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Frank Stuart Dethridge Memorial Address

THE FAR FROM HALCYON ISLE: MARITIME LIENS, RENVOI AND CONFLICTS OF LAW

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It is a great honour to be invited to give this address to the annual conference of MLAANZ. I was in my final year of Sydney Law School in 1977 when the first Dethridge Address was delivered by the Rt Hon Sir Ninian Stephen. The address now serves a significant educative function for our two nations' maritime professionals.

Ships are probably the paradigm examples of the effects of cross-border insolvencies. The commercial failure of a ship on an international voyage had been a well known legal problem for perhaps millennia before the more recent advent of the collapse of a multinational corporation or corporate group.

Ships can incur not only debts but liabilities anywhere they sail. The principles of what we know broadly as maritime law developed over time to deal with the recognition of what claims each forum will recognize as enforceable against a ship when she enters its port.

In this address I want to explore how a maritime lien can be classified and which choice of law rules may be used to ascertain whether a foreign maritime lien could be recognised under Australian law, particularly in light of the High Court's recent development of Australian private international law rules. I will discuss the Privy Council's controversial majority decision and dissent in *The Halcyon Isle*,¹ concerning the choice of law for recognition of a foreign maritime lien, and the competing theories of whether the private international law doctrine of *renvoi* may apply in relation to Australian law, maritime liens and contracts. Lest it be thought that this collection of topics sounds like it came from the over excited mind of a professor of law, I must reveal that it is a greatly simplified part of the subject matter of a case that I heard recently which has settled. I do not propose to give any of the answers that I came to but rather I will work through some of the issues that arose in argument.

The Problem in the *Halcyon Isle*

First, I should give a little history from the *New Straits Times* of 9 September 1974 concerning the arrest of the 17,000 ton oil tanker, *Halcyon Isle*. She was part of a fleet operated by the London based company, Court Line. Court Line collapsed in mid August 1974, during the recession caused by the oil price crisis. The ship, which was registered in London, had been mortgaged the previous year to a British bank. Because Court Line was in financial trouble, the ship could not take on a full load of provisions when she called at Dubai on 11 August 1974 en route for Singapore. She broke down in the Straits of Malacca just after her owners' own collapse and was without her engines or generators for a week until she was towed into Singapore on 5 September 1974.

Earlier, on 28 August 1974, the bank began proceedings in Singapore and obtained a warrant for the ship's arrest in support of its claim for over S\$14 million. On the same day, Todd Shipyards Corporation, the New

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¹ *Bankers Trust International Ltd v Todd Shipyards Corporation* [1981] AC 221.

York repairers ('the necessities men'), who had worked on the ship in their Brooklyn yard in March 1974, also issued a writ in Singapore claiming about S\$240,000 for work, materials and interest.

When *Halcyon Isle* was arrested, her crew told of their week long ordeal while stranded without power, and with food and water running low. The *New Straits Times* reported that in desperation they tore up deck boards to cook their food. When the ship was sold, the proceeds were insufficient to satisfy all the creditors. The necessities men claimed priority for the maritime lien they had under Title 46 of the United States Code.

That brings me to the legal history. In December 1972, in *The Ioannis Daskalelis*² the Supreme Court of Canada had upheld a similar claim by Todd Shipyards for a United States maritime lien as having priority over a ship's mortgage, even though no such maritime lien was conferred by Canadian law.

In December 1977, the Singapore Court of Appeal decided *The Halcyon Isle* by following the Supreme Court of Canada. It upheld the necessities men's assertion that the law of Singapore would recognise their maritime lien as created by the law of the place of its creation, being there, the *lex loci (contractus)*, and gave the lien priority over the bank's mortgage.

The bank appealed and the question for the Privy Council was whether a maritime lien that arose under the *lex loci* created a substantive right that the law of the forum (*lex fori*) should enforce or whether only those categories of maritime lien that arose under the law of the forum should be enforceable. All of their Lordships agreed that the law of Singapore on this issue was the same as the law of England.³

The majority, Lords Diplock, Elwyn Jones and Lane, held that English conflicts of law rules provided that the law of the forum (*lex fori*) governed the questions of recognition and priority in respect of maritime liens. They held that, accordingly, the only maritime liens that could be enforced were those that could be maintained by an action *in rem* brought in England: i.e. maritime liens enforceable in the English Court of Admiralty for salvage, collision damage, seaman's wages, bottomry⁴ and the statutory maritime liens created in the 19th century for master's wages and master's disbursements.⁵ In the majority, only Lord Diplock was a recognised commercial judge with some maritime experience.

In contrast, Lord Salmon was a commercial judge with maritime experience and Lord Scarman had commercial experience in appellate work. They held that a maritime lien was a right of property given by way of security for a maritime claim and, if validly conferred by the *lex loci*, was equally entitled to recognition in the forum by an action *in rem* as a foreign mortgage that was validly created by the *lex loci*.⁶ Effectively, the difference between the majority and minority was that the former classified the right to proceed *in rem* on a maritime lien conferred by a foreign law as procedural and the latter classified it as substantive.

The Nature of a Maritime Lien

Before I analyse the two approaches, it is worth considering what a maritime lien is under Australian law. The theoretical explanation of a maritime lien begins with *The Bold Buccleugh*.⁷ There, Sir John Jervis giving the advice of the Privy Council said that a maritime lien had its origin in the civil law and:

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 Story⁸ explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches ...

However, a maritime lien does not require or include possession of the *res*. Critically, as Scott LJ demonstrated in his seminal judgment in *The Tolten*,⁹ the principle that a maritime lien automatically attaches to a ship is

² *Todd Shipyards Corporation v The Ship "Ioannis Daskalelis"* [1974] SCR 1248; [1974] 1 Lloyd's Rep 174.

³ *The Halcyon Isle* [1981] AC 221, 229G-H, 242G.

⁴ i.e. security against the keel for the price of goods and services supplied to a ship by necessities men outside its home port.

⁵ *The Halcyon Isle* [1981] AC 221, 232G-233B.

⁶ *Ibid* 250C-D.

⁷ *Harmer v Bell* (1851) 7 Moo PC 267, 284-285; 13 ER 884, 890-891.

⁸ *The Brig Nestor* 1 Sumner 78.

⁹ [1946] P 135, 144-145.

‘indubitably a rule of substantive law’. He also said that the principle underlying the general law of the sea was the protection of maritime commerce.¹⁰ In *The Two Ellens*¹¹ the Privy Council said:

A Maritime lien must be something which adheres to the Ship from the time that the facts happened which gave the Maritime lien, and then continues binding on the Ship until it is discharged, either by being satisfied or from the laches of the Owner, or in any other way by which, by law, it may be discharged. It commences and there it continues binding on the Ship until it comes to an end.

Scott LJ explained that a lien has to be admitted or proved to exist in the proceedings. Once that condition has been satisfied he said that the lien consists in the substantive right of putting into operation the Admiralty Court’s function of arresting and selling the ship so as to give a clear title to the purchaser and thereby enforcing distribution of the proceeds among the creditors in the order of priorities.¹² In *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd*¹³ Allsop J observed that, at least before any unconditional appearance of a relevant person, the proceeding *in rem* is an action against the ship herself, and not against the owner or demise charterer.¹⁴

As we know, often the Court exercises Admiralty jurisdiction because of the adventitious and transient presence of a ship in the local waters. The events giving rise to the proceedings frequently have nothing to do with the locality of the ship when arrested and the Court will apply another country’s maritime laws to resolve the proceedings. We can easily recognize that maritime liens and contract claims concerning ships have an international character because frequently they will arise under the law of another country. Often the local court must make a decision as to what law applies and use municipal or domestic choice of law rules to arrive at that answer. Under English law, as Lord Wright said in *Admiralty Commissioners v Valverda (Owners)*,¹⁵ a maritime lien cannot be created by contract.

