Table of Contents

**Editorial**

Editorial
Dr Craig Forrest i

**Frank Dethridge Memorial Address**

The Far From Halcyon Isle: Maritime Liens, Renvoi and Conflicts of Law
The Honourable Justice Steven Rares 1-15

**Addresses and Conference Papers**

The Early History of Admiralty Jurisdiction
Dr Damien J. Cremea 16-24

**Student Submissions**

International Maritime Arbitration and the Rotterdam Rules: A New Perspective on Party Autonomy
Joshua Taylor 25-43

**Casenotes and Articles**

Service of Proceedings In Rem Outside the Territorial Sea
Christopher Griggs 44-47

**Book Reviews**

Dr Michael Underdown 48-50

**New Developments, CMI Reports, Items of Interest**

International Law: CMI Issues
Stuart Hetherington 51-57
Editorial Board: Volume 28 2014

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Editorial

After eight years at the helm, Associate Professor Kate Lewins has passed the editorship of the Australian and New Zealand Maritime Law Journal to the Marine and Shipping Law Unit at the University of Queensland. Kate and her dedicated Murdoch University team has ensured that the journal has continued to publish significant and original works that make new contributions to maritime law in its broadest sense, of interest and impact to the profession and to scholarship. Fortunately Kate’s experience and editorial skill is not lost to the journal and she has kindly agreed to continue as an Associate Editor.

As Director of the Marine and Shipping Law Unit as the TC Beirne School of Law University of Queensland, I have taken over the helm from Kate, supported by the very able crew of the Marine and Shipping Law Unit. The Maritime Law Association of Australia and New Zealand has very kindly agreed to support the editorship of the journal through the provision of funding to support a student editor. This continues the practice that Kate initiated at Murdoch University, and enables a bright, energetic and capable student to engage with a wide range of maritime law issues leading, hopefully, to a new entrant into the maritime law profession in years to come. In 2014, the student editorship is taken up by Mr Samuel Walpole, an LLB student at the TC Beirne School of Law who, in this twenty eight edition, has proved to be a most worthy appointment. In what might have been a difficult transition from one institution to another, Samuel has ensured that the processes, procedures and standards set by Kate and her team, have passed with ease.

At its new berth in Queensland, I hope the journal will continue to attract excellent submissions and support from the maritime law fraternity.

Craig Forrest
General Editor
May 2014
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*, 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
York repairers (‘the necessaries 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 necessaries 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* 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 necessaries men’s assertion that the law of Singapore would recognise their maritime lien as created by the law of its 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.

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, bottomry and the statutory maritime liens created in the 19th century for master’s wages and master’s disbursements. 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*. 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*. 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 Story 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*, the principle that a maritime lien automatically attaches to a ship is
‘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 Ellens11 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 Ltd13 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 Tolten16 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 Commonwealth17 Gleeson CJ, Gummow, Hayne and Heydon JJ appear to have adopted Lord Diplock’s explanation in The Tojo Maru18 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.

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10 Ibid 145.
11 (1872) LR 4 PC 161, 169.
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 necessaries 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 Daskalelis28 and The Ship “Strandhill” v Walter W Hodder Company29 on the basis that they had misunderstood the judgments in The Colorado.30 He said31 that the reasoning in The Colorado32 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 Colorado33 was:34

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21 Blanden 218 CLR 330, 337 [12].
23 Ibid 230A-B.
24 Ibid 230D-G.
25 Ibid 230F-H.
26 Ibid 234F-H.
27 Ibid 235C-D (emphasis added).
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*. 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.’ The minority relied on Scott LJ’s adoption of the conclusion of Gorrell Barnes J in *The Ripon City*, 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. They said of the result arrived at by the majority:

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. 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. After all, they reasoned, the necessaries 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* distilled and followed by Ritchie J for the Supreme Court of Canada in *The Ioannis Daskalelis*.

... 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* where Newcombe J, for the majority, drawing on Story’s *Commentaries on the Conflict of Laws*, 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) after preparing its excellent report *Civil Admiralty Jurisdiction: Report No 33* (‘ALRC 33’). The Commission remarked that there was what it called ‘a conspicuous lack of uniformity on maritime law even between Western

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36 *The Halcyon Isle* [1981] AC 221, 238G-H.
37 Ibid 246B-D; see also 242H-243A.
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.
46 Anglin CJC, Duff, Mignault and Rinfret J.; Idington J dissenting.
It cited in support what both the majority and minority in *The Halcyon Isle* had agreed was the lack of uniformity in the international treatment of maritime liens.

The Commission noted that the position in other common law jurisdictions was different to that declared by the ‘bare majority’ in *The Halcyon Isle* citing Canadian and South African cases. The position in South Africa is now different since its Supreme Court decided *Transol Banker BV v MV Andricho Unity*. 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.

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.

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’.

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*, however, as Allsop J noted in *Comandate* there are constraints on the expansion of maritime liens by judicial exposition. The maritime lien for a bottomry bond has fallen into desuetude. Ironically, a bottomry bond was a security usually offered by the master or owners of a ship to necessaries 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 necessaries 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.

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49 Australian Law Reform Commission, above n 48, 64 [94].
50 [1981] AC 221.
51 Particularly [1981] AC 221, 238, 244.
54 1989 (4) SA 325.
55 Ibid 330D, 332B-D.
56 Australian Law Reform Commission, above n 48, 91 [123].
57 Ibid.
59 157 FCR 45, 78 [114]-[115].
60 See DR Thomas, *Maritime Liens* (Steen & Sons Ltd, 1980) [371]-[374].

(2014) 28 ANZ Mar LJ 6
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 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, 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 and seemingly in the ‘ambiguous and perplexing’ decision of the English Court of Appeal in The Colorado.

Professor DC Jackson in his work, Enforcement of Maritime Claims, said the view of the majority in The Halcyon Isle 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. He contended that prior to The Halcyon Isle 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. 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.

The learned authors of the current edition of Cheshire, North and Fawcett: Private International Law 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 as ‘clear and … correct’.

Professor Sarah Derrington and James Turner QC in their work, The Law and Practice of Admiralty Matters line up with the critics of the majority’s decision in The Halcyon Isle 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 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
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

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77 [1981] AC 221, 235C-D.
78 Morse, McClean and Collins, above n 76, [7-041].
82 (LexisNexis Australia, 8th ed, 2010) [16.43].
83 [1997] FCA 432; 1998 AMC 1727, 1733 (*Morlines*).
84 [1981] AC 221.
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.
Andrico Unity. 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. Ultimately, he concluded that the majority in The Halcyon Isle 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. 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. 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.

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. Of course, since Regie Nationale des Usines Renault SA v Zhang that is not the law in Australia because it now recognises the lex loci delicti as the governing substantive law for tort claims.

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

In Morlines, Sheppard J followed the majority in The Halcyon Isle. 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”, 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. 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 necessaries 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:

83 1989 (4) SA 325.
84 Ibid 340C-E.
86 1989 (4) SA 325, 347D-E.
87 Ibid 344E-F, 346H-J, 348E-349F.
88 Cf 1989 (4) SA 325, 347A-J.
89 (1870) LR 6 QB 1.
90 (2002) 210 CLR 491 (‘Zhang’).
91 Ibid 515-517 [61]-[67] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
93 [1999] 3 NZLR 111, 115 (Fisher J).
95 [1993] 3 NZLR 576 (Holland J).
99 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.
100 (2002) 210 CLR 491, 522 [86].

(2014) 28 ANZ Mar LJ
Dethridge Address: Maritime Liens, Renvoi and Conflicts of Law

Dean Prosser described that subject as a ‘dismal swamp’. 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. For Cardozo J, it was ‘one of the most baffling subjects of legal science.’

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). 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 and Morlins 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, 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, ‘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.

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. In Neilson v Overseas Projects Corporation of Victoria Ltd 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, 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 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

114 [1981] AC 221, 230E-F.
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’).

(2014) 28 ANZ Mar LJ
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

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127 Neilson (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].
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 opinion\(^{144}\) might be considered to be sound both in principle and its reasoning. Lord Wright explained,\(^{145}\) following what Lord Atkin had held

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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).  
139 (LexisNexis Australia, 8th ed, 2010).  
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 LJJ 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 claimed the Privy Council’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.  
149 [1984] AC 50, 61D-62C (‘Amin Rasheed’).  
150 as it also is in its Australian analogue.  
152 Ibid 69G-70A.  
153 In re United Railways of the Havana and Regla Warehouses Ltd [1960] Ch 52, 96-97 (Jenkins and Romer LJJ), 115 (Willmer LJ).  
156 [1939] AC 277, 292.  
157 Morse, McClean and Collins, above n 76, xxiv.  
159 Morris and Cheshire, above n 155, 333.  
160 Ibid 335.
Dethridge Address: Maritime Liens, Renvoi and Conflicts of Law

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 it 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\(^{71}\) 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.

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\(^{161}\) 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.


\(^{169}\) 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).


\(^{174}\) *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.
THE EARLY HISTORY OF ADMIRALTY JURISDICTION

Dr Damien J. Cremeaj*

1 Introduction

As regards the historical origins of Admiralty jurisdiction in Australia we must thank Dr Bennett whose researches have uncovered Royal Letters Patent of May 1787 under which the first court of Vice-Admiralty was convened in 1798.176 Possibly it sat in old Government House not far from here in Sydney Cove. Admiralty jurisdiction in Australia was put on a firmer statutory basis in criminal matters at least with s 3 of the Australian Courts Act 1828 (UK) replacing an earlier 1823 Act.

I am concerned in this paper, however, with civil admiralty jurisdiction as it originated in England. That was jurisdiction exercised by the High Court of Admiralty. Australian courts exercising Admiralty jurisdiction today are the successors of that court.

There was jurisdiction in maritime matters before there was admiralty jurisdiction. Holdsworth177 speaks of many seaport towns having jurisdiction in maritime cases. But it would be jurisdiction exercised in a very informal way. He says: ‘The Domesday of Ipswich tells us that “the pleas yoven to the law maryne, that is to wite, for strange marynerys passaunt and for hem that abydene not but her tyde, shuldene be nyleted from tyde to tyde”.’ Yet the Court Rolls of Ipswich do not support a view at all that maritime work was very pressing:178 Law in England, at this time, just after the Norman Conquest, is focused on property and thus on land. Property was the basis of wealth—not the sea.

The Admiralty Court came into being at a very early time

Dr RG Marsden in Select Pleas in the Court of Admiralty tells us that the court soon after its establishment sat at Orton Key, near London Bridge: sittings, he says, are also to be found mentioned in other places including Wool Key, Edgose’s Store and at the ‘High Berehouse’ near Horsleydown.179 All these are locations near or on the Thames or an estuary or inlet of the sea. Then the court, it seems, sat in the Church of St Margaret-at-Hill in Southwark.180 Finally, it became centrally located in Doctors Commons (the College of Civilians) near St Paul’s Cathedral where it existed over several centuries. Nearby was the Court of Arches. Doctors Commons—described by Dickens as ‘cosey, dosey, old-fashioned [and] time forgotten’ — was destroyed in 1867. But Doctors Commons may have been a rather cheerier place than Dickens makes out: I have in my possession a receipt dated July 31,1746 for ‘Three pounds fifteen shillings … for Musick for the Admiralty Court’ signed by a John Wakefield.

At first there were several admirals. Dr Godolphin, writing in 1685, says that in the year 1294:

William de Leburne was made Admiral of Portsmouth, and the adjacent parts; John de Botecurts of Yarmouth, and the Neighbouring Coasts thereof; and a certain Irish Knight of the West and Irish Coasts.181

Out of the authority of the admirals, at some point in the distant past, came a curial authority to deal with civil cases. By a ‘natural evolution’, Roscoe says, ‘they became also arbitrators in maritime disputes’.182 I suggest this could likely have been in the mid- 1200’s.

One does not have to be a specialist Admiralty lawyer, therefore, to appreciate that the Admiralty Court is very old. The question when it may have come into existence is intriguing – to Admiralty lawyers especially.

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177 WA Holdsworth in Goodhart and Hanbury (eds), A History of English Law (Methuen, London, 1903) vol 1, 531.
178 See generally GH Martin, The Early Court Rolls of the Borough of Ipswich, (University College of Leicester, 1954).
179 See RG Marsden, Select Pleas in the Court of Admiralty (Selden Society, 1894) vol 1, xxix.
181 J Godolphin, A View of the Admiral Jurisdiction (George Dawes, Chancery Lane, 2nd ed, 1685) 23.
182 Roscoe, above n 5, 2.
We can be sure that the Admiralty Court was in existence in the 1300s. Evidence suggests, however, that it may have been in existence even at a much earlier time. If so, but even if it only came into existence in the 1300s, it must count as one of our oldest institutions. Admiralty lawyers and non-admiralty lawyers alike can both marvel at this. For, over the years, the Admiralty Court has contributed much to the learning of the law in many areas – particularly commercial and international law. So even modern day lawyers in other fields may often owe a debt of gratitude to the court for the wisdom of its decision-making.

When, then, did the Admiralty Court come into existence?

The conventional account, below, is that given by Dr RG Marsden. That account, however, upon analysis, seems at best doubtful in light of the evidence. Yet Marsden’s account is one which has largely gone unchallenged.

2 Marsden's Account

The conventional account of the origins of the High Court of Admiralty is that of Dr Marsden. His claim in Select Pleas in the Court of Admiralty published in 1894 is that admiralty jurisdiction grew out of the authority of the High Court of Admiralty and that the origin of that court can be traced ‘with tolerable certainty’ to the period between the years 1340 and 1357. Dr Marsden says that the institution of the court was intimately connected with Edward III’s claim to be sovereign of the seas following victory in the Battle of Sluys in 1340. In the Black Book of the Admiralty, Sir Travers Twiss QC writes:

No year was more memorable in the annals of the British Navy than 1340, when Edward III, having assumed the title and arms of the King of France, resolved to maintain his claim to the French throne by force of arms.

After the battle, which lasted at most about 12 hours, Edward wrote to his son, the Duke of Cornwall, on June 28, 1340 that ‘God, by his power and miracle, granted us the victory over our ... enemies for which we thank him as devoutly as we can’. This letter from Edward, which is quoted in full by Sir Nicholas Nicolas in A History of the Royal Navy: 1327–1422 (1847), is said to be the earliest dispatch containing an account of a naval victory in existence. A year after the battle a special gold coin was struck commemorating Edward’s victory. The coin was called the ‘noble’ and it bore an image of the crowned king aboard a ship and the legend on it was from Luke 4:30: ‘Jesus passing through the midst of them, went on his way.’ Interestingly there is a house still standing on a corner in the old city of Southampton despite being attacked by the French in 1338.

Marsden says that, after the battle, instituting a Court of Admiralty to deal with piracy and other offences committed at sea was the outward and visible sign of the existence of the sovereignty to which the kings of England laid claim.

The view, advanced by Sir Victor Windeyer and others, is that soon after its establishment, the court made a ‘bold bid’ for business and shortly acquired extensive civil jurisdiction as well, so much so that it encroached upon the jurisdiction of the common law courts. Viscount Haldane LC referred to the ‘sharp conflict’ which developed between these courts and the Admiral’s Court in Owners of the SS Devonshire v Owners of the Barge Leslie. This led to two statutes passed in 1389 and 1391 restricting the jurisdiction of the Admiral’s Court to things done upon the sea. These statutes are still cited from time to time. They were cited, for example, by Lord Brandon in The Goring, which held that admiralty jurisdiction could not be exercised in the non-tidal waters of the Thames. Until those statutes, Mr Justice Story in the famous US case of De Lovio v Boit said that:

183 Marsden, above n 4, xiv.
186 Nicolas, above n 10, 60–62.
187 See WM Ormrod, Edward III (Yale University Press, 2011) 244.
188 Marsden, above n 4, xiv.
190 Owners of the SS Devonshire v Owners of the Barge Leslie [1912] 1 AC 634, 643 (House of Lords).
191 13 Ric II, St 1, c 5 and 15 Ric II, c 3
194 De Lovio v Boit 7 Fed Cas 418 (1815).
The Early History of Admiralty Jurisdiction

[The jurisdiction of the admiralty ... extended to all maritime contracts, whether executed at home or abroad, and to all torts, injuries and offences on the high seas, and in ports and havens, as far as the ebb and flow of the tide.

3 Criticism of Marsden’s Account

There is no doubting the significance of Edward’s victory in the Battle of Sluys. It is tempting to regard Marsden’s account, written as it was in the Victorian era, as one, however, influenced by notions of Empire. The account does not give certain particular points the prominence they deserve and some others are neglected or overlooked. Taking all these into account, I suggest that the High Court of Admiralty most probably came into existence quite some time before 1340 and certainly long before 1357. Plainly there is no strong basis whatever for Lord Justice Willmer’s claim that the history of the court ‘goes back to the year 1360’, 195 although there is clear reference to the Admiral’s court in a case in 1357. 196 Laing’s claim that ‘Admiralty jurisdiction was exercised before Admiralty courts were created’ seems illogical or absurd unless by ‘Admiralty jurisdiction’ he meant maritime jurisdiction more generally.

In essence, Dr Marsden’s account seems doubtful for the following reasons.

3.1 Learned Writings

First, that there was an Admiral’s Court in existence before 1340 to 1357 is supported by learned writers of great antiquity. William Prynne, in his Animadversions On the Fourth Part of the Institutes of the Lawes of England Concerning the Jurisdiction of Courts, 198 mentions him having actually perused the Black Book of the Admiralty (the original) and having found in there ‘an Ordinance made at Ipswich in the reign of King Henry the I by the Admirals of the North and West, and other Lords, and of DIVERS KINGS before that time’. He says: ‘(Nota) conteining the manner of outlawing and banishing persons attainted of felony or trespass in the Admiral’s Court’, by which he says:

[It is apparent, that there was an Admirals Court, and proceedings in it even in Criminal and Capital causes, relating to Mariners and Seamen, (as well as in Civil) in the reign of King Henry the I.

Dr John Godolphin in A View of the Admiral Jurisdiction, 200 published in 1685, said:

Whereas it is universally acknowledged, That the Admiralty of England is very Ancient, and long before the Reign of Edward the Third, who ever consults Antiquity shall find it far more Ancient and even time out of mind before the said Edward the First.

