a thing of the past, as a result of the influence of the European Union and in particular of the Rome Convention 1980. We saw this as well in the U.K.'s *Private International Law (Miscellaneous Provisions) Act 1995*,⁷⁸ which rejects double actionability in tort.

Von Mehren has led in the rejection of the *lex fori*, in favour of a more equitable and just choice-of-law rule.

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⁷⁷ U.K. 1990, c. 36. See this argument further developed in Tetley, *Int'l Conflict*, 1994 at pp. 580-581.

⁷⁸ U.K. 1995, c. 42, sect. 10.