In *The Tolten*¹⁶ Scott LJ was dealing with a maritime lien for collision damage, but there is a division of opinion whether the following passage of his judgment should have a broader application:

It has been characteristic of English judges exercising admiralty jurisdiction as I have already said, to look to ‘the general law of the sea’ for two allied, but distinct, purposes: first to resolve doubts on a question of English law by adopting what they believed to be the relevant rule of the ‘general law’; and secondly, as a principle of judicial policy in order to avoid creating divergence by our law from the general law. The importance to maritime commerce of uniformity in all seas, the world over, has received frequent emphasis, both before the Judicature Acts and since.

That view has powerful critics and is now probably too broadly stated for both Australian and English law purposes. That is because in *Blunden v The Commonwealth*¹⁷ Gleeson CJ, Gummow, Hayne and Heydon JJ appear to have adopted Lord Diplock’s explanation in *The Tojo Maru*¹⁸ of the nature of the principles of maritime law or the maritime law of the world. Lord Diplock said that apart from the special field of ‘prize’ in times of hostilities, there was no ‘maritime law of the world’.

Rather, he said that the maritime law consisted of the internal municipal laws of sovereign states that were capable of giving rise to rights and liabilities enforceable in English Courts. Lord Diplock observed that those internal municipal laws, relating to what happens on the sea, may show greater similarity to one another than in respect of laws relating to what occurs on land. He said that was because of both the nature of the subject-matter and the historic derivation of those municipal laws from sources common to many maritime nations. He concluded:¹⁹

But the fact that the consequences of applying to the same facts the internal municipal laws of different sovereign states would be to give rise to similar legal rights and liabilities should not mislead us into supposing that those rights or liabilities are derived from a ‘maritime law of the world’ and not from the internal municipal law of a particular sovereign state.

¹⁰ Ibid 145.

¹¹ (1872) LR 4 PC 161, 169.

¹² *The Tolten* [1946] P 135, 145-146.

¹³ (2006) 157 FCR 45, 81 [128] (*‘Comandate’*).

¹⁴ See also *Ship “Hako Endeavour” v Programmed Total Marine Services Pty Ltd* (2013) 211 FCR 369, 395 [92]-[93] (Rares J), 372 [1] (Siopis J agreeing).

¹⁵ [1938] AC 173, 186.

¹⁶ *The Tolten* [1946] P 135, 148.

¹⁷ (2003) 218 CLR 330, 337-338 [13] (*‘Blunden’*).

¹⁸ [1972] AC 242, 290G-291B.

¹⁹ Ibid 297A-B.

Allsop J drew on these remarks to emphasise that the international character of the Admiralty and maritime jurisdiction of Australian Courts under s 76(iii) of our *Constitution*, and the law that Courts ascertain and declare in the exercise of that jurisdiction, does not elevate the resolution of those controversies, or the applicable law governing that resolution, above the municipal law and its context.²⁰

These authorities highlight the need to keep in mind the distinction between a court's jurisdiction, in the sense of its authority to decide a controversy derived from its municipal law, and the choice of the law applicable to that resolution that arises because some or all of the circumstances giving rise to the controversy occurred outside the municipal jurisdiction.²¹

The Decision in the *Halcyon Isle*

Lord Diplock gave the majority's reasons in *The Halcyon Isle*.²² He began by saying that priorities of claimants to a limited fund were a matter for the law of the forum under English conflicts of law rules.²³ He then observed that the classification of a claim against the former owners of a ship could be said to depend on the *lex causae* of such a claim and, if there were more than one, those laws may create different consequences. Lord Diplock identified two possible solutions, namely, either the use of the law of the forum to classify a claim based on the events on which it is founded and giving it the appropriate priority under that law; or alternatively, *first*, 'applying a complicated kind of partial *renvoi*' by ascertaining the legal consequences of the *lex causae* in respect of the claim, apart from its treatment of priorities, and then, *secondly*, applying the law of the forum to determining the priorities of the competing claims so ascertained on the basis of how the forum would classify the events giving rise to each claim.²⁴

He reasoned that it was 'too simplistic' an approach to the questions of conflicts of law that are involved to omit the second of his suggested steps in the alternative scenario. One might observe that that step simply brought about the result of his first alternative so that each of his posited solutions arrived at the same result. Unsurprisingly, then, Lord Diplock concluded that his first alternative had the merit of simplicity and was preferable in principle.²⁵

The result of that reasoning was that since English law did not recognize a maritime lien for necessities men's claims, their claim ranked after the mortgagee bank's claim. The majority said that the charge created on a ship by a maritime lien was initially inchoate, and, unlike a mortgage, created no immediate right of property. Lord Diplock said that a maritime lien was devoid of legal consequences unless and until it was carried into effect by a proceeding *in rem*.²⁶ He said that if it were carried into effect, the maritime lien would date back to the time that the claim on which it was founded arose. Consequently, the majority expressed its *ratio decidendi* thus:²⁷

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

Lord Diplock refused to follow the decisions of the Supreme Court of Canada in *The Ioannis Daskalelis*²⁸ and *The Ship "Strandhill" v Walter W Hodder Company*²⁹ on the basis that they had misunderstood the judgments in *The Colorado*.³⁰ He said³¹ that the reasoning in *The Colorado*³² was consistent only with the characterization of a maritime lien in English law as involving rights that were only procedural or remedial. Suffice to say that Lords Salmon and Scarman concluded that *The Colorado*³³ was.³⁴

²⁰ *Elbe Shipping SA v The Ship "Global Peace"* (2006) 154 FCR 439, 451 [51].

²¹ *Blunden* 218 CLR 330, 337 [12].

²² [1981] AC 221.

²³ *Ibid* 230A-B.

²⁴ *Ibid* 230D-G.

²⁵ *Ibid* 230F-H.

²⁶ *Ibid* 234F-H.

²⁷ *Ibid* 235C-D (emphasis added).

²⁸ [1974] SCR 1248; 1 Lloyd's Rep 174.

²⁹ [1926] SCR 680; 4 DLR 801.

³⁰ [1923] P 102; *The Halcyon Isle* [1981] AC 221, 238B-C.

³¹ *The Halcyon Isle* [1981] AC 221, 238B.

³² [1923] P 102.

³³ *Ibid*.

³⁴ *The Halcyon Isle* [1981] AC 221, 248H.

a neat illustration of the application of two principles of the law. The court looks to the *lex loci* to determine the nature of the claim. Having established its nature, the court applies the priorities of its own law, the *lex fori*.

The majority and minority had similarly divergent views of Scott LJ's reasoning in *The Tolten*.³⁵ Lord Diplock said that Scott LJ treated 'English law as the only proper law to determine what kind of transaction or event gave rise to a maritime lien that an English court had to enforce as such.'³⁶ The minority relied³⁷ on Scott LJ's adoption of the conclusion of Gorrell Barnes J in *The Ripon City*,³⁸ namely:

It [i.e. a maritime lien] is a right acquired by one over a thing belonging to another - *a jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing.