It was the Lord High Admiral who presided over the High Court of Admiralty; yet, of this high office, Dr Godolphin says:

[T]he Lord Admiral’s Jurisdiction is very Ancient, and long before the Reign of Edw 3, and that there hath ever been an Admiral, time out of mind, as appears not only by the Laws of Oleron, but also by many other Ancient Records in the Reign of Hen 3. Edw 1 & Edw 2.

Marsden dismisses these references as ‘apocryphal’ but does so without giving any specific reasons for saying so. Perhaps they simply do not fit in with his account. There appears to be nothing ‘apocryphal’ about them at all. We might not agree with Godolphin ‘that there hath ever been an Admiral’ but Prynne seems very clear and bases his view on having actually seen the original Black Book: this does not seem ‘apocryphal” in any way. In that regard. Twiss’s account of the origins of the Black Book are supportive of Prynne: for, he says, there ‘can ... be no doubt that there are documents inserted in it, which were drawn up at a period antecedent to the reign of Edward III. 201

199 Ibid.
200 Godolphin, above n 6, 26–27.
201 Twiss, above n 9, vol 3, x.
The Early History of Admiralty Jurisdiction

So these writers of great note – closer to a period in time when records still existed and had not been lost or destroyed – are uniformly of the view that the Admiral’s Court came into being long before 1340.

3.2 Origin of word ‘admiral’

Secondly, the word ‘admiral’ (derived it seems from the Arabic ‘amir-al-bahr’, meaning ruler of the seas) itself is in use in England by 1295 – if not earlier. Marsden, himself, says that the word occurs in a Vascon Roll of 23 Edw. I (1295) where Berardo de Sestars (or de Sestas) is appointed admiral of the Baion fleet – ‘Admirallum maritime Baion et capitaneum nautarum et marittorium nostrorum in ejusdem villa.’ This, however, seems to be contradicted by Marsden’s own statement that the ‘title of “Admiral” [is] not [to be] found before 1298’ (from which he reasons that it seems clear that there was no Admiralty Court in the thirteenth century). There are several subsequent similar references to others being appointed admirals before the close of the century and then, in 1300, as Marsden himself notes, Gervase Alard is called Admiral of the Fleet of the Cinque Ports. This is 40 years before the Battle of Sluys. Indeed, Dr Marsden even cites a case in 1295 when a ship is arrested for the King’s service but which departs Aquitaine without licence and, for this, the master is summoned before the ‘admiral’ and there fined.

This indicates the existence of a court (perhaps of a very basic kind) exercising jurisdiction to fine even before the end of the 13th century despite Marsden saying it ‘seems clear’ that the contrary of this is the case. This is significant and especially so considering submissions of Serjeant Mutford made in a case in 1297 referred to below.

Dr Godolphin, however, says that the word ‘admiral’ is first encountered ‘about 150 years before that of Ed I’. There is no clear support for this in any other sources. But this, if so, could put first use of the word as having occurred in the early 1100s – which is very ancient indeed.

In saying a ‘court’ was in existence we should not necessarily expect a court like the ones we have in use today. It is very possible, for instance, that the little known Court of Shepway ‘was held in the open air, or in a tent prepared for the purpose’ and it was this court which was presided over by the Lord Warden and Admiral of the Cinque Ports. We should not believe the High Court of Admiralty was any less different at least very early on.

3.3 Early Maritime Courts

Thirdly, in the earlier part of the Middle Ages, Holdsworth tells us, the ‘courts which had jurisdiction in maritime matters were for the most part the courts of seaport towns’. Reference has been made already to Ipswich in this regard which figures prominently in records. Holdsworth points out that the court at Newcastle dated from Henry I’s reign. He mentions also that the jurisdiction exercised by these courts was supervised and controlled by the Crown. This is because these courts often dealt with matters involving foreign affairs, including foreign seafarers. In what better way, it might be asked, could the Crown have controlled their operations in such matters than by the central authority of a high official – the Lord High Admiral? Possibly what Godolphin wrote of the Lord High Admiral in 1685 was true also of the late 1200s or early 1300s. He wrote that the Lord High Admiral is ‘concredited with the management of all Marine Affairs, as well as in respect of Jurisdiction as Protection’. It certainly would make sense in principle for the Crown to exercise control over the courts of the seaport towns by having a single high personage dedicated to the role. This would ensure uniformity in decision making.

This, however, is merely suggestive for it is based on speculation about how the Crown ran its affairs in maritime law matters at a very early point in time and surviving records are few.

203 Marsden, above n 4, xii.
204 Ibid xv.
205 Ibid xii-xiii.
206 Godolphin, above n 6, 24.
207 E Knocker, An Account of the Grand Court of Shepway Holden etc (John Russell Smith 1862) 43.
208 Holdsworth, above n 2, 530–533.
209 Godolphin, above n 6, 26.
The Early History of Admiralty Jurisdiction

But this statement from Godolphin does indicate that by that time at least (1685) there was a clear split or division in the admiral’s functions – ‘jurisdiction’ relating to court matters and ‘protection’ relating to naval matters. But that split or division in functions may have been recognised some three centuries before.

3.4 Statutes of Ric II

Fourthly, the proximity of the statutes of 1389 and 1391 to the period between 1340 and 1357 clearly seems to stand against Marsden’s account. Once more though we must engage in a speculative exercise. Parliament was not as active in Richard II’s reign as it is today or was in later times, and it is hard to accept that, in a period of about 30 or 40 years, a court sprang into existence and made such a ‘bold bid’ for business that it had to be contained not by one statute but by two. The 1391 statute commences with the Preamble:

[F]orasmuch as a great and common clamour and complaint hath been oftentimes made before this time, and yet is, for that the admirals and their deputies hold their sessions within divers places of this realm, as well within franchise as without, accroaching to them greater authority than belongeth to their office ... .

This is suggestive (but no more than that) of long-standing and widespread dissatisfaction – longer than merely a period of, at best, say 30 or 40 years. It seems doubtful that any ‘sharp conflict’ which led to this statute was only of relatively recent origin.

The statutes of 1389 and 1391, in other words, do not themselves support a view that the Admiral’s Court was but of recent origin. They suggest rather that it was of quite some antiquity—which is consistent with other evidence – and that, while it may have made a ‘bold bid’ for business, possibly or probably it did so at a much earlier time than either 1357 or 1340.

It is to be noted also that the 1391 statute speaks of ‘the admirals and their deputies’. Blackstone in his Commentaries says the deputies of the admirals were the judges of the Admiral’s Court. So it would be the judges of a court who made that bold bid for business – but at that much earlier time. Of course it might not be exactly like a court which we would find today as I have mentioned but it would be identifiable as a court, nonetheless in respect of the functions it was exercising in resolving disputes between maritime claimants and disputants.

3.5 Prize Jurisdiction

Fifthly, there is also inconsistency in Marsden’s theory (that the Admiral’s Court emerged between about 1340 to 1357) with his analysis of early prize jurisdiction, for he wrote in 1909 that:

The prize jurisdiction now vested in our high court of justice originated in the disciplinary powers conferred upon the admirals of the early fourteenth century by their patents.

This refers to the early 1300s. Almost certainly the first of these, he says, was Gervase Alard, mentioned above, who was Warden of the Cinque Ports and called Admiral of the Portsmen in 1300. How can it possibly be that it was another 40 years before an Admiral’s court came into existence (more generally – and not confined to the Cinque Ports) to deal with piracy and spoil and, only 40 or 50 years after that, that its excesses were such that it was necessary to pass two statutes to curtail its authority? Especially if Marsden is himself citing, as above in the second point, a case in 1295 when a ship is arrested and its master fined before the Admiral.

3.6 Robert de Benso v William Crake

Sixthly, Dr Marsden mentions a case in 1297 which he notes is cited by Selden and Fitzherbert as evidence they say that an Admiralty Court was in existence in that year. The case is that of Robert de Benso v William Crake which went before Common Pleas (Bereford, Haward and Mettingham JJ). To put this case into perspective – when the case is decided it is still 45 years until Chaucer is born and Henry V’s victory in the Battle of Agincourt on Saint Crispin’s Day is 118 years away.

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211 RG Marsden, ‘Early Prize Jurisdiction and Prize Law in England’ (1909) 24 English Historical Review 675.
212 Marsden, above n 4, xii.
This is a most significant decision and the report of it has come down to us in Law French. Relying on Marsden’s translation, the action was before the court for seizing a ship at sea – the ship being afterwards brought by the spoilers to ‘Holtham’ in Norfolk. Objection was taken to jurisdiction by Serjeant Mutford, for the defendant, on the ground of venue and on this ground:  

[T]here is assigned on behalf of the King upon the sea an Admirall to hear and determine matters done upon the sea and we suppose that you are not minded to curtail their jurisdiction.

The reply of Bereford J is this:  

We have general power throughout the whole of England, but of the power of the Admirals of whom you speak we know nothing. Nor are we minded to yield to them any of our power, if it be not so done by command of the King, of which you show us nothing.

Nothing of moment appears to have been said by Haward J or Mettingham J. How much may we rely upon this case to show that an Admiral’s court was in existence in 1297?

(i) In the first place we must note that we have only Selden’s record of the case. The manuscript of the case (25 Ed. 1, fol.82, b) as Marsden points out has disappeared or is no longer accessible. But Selden is quite clear about the accuracy of his transcription: ‘I have transcribed the case according to the very letters of my copy’, he said. His transcription, therefore, seems to be one we can rely upon for its accuracy – if we can rely upon his assurance. But we have no better evidence.

(ii) Secondly, in the submissions of Serjeant Mutford, although they were rejected, the case is highly suggestive of the existence of admiralty jurisdiction or of an Admiral’s court at least in 1297. This is how Selden regarded it and he added: ‘Some cases in the old records justify it also.’ But Marsden says it ‘appears to be giving too much importance to [Serjeant Mutford’s] remarks’ to draw this inference from them. Marsden, however, nowhere explains why he says this is so and he makes no further attempt at analysis.

(iii) The remarks themselves seem unmistakeable and perfectly plain. Mutford speaks as if it is common knowledge that ‘there is assigned on behalf of the King upon the sea an Admirall to hear and determine matters done upon the sea’. It is hard to imagine he could be mistaken about something as specific as this but it is not hard to imagine, on the other hand, the judge not understanding what he (Mutford) was referring to or not knowing anything about it. Mutford does not give notice that he speaks subject to correction (which may have been the custom at this time) so that his blunders would be harmless. He was a serjeant at law – perhaps among the first 30 ever to enjoy that rank. Someone of that rank we can expect would not knowingly mislead the court. Moreover, the earliest year books show, it has been said, ‘that the leading advocates [i.e. the serjeants] were men of technical skill and intellectual distinction’. We can be sure, therefore, that Mutford was one of those at the top of his profession. Public records in the National Archives, not previously referred to in connection with him, show, furthermore, that in the period between about 1307 and 1314 he was himself a justice of assize in Buckinghamshire. He was obviously very learned in law and an obvious mistake by him before Common Pleas – such as asserting to the court the existence of a non-existent jurisdiction – does not seem likely.

(iv) His submissions, which are considered ones, also give a sense of court structure to the admiral’s jurisdiction. For the admiral, he submits, has authority on behalf of the King ‘to hear and determine matters done upon the sea’. This appears to be very much a statement about curial authority or judicial inquiry. Cases are to be determined upon a hearing – judges in courts hear and determine matters. It is a developed submission – carefully expressed – going to jurisdiction which is put in a way by him that would not be out of place in a court today. Quite some thought may or must have gone into it. Something which was already in existence (or likely to be) may or must have driven the submission – unless indeed it did spring from nowhere which is not likely. In other words, an already existing body of learning underlay or may have underlain it. How old any such body of learning may have been or its actual content cannot now be known. And one would think that to be able to hear and determine matters, there must have been in place, already, structural features enabling this to occur and that they may or would have

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213 Ibid xvii.
214 Ibid.
215 Ibid.
217 Ibid 1879.
218 Marsden, above n 4, xviii
220 Ibid 10.
The Early History of Admiralty Jurisdiction

taken time – perhaps years or even decades – to develop and establish. We simply do not know. In such a setting, however, most likely, it would be the Lord High Admiral himself, or a deputy called the judge of the court, who would be presiding. 221 Again though, perhaps not in a court setting as we would expect it to be like today but nonetheless in a suitably formal place (perhaps a chamber or hall of some sort).

(v) Mutford’s submission also seems to be corroborated by the fact, referred to by Sir Matthew Hale in On Admiralty Jurisdiction (c. 1676), that Robert de Benso v William Crake ‘came in question but three years after the name of Admiral came to be of use in England’. 222 Marsden’s analysis would suggest it was only two years afterwards, Godolphin would suggest it was much longer than this even. But whichever is correct it is significant that the submission is made after the word is found to be in use – and perhaps soon after that. Moreover, Serjeant Mutford speaks of ‘an Admirall’ and not of the ‘Admiral of the Cinque Ports’. And he would not or could not be referring to the latter – if in existence at that time – because the case would not have been of concern to the Admiral of the Cinque Ports: Norfolk was not one of the Cinque Ports.

(vi) Bereford J’s reply is instructive in itself. It could be viewed as dismissive. Or, perhaps it could be regarded as one of genuine surprise – ‘of the power of the Admirals of whom you speak we know nothing’. Intriguingly he uses the plural ‘Admirals’ although Mutford’s submission is based on the singular ‘Admirall’. Is it open to be said, therefore, that he is feigning ignorance? – he already knows there are admirals and not merely one admiral. Perhaps he was perplexed by this. Interestingly, he does not say their power does not exist. On the contrary: he says, nor ‘are we minded to yield to them any of our power’ unless by King’s command. This is far from denying their existence. Indeed, he appears to be saying that, if they do exist, we (meaning Common Pleas) are not willingly giving up any of our powers unless by King’s command. Then following on from this, it is as if he puts Serjeant Mutford to his proofs: referring to the King’s command, he says ‘of which you show us nothing’. Perhaps Mutford was caught out perhaps because it was just expected, among the serjeantry and others, that the King’s command to the Admiral or to admirals ‘to hear and determine matters done upon the sea’ would be well known. But Bereford J does not say ‘of which you can show us nothing’. He does not, in other words, appear to rule out the possibility that the Ling’s command might be shown. He seems to leave this open. But he does not say to Mutford – ‘that is wrong’ or something to like effect. It is as if he is testing him in the way judges are often known to do to Counsel.

(vii) Interestingly also nor does Bereford J make any mention of the Admiralty Court of the Cinque Ports. The analysis undertaken by Miss K Murray in her History of the Cinque Ports 223 establishes that the Admiralty Court of the Cinque Ports is not to be found mentioned by name as such until 1395 in any event and if this is right then Serjeant Mutford could not have been referring to the Admiralty Court of the Cinque Ports in any event.

Dr Phillimore in The Lord Warden and Admiral of the Cinque Ports v HM in his Office of Admiralty 224 is correct, however, in saying there were at first several admirals each to himself exercising jurisdiction within his boundaries. Curiously perhaps Sir Nicholas Nicolas speaks even of a Sir William Clinton on 16 July 1333 being made Captain and Admiral of the Ships of the Cinque Ports and of all other places from the Thames westward. 225

(viii) In light of this analysis, Dr Marsden’s dismissal of Robert de Benso v William Crake, for no reason given, is hard to explain. For the case, it seems plainly, does strongly suggest that, by 1297, there was curial or judicial authority in the Admiral to hear and determine ‘matters done upon the sea’. That is clearly a reference to matters which are maritime disputes. And it is suggestive also that such authority is of more ancient origin than that even – but perhaps not by much.

The submissions of Serjeant Mutford thus carry considerable weight. And they are reinforced, as Hale points out, by the word ‘admiral’ being in use before the time of the case – perhaps even long before that time, if Godolphin is correct.

221 Blackstone, above n 36.
223 K Murray, The Constitutional History of the Cinque Ports (Manchester University Press, 1933) 121.
224 (1831) 2 Hagg 438 at 445.
225 Nicolas, above n 10, 7.
4 Additional Points

There are certain additional points to be made.

4.1 Shipmoney case

There is support for an Admiral’s court (much earlier than Marsden would have it) in observations of Crooke J in *R v John Hampden* in 1637—otherwise known as the *Shipmoney Case*. Reviewing the records of King John’s time he said:

> Three of these are to arrest and make stay of ships, that they should not go out of the Kingdom, but to be ready for the King’s service and the order was to bring Ships of Particular Towns to the mouth of the Thames for the King’s service.

This is one of the earliest recorded references to an ‘arrest’ of ships as in a proceeding in rem. However, the ‘arrest’ being referred to appears to be more in the nature of a requisitioning. This is not referred to by Dr Marsden but he does refer to *Warner v Wheler*, decided in 1542, whereby, by letters patent of Henry VIII, the Lord High Admiral is declared to have jurisdiction to arrest ‘goods wares and things’ found on ships or boats in the Thames:

> And that by reason of such arrest as well the things arrested as the persons to whom such things belong were and are subject and liable to the jurisdiction of the court of the said lord our King his Admiralty of England.

Nonetheless, Crooke J is quite specific in referring to an ‘arrest’ of ships (and arrest of ships was known as such in his time, as may be seen from *Warner v Wheler* itself) and he puts this at a time in the reign of King John – that is in the early 1200s.

4.2 PRO manuscripts

There are also scattered references in significant documents to be found in the National Archives, which are obscure but available for public viewing, which raise further doubts about Marsden’s account:

(i) One such document, which is Anglo-Norman in content, is headed: ‘*De Superioritate Maris Anglia Et Jure Officy Admirallatus in codem. Ano: 26 Edw Primi*’. This document appears to be an official report of some kind. It appears to be referring to the supremacy of the English over the seas (or the narrow seas) and the jurisdiction of the office of Admiral. It is undated but would appear to be referring to the year 1298 – year 26 of Edward I’s reign. This is 40 or 50 years or more before the time when Dr Marsden says the High Court of Admiralty came into being. He attaches significance to the court’s establishment in Edward III’s claim, after the Battle of Sluys, to be sovereign of the seas. But this document, which does not appear to be referred to by him at all, indicates this was a claim being made half a century earlier.

