# COMMENT

## PRIORITIES AND THE FOREIGN MARITIME LIEN

The recent decision of a closely divided Privy Council on appeal from Singapore in *Bankers Trust International Ltd* v *Todd Shipyards Corporation*[1] (hereafter referred to as *The Halcyon Isle*) has highlighted the difficulties posed by divergences in national laws for ship financing and securities. The issue facing the Board was whether it should give effect to a maritime lien validly created by the rules of a relevant foreign legal system, but unrecognised by the domestic rules of the *lex fori*. This question had never previously been squarely faced as such by an English or Australian court. In view of the international nature of shipping, the relevance of the decision to ship purchasing and financing, and a growing national interest in maritime matters, consideration of *The Halcyon Isle* is apposite.

In this case, the appellants were an English bank which held a mortgage on the "Halcyon Isle", a British ship registered in London. Created on 27 April 1973, the mortgage was registered on 8 May 1974. The respondents were ship repairers carrying on business in New York, and they executed repairs to the "Halcyon Isle" at their Brooklyn shipyard in March 1974 (thereby becoming "necessaries men"). The vessel sailed from New York. Both the mortgagees and the ship repairers took out writs *in rem* against the ship in the Singapore High Court. When the "Halcyon Isle" reached Singapore, the mortgagees had her arrested on 5 September 1974. Their claim was for $S24,413,000, while the ship repairers said they were entitled to $S237,011. Judgment was awarded in favour of both claimants, but the proceeds of sale of the vessel amounted to only $S1,380,000. It was accepted that the holder of a maritime lien had priority over a mortgagee. However, the appellants claimed that under Singapore law (which was the same as English law on this issue)[2] a mortgagee ranked ahead of a necessaries claimant, since no maritime lien was created by the supply of necessaries, and therefore their claim had priority over that of the ship repairers. On the other hand, the respondents contended that, under American law, a ship repairer as a necessaries man was entitled to a maritime lien for the price of repairs done to a vessel, and thus under both American and English law they were entitled as holders of a maritime lien to priority over the mortgagees. If the mortgagees were correct, they would be awarded the entire sale proceeds, leaving nothing for the ship repairers. If the ship repairers succeeded, their complete claim would be satisfied, the mortgagees having to content themselves with the difference between the sale proceeds and the ship repairers' claim. The difficult nature of the decision is illustrated by the fact that the Singapore High Court found

1 [1980] 3 WLR 400.

2 Indeed, the Privy Council pointed out that as regards practice, procedure and substantive law in admiralty matters, there was no relevant difference between the law of Singapore and the law of England, and throughout the judgment, the Board used the term English law to include Singapore law. This terminology will be followed here.

for the mortgagees,[3] the Court of Appeal for the ship repairers,[4] and the Privy Council by a majority of 3 to 2 for the mortgagees. Although their Lordships differed on the issue of the *existence* of a maritime lien, they all agreed that, under the English law of priorities, a maritime lien took precedence over a mortgage, and that the *lex fori* applied to the actual ranking of claims.

The majority of the Board (Lords Diplock, Elwyn-Jones and Lane) pointed out that, in classifying claims arising in other jurisdictions for the purpose of determining priorities to a limited fund, an English court has two choices.[5] It could classify the claim by reference to the events on which it was founded, and give to it the priority to which it would be entitled under the *lex fori* if those events had occurred within the territorial jurisdiction of the distributing court. Alternatively, the court could first ascertain the legal consequences (other than those relating to priorities) attributable under the *lex causae* of each claim to the events on which it was founded, and then accord to that claim the priority which the forum would accord to claims arising from events which would have given rise to the same or analogous legal consequences if they had occurred within the territorial jurisdiction of the forum. The majority of the Board chose the former approach for basically three reasons: it was said to be correct in principle, to be supported by authority, and to reflect sound policy. The majority also felt that it had the "merit of simplicity",[6] presumably meaning that it avoids the complication of considering the content and scope of a foreign legal rule, but wisely this ground was not pressed, as it partakes of a rigid parochialism.

Enlarging on the first ground, the majority felt that, while there was justification to resort to the "proper law" of a contract in order to give effect to the legitimate expectations of parties to an agreement vis-a-vis each other, there was no compelling reason to look to foreign law when the court was merely distributing a limited fund among a number of creditors. While each creditor is a party to a contract with the debtor, the creditors have entered into no legal relationship with each other. Thus, it cannot be said that a given creditor does anything to arouse any legitimate expectations in another creditor as to the priority to which he will be entitled in the distribution of the fund.[7] No injustice then is caused by allowing the *lex fori* to arrange the ranking of claims. The ship repairers, "experienced litigants in courts of admiralty", must have known that if the "Halcyon Isle" were arrested in any major trading country, their claim would be subject to the rules of priorities of the forum: which rules varied considerably from one country to another. The Board recognised, however, that the situation was not so clear when a creditor argued that he had a secured claim against the property which entitled him to a preferential status. Whether or not a security exists is a question of substance, which, under the rules of private international law, must be referred to the *lex causae* of the claim. Since the respondents' contention was that their security was created by a maritime

3 [1977] 1 MLJ 145.
4 [1978] 1 MLJ 189.
5 [1980] 3 WLR 400, 403.
6 Ibid 404.
7 Ibid.

lien given to them by American law as the *lex causae,* the Board then had to analyse the nature of a maritime lien.