In essence Lords Salmon and Scarman treated the rights conferred by a maritime lien as substantive and repudiated the notion that it was no more than a procedural remedy.³⁹ They said of the result arrived at by the majority:⁴⁰

We have returned to the legal climate which in England prior to 1840 nourished the common law courts by excluding the Admiralty jurisdiction from 'the body of the county,' i.e., the internal waters, ports and dockyards of the country. In the climate of a dominating domestic law the concepts and principles of the law of the sea wilt and die.

The minority recognised the unsatisfactory nature of whichever outcome of the treatment of foreign maritime liens is adopted by the law of the forum: i.e. the recognition or the denial of the efficacy of the foreign lien.⁴¹ They pointed to the failure of maritime nations to agree on a convention to secure uniformity of treatment of maritime liens and to the temptation for some countries to enact 'chauvinistic' laws conferring more and more such liens. In the end, their answer was that 'the balance of (the English) authorities, the comity of nations, private international law and natural justice all require' that English law, as the law of the forum, recognise a maritime lien created in the law of the place where the parties contracted.⁴² After all, they reasoned, the necessities men had provided their services in the United States under a contract that expressly provided that they were entitled to the benefit of the maritime lien that that nation's law conferred. The minority adopted as correct the view of the principle in *The Colorado*⁴³ distilled and followed by Ritchie J for the Supreme Court of Canada in *The Ioannis Daskalelis*:⁴⁴

... that where a right in the nature of a maritime lien exists under a foreign law which is the proper law of the contract, the English courts will recognise it and will accord it the priority which a right of *that nature* would be given under English procedure.

The Canadian position followed from an earlier detailed consideration of the topic in *The Strandhill*⁴⁵ where Newcombe J, for the majority,⁴⁶ drawing on Story's *Commentaries on the Conflict of Laws*,⁴⁷ said that it had to be remembered that 'it is the right, and not the remedy, which is regulated by the *lex loci*'.

The Australian Law Reform Commission's Response

The Australian Law Reform Commission drafted what became in substance the *Admiralty Act 1988* (Cth) in preparing its excellent report *Civil Admiralty Jurisdiction: Report No 33* ('ALRC 33').⁴⁸ The Commission remarked that there was what it called 'a conspicuous lack of uniformity on maritime law even between Western

³⁵ [1946] P 135.

³⁶ *The Halcyon Isle* [1981] AC 221, 238G-H.

³⁷ Ibid 246B-D; see also 242H-243A.

³⁸ [1897] P 226, 242.

³⁹ *The Halcyon Isle* [1981] AC 221, 242H-243B.

⁴⁰ Ibid 243A-B.

⁴¹ Ibid 244D-H.

⁴² Ibid 246F-G.

⁴³ [1923] P 102.

⁴⁴ [1974] SCR 1248, 1256 (emphasis in original).

⁴⁵ [1926] SCR 680, 688.

⁴⁶ Anglin CJC, Duff, Mignault and Rinfret JJ; Idington J dissenting.

⁴⁷ (Little, Brown & Company, 4th ed, 1852) 550 s 327.

⁴⁸ Australian Law Reform Commission, *Civil Admiralty Jurisdiction*, Report No 33 (1986).

countries'.⁴⁹ It cited in support what both the majority and minority in *The Halcyon Isle*⁵⁰ had agreed was the lack of uniformity in the international treatment of maritime liens.⁵¹

The Commission noted that the position in other common law jurisdictions was different to that declared by the 'bare majority' in *The Halcyon Isle*⁵² citing Canadian and South African cases.⁵³ The position in South Africa is now different since its Supreme Court decided *Transol Bunker BV v MV Andrico Unity*.⁵⁴ However, that result followed because in 1983 South Africa amended its statutory Admiralty jurisdiction from requiring its courts to apply English law as administered by the English High Court in exercise of its Admiralty jurisdiction as it existed in 1891 to that which the English Courts would have applied on 1 November 1983.⁵⁵

The Commission recorded that the dominant view expressed to it favoured the minority view and the Canadian and the then South African approach. It observed that there was no international consensus and that one consequence of adopting the minority position could be that a foreign maritime lien that was not within any class of *in rem* claims enforceable under the *Brussels Arrest Convention of 1952*, would take priority over a local claim.⁵⁶

On balance, the Commission concluded that the question of which maritime liens should be recognised under Australian law should be resolved by an international convention and that, in the absence of that clarification, it said that 'the question is best left to the courts to resolve, taking into account developments in other jurisdictions'.⁵⁷

That explains why s 6(a) of the *Admiralty Act 1988* (Cth) provides that the provisions of the Act do not have effect to create a new maritime lien or other charge and why s 15 is expressed circumspectly as follows:

15 Right to proceed *in rem* on maritime liens etc.

- (1) A proceeding on a maritime lien or other charge in respect of a ship or other property subject to the lien or charge may be commenced as an action *in rem* against the ship or property.
- (2) A reference in subsection (1) to a maritime lien includes a reference to a lien for:
 - (a) salvage;
 - (b) damage done by a ship;
 - (c) wages of the master, or of a member of the crew, of a ship; or
 - (d) master's disbursements.

Thus, s 15 leaves open whether Australian Courts should follow the majority or minority in *The Halcyon Isle*,⁵⁸ However, as Allsop J noted in *Comandante*⁵⁹ there are constraints on the expansion of maritime liens by judicial exposition. The maritime lien for a bottomry bond has fallen into desuetude.⁶⁰ Ironically, a bottomry bond was a security usually offered by the master or owners of a ship to necessities men in foreign ports in order to procure supplies or services needed for her to undertake or continue a voyage. It may be that the United States took a policy decision that the formality of execution of a bottomry bond was not essential. On the other hand, it is not clear why necessities men gave up demanding bottomry bonds to secure their provision of credit. Perhaps it was attributable to the same aggressive late 19th century assertion by shipowners of their economic power that ultimately led *first*, to the *Harter Act 1893* (US) and its analogues in the initial Australian, New Zealand and Canadian *Carriage of Goods by Sea Acts* in the early 20th century and, *secondly*, the *Hague Rules* to protect shippers' interests.

⁴⁹ Australian Law Reform Commission, above n 48, 64 [94].

⁵⁰ [1981] AC 221.

⁵¹ Particularly [1981] AC 221, 238, 244.

⁵² [1981] AC 221.

⁵³ Australian Law Reform Commission, above n 48, 91 [123]; Canada: *The Strandhill v W Hodder Inc* [1926] SCR 680; *Todd Shipyards Corp v Altama Compania Maritime SA; The Ioannis Daskalelis* [1974] SCR 1248. The decision of the Privy Council in *The Halcyon Isle* has not altered the attitude of Canadian Courts: see eg *Marlex Petroleum Inc v The Ship "Har Rai"* [1984] 4 DLR (4th) 739, 744 (FC); South Africa: *Southern Steamship Agency Inc v MV Khalij Sky* 1986 (1) SA 485.

⁵⁴ 1989 (4) SA 325.

⁵⁵ Ibid 330D, 332B-D.

⁵⁶ Australian Law Reform Commission, above n 48, 91 [123].

⁵⁷ Ibid.

⁵⁸ [1981] AC 221.

⁵⁹ 157 FCR 45, 78 [114]-[115].

⁶⁰ See DR Thomas, *Maritime Liens* (Steven & Sons Ltd, 1980) [371]-[374].