(ii) A second such document is also undated but is similarly headed. This document, however, refers to Ordinances made on March 8, 1286 (or 1287) at Bruges, in the presence of Guy, Count of Flanders and Marquis of Namur, and Walter, Bishop of Chester and Treasurer of England, and Sir John de Berwick, Messenger of the King of England, and William de Leybourn (or Leiburne), Admiral of the Sea of the King of England. This document may be one referred to by Dr Marsden but wrongly dated by him as 1297. It is a document of 1286 (or 1287) which puts the earliest use of the word ‘admiral’ at well over 50 years before Dr Marsden says the High Court of Admiralty was created – at the earliest. And it is a use of the word ‘Admiral’ 10 years before Common Pleas heard the case of *Robert de Benso v William Crake* in 1297. Why wait that period – until 1340 – to create a court of that name – given that, in the meantime, there were pressing needs to have an Admiral’s court arising from cases of piracy and spoil? This does not seem supportable on the basis of anything advanced by Marsden.

Marsden’s dating seems wrong based in particular on Dr Godolphin’s view that William de Leybourn (or Leiburne) was known as Admiral ‘in the 15 of Edw I’ – that is, in 1287. That, or 1286, happens to be the date of this second PRO document.

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226 *R v John Hampden* (1637) 1 State Trials 505, 656.
227 Marsden, above n 4, 220–221.
228 Godolphin, above n 6, 24.
The Early History of Admiralty Jurisdiction

5 Conclusion

Analysis shows there is no strong basis for Dr Marsden’s claim that the High Court of Admiralty can be traced with ‘tolerable certainty’ to the period between the years 1340 and 1357. It was in existence then (and certainly in 1357) but it seems it is traceable to a much earlier time. It is definitely traceable to the early 1300s – if not to the late 1200s indicated by Serjeant Mutford’s submissions in Robert de Benso v William Crake in 1297. It may even be traceable to the early 1200s. No records can assist us further than this. They simply do not exist.

The Admiralty Court of today, and all Anglo-Admiralty courts abroad, are ultimately the successors of the High Court of Admiralty. We cannot be entirely sure how that court began – although, most likely, it was connected with the claims of the English kings to sovereignty of the seas, as Marsden says. But we can be sure that the court disappeared in the Judicature Act reforms of 1873 and 1875. The place where it conducted its business for centuries – Doctors Commons – disappeared also at about the same time or shortly before. But the body of law developed by the court, over the centuries of its existence, lives on – in Australia, as well, and elsewhere. In a way, Australian Admiralty lawyers are the inheritors of a system devised perhaps as much as 800 years ago. That in itself is something to truly marvel at.
INTERNATIONAL MARITIME ARBITRATION AND THE ROTTERDAM RULES: A NEW PERSPECTIVE ON PARTY AUTONOMY

Joshua Taylor*

Rotterdam Rules - A set of rules dreamed up by the United Nations to govern the international carriage of goods, with a special focus on the rights of landlocked countries. Thirteen years in the making, the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (to give it its full, grey name) takes us back to pre-Hague Rules days and carries on the tradition of producing something for everybody which meets the needs of nobody. – Chris Hewer, December 2012, The Arbitrator

1 Introduction

In 2009 the United Nations presented a document, developed by its Working Group III under the United Nations Commission on Trade Law (UNCITRAL), for signatures by member states as the new regime for shipping liability. The document is called the United Nations Convention on the Carriage of Goods Wholly or Partly by Sea, to be known commonly as the Rotterdam Rules. Containing a chapter on arbitration, the Rotterdam Rules followed the precedent set by the Hamburg Rules in regulating forum selection clauses in contracts for the carriage of goods by sea. The chapter was hotly debated so that, along with the chapter on jurisdiction, provisions had to be made that contracting states to the Rotterdam Rules will only be bound by this chapter if the states take a further step by opting in.

The effect of this chapter is, for specific maritime contracts, to limit party autonomy to choose an exclusive arbitral forum in arbitration clauses and enforce a choice of places connected to the dispute. So a clause in a maritime contract affected by Chapter 15 requiring arbitration to take place in location A would not be binding on the claimant. Instead the claimant could bring arbitral proceedings in any of the places listed in Chapter 15. While in an ideal world the place would have no substantive effect on the fairness of any arbitral tribunal, in reality the choice of place is a significant factor as parties seek a convenient and economical forum that is sympathetic to their interests. This drives the controversy as taking away the contractual stipulation of place is considered by some to be a revolutionary break from party autonomy.

When the UNCITRAL Working Group III decided to include a chapter on arbitration, the debate and submissions by interested parties were substantial and opinions were diverse. Some are strongly on the side of party autonomy and abhor this intrusion onto freedom of contract. Others take a permissive approach considering that a chapter on arbitration is necessary for the coherence of the Rotterdam Rules as a whole, especially in relation to the chapter on jurisdiction. The end result is that Chapter 15 on arbitration is a unique and complex compromise between party autonomy and mandatory rules. In the author’s humble opinion, this chapter now reasonably accurately, in theory, represents the current reality of party autonomy of maritime arbitration. However, the provisions are also plagued with major problems making them practically unworkable. The aim of this paper will be to discuss how party autonomy in maritime arbitration clauses can be interpreted with a new perspective through the lens of the Rotterdam Rules and also to offer a starting point for the discussion on how more pragmatic rules on maritime arbitration could be considered for adoption by New Zealand.

1.1 A New Perspective on Party Autonomy in Maritime Arbitration through the Rotterdam Rules

The author contends that when approaching maritime arbitration, there are different perceptions of how party autonomy is understood. A compromise between party autonomy and mandatory rules must be seen to be the sensible way to advance congruent worldwide legal regimes. The limited encroachment by the Rotterdam Rules upon party autonomy and freedom of contract in arbitration clauses, in bills of lading and other contracts of carriage of goods by sea, is in many ways appropriate when considering the unique nature of maritime arbitration and the current legal impositions on maritime arbitration agreements. The prevalence of ‘copy and

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International Maritime Arbitration and the Rotterdam Rules

paste’ arbitration clauses, fitted into the transport document by the carrier, which designate unsuitable and distant locations for arbitral proceedings necessitate that it must be possible, in some cases, for arbitration to be held at a place connected with the dispute.

In this paper, the author will use the mechanics and effects of Chapter 15 of the Rotterdam Rules on arbitration as the context by which party autonomy in maritime arbitration can be seen in a new perspective. Through examining the development of the rules and by comparing the relationship between party autonomy and the Rotterdam Rules in maritime arbitration and other regimes affecting arbitration such as the Hamburg Rules, Canadian law, United States law, Australian law, and the international air carriage liability regimes, the author will show that ultimately the Rotterdam Rules represent no major break from global legal trends. Criticisms of the arbitration chapter will be given due attention and potential directions for expanding on this fresh outlook on maritime arbitration will be postulated.

1.2 The Development of Maritime Arbitration

Maritime arbitration is the result of a marriage between two different fields of law – maritime law and arbitration law. The rise of modern international commercial arbitration is a relatively recent triumph of party autonomy in the last century. Arbitration agreements are contractual arrangements to have disputes solved by an independent arbitrator instead of the courts. Prior to 1958, arbitration clauses were generally frowned on by courts in many jurisdictions as ousting the jurisdiction of the court. However, signed in 1958 and entering into force in 1959, the New York Convention on the Enforcement of Arbitration Agreements (New York Convention) unified the law internationally on arbitration agreements by confirming and upholding their enforceability and the freedom of parties to contract into them. The New York Convention was such a success that now in many states the only practical answer to an international commercial dispute is arbitration.

In contrast to arbitration, maritime law is an aged branch of law, developing mainly as a civil law concept. Developed to accommodate taxes, international customs and statecraft, maritime law is most recognisable for its mandatory rules and international legislative cooperation or at least uneasy compromise to encourage uniform practice. While this may be an overly romantic assessment, none can deny that maritime legal instruments and practices diverge from traditional common law rules, such as the way in which the bill of lading bends the rule of privity of contract. A prominent Australian judge, Justice James Allsop in talking about maritime law stated that due to shipping’s ancient nature and its status as a universal and necessary activity to commerce, the field ‘has always revealed a striking degree of uniformity’ through compulsory rules. Thus, the value placed on party autonomy in arbitration is different to party autonomy in maritime law. The former was a recent worldwide legislative movement to protect and uphold parties’ freedom of contract and values party autonomy highly. The latter is a legal tradition where the imposition of mandatory rules has been seen as necessary to balance competing interests and enhance uniformity and sees party autonomy as one of many competing principles.

Maritime arbitration has developed rapidly in spite of its mixed parentage. Now is the ‘golden age’ of maritime arbitration due to worldwide respect for the arbitration process, judicial cooperation with the arbitration industry and near universal enforcement of arbitral awards. While vulnerable to substandard legislation, in current practice all forms of commercial arbitration remain a legal success. Notable maritime arbitration centres, such as those in London, New York, Singapore and Tokyo, have established reputations in dealing with maritime disputes and most arbitration clauses in maritime contracts are based on one of their model clauses.

230 It is well known that a great number of shipping cases arise due to contracts which are constituted of terms and clauses copied from standard form bills of lading. These contracts are usually unworkable in the circumstances and lead to needless litigation beneficial only for use as case studies in contract law textbooks.
235 Allsop, above n 4, 5.
237 Ibid.
stipulating their own forum and rules of procedure for the proceeding. The success of these centres is due to the high level of expertise by its arbitrators because professional maritime arbitrators must not only know ‘the law of admiralty but … the practice of maritime operations’. Unquestionably the maritime arbitration industry is a branch of arbitration which involves different professional expectations and practice.

2 The Unique Field of Maritime Arbitration

Arbitration is a triumph of freedom of contract, whereas maritime law has always been an area needing mandatory laws. Maritime arbitration is a mixture of the two. In this section the author will illustrate how maritime arbitration is a distinct industry. Also, the problems with maritime arbitration will be highlighted. These problems show that in maritime arbitration especially, the place of arbitration should be open to a place connected with the dispute when one of the parties is domestically constrained and yet the other is an international carrier.

2.1 The Nature of Party Autonomy in Maritime Arbitration

Maritime arbitration is unique because in many ways it already has a lesser degree of party autonomy due to the nature of existing maritime laws. In The Hollandia sub nom The Morviken (‘The Hollandia’) a jurisdiction agreement was struck down for an exclusive jurisdiction clause specifying a jurisdiction which would offend the limits in the Hague-Visby Rules. The Hollandia indicated in obiter that the Court may not distinguish between jurisdiction and arbitration agreements. So where an arbitration agreement would likely result in a violation of the Hague-Visby Rules’ liability standards, based on The Hollandia, the court may either annul the arbitration agreement or suspend the proceedings pending the arbitration and in that way ensure that liability standards are adhered to. Although the case Vimar Seguros y Reaseguros, S.A. v Sky Reefer (‘Sky Reefer’) is seen as an example of party autonomy being applied to maritime arbitration, it is actually an instance of Court control in arbitration. In that case the proceedings in the US courts were merely stayed to make sure the arbitral tribunal did not breach the standard of liability. According to the minority in Sky Reefer the decision was incorrect under US law because the Carriage of Goods Act already limits foreign choice of forum arbitration clauses in maritime contracts if they make it uncertain whether the minimum liability standard will be kept. Germany is another state where it is possible that where a maritime arbitration agreement would result in a violation of the Hague-Visby limits then the foreign arbitration clause could be invalidated. In many respects, the minimum standards of liability in existing maritime trade regimes limit party autonomy in foreign maritime arbitration clauses, in an equally large if not quite so obvious way, based on whether or not the liability would be diminished based on the substantive law likely to be applied by the arbitral tribunal; examples of this are the US, the UK and Germany. Maritime arbitration is an area of international dispute resolution that is already characterized by a lesser prominence of party autonomy.

2.2 Encouraging Fairness in Maritime Arbitration

Arbitration was encouraged by the New York Convention and is now widely used in international commercial arrangements. However, modern arbitration has taken a downturn; for instance, esteemed international arbitrator David W Rivkin enunciated that arbitration is now plagued with delay and extra cost. Part of the cause of this dissatisfaction is the penchant for arbitration agreements to specify places for arbitral proceedings in a place inconvenient for the parties which makes claims risky to pursue. International trade has been agreed to be something needing international frameworks to guide and ensure fairness between competing interests of carrier, shipper and consignee. Maritime arbitration is guaranteed to involve complicated disputes involving

239 Cortazzo, above n 8, 266.
244 Sparka, above n 13, 163.
245 Ibid 164.
246 David W Rivkin, ‘Making International Arbitration Suitable for the 21st Century’ (Speech delivered at the Centre for the Interdisciplinary Study of Conflict and Dispute Resolution, Cleveland, October 2011).
multiple international entities. It is logical to suggest that some international rules like Chapter 15 of the Rotterdam Rules would be helpful in encouraging fairness in arbitration. Another argument supporting a Rotterdam Rules approach comes from insurance companies and banks. In order to gather ideas, the working group distributed an initial questionnaire on the scope of any draft instrument for a regime of carrier liability. The International Union of Maritime Insurance (IUMI) strongly argued for taking away the ability of the contracting parties to specify a place of arbitration that would bind third parties, as it is more convenient for insurance companies to handle the arbitration in a place convenient for them. It is important to realise that the enterprise of carriage of goods by sea is not as simple as between a carrier and a shipper but rather that banks, insurance companies and other interested parties are also intricately involved. Maritime ventures are best arbitrated at a place convenient for all concerned. This argument was presented by insurance companies during the drafting stating that because maritime arbitration should be treated differently in regards to party autonomy.

Maritime arbitration proceedings should take place in a forum connected with the dispute for reasons of cost and convenience. The United States has been a major supportive force for these kinds of changes. The list in Article 75 of Chapter 15 of the Rotterdam Rules is of places bound to be connected with the dispute. Professor William Tetley emphasised that ensuring the claimant has the option of bringing arbitral proceedings in one of the places in Article 75 is a positive thing for maritime arbitration because the designated place by ‘copy and paste’ arbitration clauses is often not connected and unrelated to the dispute. It is particularly desirable in maritime arbitration to be able to hold the proceedings in one of these places when there is a disparity between the parties’ capabilities in terms of resources and will to pursue claims through arbitration. Parties like to forum shop and the carrier does it by selecting a standard form bill of lading or transport document whereas the cargo claimant rarely has the opportunity to negotiate such matters. In the US, the case of Sky Reefer in which party autonomy was upheld, spurred some US attitudes against complete party autonomy in maritime arbitration agreements. Due to the threat of having to pursue arbitration in an expensive foreign forum, many cargo claimants have been forced to accept lower awards since the Sky Reefer decision. Academic support includes Chester Hooper who calls the Rotterdam Rules’ provisions on arbitration a ‘significant improvement on the present law in the United States’. As seen in the US, the fact that many arbitration agreements are not negotiated can result in unfairness to cargo claimants since they cannot choose a place convenient to them.

3 The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - Approaching New Viewpoints on Arbitration in Shipping

In this section the author will briefly unravel the historical development and background of the Rotterdam Rules and how the contentions to the chapter created a compromise crafted to be suited to arbitration within the maritime industry. In some ways it is the presence of the chapters on jurisdiction and arbitration that distinguishes the Rotterdam Rules and incidentally the Hamburg Rules from the Hague and Hague-Visby Rules. Whereas the Hague and Hague-Visby Rules were intended to balance shipping interests against the interests of the carrier, the Rotterdam Rules more ambitiously sets out to regulate a greater number of aspects of maritime law.

3.1 Development of the Rotterdam Rules

The Rotterdam Rules were developed to be a modern uniform and complete regime for shipper liability in order to replace and modernize the international carriage of goods framework. In 2000, concerns were expressed at a transport law colloquium held by the United Nations Secretariat and the Comite Maritime International (CMI), that the current patchwork of Hague Rules, Hague-Visby Rules, Hamburg Rules and various national laws in

\[\text{Addendum to Compilation of Replies to a Questionnaire on Door-to-Door Transport and Additional Comments by States and International Organizations on the Scope of the Draft Instrument, UN Doc A/CN9/WGIII/WP28/Add1 (18 September 2003), 8.}\]


\[\text{Sky Reefer, 515 US 528, 540-551 (1995).}\]


\[\text{Ibid 426.}\]
place at the time, were inadequately meeting the 21st century needs of international carriage of goods by sea. An agreement was reached that any new convention must deal with developments in shipping such as multimodal transport, electronic commerce and formulating a clearer allocation of liability. Information was sought from governments and notable international commercial organisations concerned with carriage of goods. As their purpose is to provide a complete reformed approach to shipping law, this motivated the drafters to include provisions on dispute resolution. Although presented for signatures in 2009 and having received support from 24 countries, currently, as of the time of writing, only Spain, Togo and Guinea-Bissau have ratified the Rotterdam Rules.

3.2 The Contentions behind the Dispute Resolution Chapters

Making the decision to integrate such provisions on jurisdiction and arbitration to limit party autonomy was a bold and contentious move made by the working group. Although when the CMI prepared the preliminary draft they did not draft chapters on forum selection, the CMI always anticipated that there would later be such provisions added. Because these chapters were a heavily debated part of the convention, it was decided as a compromise to all interests to make these chapters ‘opt-in’ so that contracting states to the Rotterdam Rules must take a further step to opt in to the chapters on jurisdiction and arbitration. Admittedly, a large influencing factor behind the arbitration chapter was the jurisdiction chapter. It was deemed necessary to regulate both forms of dispute resolution together or none separately – the general fear was that if there was no arbitration chapter, then arbitration would become a back door to escape the provisions on jurisdiction. Eventually, the arbitration chapter was written as a significant compromise on the original position due to the debate between champions of party autonomy and those supporting UNCITRAL’s inclination to regulate maritime arbitration. In the eleventh session of the working group, the concept of including an arbitration chapter was discussed for the first time. The apparent, although not necessarily real, consensus of opinion was that the new convention should contain provisions on jurisdiction and arbitration. In actual fact, a variety of interested groups were either in opposition to any provisions based on a party autonomy perspective, or in favour of modelling the arbitration (and jurisdiction) chapters on the CMR Regulation of the European Union and the Montreal Convention. Those that supported basing the provisions on the Hamburg Rules were the strongest group. Nevertheless, it was decided to that the decision to write the draft articles governing arbitration should proceed, and the debate moved to consider what the content of these articles should be.

