


The Australian flirtation with foreign maritime liens – is all love lost?



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A decorative graphic at the top of the slide showing a splash of water with bubbles and ripples, rendered in shades of light blue and white.

The essential question: should a claim that is recognised by the foreign *lex causae* as a maritime lien but which would not be a maritime lien in domestic law be enforceable as a maritime lien in the domestic court?
i.e. *lex causae v lex fori*?

The Halcyon Isle [1981] AC 221

Majority per Lord Diplock.

- “... in the application of English rules of conflict of laws, maritime claims are classified as giving rise to maritime liens which are enforceable in actions *in rem* in English courts where and only where the events on which the claim is founded would have given rise to a maritime lien in English law, if those events had occurred within the territorial jurisdiction of the English court.”

Lords Salmon and Scarman.

- “A maritime lien validly conferred by the *lex loci* is as much part of the claim as is a mortgage similarly valid by the *lex loci*. Each is a limited right of property securing the claim. The lien travels with the claim, as does the mortgage; and the claim travels with the ship.”

Other countries' treatment of *The Halcyon Isle*

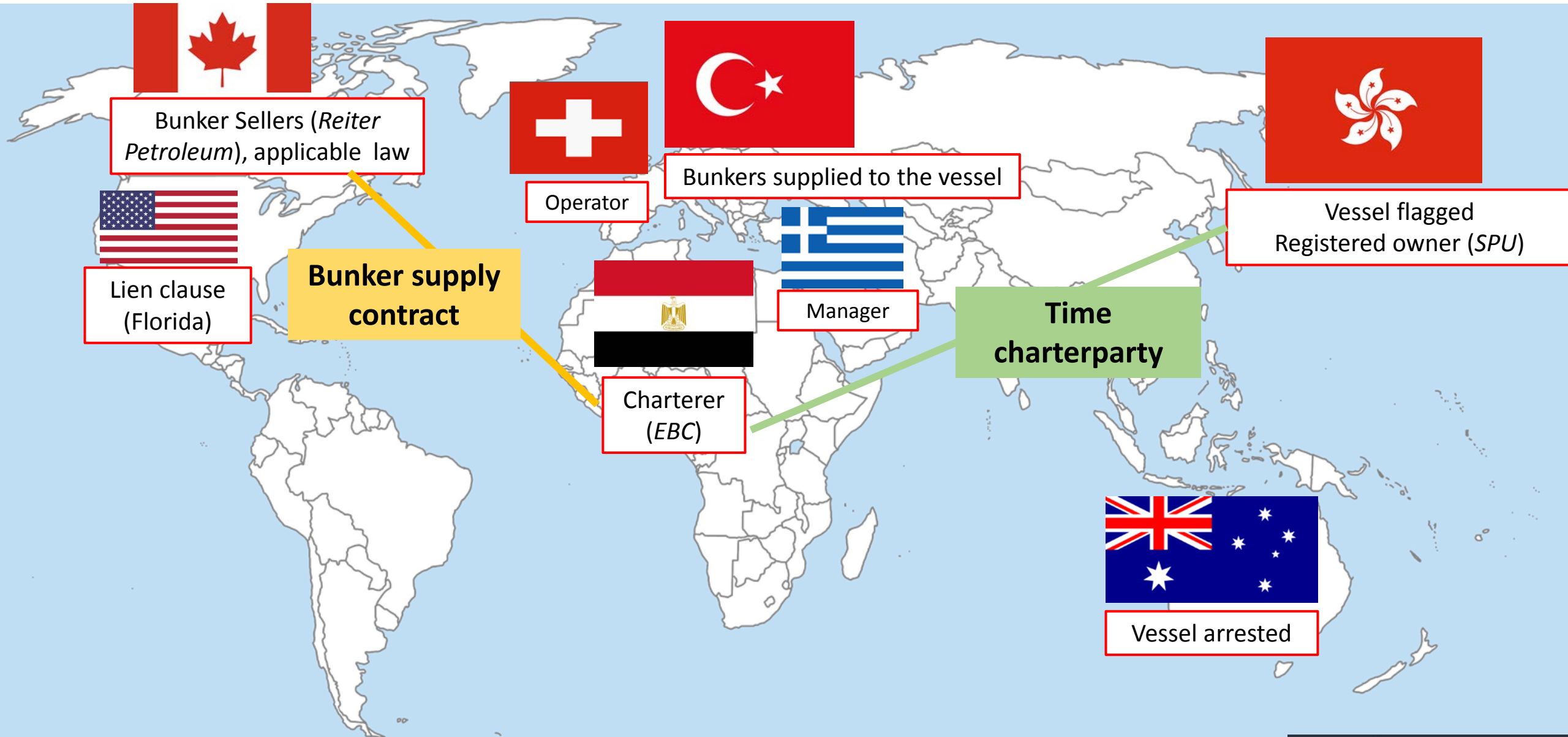
Following the majority:

- South Africa: *The Andrico Unity* 1989 (4) SA 325 (A)
- Cyprus: *Hassanein v The Hellenic Island* (1989) 1 CLR 406
- Singapore: *The Andres Bonifacio* [1993] 3 SLR 521
- Malaysia: *Ocean Gain Shipping v The Dong Nai* [1996] 4 MLJ 454
- Australia: *Morlines Maritime Agency Ltd v Ship Skulptor Vuchetich* [1997] FCA 432
- New Zealand: *Fournier v The Margaret Z* [1999] 3 NZLR 111

Following the minority:

- Canada: *The Ioannis Daskalelis* [1974] SCR 1248.

Reiter Petroleum Inc v The Ship "Sam Hawk": The Facts



At first instance:

Reiter Petroleum v The Ship Sam Hawk [2015] FCA 1005

McKerracher J:

- Following *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, “the existence, extent or enforceability” of rights are issues of substance not procedure
- As substance is a matter for the *lex causae*, the enforceability of the lien is to be determined by the foreign proper law
- Preferring the minority in *The Halcyon Isle*, the US maritime lien for necessaries was enforceable.

Full Court of the Federal Court of Australia:

Reiter Petroleum v The Ship Sam Hawk [2016] FCAFC 26

- **All five judges:** the *lex causae* was not Canadian or US law, and therefore allowed the appeal
- **Four judges:** even if by the *lex causae* there was a maritime lien, those rights would not be recognised in Australian law as a maritime lien – preferring the majority in *The Halcyon Isle*
- **One judge:** a maritime lien is a rule of substantive law to be determined by the *lex loci* – preferring the minority in *The Halcyon Isle*.

Allsop CJ and Edelman J (1):

- Maritime liens universally have 2 features: their indelible character and high ranking/priority
- Priority is determined by the *lex fori* (common ground)
- If the indelible character was to be determined by the *lex causae*:
 - The two characteristics would be de-coupled
 - Different creditors with claims of the same nature would be treated differently.

Allsop CJ and Edelman J (2):

The characterisation of a maritime lien involves 2 steps:

- The nature of the foreign right must be identified; and
- Characterise the foreign right by reference to domestic law to determine whether it is sufficiently analogous to a maritime lien recognised in domestic law.

In this case:

- The issue is whether parties to a contract with no proprietary interest in the ship can create a maritime lien on the ship, which cannot be an issue of “contract”, so Canadian and US law is therefore irrelevant and is not the *lex causae*.
- The *lex causae* is either the law of Turkey or Hong Kong, which give no relevant rights, so the second step does not arise.

Kenny and Besanko JJ:

- Essentially the same reasoning
- Also preferred the majority in *The Halcyon Isle*
- The question of whether a maritime lien attaches to a ship cannot be resolved by reference to an agreement between parties having no interest in the ship.

Rares J:

- This judgment will be considered by the next speaker, Dr. Sooksripaisarnkit.

The End



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