The Academic Position

The classification of the proper law of maritime liens is a source of the uncertainty that bedevils their disparate treatment in private international law disputes. In his 1980 work *Maritime Liens*⁶¹ that predated the Privy Council's decision, D Rhidian Thomas said that the general approach of English law was to treat the existence of a maritime lien as governed by the *lex fori*. He said that this occurred because English law regarded a maritime lien as a matter of procedure not substance, that is, the lien was merely to be seen as a means by which a substantive right was enforced. He recognized that the difference between 'substance' and 'procedure' was one of 'notorious difficulty'. Professor Thomas, as he later became, argued that while, in *The Tolten*,⁶² Scott LJ was not considering the question in the context of conflicts of law, his characterization of a maritime lien as a substantive right had much to commend it, noting that it had been adopted in the choice of law context by the Canadian courts, the Singapore Court of Appeal's then unreversed decision in *The Halcyon Isle*⁶³ and seemingly in the 'ambiguous and perplexing' decision of the English Court of Appeal⁶⁴ in *The Colorado*.⁶⁵

Professor DC Jackson in his work, *Enforcement of Maritime Claims*,⁶⁶ said the view of the majority in *The Halcyon Isle*⁶⁷ that a maritime lien is a matter of procedure 'ignores its substantive characteristics, and the very rationale of a lien'. He said that it was difficult to see how an action *in rem* could be used to enforce a maritime lien unless it implemented a substantive interest that pre-existed the commencement of the proceedings. He argued that it may be preferable, in ascertaining whether the maritime lien exists, to utilize as a choice of law rule a law other than that of the forum, namely the putative proper law.⁶⁸ He contended that prior to *The Halcyon Isle*⁶⁹ the preferred doctrine of English law was to examine the foreign law that a person claimed gave rise to a right so as to ascertain the characteristics of the right under that law.⁷⁰ Even if a foreign maritime lien were treated by domestic Australian law as a substantive right, the issue of priorities would then arise. The forum must determine the ranking of claims. That exercise may involve classifying and ordering claims that arise under more than one legal system each of which treats the other claims differently. Professor Jackson suggested that the law of the forum should treat a substantive foreign claim, including a lien, as a matter of substance and apply the *lex fori* to 'adjudicate' only where those rights compete with claims governed by different laws.⁷¹

The learned authors of the current edition of *Cheshire, North and Fawcett: Private International Law*⁷² said that the majority had failed to draw the crucial distinction between the substance of the right, which, they said, was an issue for the governing law and the question of priorities which was a matter for the law of the forum. They said that the minority's analysis was much to be preferred. In contrast to Professor Thomas' view, they described the approach in *The Colorado*⁷³ as 'clear and ... correct'.

Professor Sarah Derrington and James Turner QC in their work, *The Law and Practice of Admiralty Matters*⁷⁴ line up with the critics of the majority's decision in *The Halcyon Isle*⁷⁵ saying that it had weaknesses, 'its most objectionable feature being the triumph of procedure over substance'. They contended that a better approach was to use the *lex causae* to resolve whether a particular claim attracts the protection of a maritime lien, while leaving priorities to be ascertained, as a matter of procedure by the law of the forum, as in Canada.

The latest editors of *Dicey, Morris & Collins on The Conflict of Laws*⁷⁶ treat the majority view that 'any question as to who is entitled to bring a particular kind of proceeding in an English Court ... is a question of jurisdiction ... to be decided by English law as the *lex fori*' as a statement that 'cannot be supported, and must

⁶¹ Ibid [575]-[579].

⁶² [1946] P 135, 145.

⁶³ [1978] 1 MLJ 189.

⁶⁴ Or at least that of Bankes LJ.

⁶⁵ [1923] P 102, 106; Thomas, above n 60, [579], [585].

⁶⁶ (Informa, 4th ed, 2005) [17.57]-[17.58].

⁶⁷ [1981] AC 221.

⁶⁸ Jackson, above n 66, [26.17].

⁶⁹ [1981] AC 221.

⁷⁰ Jackson, above n 66, [26.41].

⁷¹ Ibid [26.43], [26.178].

⁷² (Oxford University Press, 14th ed, 2008) 92-94.

⁷³ [1923] P 102.

⁷⁴ (Oxford University Press, 2007) [4.50]-[4.51].

⁷⁵ [1981] AC 221.

⁷⁶ Professor CGJ Morse, D McClean & Lord Collins of Mapesbury (eds), (Sweet & Maxwell, 15th ed, 2012) [7-018], [7-041].

be confined to the special context of maritime liens'.⁷⁷ Those learned authors also accepted that the law of the forum determined priorities.⁷⁸

Professor William Tetley QC is another critic.⁷⁹ He suggested that the majority decision also invited forum shopping. He said:

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.⁸⁰ 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.⁸¹

And M Davies, AS Bell and PLG Brereton in *Nygh's Conflict of Laws in Australia*⁸² say that the *lex causae* should be used to determine whether a claim has a secured status and that the law of the forum should govern the question of priorities. They observed that in the only Australian decision on the point, *Morlines Maritime Agency Ltd v MV Skulptor Vuchetich*,⁸³ Sheppard J had followed the majority in *The Halcyon Isle*.⁸⁴ But they said that it was questionable whether the principle on which the majority decision stood was consistent with the subsequent decision of the High Court in *John Pfeiffer Pty Ltd v Rogerson*.⁸⁵ I will return to this issue later.

I have not discovered any leading text that supports the majority *ratio decidendi* in *The Halcyon Isle*.⁸⁶ However, the late leading United States maritime lawyer and commentator, Michael Marks Cohen did so in an article entitled *In Defense of the Halcyon Isle*.⁸⁷ He argued that it was aberrational for a court applying the law of its forum to give foreign creditors greater rights than it gave to its local creditors. He argued that, contrary to Professor Tetley's view, the protection of ship's mortgages held by financial institutions makes the forum attractive to those institutions and so promotes the availability of finance on more favourable terms. He contended that a policy rule, such as that in the United States, favouring creation of maritime liens for smaller claimants was Benthamite: i.e. it adopted Bentham's thesis of the greatest happiness of the greatest number. However, Mr Cohen reasoned that the expansive remedy of a maritime lien available in the United States had had a consequence of broadening the availability of the remedy of arrest.⁸⁸

I would observe that the latter argument, of course, is fallacious, since general maritime claims in common law Admiralty jurisdictions such as Australia, New Zealand, England and Canada support the exercise of the arrest power in actions *in rem*.

The Subsequent Cases

The majority reasoning in *The Halcyon Isle*⁸⁹ was roundly criticized and not followed by Munnik JP in the South African case relied on by ALRC 33 at [123]: *Southern Steamship Agency Inc v MV Khalij Sky*.⁹⁰ Munnik JP concluded that the law of England in 1891 was as the minority had identified in the result of *The Colorado*.⁹¹

After South Africa amended its Admiralty legislation in 1983 to adopt English law as at that date as the governing law for that jurisdiction, the Supreme Court of South Africa followed *The Halcyon Isle*⁹² in the

⁷⁷ [1981] AC 221, 235C-D.

⁷⁸ Morse, McClean and Collins, above n 76, [7-041].

⁷⁹ See William Tetley, 'Maritime Liens in Conflict of Laws', in JAR Nafziger and Symeon C Symeonides (eds), *Law and Justice in a Multi-State World: Essays in Honour of Arthur T von Mehren* (Transnational Publishers, 2002) 439, 448.