There were two general positions on the content of the arbitration chapter. The first came from the United States, a great influence on any international activity, who strongly supported rules similar to the Hamburg Rules by listing permissible forums for dispute resolution. Many of the United States’ suggestions were integrated into the chapter. Advocating modifying the Hamburg Rules in certain respects, the United States proposed that the provision should be worded as to limit the party qualifying to a selection of forums to only the cargo claimant. Furthermore, the United States espoused the list of permissible forums now in the convention. A second argument, particularly from the United Kingdom and France, supported either no arbitration provisions or drafting the arbitration chapter so that it would have little substantive effect on freedom

The Working Group III proposed two variations at the twelfth session based on these arguments. One favoured party autonomy and one favoured the Hamburg Rules approach.\footnote{Draft Instrument on the carriage of Goods [Wholly or Partly] [by Sea], UN Doc A/CN9/WGIII/WP32 (4 September 2003), 67.} However, a third group which favoured a compromise of distinguishing between different types of contracts was also developed. Eventually, the solution proposed by this group was adopted. Headed by Denmark and the Netherlands, the compromise reached entailed drafting provisions affecting mainly liner transportation arbitration agreements and only in limited instances other\footnote{Volume contracts and Article 7 contracts, see below.} arbitration agreements.\footnote{Proposal by the Netherlands on Arbitration, UN Doc A/CN9/WGIII/WP54 (13 September 2005), 2.} Ultimately there were three views influencing the Rotterdam Rules: Those that favoured compromise, those that favoured party autonomy and those that favoured the Hamburg approach. It was the compromise that succeeded\footnote{Sturley, above n 42, 951.} and made Chapter 15 the successor of the strict regulation from the Hamburg Rules but with a mix of party autonomy and regulation. This compromise was deemed an appropriate approach to maritime arbitration’s conditions because of the international maritime industry that defines it.

### 3.3 The Rotterdam Rules on Jurisdiction Clauses

Because the arbitration chapter was developed to complement the jurisdiction chapter,\footnote{Sturley, Fujita, and van der Ziel, above n 31, 354.} the rationale behind the jurisdiction chapter is relevant to determining whether the arbitration chapter reflects the reality of maritime arbitration. Like the arbitration chapter, the jurisdiction chapter opens it up to the claimant to choose from a variety of forums connected with the dispute. The rationale for the jurisdiction chapter was to prevent the situation when exclusive jurisdiction clauses specify a foreign forum that would make the cost of suit for even substantial amounts impractical. This attracted interest from parties such as the European Union.

Although the European Union did not attend the parts of the Convention where such rationales were discussed, the European Union became a leading advocate of making the chapter ‘opt in’ due to its own Jurisdiction Regulation.\footnote{Sturley, Fujita, and van der Ziel, above n 31, 355.} The contrast between Chapter 14, the jurisdiction chapter, and Chapter 15, the arbitration chapter, is not in its effects but in its underlying rationale. Jurisdiction has no background legal framework of international legal regimes except in the European Union while arbitration has had a massive international law scheme for decades. Thus, the arguments for and against each was different.\footnote{Ibid.} Due to the European Regulations on Jurisdiction, the jurisdiction chapter was made ‘opt in’ and by association the arbitration chapter was also made ‘opt in’.\footnote{Sturley, above n 42, 951.}

### 4 How the Arbitration Chapter Affects Maritime Arbitration

In this section the author will investigate the effects of the chapter of arbitration and the mechanics of its application. Chapter 15 provides a new perception of party autonomy in maritime arbitration which is argued to be appropriate in the degree of its infringement of party autonomy. However the articles in Chapter 15 are complicated and unappealing as a workable international maritime arbitration regime. The key feature of the chapter is the restriction on freedom of contract in the form of removing the enforceability of the designation of arbitral place in some cases. Instead, it is up to the claimant’s choice where to pursue proceedings in one of the places listed by Chapter 15.

### 4.1 The Application of the Arbitration Provisions of the Rotterdam Rules

In analysing the arbitration chapter in the Rotterdam Rules, a brief explanation of some key differences between the Rotterdam Rules and previous conventions is required. The first key difference is that the Rotterdam Rules apply to all contracts of carriage that have a sea leg and the contractual place of receipt, discharge, loading or
delivery is in a contracting state.\textsuperscript{275} Unlike the Hague Rules and the Hague-Visby Rules which strictly covered only the part of the journey which was by sea, the Rotterdam Rules will pertain to all agreements for carriage that has at least one section being by sea. This would have the effect of overriding any domestic carriage of goods legislation in countries which sign up to the Rotterdam Rules and invading domestic law including in regards to arbitration. This is important to keep in mind when considering arbitration. For example, if New Zealand was a contracting state and there was a domestic carriage containing an arbitration clause to which the Rotterdam Rules applies,\textsuperscript{276} the place of arbitration would still be open for the claimant to choose the forum within the limits the Rotterdam Rules provide.

\subsection*{4.2 The Imposition on Party Autonomy in Article 75}

Article 75 paragraph \textsuperscript{277} stipulates that the person claiming against the carrier has the option to proceed with arbitration at any one of 6 places, which are certain to be places connected with the dispute. These places are (1) the place designated by the arbitration agreement, (2) a location in the state of the domicile of the carrier, (3) a location in the state of the receipt agreed in the contract of carriage, (4) a location in the state where delivery was agreed in the contract of carriage, (5) a location in the state where the goods were initially loaded on a ship or (6) a location in the state where the goods were finally discharged. The working group conceded that the rationale behind intervening in party autonomy in this way was to prevent arbitration being held in a place that is overly expensive, unconnected with the dispute and not worth the cost of dispute resolution.\textsuperscript{278}

\subsection*{4.3 The Exceptions to Article 75(2)}

Importantly, there are some key exceptions to Article 75 paragraph 2 which provide that the place stated in the arbitration agreement will be enforced: \textsuperscript{279} volume contracts with certain conditions met;\textsuperscript{280} third parties to volume contracts with certain conditions met and; Article 7 contracts which meet certain conditions contained in Article 76 paragraph 2. Volume contracts are broadly defined as ‘a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time’.\textsuperscript{281} Thus, as there is no minimum quantity defined, a carriage of as few as two containers could be considered a volume contract.\textsuperscript{282} The volume contract must clearly state the names and addresses of the parties and must be either individually negotiated or contain a prominent statement making known the presence of the arbitration agreement. Since the concept of volume contracts are loosely defined, the concept is considered a weakness of the Rotterdam Rules as a whole. For these reasons, it is advisable for parties to err on the side of caution and ensure that arbitration agreements are negotiated.

Article 7 contracts are bills of lading or transport documents under charterparty arrangements where the bill of lading is transferred to a consignee or other third party, even though the bill of lading references the charterparty. While charterparties and other ‘non-liner’ contracts are not affected by the Rotterdam Rules, Article 7 will apply the convention to these contracts and charterparty transport documents as between the carrier and consignee or holder of the negotiable document if they are not an original party to the charterparty. Any arbitration agreements in ‘Article 7’ contracts are not affected by Article 75 paragraph 2 by virtue of Article 76 paragraph 2 if specific requirements are fulfilled. Since the majority of ocean trade is governed by these types of contracts, complying with the terms listed in Article 76 paragraph 2 will ensure the designation of place in arbitration agreements are enforced by the convention.

\subsection*{4.4 Summary of Chapter 15’s Application}

Essentially Chapter 15 on arbitration in the Rotterdam Rules divides maritime arbitration agreements into two broad categories: those that are subject to paragraph 2 of article 75 on forum selection and those that are not.

\textsuperscript{275} United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, GA Res 63/122, GAOR, 63\textsuperscript{nd} sess, 67th plen mtg, Agenda Item 74, Supp No 49, UN Doc A/Res/63/122 (2 February 2009), art 5 (‘Rotterdam Rules’).

\textsuperscript{276} For example a domestic carriage of goods governed by a head door-to-door international transport contract which also involves a sub-contract for carriage by sea.

\textsuperscript{277} See Rotterdam Rules, above n 48.


\textsuperscript{280} See Rotterdam Rules, above n 48, art.75(3) – (4).

\textsuperscript{281} Ibid art 1(2). See also Sparka, above n 13, 200.

\textsuperscript{282} Asariotis, above n 51, 357.
Greater party autonomy is given to non-liner trades and charterparties where arbitration is more standard practice and lesser party autonomy to liner trades where arbitration is the exception.\(^{283}\) The application and mechanics of the arbitration chapter is designed to surgically restrict party autonomy in some maritime contracts and is necessary for maritime arbitration to fit into the Rotterdam Rules. In an ideal world where all countries opt in to these arbitration provisions, they could be workable, but realistically these rules are made unattractive because of their complexity.

Figure 1: Chapter 15’s application.
5 Comparing Chapter 15 with Existing Perspectives of Party Autonomy in Maritime Arbitration

The Rotterdam Rules are inventive in many ways but they draw from international trends in regards to arbitration. In this section, the author will show that a prohibitive approach to exclusive forum clauses in arbitration agreements are supported by these international trends. Furthermore these jurisdictional attitudes are evidence that maritime arbitration is unique. While US law and policy has been a proponent of party autonomy, it now has shown dissatisfaction and pushes for more intervention in maritime arbitration. The conventions regulating the carriage of goods by air such as the Warsaw Convention and the Montreal Convention include provisions of arbitration opening the place of arbitration to be at the option of the claimant. Developed by UNCITRAL as a shipping liability regime to be more balanced and replace the Hague-Visby Rules, the Hamburg Rules were the first to regulate jurisdiction and arbitration. Canadian law has taken on a modified Hamburg Rules approach to maritime arbitration. Although not directly based on the Hamburg Rules, Australian law has had a parochial legislative position similar to Canada on foreign maritime arbitration clauses. These examples show that maritime arbitration is recognised as different by some major international legislatures.

5.1 Maritime Arbitration and US Law

The United States of America has been an instigator of international maritime legal change since the Harter Act 1893 and recent trends have shown that consensus in the US is for a new perspective on party autonomy in maritime arbitration. The scene is originally set by *Indussa Corp v. SS Ran bourgeois* (*Indussa*) which stated that the *Carriage of Goods by Sea Act* (COGSA) invalidated foreign forum selection clauses in jurisdiction agreements to which COGSA applied. In the case *M/S Bremen v. Zapata Off-Shore Co* (*Bremen*) the general rule was given that foreign forum clauses will be upheld as long as COGSA does not apply to the contract unless the party resisting enforcement could demonstrate unreasonableness or unjustness. *State Establishment for Agricultural Product Trading v M/V Wesermunde* is another example where the US courts held that a maritime arbitration clause for English arbitration violated COGSA as the only connection was the charterer who was not even named in the action. This precedent, although concerning exclusive jurisdiction clauses, reveals the distinct nature of how the courts would treat maritime arbitration as a branch of arbitration in which party autonomy is not the highest value, but the *Indussa* and *Bremen* cases were undermined by the majority in *Sky Reefer* which refused to enforce foreign forum selection clauses in maritime contracts and changed case law to state that foreign arbitration clauses will be upheld.

*Sky Reefer* truly upset many commentators on US law for this issue. A contract for carriage of fruit between a Japanese carrier and American fruit distributor contained an arbitration clause specifying Tokyo as the place of arbitration. When the fruit was damaged in transit it was argued that the cost of the proceedings in Tokyo would offend the COGSA and the arbitration clause should be made void, yet this argument was rejected. American legal scholar Cherie L LaCour states that *Sky Reefer* is inconsistent with existing maritime liability regimes because foreign arbitration clauses intrude upon COGSA due to potential uncertainty of the appropriate law for the arbitral tribunal to make awards and the transaction costs of pursuing proceedings overseas. *Sky Reefer* has increased momentum to change the approach to foreign arbitration clauses in maritime contracts and exhort US support for Chapter 15 in the Rotterdam Rules.

Since *Sky Reefer*, the US has drafted proposed domestic legislation which is currently on hold and will essentially overturn *Sky Reefer* and revert it back to its historical position. This seems unnecessary because if

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285 377 F 2d 200 (2d Cir 1967).
288 838 F2d 1576 (11th Cir 1988).
289 LaCour, above n 15,136.
291 Force and Davies, above n 59, 4-5.
292 Allsop, above n 4,18.
293 LaCour, above n 15, 137.
294 Starley, above n 30, 6.
the US signs up to the arbitration chapter in the Rotterdam Rules, it would undo *Sky Reefer*.\(^{295}\) American courts have not favoured foreign arbitration agreements\(^{296}\) in spite of it being a signatory to two international arbitration treaties both placing the highest value on party autonomy, the New York Convention and the Inter-American Convention.\(^{297}\) The US legislative trend shows that maritime arbitration agreements should be open to being granted a lesser amount of party autonomy.

### 5.2 The Hamburg Rules on Maritime Arbitration

The predecessor to international regulation of maritime arbitration in the Rotterdam Rules is arbitration provisions in the Hamburg Rules.\(^{298}\) The Hamburg Rules is the common name allotted to the United Nations Convention on the Carriage of Goods by Sea which was adopted in Hamburg in 1978 and came into force in 1992. The Hamburg Rules have not been an outstanding success with few major shipping nations ratifying. Article 22 of the Hamburg Rules mirrors article 21 on jurisdiction by allowing arbitration in a number of places at the option of the claimant. The justification was, like in the Rotterdam Rules, to prevent arbitration from becoming a method to escape the provisions on jurisdiction.\(^{299}\) The main difference from the Rotterdam Rules is that this list of permissible forums is open to every claimant in every maritime arbitration agreement\(^{300}\) so party autonomy is even less.\(^{301}\) The Hamburg Rules certainly infringed on party autonomy too much\(^{302}\) because in cases where the shipper has equal bargaining power it makes sense to allow the place of arbitration to be upheld. However, the compromise in the Rotterdam Rules offers a better philosophy than that driving the Hamburg Rules. Nevertheless the Hamburg Rules do show an international tendency to include rules for arbitration in maritime commerce.

### 5.3 The Canadian Marine Liability Act 2001 and Maritime Arbitration

Canada has enacted the Hamburg Rules in section 45 of its *Marine Liability Act 2001*.\(^{303}\) Section 46 of the *Marine Liability Act* extends Article 22 of the Hamburg Rules to apply to all maritime contracts concerning the carriage of goods by water whether covered by the Hamburg Rules or not. A cargo claimant will be entitled under the Act to bring arbitral proceedings in Canada if the contract is sufficiently connected to Canada regardless of the designation of forum in the contract itself.\(^{304}\) This can be criticised as having somewhat of a narrow approach, as such acts limits maritime arbitration to only be held in Canada itself. Relating this to the Rotterdam Rules, Canada’s perspective is much more limiting of party autonomy but it does support a departure from strict adherence to complete party autonomy in maritime arbitration.

### 5.4 Australian Law’s Approach to Maritime Arbitration

Australia’s key shipping legislation is the *Carriage of Goods by Sea Act 1991* (Cth). Similar to the Canadian provisions, section 11 of the Act strikes down clauses in maritime contracts that stipulate arbitration occurring in a foreign place unless the arbitration happens in Australia.\(^{305}\) This is essentially producing the same effect as the Canadian legislation. In the recent case *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*\(^{306}\) (Dampskibsselskabet) the court refused to enforce a foreign arbitration award due to its legislation which annulled the arbitration clause. The decision indicates an overly regulatory stance taken by the Australia legislature which is in contradiction also with the Rotterdam Rules since under them places outside Australia would be permitted. The Australian position is another example of an extreme protectionist policy against foreign arbitration – the Rotterdam Rules offer a more sensible and balanced view on maritime arbitration.

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\(^{295}\) Lindholm, above n 27, 13.

\(^{296}\) *Bremen* 407 US 1, 9-10 (1972).

\(^{297}\) Sparka, above n 13, 31.


\(^{299}\) Sparka, above n 13, 194.

\(^{300}\) See above section 4: The Rotterdam Rules allow for enforcement of the designated place of arbitration in many cases.

\(^{301}\) Thomas, above n 20, 263.

\(^{302}\) Sparka, above n 13, 195.


\(^{305}\) ‘An agreement, or a provision of an agreement, that provides for the resolution of a dispute by arbitration is not made ineffective by subsection (2) (despite the fact that it may preclude or limit the jurisdiction of a court) if, under the agreement or provision, the arbitration must be conducted in Australia’: *Carriage of Goods by Sea Act 1992* (Cth) s 11(3).

5.5 The Conventions on the Carriage of Goods by Air

The concept of leaving the choice of forum for arbitration to a list of places at the option of the claimant in the Rotterdam Rules is paralleled by the Warsaw and Montreal Conventions on carriage of goods by air in Article 32 and Article 34 respectively. These mandatorily allow for the claimant to bring an arbitration claim in either: the domicile of the carrier; the carrier’s principal place of business; where the contract of carriage was made or; the destination. However, practically this is inconsequential since scholars of these conventions have discovered no cases concerning arbitration of air carriage disputes to date. The explanation for the disuse of arbitration in air waybills is absent, but in drafting the arbitration chapter in the Rotterdam Rules the working group did consider following the formulation of the Montreal Convention. The striking similarity between the air carriage conventions and the Rotterdam Rules is that it restricts party autonomy in arbitration agreements mostly in cases where arbitration is usually not the first choice for parties. The two regulatory systems on the carriage of goods by sea and air concur in their dispute resolution approach. This leads to the conclusion that a unified transport law approach to party autonomy in arbitration consensus is developing.

6 The Current New Zealand Position on Maritime Arbitration

New Zealand currently follows the traditional, party autonomy centric jurisprudence on all forms of arbitration although there has been some who have voiced concerns. Through the Arbitration Act 1996 (NZ), New Zealand incorporates the New York Convention and rigorously applies it. In New Zealand, maritime law is governed partly by the Maritime Transport Act 1994 (NZ). Section 210 of that Act states that jurisdiction clauses in maritime contracts designating a forum outside New Zealand will not be enforced but unlike Australia, arbitration agreements are unaffected. While New Zealand has prioritized party autonomy in its legislation on arbitration, it would be appropriate to consider other principles in maritime arbitration such as ensuring disputes can be resolved in places connected to the contract. A New Zealand judge, Bradley Giles, expressed an apprehension to New Zealand’s ‘passion for arbitration’ in maritime contracts and postulated that third parties could be severely disadvantaged by an enforcement of arbitration agreements in all cases. Due to geography, New Zealand parties forced to arbitrate in places such as London or New York or any distant foreign location, are put at a distinct handicap in terms of cost and convenience.