A maritime lien was judicially described by Sir John Jervis in *The Bold Buccleugh* [8] as:

> "a privilege or claim upon a thing to be carried into effect by legal process....This claim or privilege travels with the thing into whosesoever 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."

The majority pointed out that English law recognised only six classes of claims as capable of giving rise to maritime liens, viz claims for salvage, collision, seaman's wages, bottomry, master's wages and master's disbursements, all of which originate in the provision of benefit to, or the infliction of damage by, the maritime property. A claim based on the supply of necessaries to a vessel was not included in the list. It was accepted that, if a maritime lien created substantive rights, then regard should be had to American law as the relevant foreign law; but if the true characterisation of a maritime lien in English law involved rights that were procedural or remedial only, then the question whether a particular class of claim gave rise to a maritime lien or not was to be determined by English law as the *lex fori.*[9]

The majority found that English authorities on maritime liens had never resorted to foreign law in determining whether a lien existed when they otherwise might have (this brings us to the second reason mentioned earlier for the Board's decision, viz authority). In cases spanning a century, their Lordships observed that the court had applied English rules as to the existence and extent of maritime liens, and not the differing rules which would have been applicable under the *lex causae.* To take one such case, in *The Tagus,*[10] the master of an Argentine vessel claimed a maritime lien for wages and disbursements over a number of voyages. By Argentine law, the law of the country to which the ship belonged, he was entitled to a lien for such sums, but only in respect of the last voyage, while English law granted a lien over all voyages. The court held that the master ranked before the mortagees in respect of the whole of his wages and disbursements. On the other hand, apart from *The Milford* [10] and *The Tagus,*[10] none of the authorities cited by their Lordships expressly considered as the main ground for the decision whether it was pertinent to have regard to foreign law, and then rejected recourse to it. Though dicta to that effect may be found in *The Zigurds* [10] and *The Acrux,*[10] Langton J in the former case specifically ruled that by German law, the German necessaries men were not in fact given a maritime lien, and therefore it should not have been relevant to

8 (1851) 7 Moo PC 267, 284; 13 ER 884, 890. See also Gorell Barnes J in *The Ripon City* [1891] P 226, 241, 242, 244.

9 [1980] 3 WLR 400, 410. Generally on this issue, see Dicey and Morris, *The Conflict of Laws*, 10th edn 1980 (Stevens) Chap 35 (and esp 1193); Cheshire and North, *Private International Law*, 10th edn 1979 (Butterworths) Chap XX (and esp pp 704-706). See also Thomas, *Maritime Liens,* 1980 (Stevens) Chap 12 (and esp paras 574-589).

10 [1903] P 44. The other cases cited were *The Golubchick* (1840) 1 W Rob 143, *The Pieve Superiore* (1874) LR 5 PC 482; *The Milford* (1858) Swa 362; *The Zigurds* [1932] P 113; *The Acrux* [1965] P 391.

look to German law, while in the latter case, the real question was whether social insurance contributions payable by Italian shipowners could be regarded as seamen's wages for jurisdictional purposes under section 1(1)(o) of the Administration of Justice Act, 1956 (UK).

The majority of the Privy Council also pointed out that the mere fact that the holder of maritime lien over a ship could proceed against the ship at any time, regardless of a change of ownership, did not necessarily mean that such a lien created substantive rights in favour of the lienor. As Atkin LJ commented in *The Tervaete*,[11]

> "[The maritime lien] is confined to a right to take proceedings in a court of law....The right of maritime lien appears...to be essentially different from a right of property, hypothec or pledge created by [a] voluntary act...."

This statement was consonant with a classification of maritime liens as going to procedure or remedy, not substance. Their Lordships rejected two Canadian decisions which had suggested the contrary in holding that, on the authority of *The Colorado*,[12] the *lex causae* determined whether or not a maritime lien existed, not the *lex fori*. In *The Strandhill* [13] and *The Ioannis Daskalelis*,[14] the Supreme Court of Canada held that American necessaries men had a maritime lien, even though Canadian law would not have granted one in purely local circumstances.[15] Their Lordships distinguished the former case on the basis that it was not directly concerned with priorities, only with jurisdiction, and the latter on the ground that it proceeded on an erroneous conception of *The Colorado* and thus should not be followed. The error was said to reside in the Canadian Court's assumption that *The Colorado* held that the French holder of the "hypothèque" was to be considered in the same position as the holder of a maritime lien, whereas the English court merely said that his position approximated that of a mortgagee.