⁸⁰ See the highly debatable case comment supporting the majority decision, by MM Cohen, 'In defense of the *Halcyon Isle*' [1987] *Lloyd's Maritime and Commercial Law Quarterly* 152, 154-155. See also in reply William Tetley, 'In Defence of the *Ioannis Daskalelis*' [1989] *Lloyd's Maritime and Commercial Law Quarterly* 11.

⁸¹ For a comprehensive critique of the majority decision in *The Halcyon Isle*, see generally William Tetley, *International Conflict of Laws, Common, Civil and Maritime* (International Shipping Publications, 1994) 570-573.

⁸² (LexisNexis Australia, 8th ed, 2010) [16.43].

⁸³ [1997] FCA 432; 1998 AMC 1727, 1733 ('*Morlines*').

⁸⁴ [1981] AC 221.

⁸⁵ (2000) 203 CLR 503 ('*Pfeiffer*'); see also Martin Davies and Kate Lewins, 'Foreign Maritime Liens: Should they be recognised in Australian Courts?' (2002) 76 *Australian Law Journal* 775.

⁸⁶ [1981] AC 221.

⁸⁷ Cohen, above n 80.

⁸⁸ *Ibid* 154.

⁸⁹ [1981] AC 221.

⁹⁰ 1986 (1) SA 485, 490-493.

⁹¹ [1923] P 102; 1986 (1) SA 485, 493E-H; a view shared in an *obiter dictum* by Nienaber J in *Oriental Commercial and Shipping Co Ltd v MV Fidias* 1986 (1) SA 714, 719C-D.

⁹² [1981] AC 221.

Andrico Unity.⁹³ Corbett JA analysed the authorities on the correct basis that a decision of the Privy Council was not a binding precedent on the question of English law because it did not bind English courts, or the Supreme Court of South Africa, although it had persuasive force.⁹⁴ Ultimately, he concluded that the majority in *The Halcyon Isle*⁹⁵ was correct.

Corbett JA held that the status of a maritime lien was conferred by operation of law and not, for example, as a matter of contract.⁹⁶ He reasoned that the ascertainment of the order of priorities could be ‘of nightmarish complexity’ if the forum had to grapple with the order of recognition of a number of maritime claims from different foreign legal systems with differing legal characteristics. He observed that the right created by a maritime lien was closely connected with the question of priorities. Accordingly, he found persuasive Lord Diplock’s invocation of simplicity in the use of the forum’s classification and priority rules.⁹⁷ Corbett JA considered that the determination of whether a particular maritime lien should have a priority ranking tended to merge the role of the law of the forum into having substantive consequences. That supported using the *lex fori* for the purposes of both classification and priority.⁹⁸

But he also reasoned that in claims for a maritime lien based on collision damage the double actionability rule in respect of foreign torts applied: i.e. the principle established in *Phillips v Eyre*.⁹⁹ Of course, since *Regie Nationale des Usines Renault SA v Zhang*¹⁰⁰ that is not the law in Australia because it now recognises the *lex loci delicti* as the governing substantive law for tort claims.¹⁰¹

New Zealand courts, being bound by decisions of the Privy Council have followed *The Halcyon Isle*.¹⁰² *Fournier v The Ship “Margaret Z”*,¹⁰³ *The Ship “Betty Ott” v General Bills Ltd*¹⁰⁴ and *ABC Shipbrokers v The Ship “Offi Gloria”*.¹⁰⁵

In *Morlines*,¹⁰⁶ Sheppard J followed the majority in *The Halcyon Isle*.¹⁰⁷ His Honour noted that it had been followed in the New Zealand and South African cases above and also, he appears to have said in Canada in *Marlex Petroleum Inc v The Ship “Hai Rai”*,¹⁰⁸ a decision of the Federal Court of Appeal. However, it may be that his Honour inadvertently omitted the word ‘not’ before ‘followed’ when referring to the more recent Canadian case because that Court had followed the earlier Supreme Court decisions, as it was bound to do.¹⁰⁹ Sheppard J noted criticisms of the majority reasoning but preferred it.

Is the Time Ripe for Reconsideration of *The Halcyon Isle* in Australia?

One unanswered question that arises from the majority decision is the status that any judicial sale would have where the law of the forum had rejected recognition of a foreign maritime lien. *Halcyon Isle* appears to have been scrapped soon after she was sold. But what if she had returned to the United States? Could she have been arrested by the necessities men in exercise of their maritime lien there? If the maritime lien is substantive, at least in the eye of its *lex loci* or *lex causae*, does it continue to exist despite a judicial sale by a forum that refused to recognise it? Moreover, why is a ship’s mortgage entered into in a foreign jurisdiction, that after all involves a contract to give security, given a status in the law of a forum applying the majority decision, greater than that of a right to a maritime lien conferred by operation of law in the same jurisdiction in which the mortgage was given?

As Kirby J remarked of the rules of international law in *Zhang*:¹¹⁰

⁹³ 1989 (4) SA 325.

⁹⁴ Ibid 340C-E.

⁹⁵ [1981] AC 221.

⁹⁶ 1989 (4) SA 325, 347D-E.

⁹⁷ Ibid 344E-F, 346H-J, 348E-349F.

⁹⁸ Cf 1989 (4) SA 325, 347A-J.

⁹⁹ (1870) LR 6 QB 1.

¹⁰⁰ (2002) 210 CLR 491 (*‘Zhang’*).

¹⁰¹ Ibid 515-517 [61]-[67] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹⁰² [1981] AC 221.

¹⁰³ [1999] 3 NZLR 111, 115 (Fisher J).

¹⁰⁴ [1992] 1 NZLR 655 (Cooke P, McKay and McGechan JJ).

¹⁰⁵ [1993] 3 NZLR 576 (Holland J).

¹⁰⁶ [1997] FCA 432; 1998 AMC 1727.

¹⁰⁷ [1981] AC 221.

¹⁰⁸ (1984) 4 DLR (4th) 739.

¹⁰⁹ See [1997] FCA 432, 37; 1998 AMC 1727, 1732. Sheppard J also noted that the decision in *The “Betty Ott”* [1992] 1 NZLR 655 was not entirely in accord with the majority.

¹¹⁰ (2002) 210 CLR 491, 522 [86].

Dean Prosser described that subject as a 'dismal swamp'.¹¹¹ Professor Cheshire praised it as the topic offering 'the freest scope to the mere jurist', even if he or she could 'seldom rest content with the solution' provided.¹¹² For Cardozo J, it was 'one of the most baffling subjects of legal science'.¹¹³

Lord Diplock said that a complicated kind of partial *renvoi* would be needed to give effect in the forum to the law of the contract or the law of the cause of action (*lex causae*).¹¹⁴ The discussion above has demonstrated that the treatment of a foreign maritime lien in Australian law will be influenced by this forum's conflicts of law rules. Those rules have changed in fundamental respects since the decisions in *The Halcyon Isle*¹¹⁵ and *Morlines*¹¹⁶ in respect of foreign torts and, possibly, the overall way in which Australian law now accommodates the effects of foreign law on the substantive rights of parties to litigation here about events that occurred in another country.