However, in spite of Justice Giles’ comments, no litigation has ever come before a New Zealand Court concerning maritime arbitration that would be decided differently under the Rotterdam Rules. Perhaps the most prominent maritime arbitration case from the ‘charterparty arbitration cases’ ever before New Zealand Courts was Mobil Oil New Zealand Ltd v The Ship “Stolt Sincerity” (‘Mobil Oil’) where the defendants to an arbitration proceeding to be instituted in London based on the arbitration agreement in the charterparty sought to use the New Zealand Carriage of Goods by Sea Act 1940 to conduct arbitration in New Zealand instead. In this case, Justice Jonathan Temm ruled on this case that the New Zealand Carriage of Goods by Sea Act cannot invalidate the designation of place in a charterparty arbitration agreement and looking through the lens of the Rotterdam Rules a charterparty is outside the ambit of the convention anyway. Although New Zealand has an upright acknowledgment of party autonomy as shown by the ‘charterparty arbitration cases’, in regards small shippers which are parties to bills of lading or transport documents, standard form arbitration clauses with distant places should not be upheld.

7 Criticisms of Chapter 15 of the Rotterdam Rules

The chapter on arbitration is one which has stirred up a lot of controversy and has also received many criticisms. While it has been most seriously debated, the argument for party autonomy in maritime arbitration is not

310 Giles, above n 6, 9.
311 Ibid.
312 See Mobil Oil New Zealand Ltd v The Ship “Stolt Sincerity” (Unreported, High Court of New Zealand, 28 March 1994); Air New Zealand Ltd v The Ship “Contship America” [1992] 1 NZLR 425. Both cases concerned an arbitration agreement in a charterparty that would not be affected by Chapter 15 of the Rotterdam Rules and in those cases the Court did in fact enforce the place of arbitration in the agreement in spite of arguments to have arbitration conducted elsewhere.
313 (Unreported, High Court of New Zealand, 28 March 1994).
persuasive enough to reject the new perspective on party autonomy in maritime arbitration in Chapter 15. In addition, there are those who state that the specialised nature of maritime arbitration means that ‘copy and paste’ provisions for inconvenient places should be enforced. The Rotterdam Rules should have been clearer on defining certain terms, especially, ‘applicable law’ as it invites inconsistency between different jurisdictions. Article 7 is a complicated provision incorporating the Rotterdam Rules in other types of maritime contracts and yet it is not clear enough how it would work in arbitration. For this part the author will address some legitimate criticisms of the arbitration chapter of the Rotterdam Rules and whether they affect any proposed outlook on party autonomy in maritime arbitration.

7.1 The Argument for Party Autonomy in Maritime Arbitration

The harshest of criticisms against the Rotterdam Rules come from those who believe party autonomy is the highest principle to be valued in every arbitration agreement. During drafting, some of the largest protests on the arbitration chapter came from countries like the United Kingdom which opposed including provisions on arbitration. Another argument comes from a straight party autonomy angle contending that the principle of freedom of contract is and should be given the highest value in any legal rules and especially in arbitration. Nevertheless, these arguments all make the same fallacious assumptions that assume that either that maritime arbitration cannot accommodate any mandatory rules or that by giving an option for a variety of places to the claimant, this will result in a complete loss of the established efficacy of arbitration.

In their report to the Working Group III, the United Kingdom stated that they are strongly against going with a Hamburg model on arbitration and prefers remaining with the trend of binding agreements.³¹⁴ London is a recognized centre for maritime arbitration³¹⁵ and an estimated half of maritime arbitration agreements specify London and the London Maritime Arbitrators’ Association as the forum.³¹⁶ Dramatically, Yvonne Baatz has complained that under the Rotterdam Rules if the contract for carriage is not involved in England then claimant or carrier could choose to not take advantage of the London Maritime Arbitrators Association.³¹⁷ Stating that the prescriptive nature of the Hamburg rules influenced its non-universal acceptance and will be a factor in the acceptance of the Rotterdam Rules, the United Kingdom adamantly concludes that party autonomy is to be preferred.³¹⁸ The United Kingdom also rejected any notion of a compromise, which selectively applies to liner contracts, asserting that ‘there are also occasions where arbitration could be appropriate to liner carriage, particularly in the context of specialist trades’.³¹⁹ The criticisms like those from the United Kingdom were perhaps the most fervent objections to the arbitration chapter during drafting.

It is contended that in the context of maritime arbitration, that the designation of place should be enforced because commonly the parties desire the choice of a neutral seat. In the case C v D³²⁰ the judge described the designation of place in arbitration agreements as a method for people to ensure that arbitration occurs without judicial intervention. Yvonne Baatz again contends that a place may be chosen ‘on the basis that the arbitrators are very specialized and experienced in maritime matters, have a speedy and effective procedure for arbitration and a good reputation for integrity’.³²¹ It has also been said that if other places are optional, then this would involve treating the commercial parties as ‘guinea pigs’ until the same level of expertise is developed in non-traditional maritime arbitration centres, as there is in popular specialised centres.³²²

The final category of this line of argument comes from a freedom of contract standpoint based on two conventions, one international and one regional, which show general support for party autonomy in international arbitration.³²³ A lessening of party autonomy is seen as corresponding with a loss in commercial certainty for commercial arbitration agreements.³²⁴ Legal scholar Felix Sparka has stated that the New York Convention is

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³¹⁴ Comments by the United Kingdom of Great Britain and Northern Ireland Regarding Arbitration, UN Doc A/CN9/WGIII/WP59 (18 November 2005), 3.
³¹⁶ Sparka, above n 13, 75.
³¹⁸ Comments by the United Kingdom of Great Britain and Northern Ireland Regarding Arbitration, above n 86, 3.
³¹⁹ Ibid 2.
³²¹ Baatz et al, above n 89, 237.
³²² Thomas, above n 20, 282.
International Maritime Arbitration and the Rotterdam Rules

in a state of friction with the provisions on arbitration in the Hamburg Rules and the Rotterdam Rules. This is not due to any express contradiction between the New York Convention and the Rotterdam Rules, indeed the New York Convention is silent on forum selection, but rather due to the New York Convention being the embodiment of principles of freedom of arbitration and the recognition of arbitration agreements and awards. In the Bremen case the judge commented that a freely negotiated instrument should be upheld in principle.

Importantly in addressing these arguments, the author would like to stress that the largely beneficial nature of freedom of contract does not necessitate its unconditional application everywhere. While the working group did acknowledge many of these arguments it did not deal with them specifically as its focus was on the compromise to reconcile all positions. Fundamentally the objection from the United Kingdom was based on the presumption that because the designation of place had always been enforceable in every arbitration agreement that it should remain so in maritime arbitration for the advantage of a prospective change in industry practice regarding liner contracts. This is hardly compelling. Liner contracts do not usually attract arbitration agreements because the value of the claim is usually too low.

There is a presumption that cargo claimants will use Chapter 15 to choose irrational and inefficient places of arbitration. However, it is vitally essential is to remember that the claimant still has an interest in choosing an efficient place of arbitration in order that its dispute can be resolved. It is usually the defendant, the carrier and the one who would have drafted the arbitration agreement in the transport document, who would be most interested to delay proceedings. These criticisms fail because they assume that by making the choice open to the cargo claimant it will greatly upset the status quo. The truth is that the changes will be based on what is convenient to the claimant - hardly unreasonable and disadvantageous to the global maritime arbitration industry.

The Working Group defended its position from those claiming that less party autonomy would make arbitration generally impracticable by maintaining that the general enforceability of arbitration agreements are still protected and can still be accommodated by the New York Convention. It is difficult to envision a situation under the Rotterdam Rules where a competent centre is not available to the parties and that the cargo claimant will subject themselves to inadequate arbitration. The notion that the place of arbitration in a maritime contract should be enforced does possess some merit from a party autonomy perspective. However this reveals an idealistic assumption that arbitration agreements are always negotiated between the parties. This is not the case. The Rotterdam Rules will generally enforce the place designated only if the agreement is negotiated, such as in volume contracts where arbitration agreements are more common (as said before, arbitration agreements in liner contracts are rare).

There are energetic proponents of party autonomy arguing against the choice of arbitral forum being made open to a limited number of forums for the claimant but these are not overwhelmingly convincing.

7.2 Maritime Arbitration - A Unique Species within the Genus of International Arbitration

Maritime arbitration is distinctly unlike general commercial arbitration, even described as ‘sectorial’. Thus, it can be contended that the designation of an inconvenient place should be upheld as long as it is a recognised centre of maritime arbitration. When the London Maritime Arbitration Association was queried as to whether maritime arbitration was like general commercial arbitration, they somewhat caustically replied that in contrast to other arbitrators, maritime arbitrators are expected to know maritime issues rather than dispute resolution law.

325 Sparka, above n 13, 191.
326 Comments by the United Kingdom of Great Britain and Northern Ireland Regarding Arbitration, above n 86, 2.
328 Sparka, above n 13, 191 fn 1208.
330 Sparka, above n 13, 71.
332 Article 75(3): see above at section 2.5
In maritime arbitration, proceedings are often ad hoc and special maritime arbitration rules can be used rather than standard commercial arbitration rules. Experienced maritime arbitrators are highly sought after and centres of maritime arbitration such as the London Maritime Arbitrator’s Association in London have developed. Evidence of maritime arbitration’s uniqueness is found in the fact that there are many institutions with special practices dedicated to resolving maritime disputes through arbitration. Maritime institutions, such as the aforementioned London Maritime Arbitrators Association, the Society of Maritime Arbitrators and the China Maritime Arbitration Commission are examples of organisations adapting to a maritime industry described as ‘a paradox of international cooperation and isolation, intense competition and camaraderie’. However, the uniqueness of maritime transport law leads to an acceptable adjustment of party autonomy but does not justify burdensome provisions to arbitrate in an inconvenient forum simply because it is a specialist centre.

The advantage of the continuing development of the maritime arbitration industry is that centres have been established worldwide. There are now prominent centres in China, Nigeria, Australia, United Arab Emirates and Singapore. It is true that it is a possibility that a claimant who avails themselves by use of Article 76 may not, by choice or by circumstance, initiate arbitration in a competent maritime arbitration centre. However business practice, reputation and hopefully an increased tendency for parties to negotiate the place of arbitration indicates that this will not always be the case. As mentioned, the volume contract and Article 7 stipulations will encourage negotiation of the designation of forum and the hope is that a more agreeable location will be agreed upon. Furthermore the continued development of maritime arbitration should be encouraged. Maritime arbitrators are required to be people knowledgeable about shipping practices rather than legal principles and with the global nature of the shipping industry these people are not hard to find. Russell J Cortazzo notes that the ‘maritime industry uses a language that is ... unique from any other trade [and] fluency in the dialect of the sea is required’. With provisions like the Rotterdam Rules, maritime arbitration can develop, as it always has, out of the lex mercatoria and the practice of carriage of goods by sea.

7.3 The Vagueness of the Term ‘Applicable Law’

Article 75.4(d) states:

... a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

(d) Applicable law permits that person to be bound by the arbitration agreement.

This is slightly problematic in the confusion it creates as to whether the ‘applicable law’ is the procedural law of the place of arbitration or the substantive law of the contract. This is a contentious problem the Rotterdam Rules had the opportunity to remedy. The doctrine of severability, established in common law states and prominent civil law states, disconnects the arbitration agreement from the main contract and treats it as an independent contract. This allows for matters of the validity of the contract to be determined by arbitration. This doctrine is well established in the United States but not mandatorily applied to every arbitration agreement in UK. It is endorsed in Germany and is important because the law applicable to the contract may differ from the law applicable to the arbitration agreement as implied by the New York convention.
International Maritime Arbitration and the Rotterdam Rules

[enforcement of arbitral awards may be refused if the agreement is] not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

Yvonne Baatz worries that this:349

could lead to a Contracting State refusing to ... enforce an arbitration award because their law as to whether there was an arbitration clause which bound the parties at all, differed from that State in which the award was made.

The lack of clarity as to whether the substantive law of the contract or the procedural law of the state governs the arbitration agreement in the application of Chapter 15 to third parties in volume contracts is a failing in the drafting of the Rotterdam Rules.

Yvonne Baatz states that the lack of guidance given on the substance and procedure dichotomy by the Rotterdam Rules ‘is far worse than the current situation’, since third parties are likely to be the most often affected by these provisions.350 In saying that however, this is not such a major issue as Yvonne Baatz contends since private international law trends show that most countries will apply the substantive law of the contract. English law deems the question of the validity of an arbitration clause according to the substantive law of the contract351 as shown in the case C v D where the Court deemed Indian law applicable to an arbitration agreement because it was the substantive law.352 Also the German judiciary have indicated that the substantive of the contract will be applied.353 While the US is an example of a major shipping nation with an uncertain approach to this,354 the vague terminology of applicable law is not quite a fatal problem as international legal trends are seemingly favouring the substantive law of the contract approach to the validity of arbitration agreements independent of the Rotterdam Rules.

7.4 What is the Meaning of Incorporating under Article 46(2) (b)?

Another lack of clarity issue affecting bills of lading and other maritime transport documents which are formed out of a charterparty arrangement is found in Article 46(2) (b):355

An arbitration agreement … to which this Convention applies by reason of the application of article 7 is subject to this chapter unless [the transport document]: (b) Incorporates by specific reference the clause in the charter party or other contract that contains the terms of the arbitration agreement.

This concerns application of the Rotterdam Rules by Article 7 which makes Article 45(2) apply only if the transport document incorporates by specific reference the arbitration agreement. The Rotterdam Rules however do not define the mechanics of incorporating by specific reference. The problem lies in the fact that there is a significant disparity between various national laws356 so while in one jurisdiction the clause could be considered ‘incorporated’, in another the agreement would fail by reason of lack of incorporation.

Conceivably Chapter 15 will often be invoked for these arbitration clauses incorporated in the bill of lading this way, so a lack of definitive wording is a defect. As charterparties are the main habitat for maritime arbitration agreements, what standard is required for a proper incorporation into the bills of lading is a contentious issue. Maritime arbitration agreements that are incorporated into the bill of lading are usually inappropriately worded and nonsensical since they refer to terms specific to the charterparty.357 Potentially an arbitration agreement could be deemed not incorporated if it references the ‘charterers’ in place of shipowner or shipper. In England this problem has been overcome by established case law allowing the Courts to skew the wording of the arbitration agreement to fit into the context of the bill of lading as long as it coincides with the parties’

349 Baatz et al, above n 89, 239.
350 Ibid 239.
351 Sparka, above n 13, 91.
353 Sparka, above n 13, 92.
355(emphasis added).
356 Sparka, above n 13, 117.
intention. \(^{358}\) Chapter 15 should have aligned its definition of incorporating to the English model so that there would be no confusion as to when a maritime arbitration agreement is validly incorporated.

## 8 Why Adopting Chapter 15 is not a Viable Option

While the Rotterdam Rules’ approach to party autonomy in maritime arbitration is suitable in theory, a potential disconnect between jurisdictions that will ratify the convention and those that do not is a major problem to the efficacy of Chapter 15. Case law from prominent common law jurisdictions show that parties to maritime arbitration would not be able to enforce their awards if in breach of national legislation. Conclusively, the only way the advantages of Chapter 15 can be expressed is if the Rotterdam Rules achieves Hague Rules-style ratification by major shipping nations for example the US, China or Germany. Another problem facing arbitration under the Rotterdam Rules is the possibility of concurrent arbitral proceedings in other jurisdictions. The Rotterdam Rules should have stipulated anti-suit injunctions to be available to claimants wanting to prevent defendants from initiating arbitration elsewhere so that potential jurisdictional conflicts can be avoided. The author supports a new perspective of party autonomy as shown by Chapter 15 but recognises the pragmatic problems that can arise, if there is no uniformity and comity regarding the convention, as a caveat to adopting Chapter 15.

### 8.1 The Need for Uniformity to be Effective

The key requirement of successful international law is that it is uniformly applied and implemented and the reluctance by shipping countries to sign up reveals a fundamental weakness in the Rotterdam Rules. It appears that the arbitration chapter suffers from the fear that many nations will not sign up to it, decreasing its universality, power and applicability. International acceptance is, rather obviously, the thing which makes a convention international law. Due to the fact that the arbitration chapter is not a mandatory part of the Rotterdam Rules there is the likelihood that in future there will be difficulties for parties to accommodate trade between states that have signed up to the chapter and those that have not. This unfortunate eventuality is predicted by Rotterdam Rules critic, Yvonne Baatz. \(^{359}\) Article 78 provides that states must sign up to the arbitration chapter to be bound by it. This article was included in order for Chapter 15 to not be an obstacle for acceptance of the Rotterdam Rules. \(^{360}\) Ironically however, the option has now become an obstacle for the acceptance of the chapter. The advantage of any international law is the fact that it is uniform and standard everywhere The momentum to ratify the Rotterdam Rules needs to be much greater before the convention will reach the status of international law.

Until the Rotterdam Rules gain prominence as an international shipping liability regime, three common law cases show that maritime arbitration could potentially suffer for the global inconsistency: *OT Africa Line Ltd v Magic Sportswear (OT Africa)* from the English Court of Appeal; \(^{361}\) *OT Africa Line v Magic Sportswear Corp* \(^{362}\) from the Federal Court of Canada and; *Dampskibsselskabet* from the Federal Court of Australia. \(^{363}\) In the United Kingdom, *OT Africa* interestingly explored the dynamics of disparity between jurisdictions on party autonomy in maritime exclusive jurisdiction clauses, directly analogous to arbitration, as between Canada with its *Marine Liability Act* and the United Kingdom. In *OT Africa*, the English Court of Appeal upheld an anti-suit injunction to enforce an adjudication agreement that designated England as the place having jurisdiction whereas the *Marine Liability Act* was allowing the claimant the right to be suing in Canada. \(^{364}\) Correspondingly the case of the same name in the Canadian Federal Court concerning the proceedings of *OT Africa,* \(^{365}\) decided that section 46 of the *Marine Liability Act 2001* did not prevent the Court from granting a stay based on *forum non conveniens.* \(^{366}\) In contrast, the decision in *Dampskibsselskabet* \(^{367}\) from the Australian Court annulled a

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\(^{358}\) See *The Rena K* [1979] QB 377; *Kallang Shipping SA Panatina v Assurances Senegal* [2008] EWHC 2761 (Comm); *Sotrade Denizcilik Sanayi Ve Ticaret SA v Amadou Lo (The Duden)* [2008] EWHC 2762 (Comm) (Senegal); *Daval Aciers d’Usinor et de Salicor v Armara SRL (The Neramo)* [1996] 1 Lloyd’s Reports 1. These cases provide a history of the development of adjusting the terms of a maritime arbitration agreement incorporated from a charterparty in order to make it apply to the parties of a bill of lading.