As for the third ground invoked by the majority in *The Halcyon Isle*, viz policy, it was pointed out that English law had traditionally adopted a policy of restricting the number of maritime liens. The reason was that English law views the easy creation of maritime liens as undesirable, only grudgingly recognising the categories of maritime liens still existing as a result of history and maritime necessity: the greater the number of maritime liens, the greater the likelihood of injustice to a purchaser of a vessel (or his mortgagee) who is unaware of the fact that, although the ship appears to be free of charges and unencumbered, as far as he can determine, she is, in reality, "mortgaged" to the hilt with maritime liens. Such a possibility makes ship financing a highly risky venture and inhibits the extension of liberal credit facilities to shipowners. As a matter of policy, therefore, in the words of Hewson J in *The Acrux*,[16]

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11 [1922] P 259, 274.
12 [1923] P 102.
13 [1926] 4 DLR 801.
14 [1974] 1 Lloyd's Rep 174. The plaintiffs here were the respondents in *The Halcyon Isle*.
15 The Canadian Admiralty Court has also held the converse to be true, viz that if the relevant foreign law does not grant a maritime lien as understood by the *lex fori*, neither should the *lex fori*, even though if the events had taken place within the terrotorial jurisdiction of the forum, a maritime lien would have arisen under the *lex fori* (see *The Terry* [1948] 1 DLR 728).
16 [1965] P 391, 403.

"the categories of maritime lien as recognised by this court cannot...be extended except by the legislature", the same sentiment being echoed by the majority in *The Halcyon Isle:* [17]

> "It is far too late to add, by judicial decision, an additional class of claim to those which have hitherto been recognised as giving rise to maritime liens under the law of Singapore...."

Indeed, one of the reasons why England refrained from ratifying the International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages of 1926 was that it required contracting States to create and recognise maritime liens in favour of necessaries men.[18] Their Lordships also felt support was provided by the wording of Article 9 of the 1952 Brussels Convention relating to the Arrest of Seagoing Ships, which reads:

> "Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the court which had seisin of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on Maritime Mortgages and Liens, if the latter is applicable".

This was said to point strongly to international recognition of the characterisation of maritime liens as procedural or remedial only, as their existence was to be determined solely by reference to the *lex fori* (the Convention apart).

It is, however, submitted that despite the cogency of the majority's reasoning, the approach of the minority (Lords Salmon and Scarman) is preferable in principle. The crucial question was: how should a maritime lien be classified? While the majority viewed its real function as being simply to enable a plaintiff to compel a defendant's appearance in court by permitting him to detain the latter's maritime property (ie a procedural or remedial function), the minority felt that so to regard a maritime lien was to deny its property-like character under English law. In their Lordships' opinion, whether or not a maritime lien existed was a question of substance, and in accordance with the rules governing the conflict of laws, matters of substance were regulated by the proper law. Since a maritime lien arose by American law, which was the proper law on this issue, the incident having taken place in America, a maritime lien existed and should be recognised by the *lex fori.* In other words, a necessaries claim under American law gives rise to a bundle of rights similar in nature to the bundle of rights recognised as attaching to a maritime lien under English law. Consequently, the English court should accord the foreign claim the same priority that it would accord a claim possessing those particular rights under its own law. In their analysis, their Lordships emphasised the security function of a maritime lien: [19]

> "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

17 [1980] 3 WLR 400, 414.
18 Ibid 411.
19 Ibid 421-422. Cheshire and North, supra n 9 at 704-706 advocate the same approach to foreign maritime liens.

> 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 should 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."

Indeed, it is undeniable that in English law a maritime lien is given the status of a privileged, and a highly privileged claim over a ship, this being exemplified by the fact that in the scheme of priorities sanctioned by the Admiralty court, a maritime lien ranks above a mortgage, another form of security. It was also pointed out, in relation to a foreign security possessing similar features to an English mortgage, that the Court of Appeal in *The Colorado* [20] looked to foreign law to ascertain the nature of the security as a matter going to substance. This case illustrated the correct approach to the issue, as advocated by the minority in *The Halcyon Isle.*