The starting point for Australian law would now appear to be what Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said in *Pfeiffer*,¹¹⁷ namely:

Two guiding principles should be seen as lying behind the need to distinguish between substantive and procedural issues. First, litigants who resort to a court to obtain relief must take the court as they find it. A plaintiff cannot ask that a tribunal which does not exist in the forum (but does in the place where a wrong was committed) should be established to deal, in the forum, with the claim that the plaintiff makes. Similarly, the plaintiff cannot ask that the courts of the forum adopt procedures or give remedies of a kind which their constituting statutes do not contemplate any more than the plaintiff can ask that the court apply any adjectival law other than the laws of the forum. Secondly, *matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in McKain*,¹¹⁸ 'rules which are directed to governing or regulating the mode or conduct of court proceedings' are procedural and all other provisions or rules are to be classified as substantive.¹¹⁹

These principles may require further elucidation in subsequent decisions but it should be noted that giving effect to them has significant consequences for the kinds of case in which the distinction between substance and procedure has previously been applied. First, the application of any limitation period, whether barring the remedy or extinguishing the right, would be taken to be a question of substance not procedure (which is the result arrived at by the statutes previously referred to). The application of any limitation period would, therefore, continue to be governed (as that legislation requires) by the lex loci delicti. Secondly, all questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the lex loci delicti.

The right to proceed on a maritime lien will now need to be viewed in this country in the prism of whether it is a matter 'that affect[s] the existence, extent or enforceability of the rights or duties of the parties' to the action.¹²⁰ In *Neilson v Overseas Projects Corporation of Victoria Ltd*,¹²¹ six justices of the High Court considered that the doctrine of *renvoi* should be applied in the case of a tort occurring in a foreign country. There, the plaintiff was injured in China in accommodation provided to her husband by his employer, an Australian company. Chinese law made specific provision for the application of its law in civil cases involving foreigners including an article (Art 146) that provided that if both parties were nationals of, or domiciled in, the same country, the law of that country or domicile 'may also be applied' in claims for damages.

As a result of *Zhang*,¹²² the *lex loci delicti* (the law of the place of the tort) was the substantive law for determining the parties' rights and liabilities in respect of a foreign tort. Thus, Chinese law applied. The question in *Neilson*¹²³ was whether the *renvoi* provision in Art 146 should be recognised in the Australian proceedings as authorising the use, as the *lex loci delicti*, of Australian tort law and limitation provisions, or

¹¹¹ William L Prosser, 'Interstate Publication' (1953) 51 *Michigan Law Review* 959, 971.

¹¹² GC Cheshire, *Private International Law* (Oxford University Press, 4th ed, 1953) vii, quoted in Peter North, 'Private International Law: Change or Decay?' (2001) 50 *International and Comparative Law Quarterly* 477.

¹¹³ Benjamin N Cardozo, *The Paradoxes of Legal Science* (Columbia University Press, 1928) 67.

¹¹⁴ [1981] AC 221, 230E-F.

¹¹⁵ [1981] AC 221.

¹¹⁶ [1997] FCA 432; 1998 AMC 1727.

¹¹⁷ (2000) 203 CLR 503, 543-544 [99]-[100] (emphasis added).

¹¹⁸ (1991) 174 CLR 1, 26-27.

¹¹⁹ *Stevens v Head* (1993) 176 CLR 433, 445 (Mason CJ).

¹²⁰ *Pfeiffer* (2000) 203 CLR 503, 543 [99].

¹²¹ (2005) 223 CLR 331 (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ; McHugh J dissenting) ('*Neilson*').

¹²² *Zhang* (2002) 210 CLR 491.

¹²³ *Neilson* (2005) 223 CLR 331.

whether the *renvoi* in Art 146, being a private international law rule of Chinese law, was not part of the domestic law of China on which an Australian Court could act. Gummow and Hayne JJ discussed the principles in *Neilson* saying:¹²⁴

... the distinction between the domestic law of the foreign jurisdiction and its conflict of laws rules may not be easy to draw. To draw such a distinction invites difficulties of the same kind as have so long attended the distinction between procedural and substantive questions.¹²⁵ *But even if those difficulties could be overcome, why should a choice of law rule which provides that the rights and obligations of the parties to a proceeding are to be resolved according to the law of a foreign jurisdiction refer to some but not all of that foreign law in deciding those rights and obligations? Why should choice of law be premised upon the results of imposing on a foreign legal system a division which that foreign system may not make?*

Those questions are not to be answered by choosing one theory of *renvoi* as the premise from which subsequent arguments proceed. *Choosing a single overarching theory of renvoi as informing every question about choice of law would wrongly assume that identical considerations apply in every kind of case in which a choice of law must be made.* But questions of personal status like marriage or divorce, questions of succession to immovable property, questions of delictual responsibility and *questions of contractual obligation differ in important respects. Party autonomy may be given much more emphasis in questions of contract than in questions of title to land.* Choice of governing law may be important in creating private obligations by contract but less important when the question is one of legal status. Choosing one theory of *renvoi* as applicable to all cases where a choice of law must be made would submerge these differences. No doubt that is why Kahn-Freund urged¹²⁶ that in this field dogmatism must yield to pragmatism.

While their Honours were considering a case of tort, the principles that they identified may be of general application for Australian's private international law purposes. The solution arrived at by Gleeson CJ, Gummow and Hayne JJ, Callinan J and Heydon J in separate judgments involved a pragmatic recognition in the Australian proceedings of the *renvoi* to Australian substantive law as the governing law for resolving the dispute by force of Art 146 under Chinese law.¹²⁷ This was because they found that Chinese law made special provision to deal with the very situation where two nationals of the same foreign country were litigating. As Gleeson CJ succinctly said:¹²⁸

If it be accepted that one object of a choice of law rule is to avoid difference in outcomes according to selection of forum, then the objective ought to be to have an Australian court decide the present case in the same way as it would be decided in China.

Gummow and Hayne JJ discussed the principles and academic theories concerning *renvoi* in some detail.¹²⁹ They said that the scholars had focused more on theoretical explanations. That was in contrast to the principal, and essentially practical, concern of the Courts to decide controversies as they arise in a proceeding.¹³⁰ Their Honours identified three premises, namely, that, *first*, parties should not be able to obtain advantages by litigating in an Australian forum that were not available in the Courts of the place of the governing law,¹³¹ *secondly*, whenever reasonably possible, certainty and simplicity are preferable to complexity and difficulty, and that the Court of the forum should assume that the governing law's legal system is one constituted by interdependent rules¹³² and, *thirdly*, an Australian Court must determine, as an element of Australian law, the source and content of rules governing the rights and obligations of parties to a particular controversy.¹³³ Their reference in the second premise to simplicity, of course, harkens back to one of Lord Diplock's principal justifications for the majority's choice of the law of the forum as being determinative of all questions in relation to a maritime lien.

When the Court of the forum is called on to decide the rights of parties to a contract that is governed by another law, it must arrive at a method of resolution that an objective person in the position of the parties at the time of the contract would have understood from what they said and did, was the method that they intended be applied.¹³⁴ In other words, just as in any contractual dispute, the Court must use ordinary principles of

¹²⁴ Ibid 366 [98]-[99] (emphasis added).

¹²⁵ Pfeiffer (2000) 203 CLR 503, 542-543 [97] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹²⁶ Otto Khan-Freund, *General Problems of Private International Law* (BRILL, 1976) 290.

¹²⁷ Nielson (2005) 223 CLR 331, 342 [13], 344 [17] (Gleeson CJ), 374 [134] (Gummow and Hayne JJ), 412-413 [250]-[256] (Callinan J), 416-417 [267]-[268], 418-419 [271], 420 [277] (Heydon J) and see also 388 ([175]) (Kirby J, in dissent, but agreeing on this point).

¹²⁸ Ibid 342 [13].

¹²⁹ Ibid. 362-367 [84]-[100].

¹³⁰ Ibid 363 [87].

¹³¹ Ibid 363 [89].