\(^{359}\) Thomas, above n 20, 287.


\(^{361}\) [2005] EWCA Civ 710; [2006] 1 All E.R. (Comm) 32.


\(^{364}\) Allsop, above n 4. 22.

\(^{365}\) [2007] 1 Lloyd’s Rep 85.

\(^{366}\) Ibid.

\(^{367}\) [2012] FCA 696.
maritime arbitration award since it did not happen in Australia according to its legislation. The trilogy of cases from England, Canada and Australia have different results and even concern different issues, but they are precedent to disorder when there are different applications of party autonomy in maritime arbitration between countries.

Prima facie these cases show that, without general international adoption, Chapter 15 of the Rotterdam Rules will be at worst unworkable and at best inefficient. There are two scenarios which could result from these authorities in a hypothetical situation involving an arbitration agreement: where the claimant will have the option to sue in one of the places in Article 75, that designates arbitration to take place in country A, where country A has not signed up to the arbitration chapter and a second country, country B, has signed up to the arbitration chapter. The claimant could attempt to pursue arbitral proceedings in country B, while the defendant could begin proceedings in country A in order to get an anti-suit injunction to prevent the arbitration in country B. The situation would then depend on whether the court in country B stays the proceedings as in the corresponding Canadian decision of OT Africa Line\(^\text{368}\) or do what the Court in Australia indicated in Dampskibsselskabet\(^\text{369}\) and ensure that arbitration can happen as the claimant wants.

These cases share a common denominator in that they uphold their respective legal systems acceptance of party autonomy in maritime arbitration against any concept of international comity. There is a case, The Al Battani,\(^\text{370}\) where the judge, Sheen J, noted that English Courts would recognize the comity of nations as an argument for respecting foreign legislation. However that case has nowhere near the precedent value of the other three since it was a decision of a lower court than the OT Africa case and has not been so widely accepted in subsequent decisions. In spite of the fact that the Dampskibsselskabet and the two OT Africa decisions came to different conclusions and dealt with different issues, they all are indications of how Chapter 15 could produce serious difficulties unless collectively ratified.

### 8.2 Concurrent Proceedings in Other Courts

Anti-suit injunctions in the context of maritime arbitration are orders made by the Court to prevent the parties from starting arbitration proceedings in another jurisdiction when arbitration is already taking place. In the context of non-universal acceptance of the Rotterdam Rules this could be some kind of solution because the claimant could bring the arbitration proceedings in accordance with Article 75 along with obtaining an anti-suit injunction to prevent the carrier from instituting proceedings in contradiction with the Rotterdam Rules. However OT Africa casts that solution in doubtful light. Moreover, within the European Union, this could never be any kind of solution because the European Jurisdiction Regulation prevents anti-suit injunctions.\(^\text{371}\) So there is potential for there to concurrently be two proceedings in different jurisdictions leading to a double award. For these reasons, Yvonne Baatz espouses the view that the Rotterdam Rules should have dealt with this in the maritime arbitration context.\(^\text{372}\) The problem is exemplified in the case West Tankers Inc v RAS Riunione Adriatica di Sicurta Spa (The Front Comor),\(^\text{373}\) where the English House of Lords referred to the European Court of Justice (ECJ) the question of whether they could issue an anti-suit injunction to prevent proceedings in other states that were in breach of an arbitration agreement. However, the European Court of Justice declined to allow anti-suit injunctions.\(^\text{374}\) Thus for Rotterdam Rules countries in Europe like Spain, anti-suit injunctions are not currently a viable solution to protect a claimant’s utilisation of the choice in Article 76. Additionally OT Africa makes anti-suit injunctions unlikely to be a solution in the common law context. Consequently, only non-European civil law jurisdictions which have adopted Chapter 15 could try to use some form of anti-suit injunction.

### 8.3 Are the Arbitration Provisions Overly Complex?

The infringement on party autonomy in maritime arbitration is almost surgical in its precision. However, like surgery, using Chapter 15 of the Rotterdam Rules is a complex and esoteric process and the untrained could make a bloody mess. The terms of the provisions are unclear and the various legal gymnastics needed to

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368 Ibid.
369 Ibid.
371 An order issued by the Court which prevents instituting proceedings in another court while arbitration proceedings are being pursued.
372 Thomas, above n 20, 292.
373 [2007] UKHL 4;[2007] 1 All ER (Comm) 794.
determine how a particular arbitration agreement will be treated may result in unnecessary litigation. Admittedly it is the nature of lawmakers and maritime law to be complicated, but a simpler option should be preferred. Regardless, the complicated provisions combined with the latent ambiguity of new conventions in how they are supposed to be applied in practice will result in a rejection of the chapter not because of real party autonomy arguments but based on status quo traditionalism.

9 The Future of Party Autonomy in Maritime Arbitration

9.1 Room for Improvement

For arbitration agreements involving domestic shippers or international shipping corporations, an approach based on Chapter 15 of the Rotterdam Rules is best, but there are several problems preventing a sound advocacy of adopting them outright. Firstly there is a lack of a clear definition of volume contracts which could lead to increased litigation or worse, disparity between jurisdictions this term should be defined or avoided. Chapter 15 would have benefited by provisions mandating anti-suit injunctions in favour of the claimant’s choice in order to counter the problem of concurrent proceedings in different jurisdictions. Clearer direction with regards to terms such as ‘incorporating’ and ‘applicable law’ would be beneficial. Ultimately instituting such modifications along with a clearer, more streamlined framework for party autonomy in maritime arbitration would make it more alluring for nation parties to accept Chapter 15.

Chapter 15 positively protects small shippers from onerous ‘copy and paste’ arbitration agreements and ensures negotiation and/or notice of the arbitration agreements in volume contracts or charterparty transport documents. However, Chapter 15 has been shown to become an unlikely solution to this problem due to its inherent defects. The arbitration provisions could work better if party autonomy was infringed upon with clear goals in mind: to ensure a fair negotiation of the place of arbitration between the parties; in the case of third parties, sufficient notice and clear incorporation of the arbitration agreement from the charterparty or other contract and its designation of place. This would enable claimants who are small time shippers to take advantage of arbitrating in a convenient place if they do not negotiate the agreement and also maintain party autonomy in volume contracts where the shipper usually negotiates the arbitration agreement with the carrier. Recognising a new perspective on party autonomy, provisions of this kind encourage negotiation of the place of arbitration and are a benefit for small shippers subject to ‘copy and paste’ clauses, but still maintain fairness as between carriers and large shipping companies.

Figure 2: A suggested regime
9.2 Conclusion

Although historically, New Zealand has been supportive of party autonomy in maritime arbitration, the Rotterdam Rules presents itself as a real international starting point for developing a new perspective on this issue. The author is supportive of the idea that New Zealand should base its understanding of party autonomy in maritime arbitration in line with the compromise of Chapter 15 of the Rotterdam Rules. Convenience and economy are the main matters of concern for many instances in maritime dispute resolution where the arbitration agreement may be one which is included as part of a standard form contract. The careful infringement upon party autonomy by the Rotterdam Rules is an appropriate approach considering the context of maritime arbitration agreements in bills of lading and other transport documents for the carriage of goods by sea.

As maritime industry is ‘distinctly isolated from all other commerce’, maritime arbitration is also distinctly isolated from other forms of arbitration and should be treated as such. New Zealand recognises the efficacy of treating maritime law separately and should include maritime arbitration as something which welcomes small amounts of regulation to ensure economical proceedings to all parties. New Zealand also needs to be aware that foreign arbitration clauses can effectively limit the carrier’s liability by increasing the costs of litigating a claim. Critics of these provisions either overestimate the effect of Chapter 15 on maritime arbitration or underestimate the uniqueness of maritime arbitration compared with normal commercial arbitration. In regards to the United States, legal scholar Peter Winship answers the question of whether that country should sign up to Chapter 15 with a definite yes. In New Zealand’s case, the author of this paper tentatively answers that question by saying it would be acceptable in New Zealand’s case to include signing up to the chapter on arbitration only provided, if the Rotterdam Rules is to be ratified, that major shipping nations have already done so. However, a much better option would be to streamline the arbitration provisions in order to guarantee the negotiation of where arbitration would be conducted and, in essence, even the scales for shippers with limited bargaining power. This would benefit small time shippers on the receiving end of ‘copy and paste’ agreements to arbitrate and contribute to a new perspective of party autonomy in maritime arbitration.

375 Cortazzo, above n 8, 264.
376 LaCour, above n 15, 138.
377 Winship, above n 22.
In September 1992, Hillyer J decided the leading New Zealand case of *Sembawang Salvage Pte Ltd v Shell Oil Services Ltd*, [1993] 2 NZLR 97, which dealt with two questions of law. First, whether a maritime lien against cargo is extinguished once the *res* in question is no longer cargo. Second, whether a writ in *rem* may be properly issued and served if the *res* is outside the jurisdiction. It is the second of these questions which I address in this paper. *Sembawang Salvage* is of practical importance as part of the body of New Zealand Admiralty law as it applies to the service of proceedings in *rem*, because it is cited in *The Laws of New Zealand* as authority for the proposition that:

> If the ship or other property is within the territorial sea or in the waters over the Continental Shelf, it will be within the territorial jurisdiction of the New Zealand Court and will be capable of being served with the proceedings.

It is not insignificant that *Sembawang Salvage* was decided two years before the *United Nations Convention on the Law of the Sea* came into force, [1982, 1833 UNTS 3, entered into force 16 November 1994 ('UNCLOS' or 'the Convention')] and four years before it came into force for New Zealand. It follows that Hillyer J was not called upon to consider the interface between UNCLOS and New Zealand Admiralty law in this case. With this in mind, the question that this paper addresses is whether *Sembawang Salvage* still represents good law two decades later, and whether in fact the commentary indicated above correctly reflects that law.

**The facts**

The proceedings in *Sembawang Salvage* arose from the near loss of a steel space-frame structure or jacket which was to form part of the Maui B oil and gas drilling and wellhead platform. The jacket was loaded as cargo (the second defendant) onto a barge (the first defendant) and towed by the salvage and fire-fighting tug *Salvigour* from Whangarei to Golden Bay, near Nelson. The *Salvigour* was owned and operated by the plaintiff, Sembawang Salvage Pte Ltd.

The *Salvigour* anchored the barge in Golden Bay on 26 February 1992 and then stood by, awaiting another vessel and orders to proceed to the Port of Nelson for clearance. At about 2 am the following morning, the barge dragged its anchor in winds gusting to 40 knots. The *Salvigour* weighed anchor and commenced a long and difficult operation to regain control of the barge and prevent it from grounding on nearby rocks, which was ultimately successful. The plaintiff then claimed salvage, arguing that the barge and cargo would have stranded and in all probability become a total loss, but for its intervention. It is trite law that a claim in the nature of salvage gives rise to the possibility of an action in *rem* against the salvaged vessel and cargo.

The jacket was subsequently installed as part of the Maui B platform, approximately 24 nautical miles off the coast of Taranaki. The plaintiff then obtained a writ in *rem* against the second defendant cargo. In the High Court at Auckland sitting in Admiralty, the fourth defendant owner of the jacket, Shell Todd Oil Services Ltd, moved to have the writ in *rem* against the second defendant set aside on two grounds. This paper focuses on the second ground, namely that the *res* was now situated outside the jurisdiction.

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[1993] 2 NZLR 97 (‘*Sembawang Salvage*’).

Now a notice of proceeding under r 25.8 of the *High Court Rules* (Judicature Act 1908 (NZ), Sch 2).


1982, 1833 UNTS 3, entered into force 16 November 1994 (‘UNCLOS’ or ‘the Convention’).

18 August 1996.

Admiralty Act 1973 (NZ), ss 4(1)(i), 5.

*Sembawang Salvage* [1993] 2 NZLR 97, 100.
Judgment of Hillyer J

Hillyer J observed at page 101 of the judgment that:

It is of significance that a writ can be issued, even though the res is not within the territorial jurisdiction.

At p 59, para 87 of Thomas, the learned authors say:385

‘Although a res may only be arrested when within territorial jurisdiction there exists no similar restriction in respect of the issue of a writ in rem and warrant of arrest. Such forms of process may be issued when the res is out of the jurisdiction and later served and executed when the res comes within jurisdiction.’

The learned Judge then considered the implications of section 7(1) of the Continental Shelf Act 1964 (NZ), which provides that:

Subject to the provisions of this Act, for the purposes of this Act and of every other enactment (whether passed before or after the passing of this Act) and of every rule of law for the time being in force in New Zealand,—

(a) Every act or omission which takes place on or under or above or about any installation or device (whether permanent or temporary) constructed, erected, placed, or used in, on, or above the continental shelf in connection with the exploration of the continental shelf or the exploitation of its natural resources shall be deemed to take place in New Zealand; and

(b) Every such installation or device shall be deemed to be situated in New Zealand, and for the purposes of jurisdiction shall be deemed to be situated in that part of New Zealand above high-water mark at ordinary spring tides which is nearest to that installation or device; and

(c) Every court in New Zealand which would have jurisdiction (whether civil or criminal) in respect of that act or omission if it had taken place in New Zealand shall have jurisdiction accordingly; and

(d) Every power of arrest or of entry or search or seizure or other power that could be exercised under any enactment (whether passed before or after the passing of this Act) or under any rule of law in respect of any such act or omission or suspected act or omission if it had taken place or was suspected to have taken place in New Zealand may be exercised on or in respect of any such installation or device as if the installation or device were in New Zealand.

Hillyer J held that the service of a writ in rem on an oil and gas platform situated on the continental shelf would qualify as an ‘act’ for the purposes of section 7(1)(a) of the Continental Shelf Act and that, accordingly, the service of such a writ or, in due course, a warrant of arrest would be within the jurisdiction.


In considering the proper interpretation of jurisdiction under the law of Admiralty in New Zealand, UNCLOS is now a key touchstone. As the Court of Appeal put it in Sellers v Maritime Safety Inspector:386

New Zealand Courts have for over a century made it plain that legislation regulating maritime matters should be read in the context of the international law of the sea and, if possible, consistently with that law.

Neither the Admiralty Act 1973 (NZ) nor the Judicature Act 1908 (NZ) explicitly state the geographical extent of the High Court’s jurisdiction in Admiralty under the former Act.

As is the case throughout the Convention, the question of jurisdiction under UNCLOS represents a balance between the interests of coastal States and flag States. A coastal State enjoys sovereignty and therefore largely unfettered enforcement jurisdiction in its territorial sea.387 However, beyond 12 nautical miles from the coastal

387 UNCLOS, art 2.
Service of Proceedings in Rem Outside the Territorial Sea

State’s baselines, the State does not enjoy sovereignty – rather it possesses sovereign rights in various zones in respect of particular matters enumerated in the Convention. For example, a coastal State is entitled to prescribe an Exclusive Economic Zone (EEZ) extending 200 nautical miles from its baselines. In its EEZ, the coastal State may:

...in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

Subject to that limited enforcement jurisdiction conferred on the coastal State, foreign-flagged ships in the EEZ enjoy high seas freedoms and are subject to the exclusive jurisdiction of their flag State. Oil and gas platforms in the EEZ are, however, subject to the exclusive jurisdiction of the coastal State. Essentially the same position applies to foreign-flagged ships operating in the waters above a coastal State’s continental shelf, and platforms established by or with the consent of the coastal State on that shelf.

**Jurisdiction ratiocinio loci under New Zealand Admiralty law**

Section 4 of the Admiralty Act extends the Admiralty jurisdiction **ratione loci** to ‘all claims, wheresoever arising’. However, ‘wheresoever’ is misleading as a geographical limit in respect of proceedings in rem, for three reasons. First, r 25.8(4) of the High Court Rules states that a ‘notice of proceeding in rem may not be served out of the jurisdiction.’ Second, there is a presumption of statutory interpretation that Parliament does not intend to assert extraterritorial jurisdiction, which can be rebutted only by clear words or necessary implication. Third, there is the principle of interpretation referred to above in *Sellers*, which applies to Admiralty law specifically.

As the designation suggests, the seaward boundary of the territorial sea marks the limit of New Zealand’s territorial jurisdiction. It follows that any exercise of jurisdiction in the EEZ or over the continental shelf is extraterritorial. The question, then, is what is meant by ‘out of the jurisdiction’ in r 25.8(4). Does ‘jurisdiction’ in this context mean ‘territorial jurisdiction’, or is it capable of bearing a broader meaning consistent with UNCLOS?

There is a contextual indication in the High Court Rules that ‘out of the jurisdiction’ is indeed a simile for ‘outside New Zealand’s territorial limits’. Rule 25.7(3) prescribes that the notice of proceeding for an action in rem may be served ‘out of the jurisdiction’ in accordance with r 6.27 to 6.35. Those rules constitute the bulk of Part 6 Subpart 4 of the High Court Rules, under the heading ‘Service out of New Zealand’. They are focused, as might be expected, on service outside the territorial limits of New Zealand. This territorial limit on the service of proceedings in rem is consistent with both UNCLOS and long-standing English Admiralty law.