In *The Colorado*, the question was whether an English necessaries man, a ship repairer, should be given priority over the French holder of a "hypothèque". The court felt obliged to invoke the assistance of French law to determine what rights flowed from a "hypothèque", before deciding that the rights attached to a French "hypothèque" were in substance the same as those flowing from an English mortgage, with the result that English law should grant the status of a mortgage to the French "hypothèque" when applying its own rules of priorities. Therefore, the French "créancier hypothécaire" was given priority over the English necessaries man. It may be accepted, as the majority observed in *The Halcyon Isle*, that the Court of Appeal did not decide that by French law the bundle of rights associated with a "hypothèque" approximated to those rights English law attributed to a maritime lien, with the consequence that English law should accord the French litigant a maritime lien. Nevertheless, as the minority noted approvingly, the approach adopted there of looking to foreign law where a security transaction takes place overseas in order to assist the court in doing justice to the parties is sound and in keeping with established principles of private international law.[21] To this extent, mere dicta to the contrary of single judges of the English High Court in *The Zigurds* [22] and *The Acrux* [23] must yield to the spirit and superior authority of *The Colorado*, as must *The Milford* [24] and *The Tagus,*[25] In any event, as pointed out earlier, except for the last two cases, none of the authorities cited in

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20 [1923] P 102.

21 This has always been the American approach: see Price, "Maritime liens" (1941) 57 LQR 409, 412-414; Griffin, "The Federal Maritime Lien Act" (1923) 37 Harv L R 15, 25. See also Price, *Maritime Liens*, Sweet & Maxwell (1940), pp 210-213 (also Chaps XVIII and XIX for the German and French positions).

22 [1932] P 113.

23 [1965] P 391.

24 (1858) Swa 362; 166 ER 1167.

25 [1903] P 44. It may be conceded that the minority's attempt to distinguish *The Milford* and *The Tagus* by saying that the foreign master's claim for his wages raised purely remedial issues which were, in the circumstances, peremptorily governed by the merchant shipping legislation of the forum was not convincing.

support by the majority expressly rejected the application of foreign law: whether there was an alternative to the *lex fori* was simply not discussed.[26] The compromise proposed by Dicey and Morris [27] to the effect that it is only where the foreign transaction is one with which English law is not familiar that regard must be had to its proper law is scarcely defensible.

On the issue of the policy of the forum, there is, of course, sound argument for restricting the number of maritime liens, in view of the fact that they operate as "secret charges" on a vessel. On the other hand, other national laws have adopted a policy of allowing the creation of maritime liens, perhaps more generously than English law, where it is considered that the proper operation of ships in foreign commerce demands that the ancient institution of a maritime lien be liberally recognised. Indeed overseas ship repairers who fear that their maritime lien will not be universally recognised may either insist on exercising their possessory lien on the vessel, or demand more stringent financial guarantees from the shipowner, his banker or his insurer. In the area of conflict of laws, it has not been demonstrated that English public policy considerations militate against the recognition of foreign law in the field of maritime liens. Public policy may dictate that an English court will refuse to apply a foreign law which "outrages its sense of justice or decency",[28] but this doctrine "should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds." [29] No evidence was adduced in *The Halcyon Isle* to show that to recognise a foreign maritime lien would impart irreparable harm to English notions of justice or even English commerce (assuming that the infliction of loss on English commerce could form the basis for the exclusion of foreign law).

The effect of saying that English law should recognise a foreign maritime lien means that English law, applying its own system of priorities, should rank the foreign claim in the same way as it would rank a maritime lien. It was accepted by both the majority and the minority in *The Halcyon Isle* that the *lex fori* governed all questions of the ranking of claims. In the words of the majority,[30]

> "In English Admiralty law and practice claims of those six classes that have hitherto been treated as giving rise to a maritime lien take priority over claims under mortgages in the distribution of a limited fund by the court, and mortgages themselves rank in priority to all classes of claims that have not been treated as giving rise to maritime liens".

Equally, all their Lordships acknowledged that if the countries of the world were to reach agreement by way of international convention on the types of claim giving rise to maritime liens, the problems encountered in *The Halcyon Isle* would disappear. Unfortunately, the two Conventions[31]

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26 Supra.
27 Dicey and Morris, supra n 9 at 1193.
28 Per Scarman LJ In *In the Estate of Fuld (No 3)* [1968] P 675, 698. See generally Dicey and Morris, Chap 6.
29 Per Lord Atkin in *Fender* v *St John-Mindmay* [1938] AC 1, 12.
30 [1980] 3 WLR 400, 406.
31 For text, see Singh, *International Conventions of Merchant Shipping,* 2nd edn Stevens

to date on the subject, namely, the 1926 Brussels Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, and the 1967 Convention to replace it, have fallen by the wayside. In the absence of a uniform law on the subject, one may reasonably expect the courts to give proper weight to the rules of private international law. In the words of the minority,[32] "the aid of private international law, slim and inadequate though it is, should not, in our opinion, be rejected". That the majority chose to sidestep its proper application and affirm the supremacy of an internal domestic rule by classifying the issue as procedural is to be regretted.

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32 [1980] 3 WLR 400, 421.

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