¹³² Ibid 364 [92], [94].

¹³³ Ibid 365 [96].

¹³⁴ Vita Food Products Inc v Unus Shipping Co [1939] AC 277, 290-292 ('Vita Food'); cf Nielson (2005) 223 CLR 331, 357 [65].

construction to determine objectively the contractual intention, having regard to the matrix of facts in which the parties contracted, matters known to both parties, and the purpose and object of the transaction.¹³⁵ This approach to ascertaining a contractual choice of governing law was expounded by Lord Atkin in *Rex v International Trustee for the Protection of Bondholders A-G*.¹³⁶ So, if the parties make a choice of the governing law for their contract expressly or by necessary implication, the Court must discern whether that choice included or excluded all or some of the rules of private international law forming part of the governing law.¹³⁷

Ordinarily, it would be surprising to commercial parties to a charterparty or a standard form contract used in international commerce that expressly provided for English law to be applied in a London arbitration, that different outcomes to their dispute were possible depending on whether English private international rules applied or not to the enforceability of their agreement to arbitrate. The evident intention in stipulating for a congruence in governing law and jurisdiction is that the resolution of any dispute would be the same whether or not any party or aspect of the dispute had a foreign element. That raises the question why, absent some clear contractual indication, would the Court of the forum be entitled to conclude that, where the parties chose a governing law but omitted a choice of jurisdiction, they intended that their dispute would be decided randomly, depending on whether the private international law rules of the forum accepted or rejected *renvoi* in contract? Such a result would provoke uncertainty rather than give effect to the intention of the parties that the governing law would yield the same result whether or not the law of forum was the same as that of the governing law.

Different considerations may be apposite in situations where a court determines that a governing law different from that of the forum applies to a contract that itself is silent on a choice of law: i.e. when the Court applies the test for ascertaining a governing law identified in *Bonython v The Commonwealth*,¹³⁸ namely that the governing law is that with the closest and most real connection with the transaction. In such a case, the Court of the forum, and not the parties, determines the system of law that governs the dispute.

The precise way and the relationships in which *renvoi* applies in Australian law has not yet been fully worked through by the courts, as is explained in Chapter 15 of M Davies, AS Bell and PGG Brereton, *Nygh's Conflict of Laws in Australia*¹³⁹ and R Garnett, *Substance and Procedure in Private International Law*.¹⁴⁰ This is not surprising since it was not necessary to set out a prescriptive formulation in *Neilson*.¹⁴¹ Indeed, as Gummow and Hayne JJ observed, the courts focus on the practical solution necessary to decide the particular controversy.¹⁴²

Can the Doctrine of Renvoi Apply to Contract?

Do Australian conflict of laws principles require an application of all of what is found to be the governing law, including any foreign choice of law principles with the consequence that rights, including maritime liens, may be created by force of the law of a third state, or is the law to be applied to the dispute only the domestic law of the forum? Furthermore, should a distinction be drawn between contractual disputes involving an express or implied choice of law and those which require the court to find the governing or proper law of the contract?

In *Vita Food Products Inc v Unus Shipping Co* Lord Wright delivered the advice of a strong Judicial Committee that also comprised Lords Atkin, Russell of Killowen, Macmillan and Porter saying:¹⁴³

There is, in their Lordships' opinion, no ground for refusing to give effect to the express selection of English law as the proper law in the bills of lading. Hence English rules relating to the conflict of laws must be applied to determine how the bills of lading are affected by the failure to comply with s.3 of the [Newfoundland Carriage of Goods by Sea] Act.

That Judicial Committee comprised pre-eminent commercial law Lords whose opinion¹⁴⁴ might be considered to be sound both in principle and its reasoning. Lord Wright explained,¹⁴⁵ following what Lord Atkin had held

¹³⁵ *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 174-176 [33]-[40].

¹³⁶ [1937] AC 500, 529-531, 567 (Lord Maughan), 573 (Lord Roche), 575 (Lord Macmillan agreeing) ('*International Trustee*'); *Akai Pty Ltd v People's Insurance Ltd* (1996) 188 CLR 418, 441; *Vita Food* [1939] AC 277, 290.

¹³⁷ *Neilson* (2005) 223 CLR 331, 365 [96], 366 [99] (Gummow and Hayne JJ).

¹³⁸ (1950) 81 CLR 486; [1951] AC 201, 219.

¹³⁹ (LexisNexis Australia, 8th ed, 2010).

¹⁴⁰ (Oxford University Press, 2012) 53-57 [3.09]-[3.14].

¹⁴¹ *Neilson* (2005) 223 CLR 331.

¹⁴² *Ibid* 363 [87].

¹⁴³ [1939] AC 277, 292 (emphasis added).

in *International Trustee*,¹⁴⁶ that the selection of the proper law should be approached on the basis that the Court ascertained, objectively, what was the parties' intention. In a passage approved by Walsh J, with whom Barwick CJ, McTiernan, Windeyer and Owen JJ agreed, in *Augustus v Permanent Trustee Company (Canberra) Ltd*,¹⁴⁷ Lord Wright said:¹⁴⁸

But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, *it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy.*

In *Amin Rasheed Shipping Corporation v Kuwait Insurance Co*,¹⁴⁹ Lord Diplock discussed the English rule in a dispute involving the Lloyd's SG form of marine insurance policy that was in a schedule to the *Marine Insurance Act 1906* (UK).¹⁵⁰ He asserted as a comment, without citation of authority, that under English conflict rules, the 'proper law' of a contract consisted of:¹⁵¹

... the substantive law of the country which the parties have chosen as that by which their mutually legally enforceable rights are to be ascertained, *but excluding renvoi, whether of remission or transmission, that the courts of that country might themselves apply if the matter were litigated before them.*

That comment was clearly an *obiter dictum*, since their Lordships held that the governing law in that case was English. Lords Roskill, Brandon of Oakbrook and Brightman agreed with Lord Diplock's reasons for his ultimate conclusion. However, with characteristic thoughtfulness, Lord Wilberforce discussed how he considered an English Court would have approached the question if the proper law were that of Kuwait. He said:¹⁵²

There is nothing unusual in a situation where, under the proper law of a contract, resort is had to some other system of law for purposes of interpretation. In that case, that other system becomes a source of the law upon which the proper law may draw. Such is frequently the case where a given system of law has not yet developed rules and principles in relation to an activity which has become current, or where another system has from experience built up a coherent and tested structure - as, for example, in banking, insurance or admiralty law, or where countries exist with a common legal heritage such as the common law or the French legal system. In such a case, the proper law is not applying a 'conflicts' rule (there may, in fact, be no foreign element in the case) but merely importing a foreign product for domestic use.

Earlier, Jenkins, Romer and Willmer LJ also expressed the view, in *obiter dicta*, that had it been necessary to decide the point, they would have been disposed to hold that the principle of *renvoi* found no place in the law of contract.¹⁵³ They observed that in consequence, while Cuban law was the governing law, that comprised only its 'domestic' law and excluded its conflict of law rules. In expressing that view they relied on criticisms in *Dicey's Conflict of Laws*¹⁵⁴ and of Mr (JHC) Morris and Dr Cheshire in their article¹⁵⁵ of the contrary view of Privy Council in *Vita Food*.¹⁵⁶ The Mr Morris, to whom the Lords Justices referred, became a distinguished editor of the 7th and later editions of *Dicey*. The article by him and Dr Cheshire was lauded by Lord Collins of Mapesbury in his Biographical Note to the 15th edition of *Dicey, Morris & Collins on The Conflict of Laws*.¹⁵⁷ In their article, Mr Morris and Dr Cheshire asserted that the Privy Council had completely failed to appreciate the purpose of the proper law in expressing its opinion in *Vita Food*¹⁵⁸ and said: 'The function of the proper law is to govern the essential validity and interpretation of the contract'.¹⁵⁹ They declaimed their Lordship's use of the conflict of laws rules of the governing law saying that it was 'novel and unsound'.¹⁶⁰ The current edition of

¹⁴⁴ See particularly Ibid 290-292.