It follows that, absent section 7(1) of the Continental Shelf Act, service of a notice of proceeding in rem on cargo discharged onto an oil and gas platform in the EEZ, ie outside New Zealand, would not be permitted under the High Court Rules. As Hillyer J held in *Sembawang Salvage*, the effect of section 7(1)(a) is that service on such a platform is deemed to have occurred in New Zealand and is therefore permitted. The effect of section 7(1) extends to ‘any installation or device... constructed, erected, placed, or used in, on, or above the continental shelf in connection with the exploration of the continental shelf or the exploitation of its natural

385 These are to be drawn in accordance with Part II Section 2 of UNCLOS, and must generally follow ‘the low-water line along the coast as marked on large-scale chart officially recognised by the coastal State’: UNCLOS, art 5.
386 UNCLOS, art 57.
387 Ibid art 73.
388 Ibid arts 58, 87 and 92.
389 Ibid art 60.
390 Ibid arts 78 and 80. Unlike the other maritime zones prescribed in the Convention, the continental shelf is a geomorphological feature which may be claimed out to a maximum of 350 nautical miles from a coastal State’s baselines: UNCLOS, art 76. New Zealand has a vast continental shelf which was accepted for the purposes of UNCLOS by the UN Commission on the Limits of the Continental Shelf on 22 August 2008: see UN Commission on the Limits of the Continental Shelf, Summary of the Recommendations of the Commission on the Limits of the Continental Shelf (CLCS) in regard to the Submission made by New Zealand 19 April 2006 (22 August 2008), <http://www.un.org/depst/los/clcs_new/submissions_files/nzl06/nzl_summary_of_recommendations.pdf>.
391 Poynor v Commerce Commission [2010] 3 NZLR 300, 318 (Supreme Court of New Zealand).
392 Interpretation Act 1999 (NZ), s 29.
394 This provision essentially mirrors United Kingdom law in respect of oil and gas platforms in the North and Irish Seas: *Petroleum Act* 1998 (UK) s 11 and Civil Jurisdiction (Offshore Activities) Order 1987 (UK) art 3. It is less clear whether Australian law is to the same effect, due to the drafting of s 428 of the *Offshore Minerals Act* 1994 (Cth) and s 22(1) of the *Admiralty Act* 1988 (Cth).
resources.’ In addition to oil and gas platforms, this could include a structure erected to conduct offshore mineral resource exploration or recovery. However, it does not include a ship; even a New Zealand-flagged ship in the EEZ over which New Zealand enjoys exclusive jurisdiction under UNCLOS Article 92. The implication of this is that it is not possible to commence *in rem* proceedings against a ship or its cargo while it remains outside the territorial sea, unless the cargo has been discharged onto, or become part of, an offshore platform or structure on the continental shelf. In Australia, this limitation is explicitly recognised in section 22(1) of the *Admiralty Act 1988* (Cth).

Subject to subsection (4):

(a) initiating process in a proceeding commenced as an action *in rem* in the Federal Court may be served on a ship or other property; and

(b) a ship or other property may be arrested in such a proceeding;

at any place within Australia, including a place within the limits of the territorial sea of Australia.

Subsection (4) provides yet a further limit on service inside the territorial sea:

Where the arrest of a foreign ship, or of cargo on board a foreign ship, would be inconsistent with a right of innocent passage that is being exercised by the ship, this Act does not authorise the service of process on the ship or the arrest of the ship or cargo.

Section 22(4) of the *Admiralty Act 1988* implements Australia’s international obligation under UNCLOS Article 24 not to ‘impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage.’ In ordinary circumstances, it would almost certainly be impractical to attempt to serve a foreign-flagged ship exercising the right of innocent passage through Australia’s territorial sea. However, while innocent passage ordinarily requires continuous and expeditious passage, it may also include stopping and anchoring in certain limited circumstances. In such circumstances, while the service of a warrant of arrest might be possible, it would not be lawful. While the provisions on arrest in Part 25 Subpart 6 of the *High Court Rules* do not give explicit recognition to this limitation, the application of the *Sellers* principle is likely to produce the same result.

**Conclusion**

It follows from the foregoing analysis that, while *Sembawang Salvage* is still good law in New Zealand, the cited portion of *The Laws of New Zealand* does not reflect that decision as closely as might be desirable.

A better exposition of the law governing the service of proceedings *in rem* might be as follows:

If the ship or other property is within the territorial sea, it will be within the territorial jurisdiction of the New Zealand Court and will be capable of being served with the proceedings, provided that, in the case of a foreign-flagged ship, such service can be effected consistently with the ship’s right of innocent passage. Service of proceedings *in rem* is also within the jurisdiction and therefore permitted if the property to be served is cargo which has been discharged onto, or forms part of, an installation or device used for resource exploration or exploitation in, on or above the continental shelf, such as an oil and gas platform.

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398 The portion of this provision which applies to State and Territory courts, which is materially the same as that applying to the Federal Court, is omitted here. As is indicated in the preceding footnote, there is in fact some doubt as to whether *in rem* proceedings under the *Admiralty Act 1988* (Cth) can be served on a cargo discharged onto a platform in Australia’s EEZ.

399 UNCLOS, art 18.

BOOK REVIEW


Dr Michael Underdown*

This book contains papers presented at a workshop convened at University College London in 2011 by the members of the Modern Laws of High Seas Piracy Project. The contributors include judges and former judges, legal academics, legal practitioners, former naval officers and senior civil servants and thus provides both private and public law perspectives on this ever challenging issue.

As the title indicates, the book is primarily concerned with the legal challenges posed by modern piracy. The book is divided into four parts: the first part considers the current situation in Southeast Asia, Somalia and West Africa and the various bodies involved in the anti-piracy response; the second and third parts are concerned with public and private law questions respectively; while in the final part the editor highlights some of the major themes.

One of the most fundamental problems in combating piracy, if not the key problem, is the definition of piracy itself. As Robert Beckman points out, the definition of piracy in the United Nations Convention on the Law of the Sea 1982 (UNCLOS III), which itself was largely a codification of customary international law, refers in Article 101(a) to acts of violence, detention or depredation committed on the high seas by a private vessel against another vessel for private ends. Even though piracy can also be committed in the Exclusive Economic Zones (EEZ) of coastal States as specified in Article 58(2), and two other offences constituting piracy under UNCLOS III have no specific locational restriction (voluntary participation in a pirate craft and facilitating or inciting piracy) (see page 326), the fact remains that the restriction of piracy to private acts committed on the high seas means that many instances commonly described as piracy are, in fact, ‘armed robbery against ships’ as defined by the International Maritime Organization (IMO) in the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships (2009) or offences under the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (as are also many of the actions of the Sea Shepherd vigilantes).

Robert Beckman examines offences against ships in Southeast Asian waters and the measures taken especially by Singapore, Malaysia and Indonesia to suppress attacks on shipping. Although this cooperation has been largely successful, there are still two disturbing trends: ‘theft against ships at anchor in territorial waters’ and hijacking and ‘re-birth’ of tugs to order. He sees the way forward as involving improved information sharing, capacity building, ratification and enforcement of international conventions in this area and review of national legislation against piracy – all suggestions which are equally relevant elsewhere.

Somali piracy has attracted the most attention in recent years. As Douglas Guilfoyle explains, while illegal fishing in Somali waters is sometimes used as a justification by the pirates for their activity, the reality is that the breakdown of law and order in Somalia, and particularly in Puntland, has led to the creation of a successful business model which, with the use of ‘mother ships’, has enabled the Somali pirates to range ever further from the coast. Hijacking of vessels and the taking of hostages for ransom led the UN Security Council to adopt Resolution 1816 on 2 June 2008, authorising member States to enter Somali territorial waters and use ‘all necessary means to repress acts of piracy and armed robbery’ (paragraph 7). Subsequently, naval operations have been conducted by the United States (CTF-151), NATO (Ocean Shield) and the European Union (EU NAVFOR) and by a number of countries whose shipping has been affected (including India, China and South Korea). Shortly thereafter, UN Security Council Resolution 1851 of 16 December 2008 authorised a shift towards law enforcement, including arrangements for the custody and prosecution of pirates and armed robbers. Many of the problems with suppressing piracy revolve around these last two issues. Taking a warship out of a naval convoy to transport a few pirates back to Europe, Australia or the United States is both deleterious from a military viewpoint and not cost effective. At the same time, there is not a lot of inclination to prosecute, sentence and detain captured Somali pirates.

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Book Review: Modern Piracy: Legal Challenges and Responses

Piracy in the Gulf of Guinea, primarily in Nigerian waters against ships and oil installations, is less well known, but far more serious and deadly. Martin N Murphy details the role of official corruption and the continuing ethnic and other causes of rebellion (such as loss of oil revenue) in the Delta region, which fuel the issue. Of course, strictly speaking, most of the so-called ‘illegal bunkering’ is not piracy since it is taking place in coastal and inland waters.

The final chapter in Part I, by Christian Bueger, considers the efficacy of the more than 50 organisations and arrangements involved in fighting piracy. Bueger looks at current practice under a number of heads, including government, law enforcement, security, development and humanitarian. There is widespread consensus that the ‘root cause’ of piracy, at least in Somalia, is the breakdown in law and order, corruption and poverty and a number of international efforts are directed at improving this situation. In addition, NGOs and development agencies are aimed at supporting the local fishing industry, reducing local support for the pirates and spreading anti-piracy messages.

In Part II, Tullio Treves examines public international law relating to piracy. He correctly notes that the UN Security Council Resolutions already mentioned have broadened the scope of existing rules, although the Security Council was careful to limit their scope both temporally and geographically. Nevertheless, some States are concerned about extending the UNCLOS III regime. Other significant legal issues concern the handling and prosecution of captured pirates and armed robbers, inadequacy of the transfer agreements negotiated with neighbouring African and Indian Ocean States and the use of force to suppress attacks on ships.

Andrew Murdoch and Douglas Guilfoyle take up the issue of the use of force against Somali pirates in the next chapter. After first examining the cooperation arrangements between the various naval forces involved and the impact of the UN Security Council Resolutions, they turn their attention to the question of naval rules of engagement, using as case studies operations carried out by HMS Cumberland and INS Tabar.

Håkan Friman and Jens Lindborg next take this analysis one step further by looking at the criminal versus ‘enemies of mankind’ question. A number of offences are widely recognised as international crimes, such as slavery, trafficking in women and children, gun-running – and piracy – but this does not allow pirates, and even less so, armed robbers to be treated as ‘enemies’ in a military sense. This discussion highlights another paramount issue in combating piracy. If pirates are simply to be treated as criminals there needs to be more international cooperation in respect of their arrest, transfer, prosecution and detention, as well as into evidentiary issues.

The final contribution in this Part, by Brian Wilson, discusses the origin and application of the US Maritime Operational Threat Response Plan (MOTR Plan) and concludes that, following a piracy attack, the following steps should be undertaken: extensive details of the incident should be recorded; full personal details of all captured pirates should be obtained; and all equipment and weapons seized should be itemised. The purpose of these records is to assist with providing evidence for prosecution and establishing a chain of custody. In addition, personal details of victims should be obtained, amongst other things, in order to be able to trace them if necessary.

James Kraska considers the use of private maritime security companies (PMSC) to help combat piracy. Following incidents involving actions by private security contractors on the battlefield, the International Committee of the Red Cross drew up the Montreux Document on legal obligations and good practice for private military and security companies during armed conflict. However, as mentioned above, pirates are not regarded as being at war. Therefore, an International Code of Conduct for Private Security Service Providers was developed from the Montreux Document and has been supported by Singapore and the Philippines within the IMO. The Maritime Safety Committee of IMO has been examining PMSC’s for some time and Kraska provides a good overview of these considerations (see pages 226-248).

Queen’s Counsel Peter MacDonald Eggers next looks at the definition of piracy and distinguishes the elements of a common law offence. These are:

- theft or attack on a ship or other maritime property and/or persons on board (and possibly coastal property) carried out from another vessel or from shore, whether successful or not;
- carried out at sea – including territorial waters and even inland waters;
- using violence, threatening violence or intending to use violence;
- without the authority or complicity of a state; and
- for motives of personal gain or vengeance or hatred.

(2014) 28 ANZ Mar LJ 49
This definition goes a long way to meeting some of the weak points in the UNCLOS III definition, but still leaves open ambiguity around political and ideological considerations. Are Somali pirates really only responding ‘politically’ to threats to the local fishing industry? The requirement that there be no state complicity would also exclude some piracy incidents in the South China Seas.

In the following chapter Eggers deals with piracy as a peril insured against in policies of marine insurance and the nature of the loss from an insurance perspective. For readers not familiar with marine insurance, the discussion in this contribution is very important. He also examines the legality and public policy issues involved in the payment of ransoms, which are driving the Somali ‘business model’. For those interested in this issue, I suggest reading the judgment in *Masefield AG v Amlin Corporate Member Ltd* [2011] EWCA Civ 24.

The remaining private law contribution by Keith Michel examines the effect of hijacking – and the consequent off-hire, delay and frustration issues – on charter parties and contracts of carriage evidenced by a bill of lading. He also discusses standard war risk and piracy clauses. Again, for those less familiar with carriage of goods by sea, this chapter provides a good although brief overview.

In the final chapter, Douglas Guilfoyle returns to some recurring themes: the obvious one of definition, but also whether there is one form of piracy or multiple types, the tension between efficiency and justice, sovereignty versus multilateral action, and market intervention.

There was not always such a problem of definition. Under the *Offence at Sea Act 1536* (incidentally, like the subsequent British Piracy Acts, still in force in the Australian Capital Territory and possibly elsewhere until repealed in 2002) ‘traytors, pirates, thieves, robbers, murtherers and confederate upon the sea .. or in any other haven, river, creek or place where the admiral or admirals have or pretend to have power, authority or jurisdiction’ were all treated alike. The problem was, then as now, since the civil laws were being applied, that the offender had to ‘plainly confess their offences .. or else their offences (had to) be so plainly and directly proved by witness indifferent’.

Since only ‘torture or pains’ would bring about a confession and witnesses were often killed or had sailed on, trial before admirals fell into disuse. The *Piracy Act 1698* sought to address the greatly increased ‘insolencies’ of pirates in the East and West Indies and the difficulties of prosecuting them in England by allowing them to be tried ‘in any place at sea, or upon the land, in any of his majesty’s islands, plantations, colonies, dominions, forts or factories’.

The *Piracy Act 1717* applied to ‘pirates, felons or robbers’ and tackled another problem that had emerged in practice, claims to benefit of clergy, from which pirates were to ‘be utterly debarred an excluded’. I do not believe that modern pirates and armed robbers have resorted to this tactic, but the remedy has already been tried. The next change, the *Piracy Act 1721*, tackled a new development that had emerged, help by others to provide, fit out and supply pirate ships. Those who ‘consulted, combined, confederated or corresponded’ with any pirate, felon or robber upon the seas were to be treated in exactly the same manner in order to prevent ‘trade and navigation into remote parts’ from suffering further.

Finally, the *Piracy Act 1744* was enacted because British subjects had entered into French and Spanish service on board privateers. Even though Britain was at war with France and Spain, doubts had arisen as to whether those apprehended had committed high treason. The new act, however, made clear that they were guilty of felony and could be tried as pirates – in a court of Admiralty, *on shipboard*, or upon the land. Upon conviction they were to ‘suffer such pains of death, loss of lands, goods and chattels, as any other pirates, felons and robbers.’

There is, as the saying goes, nothing new under the sun. This brief excursus on the historical legislation illustrates that many of the definitional and practical issues were also present in the 16th-18th centuries. Can we learn anything from past experience? Perhaps there is scope in Eggers’ common law definition to include other felonies. Should we have shipboard trials? What about dealing more firmly with those aiding and abetting or conspiring with pirates?

These are just a few thoughts inspired by a very interesting and informative book, well produced as always by Edward Elgar.
The Comité Maritime International (CMI)

The CMI was established in 1897. The late 19th Century was a period during which much was done to codify and rationalise the law, both domestically and internationally. A paper given by Chief Justice Allsop in 2009 celebrated the Centenary of the Marine Insurance Act 1909 (Cth) and honoured the memory of Sir Mackenzie Chalmers, who was responsible for three major pieces of commercial legislation in the United Kingdom: the Sale of Goods Act 1894, the Bills of Exchange Act 1902 and the Marine Insurance Act 1906.

At the same time the International Law Association embarked on a project to codify international maritime law. Out of those failed endeavours emerged the CMI, whose founders were Belgian lawyers, marine insurers and a politician. Thereafter Maritime Law Associations were formed, first in Belgium, then France, Germany, Norway, Sweden, Denmark, Italy and the US before the turn of the century. The Maritime Law Association of Australia was formed in 1973 and it was in 1977 that the New Zealanders came on board as well.

Since its early formation, the CMI has been responsible for drafting all the major International Conventions that concern our every day practices. To list just a few: Collision, Salvage, Hague Rules, Limitation, Arrest of Ships and many others. Between 1910 and 1979 there were 13 Brussels Diplomatic Conferences on maritime law that gave effect to the work that had been done by the CMI.

There are some 50 National Maritime Law Associations that are part of the CMI family.

As its Constitution states it was formed for the purpose of unification of maritime law in all its aspects. It promotes the establishment, and encourages the activities, of National Maritime Law Associations which are the constituent voting members of the CMI. Its seat remains Antwerp, where it was founded.

It commences work on any project by appointing an International Working Group (IWG), which would then usually start its work by sending out a questionnaire to the National Maritime Law Associations to ascertain what the law in their jurisdiction is on the particular subject being studied. Thereafter it might convene an International Sub-Committee (ISC) meeting to which interested bodies (such as the International Chamber of Shipping, the International Union of Marine Insurers, the International Salvage Union etc), and individuals who have a particular interest in the topic, are invited. A draft instrument (whether it be a proposed Convention, Guidelines or Rules) is prepared by the IWG and debated, as in an international diplomatic conference, at a Conference of the CMI, which only takes place every four years. In between the Conferences, Colloquiums or Symposia are held every year or two.

The Present Work of the CMI

(a) Review of the Salvage Convention and Recognition of Foreign Judicial Sales of Ships

The two principal topics which were discussed at the Beijing Conference in October 2012 were a Review of the Salvage Convention and Judicial Sale of Ships. The former had been carried out as a result of a request made to CMI by the International Salvage Union who have been very unhappy with the Convention for many years. Sadly, for the Salvage Union, the CMI was not convinced that there was a ‘compelling need for reform’. That is the International Maritime Organisation’s (IMO) requirement before it will consider a new agenda item.

Work on the topic of Judicial Sale of Ships started on the initiative of Chinese lawyer Henry Li who was concerned that the absence of a Convention in this area meant that sales of ships by order of the Courts in one jurisdiction were not always being recognised in other jurisdictions. There were further discussions on this topic in Dublin at an International Sub-Committee on 28 and 29 September 2013 and the project will, hopefully, be

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concluded in Germany in June 2014. Both those topics were classic CMI projects, that is, IWG's working on wordings for an international instrument before a Conference and then for it to be debated over a number of days at a Conference in sessions that have much in common with a diplomatic conference.

