

**Whose ship is it
anyway? Ownership
and choice of law in
admiralty**

Paul Myburgh
University of Auckland

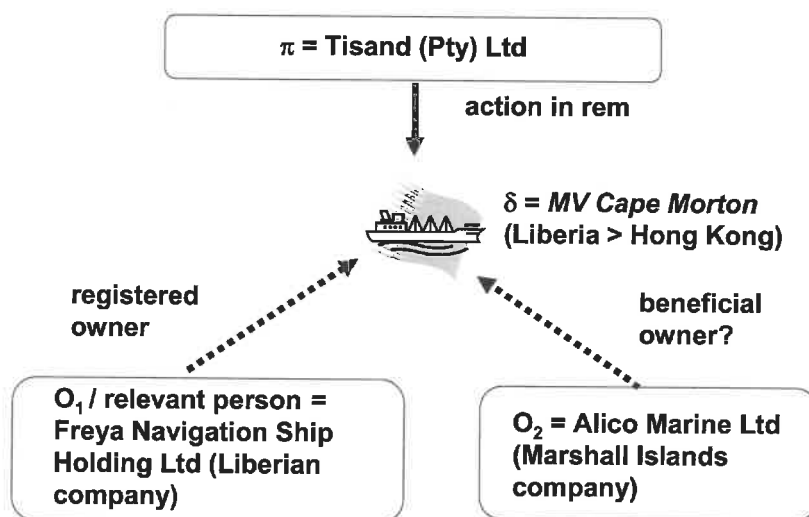
Whose ship is it anyway? Ownership and choice of law in admiralty

Paul Myburgh



THE UNIVERSITY OF AUCKLAND
FACULTY OF LAW

The Cape Moreton



Choice of Law Issue

- Which legal system governs the issue of vessel ownership in the context of admiralty jurisdiction?
- How does one characterise the conflicts issue?
 - Issue of jurisdiction > procedural question > lex fori?
 - Issue of proprietary rights / ownership / title > substantive question > lex causae?

Comparative Survey

Singapore

- *The Andres Bonifacio* [1993] SLR 521 (CA)
 - Uncompromising lex fori approach.
 - Issue characterised as jurisdiction > procedural.
 - “[T]he determination by the court of its own jurisdiction in rem depend[s] on Singapore law as the lex fori.”
 - Based on the majority approach in *The Halcyon Isle*.

Comparative Survey

United Kingdom

– *The Nazym Khikmet* [1996] 2 Lloyd's Rep 362 (CA)

- Modified lex fori approach.
- “[N]ecessary to enquire whether, when the action was brought, [the relevant person] was, under the law to which it was subject, what English law [ie the lex fori] would regard as the beneficial owner as respects all the shares in the vessel”.

Comparative Survey

New Zealand

– *The Kapitan Lomaev* [2000] 1 NZLR 37 (CA)

- Apparently also a modified lex fori approach, although purported to follow both *The Andres Bonifacio* and *The Nazym Khikmet*.
- Issue characterised as jurisdiction > procedural.
- But foreign law is relevant in determining whether the relevant person is what the lex fori would recognise as the beneficial owner of all the shares in the vessel.

Comparative Survey

Hong Kong

– *The Halla Liberty* [2000] 1 HKC 659

- Issue characterised as substantive > proprietary effect of transfer of vessel > lex situs of ship > law of the ship's flag.
- “[E]vidence of Korean law is relevant ... as the lex situs to determine the proprietary effects of such alleged unregistered transfer.”
- Fully developed lex causae approach: Korean law governed the entire issue of vessel ownership.

Comparative Survey

Australia

– *The Cape Moreton* [2005] FCAFC 68

- Court stated that it was adopting a similar approach to *The Nazym Khikmet*; however, on closer analysis, appears to be a fully developed lex causae approach.
- Issue characterised as substantive > proprietary effects of transfer of vessel > lex situs of ship > law of the ship's flag.
- Starting point is the lex fori, but the “existence, nature and extent” of any proprietary rights created by the transfer of the vessel “will be governed or affected by any law that Australian rules of private international law regard as relevant.”

Evaluation

- Lex fori and modified lex fori approaches are problematic:
 - Based on a simplistic and artificial application of the substance/procedure doctrine.
 - Characterisation of issue as jurisdictional > procedural does not preclude reference of a substantive incidental question to the lex causae.
 - Generate inconsistent and arbitrary results and interfere with foreign proprietary rights.
 - Undermine the purpose of the in personam link.
 - Likely to amount to a “brutum fulmen”.

Evaluation

- Lex causae approach in *The Cape Moreton* and *The Halla Liberty* is preferable from a conflicts perspective:
 - Does not distort the conflicts analysis of proprietary consequences of vessel transfer.
 - Produces consistent results which will be recognised by the country of registration.
 - Allows the in personam link and procedural theory to operate effectively: relevant person is matched to the correct ship.

Which lex causae?

- *The Cape Morton*:

“The chance location of a working merchant ship in a port within its range of sailing or on the high seas appears to introduce an element of arbitrariness to the legal analysis. This is especially so if, as is likely, the national register and registration laws of the port in question are directed to ships of that country. If a law of a country other than the country of registration is chosen to deal with the assignment of property in a ship, it is likely that there will be no statute dealing with registration that is made relevant. ... Particularly for reasons of clarity and certainty in commercial dealings and conformity with notions of ship nationality, there is much to be said for regarding the *situs* of a merchant ship as its country of registry.”

Further issues

- Proof of foreign law (under urgency).
- Expansive interpretation of “owner” in Anglo-Common Law jurisdictions (as compared with lack of the concept of beneficial ownership in Civil Law jurisdictions).
- Function of ship register in proving title / giving notice of transfer of title.