¹⁴⁵ Ibid 290.

¹⁴⁶ *International Trustee* [1937] AC 500, 529.

¹⁴⁷ (1971) 124 CLR 245, 252, 260.

¹⁴⁸ [1939] AC 277, 290 (emphasis added).

¹⁴⁹ [1984] AC 50, 61D-62C ('*Amin Rasheed*').

¹⁵⁰ as it also is in its Australian analogue.

¹⁵¹ *Amin Rasheed* [1984] AC 50, 61H-62A (emphasis added).

¹⁵² Ibid 69G-70A.

¹⁵³ *In re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch 52, 96-97 (Jenkins and Romer LJ), 115 (Willmer LJ).

¹⁵⁴ (Stevens & Sons, 7th ed, 1958) 72-73, 721, 722.

¹⁵⁵ 'The Proper Law of a Contract in the Conflict of Laws' (1940) 56 *Law Quarterly Review* 320, 333-335.

¹⁵⁶ [1939] AC 277, 292.

¹⁵⁷ Morse, McClean and Collins, above n 76, xxiv.

¹⁵⁸ [1939] AC 277, 291.

¹⁵⁹ Morris and Cheshire, above n 155, 333.

¹⁶⁰ Ibid 335.

Dicey, Morris & Collins adopted another commentator's description of the Privy Council's decision as a *lapsus calami*.¹⁶¹

However, it is important to remember what Gummow and Hayne JJ observed in *Neilson*¹⁶² that Dr Morris and his successors as editors of *Dicey* had 'exhibited a marked antipathy to *renvoi*'. The source of Lord Diplock's assertion in *Amin Rasheed*¹⁶³ is probably what was in the 10th edition of *Dicey & Morris*. Subsequently, Lord Collins, then Lawrence Collins J, in *Mattos Junior v MacDaniels Ltd*,¹⁶⁴ discussed approvingly (and unsurprisingly given his position as general editor of the work) that *Dicey & Morris* advocated that in all but exceptional cases the theoretical and practical difficulties of applying *renvoi* outweighed any supposed advantages it might possess. He cited (in *obiter dicta* with approval) Millett J's observation in *MacMillan Inc v Bishopgate Investment Trust Plc (No 3)*¹⁶⁵ that the doctrine of *renvoi* had not been applied in contract or other commercial situations. Millett J said:¹⁶⁶

It has often been criticised, and it is probably right to describe it as largely discredited. It owes its origin to a laudable endeavour to ensure that like cases should be decided alike wherever they are decided, but it should now be recognised that this cannot be achieved by judicial mental gymnastics but only by international conventions.

Another English text, *Cheshire, North and Fawcett: Private International Law*¹⁶⁷ contains the criticism that 'no sane businessman or his lawyers would choose the application of *renvoi*'. However, Professor Adrian Briggs gave a salutary answer to that criticism in his article 'In Praise and Defence of *Renvoi*'¹⁶⁸ that:

... whilst the unsupervised administration of a dose of *renvoi* might be capable of upsetting the sensible intentions of commercial men, principled use of the technique may be the only way of giving effect to them. Yet the present state of English law is that this is simply not possible.

Prof Briggs was criticising an earlier version of the Rome I treaty and s 9(5) of the *Private International Law (Miscellaneous Provisions) Act 1995* (UK) that substantively abolished *renvoi* in English law.¹⁶⁹

The only Australian case involving the possible connection of *renvoi* to contract law is *O'Driscoll v J Ray McDermott SA*.¹⁷⁰ There, the Western Australian Court of Appeal, in considering a contract, the proper law of which was Singapore, referred to *Neilson*¹⁷¹ but, as Murray AJA noted,¹⁷² there was no issue of *renvoi* raised.

So, the question is now open in Australia of whether the doctrine of *renvoi* will be treated as a matter of substance affecting the existence, extent and enforceability of foreign maritime liens and contracts.¹⁷³

Conclusion

This address has asked more questions than it answered. That is because the settlement of the proceedings which stimulated it, has left me like a dog deprived of a bone. But, I hope that this is a little like the position that confronted FE Smith, the first Lord Birkenhead, when a judge said to him, 'I have listened to you for an hour and am none the wiser.' Smith retorted, 'Possibly not, my Lord, but far better informed.'

Nonetheless, the subject matter I have explored is of significance to not only those with an interest in maritime law but more generally to all persons who are engaged in international trade or commerce with Australia. The High Court's substantial recent initiatives in developing the rules of Australian private international law have opened up large unexplored fields for the application of, *first*, its new articulation of the difference between substance and procedure in *Pfeiffer*¹⁷⁴ and, *secondly*, the doctrine of *renvoi* beyond the law of tort.

¹⁶¹ Morse, McClean and Collins, above n 76, 1793 [32-029].

¹⁶² *Neilson* (2005) 223 CLR 331, 368 [109].

¹⁶³ [1984] AC 50, 61D-62C.

¹⁶⁴ [2005] EWHC 1323 Ch [108]-[110].

¹⁶⁵ [1995] 1 WLR 978, 1008D, G.

¹⁶⁶ Ibid 1008D.

¹⁶⁷ Cheshire, North and Fawcett, above n 72, 71.

¹⁶⁸ (1998) 47 *International and Comparative Law Quarterly* 877, 881.

¹⁶⁹ See Ibid 880-881; see also the *Contracts (Applicable Law) Act 1990* (UK), referred to in Cheshire, North and Fawcett, above n 72, 71.

¹⁷⁰ [2006] WASCA 25 ('*O'Driscoll*').

¹⁷¹ (2005) 223 CLR 331.

¹⁷² *O'Driscoll* [2006] WASCA 25 [60], [1] (Malcolm CJ agreeing), [18] (McLure JA).

¹⁷³ *Pfeiffer* (2000) 203 CLR 503, 543-544 [99]-[100]; *Neilson* (2005) 223 CLR 331.

¹⁷⁴ *Pfeiffer* (2000) 203 CLR 503, 543-544 [99]-[100].

Moreover, one day a court here will have to make the intellectually challenging choice as to whether Australian law will accord recognition to a foreign maritime lien that is outside the nature of those liens referred to in s 15(2) of the *Admiralty Act*. That is an area between the majority and minority opinions in *The Halcyon Isle*¹⁷⁵ that the Australian Law Reform Commission deliberately left open. And this issue will no doubt arise again when a cross-border insolvency is recognised here under the *Cross-Border Insolvency Act 2008* (Cth) and it affects the arrest of a ship on a maritime lien.

The adjective ‘halcyon’ means ‘calm, quiet, peaceful, undisturbed’. The halcyon was a mythical kingfisher that bred around the time of the winter solstice in a nest that floated on the sea. During its breeding season, the bird so charmed the wind and waves that the sea was especially calm. Oh that the *Halcyon Isle* had lived up to its name.

¹⁷⁵ [1981] AC 221.