(b) Review of the Rules on General Average

The CMI is the Custodian of the York Antwerp Rules and initiated in October 2012 a major review of those Rules by appointing a new IWG under the chairmanship of Bent Nielsen. Amendments made in 2004 to the York Antwerp Rules at the CMI Vancouver Conference have not received widespread support. The main reasons the 2004 Rules were unacceptable to the shipping community were that salvage (Rule VI) was excluded from General Average and crew wages in ports of refuge (Rule XI) were abolished. There were additional provisions but those appear to be the primary concerns. The Questionnaire which was sent out to Maritime Law Associations on 15 March 2013 raises those issues but also seeks to know whether General Average should be abolished, whether the Rules need amendment in the light of the Rotterdam Rules, whether the Rules should attempt to define terms used, whether they should incorporate provisions relating to arbitration or mediation in relation to disputes, whether they should incorporate key documents such as average guarantees and average bonds, whether changes are needed to further assist in relation to absorption clauses (where hull insurers pay general average in full up to a certain limit), whether express wording is needed in the Rules to deal with the payment of ransoms, as well as detailed questions posed in relation to particular Rules. The current Rules, which are most in use, are the 1994 Rules drafted in Sydney at the CMI Conference in 1994.

The hope is that work on this topic will reach finality in New York at a CMI Conference in 2016.

(c) Offshore Activities - Pollution Liability and Related Issues

Another topic which was debated at Beijing in 2012 was ‘Offshore Activities’. CMI sent a draft instrument to the IMO after the Rio de Janeiro Conference in 1977. It did not come up for consideration by the IMO Legal Committee until 1990 when it asked the CMI to consider whether any revision needed to be made of its 1977 document. At the 1994 CMI Conference in Sydney a revised version of the 1977 Rio Draft Convention on Off-Shore Mobile Craft was adopted. At the same time CMI established a working group to ‘further consider and if thought appropriate draft an International Convention on offshore units and related matters’. The Sydney draft was considered by the IMO Legal Committee in 1995 but it became apparent that it did not commend itself to the Legal Committee and the CMI was encouraged to pursue its efforts to draft a comprehensive treaty. The work done by that IWG can be seen in the CMI Yearbooks 1996 and 1997. That history was brought up to date by the late Richard Shaw in a report he prepared for the Beijing Conference in 2012 which is also reproduced in the CMI Yearbook 2011-2012 Beijing 1.

He noted that the CMI had submitted a report to the IMO Legal Committee in 1998 containing a review of the subject, with a survey of the principal legal issues which should, in the view of the CMI International Sub-Committee, be covered by such a Convention. In 2001 the Canadian Maritime Law Association produced a draft framework document for an International Convention on Offshore Activities, which was published in the CMI Newsletter in 2004. As Richard Shaw noted in his Beijing report:

The need for an international Convention to clarify the application of legal principles relating to subjects such as registration, mortgages, salvage, limitation of liability and liability for oil pollution appears to be widely recognised, although it would not be right to overlook the view expressed in certain quarters, notably by the International Association of Drilling Contractors and the E&P (Exploration and Production) Forum (now known as the International Association of Oil and Gas Producers), that there is no need for such a Convention.

Since the Deepwater Horizon and Montara disasters, some States, especially Indonesia, have argued that something needs to be done in this area. Justice Steven Rares of the Federal Court of Australia has written eloquently on the subject and believes that an international Convention modelled on the Civil Liability Convention (dealing with oil pollution) should be prepared. A new IWG (Offshore Activities - Pollution Liability and related issues) has been set up by the CMI. A questionnaire was sent out to National Maritime Law

402 Ibid 304.
International Law: CMI Issues

Associations in July 2013. This seeks to collect information about existing regional and bilateral agreements on trans-boundary oil pollution from offshore activities.

Tabetha Kurtz-Shefford has pointed out, in a paper published last year:405

...It is obvious that there is little appetite for a global regime. The probability of one arising within the near future is very low, especially without the support of some of the more influential nations and organisations. Although it will never be explicitly cited as a reason for failure, it is almost certain that such a regime faces strong resistance from the main oil and gas entities within the industry. ...The subject has now turned from the establishment of a global regime to the shape regional guidelines might take.

(d) Fair Treatment of Seafarers

This IWG is chaired by Olivia Murray of Ince & Co in London. Its mandate is to review relevant rules, such as under UNCLOS and MARPOL, and guidelines relevant to fair treatment issues, prepare pertinent submissions to the IMO Legal Committee or other relevant organisations and to monitor and encourage the recognition of and adherence to the IMO Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident. For more information on the work being done by this IWG I refer to the paper written by Olivia Murray on ‘Fair Treatment of Seafarers International Law and Practice’.406

(e) Acts of Piracy and Maritime Violence

This IWG is being chaired by Andrew Taylor of Reed Smith in London. The role played by this IWG is really to monitor and become involved where it thinks it can assist other international organisations. It did produce, in 2007, Draft Guidelines for National Legislation on Maritime Criminal Acts which it forwarded to the IMO Legal Committee (LEG 93/12/1). That work had originated 10 years earlier when the CMI invited a group of concerned international organisations to join together to examine the rapidly expanding plague of international piracy. Its first work was a Model National Law on Acts of Piracy and Maritime Violence, but its work was overtaken by the events in New York of 9/11/2001 and other terrorist/piratical acts which caused the IMO to produce wide ranging amendments to the 1988 Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) Convention, which occurred in October 2005.

For a more detailed history of those events and subsequent activities I direct your attention to the CMI website where you can see more recent papers that have been written by Andrew Taylor and Patrick Griggs on CMI's activities in this area.

(f) Marine Insurance

Whilst the CMI has had some involvement in the topic of marine insurance in the past, particularly work done by an IWG chaired by Professor John Hare of South Africa, the current IWG which is being chaired by Dr Dieter Schwampe of Hamburg is looking at ‘mandatory insurance under international conventions’ and a questionnaire, on that topic, has been sent out to National Maritime Law Associations, to ascertain whether guidelines could be developed to assist in the formulation and proper implementation of national law on this topic. The Liability Conventions to which that work is directed are those such as the CLC of 1992, the HNS of 1996, the Bunkers Convention of 2001, the Nairobi Wreck Removal Convention and the Athens Protocol of 2002, all of which require shipowners to carry liability insurance and to have evidence of the existence of such insurance, or a bank guarantee, on board.

The questionnaire has sought information concerning the procedural steps that need to be taken in different jurisdictions as to the licensing of insurers, the recognition of certificates issued to insurers in other jurisdictions, the availability of direct action claims against insurers under national laws and the particular requirements of any such national laws, as well as whether the national laws provide for the liability of the State where it issues a certificate which turns out to be misleading: for example, where there is no insurance contract at all, where the contract is inconsistent with the provisions of the Convention or that the insurer is not financially stable and cannot satisfy direct claims.

(g) Cross-Border Insolvency

This IWG is being chaired by Chris Davis of New Orleans and Dr Sarah Derrington is his Rapporteur. This project is becoming more and more topical as cases come before the courts all around the world which seek to balance the conflicting interests of ordinary creditors of shipowners under the principles of the UNCITRAL Model Law and those who have rights to arrest vessels in order to obtain security and/or seek to attach the proceeds of any sale of a vessel under admiralty jurisdiction.

A good example in our own jurisdiction was the decision of Buchanan J in Yu v STX Pan Ocean Co Ltd (South Korea).407 The facts in that case were that the plaintiff, who was appointed receiver of STX Pan Ocean Co Ltd (‘STX’) on 17 June 2013, applied for recognition as a ‘foreign representative’ of STX and for recognition of proceedings commenced in Korea as a ‘foreign proceeding’ under the Cross-Border Insolvency Act 2008 (Cth), which Act gives effect, from 1 July 2008 to the Model Law on Cross-Border Insolvency of UNCITRAL. The Judgment sets out all the relevant provisions of the Model Law. Orders were made that the rehabilitation proceedings by which the plaintiff was appointed should be recognised as a foreign proceeding, that the plaintiff should be recognised as a foreign representative and a further order that ‘any application for the issue of a warrant of arrest in Australia of any vessel owned or chartered by the defendant be dealt with by a judge of this court and these reasons for judgment be drawn to the attention of the court at the time any such application is made’. Orders had been sought pursuant to Article 21 of the Model Law to the effect that ‘no proceeding in any court against the defendant, or in relation to any of its property, may be begun or proceeded with’ and that ‘no enforcement process in relation to property of the defendant may be begun or proceeded with.’ Such orders would clearly have precluded any arrest of any of the defendant’s ships visiting Australian ports. In his judgment his Honour said:408

[39] A criticism has been made of the terms of the Model Law by reason of its failure to recognise and take appropriate account of international maritime law and the operation in Australian jurisdictions of the Admiralty Act. I do not propose to take up those matters in the present Judgment, but those criticisms draw attention to the fact that, for centuries, international maritime law developed its own security regimes for reasons which remain generally observed around the world, including in Australia.

His Honour continued.409

[41] I see no reason at present why an action in rem to enforce a maritime lien would not fall within the operation of s471C of the Corporations Act, as contemplated by Article 20(4) of the Model Law. I can see no basis, either, for extinguishing or modifying at the present time any recourse to s471B of the Corporations Act. Those potential rights may require assessment according to the circumstances of particular cases but, to take a simple example, there may be a very good reason why a claim for seamen’s wages, normally enforceable as a maritime lien, should not be affected by recognition of the foreign main proceedings.

[42] I see no reason at present either to curtail or foreclose the exercise of rights which are recognised by the model law itself. The terms of Article 20 of the Model Law will take effect automatically, but I see no reason why the arrest of a ship owned or operated by the defendant which is Australian waters could not be sought in appropriate circumstances, without having to overcome an order such as proposed order 5. Whether an arrest warrant would issue would depend on the circumstances, the reason why the arrest was sought and the interests sought to be vindicated by the action in rem. Such an application could be made to a Judge of the Court rather than to a Registrar. Full disclosure should be made to the Court that the foreign proceedings have been recognised under the Cross-Border Insolvency Act 2008 (Cth) and the terms of this judgment should be drawn to the attention of the Judge at the time any such application is made.

A questionnaire which CMI sent out in 2012 has sought to ascertain which jurisdictions amongst National Maritime Law Associations have given effect to the UNCITRAL Model Law, how those jurisdictions deal with the question of foreign creditors or a foreign insolvency administrator where cross-border maritime insolvencies occur, and the procedures to be followed in such situations. The topic is very much more complicated than that, as is the questionnaire, but once again I direct you to the CMI website if you would like more information on it.

408 Ibid [39].
409 Ibid [41]-[42].
(h) Rotterdam Rules

This IWG is chaired by Tomotaka Fujita, the Professor of Law at the University of Tokyo. The role of this IWG is principally to monitor developments in the ratification process and the CMI website contains up to date information on what is going on in that regard. We are also keeping an eye on continuing work being done by UNCITRAL in relation to proposed Model Laws Concerning Electronic Documents.

When I visited the United States in April 2013 I had a meeting at the State Department in order to seek to persuade the US Government Agency which is in charge of the ratification process to move as quickly as possible to secure ratification, as I considered that a number of countries are hanging back to await developments in the US. I attended that meeting with Chet Hooper, a former President of the US Maritime Law Association, who had been instrumental in the mid 1990s, during his Presidency, in work done within the US Maritime Law Association to seek to reform the United States COGSA legislation. Happily, since our visit, Chet Hooper has been informed that what is described as the ‘Transmittal Package’ was close to finality and would then be sent to other government agencies before being signed off by the Secretary of State and sent to the White House. Once it is signed off by the President it is then sent to the Senate at which point the ratification process can be completed. A number of countries have indicated that they will be ratifying the Rotterdam Rules Convention, but are awaiting developments in the United States. Only two countries have thus far ratified, Spain and Togo.

(i) Arctic and Antarctic Issues

This IWG is being chaired by the former Secretary-General of the CMI, Nigel Frawley. As a former submariner, he is well qualified to lead such an interesting topic. He put this topic on the program of the CMI because of the growing interest in the polar regions, largely due to climate change and new technologies. Because it is not a topic in which there is the potential for conflicts of laws amongst the entire membership of the CMI, it has not been the subject of a questionnaire, although that is not to say that there are not a number of countries (eg in the Arctic: Canada, Denmark, Norway, the Russian Federation and the United States of America) who have a deep interest in that region. As Nigel Frawley has pointed out, however, the legal framework in the Antarctic is comprehensive, unlike the Arctic, where sovereignty is a major issue, spurred on by the discovery of new oil and gas fields that may contain as much as 30% of the world's undiscovered gas and 13% of the world's undiscovered oil. It is also believed to be rich in gold, silver and diamonds, as he pointed out in a paper that he gave at the CMI Colloquium at Buenos Aires in 2010. There are a number of papers on the CMI website, including one given by Donald Rothwell in relation to the Southern Ocean.

Promotion of Maritime Conventions

A new initiative launched at the Beijing Conference was the setting up of a Standing Committee to investigate the possibility of joining with the International Chamber of Shipping (ICS) and IMO to seek to have more Conventions ratified. This has now occurred. It is believed that National Maritime Law Associations could do much (in conjunction with the ICS worldwide membership) to educate States about the Conventions that they have not ratified. A brochure has been published listing the Conventions upon which a major focus is sought to be addressed.410

CMI/MLAANZ Canberra Meeting - 20 June 2013

On 20 June 2013 I visited Canberra with Matthew Harvey, the President of the Maritime Law Association of Australia and New Zealand (MLAANZ) and we met with officers of the Department of Infrastructure and Transport. Rachael Davis (the Section Head, Maritime Economic Regulation, Maritime & Shipping Branch, Department of Infrastructure and Transport) and a number of her colleagues were present. I explained my role as President of the CMI and its history, and in particular the work being done by the CMI Standing Committee together with the ICS on the Promotion of Maritime Conventions, which it is hoped will enliven relationships

between National Maritime Law Associations, the International Chamber of Shipping Member in their country and Government employees involved in international maritime treaties.

Rachael Davis welcomed that initiative and explained the difficulty which the Department has in advising government on the regulatory impacts of international conventions. While she recognised that the department has had a long relationship with the Australian Shipowners’ Association (ASA), it does not have such relationships with, for example, charterers, who would be affected by a convention such as the HNS Convention. Angela Gillham (of ASA) did however note that the Australian shipping industry is small and is stretched in terms of resources.

There are many stakeholders in relation to some of the conventions which were listed on the agenda for the meeting which are outside the traditional relationships of the Department. The Government needs to have a sophisticated conversation about the cumulative impact of conventions such as the Limitation Convention, the Athens Convention, the HNS Convention and the Nairobi Convention. They are good examples of Conventions in which the department needs to understand the impacts on stakeholders.

There was discussion concerning the Cape Town Convention 2007. A Convention that I knew nothing about until recently on International Interests in Mobile Equipment 2001 and its three protocols relating to aircraft, railways rolling stock and space assets. It seems that UNIDROIT is giving consideration to incorporating ships within that Convention. This was opposed by the CMI and the IMO, when it was first raised, in the 1990s and it looks as if we are going to have to re-debate that issue over the coming months. I expressed regret that the department appeared to have taken a view on the benefit of incorporating shipping in this convention without any consultation with MLAANZ (or perhaps any other stakeholder) when there was resistance to such inclusion within both the IMO and the CMI in the 1990s. I referred to the significant differences between ship registration, the national registries, the tradition of maritime liens, the arrest and liens and mortgages conventions etc.

The meeting therefore noted that for conventions like Rotterdam, HNS, Athens, and Nairobi, it would be helpful for the government to receive preliminary advice which discusses the background to the development of the convention, what benefits would flow to stakeholders and who would be affected by the ratification of the convention. In so far as other government departments are concerned, the Department of Trade may have relationships with some of the potential stakeholders and the Attorney-General’s Department has a role to make sure that any new convention will comply with existing arrangements. The policy agenda, however, sits with the Department of Infrastructure and Transport, which provides advice to the portfolio minister. The HNS Convention falls within the responsibility of the liability team. There have already been good discussions with industry in relation to recycling and ballast which have involved AMSA and environmental departments.

As a result of that meeting I am hopeful that MLAANZ will be in a position to provide assistance to the department when it is putting together ministerial submissions for Australia to put in train steps to ratify Rotterdam Rules, HNS, Wreck Removal and Athens Conventions. Dr Sarah Derrington has put in train steps to produce material. I have posed the question to MLAANZ whether Australia should revisit the Arrest Convention (1999), the Maritime Liens & Mortgages Convention (1993) and debate whether there is anything in these Conventions which would benefit Australia (and New Zealand).

**Handbook on Maritime Conventions**

CMI has in the past worked with a publisher to produce a handbook containing the most significant Maritime Conventions. With the assistance of Frank Wiswall and IMLI in Malta, work is being done to produce a new edition. At the same time consideration is being given to having that material posted on the CMI website. In recent years the CMI website has been considerably upgraded.

**Jurisprudence Database**

A further initiative which the CMI took in 2013 was to employ somebody to gather together important decisions worldwide on international Conventions, which would be available on the CMI website. Francesco Berlingieri has already worked on this for some years voluntarily but has been reliant on volunteers around the world sending him decisions, but it is thought that someone working full time on such a project for a six month period could assemble very much more material and establish a more committed network of volunteers around the world to gather such material in future. The services of a French lawyer have been retained to take on this role for six months. A volunteer within MLAANZ will need to be identified to assist her in gathering together
International Law: CMI Issues

Australian jurisprudence on the specified Conventions, such as Salvage, Limitation, Hague/Hague-Visby Rules and Admiralty.

Young CMI

Thanks to the initiative of the President of the Dutch MLA, Taco Van de Valk, there is now a CMI group on LinkedIn: <http://www.linkedin.com/groups/comit%C3%A9-Maritime-International-CMI-4752946?trk=myg_ugrp.ovr>. I urge all young lawyers with an interest in maritime law to join that group and keep abreast of developments.

Future CMI Meetings

There is Conference in Hamburg in June 2014; a Colloquium in Istanbul in 2015 and a Conference in New York in May 2016.

Conclusion

Whilst there seems to be a lack of interest in the IMO Legal Committee to develop new Conventions (about which the shipping community will no doubt sigh with relief), I hope I have demonstrated that maritime lawyers both within our own jurisdiction and internationally are still doing much work seeking to unify maritime law. I look forward to the MLAANZ continuing to play its part in the ongoing work of the CMI.