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English conflicts law at sea – the transfer and creation of proprietary interests in ships

Andrew Tettenborn*

Surprisingly, the law applicable to the creation and transfer of proprietary interests in ships remains remarkably obscure as a matter of the English conflict of laws. In this article an attempt is made to investigate the relevant authorities and to reconcile them. The conclusion is that, subject to exceptions, English courts will recognise transfers if they are effective under any one or more of (1) the *lex situs*, (2) the law of the registry and (3) (in the case of equitable interests) English law.

Keywords: maritime conflicts; property; ships; English law; *lex situs*; law of registry; equitable interests

A. Introduction – the problem of title to ships

English commercial courts, being institutions whose business is robustly transnational, hear a fair number of cases about proprietary interests in foreign ships. These may concern either the relative proprietary rights of owners, mortgagees, insurers and others; or they may simply bring up the question of who is "owner" or "mortgagee" of a vessel for a particular purpose of domestic law, such as the right of arrest,[1] or the attachment of some statutory liability.[2] Yet despite such claims being fairly commonplace, under English conflict rules[3] it remains astonishingly unclear which law governs the issue.[4] Is it the *lex situs*,

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[1]The right to arrest under s21 of the Senior Courts Act 1981 often hinges on who, at the time of the cause of action or the issuing of the proceedings, was the "owner" of the vessel involved; see s21(4)(b). Similarly an unpaid mortgagee seeking to hold an arrest under s20(2)(c) of the same Act must obviously show that they are indeed a mortgagee.

[2]Such as oil pollution liability under the Civil Liability Convention 1969–1992 or the Bunkers Convention 2001, or liability for damage to port furniture under the venerable s74 of the Harbours, Docks and Piers Clauses Act 1847. All these attach explicitly to an "owner" and to no-one else.

[3]Most of the cases have been in England. But what appears here is also highly relevant to many other common law jurisdictions, and indeed a number of the authorities cited here are Commonwealth cases.

[4]Compare Lord Denning MR's puzzled speculation over 40 years ago in *The Stena Nautica (No 2)* [1982] 2 Lloyd's Rep. 336, 347 about what law should be chosen to govern the

as with other chattels; the law of the place of registry;[5] or even (paradoxically, in some cases) English law?

By way of a preliminary point, as in any conflicts case we need to make clear precisely what the issue is that we are discussing here.[6] Most of the transactions dealt with in this article involve not only the transfer of a proprietary interest in a vessel, but also a background agreement: in most cases either a mortgage agreement or a contract, whether the latter be a contract of sale, an insurance policy with a provision governing the insurer's rights following a total loss, or whatever. That underlying agreement may raise its own difficulties in the conflict of laws, and in particular as to the law that governs its validity or effectiveness.[7] Nevertheless, here we will only be dealing with the property aspect: that is, validity of the transferee's proprietary interest, whether ownership or something short of ownership such as a legal or equitable mortgage.

In some cases, of course, the effectiveness of a transfer of property will in turn depend on the validity of the underlying agreement. For example, if an agreement for security on which an alleged equitable mortgage is founded is ineffective under its governing law, then the mortgage itself must fall with it. But with this we are not concerned. For the purposes of this article we will assume the validity of any underlying obligation, and concentrate instead on the effectiveness of any proprietary interest arising from it.

Turning to the question of what law should govern the validity of the proprietary interest involved – the *lex situs*, the law of the registry, or English law – there are respectable authorities that can be cited in favour of all of these. The textbooks unfortunately are also of limited assistance. Most simply regard ships as ordinary tangible moveables and do not suggest any particular specialist rules applicable to them; though it must be admitted that *Dicey, Morris & Collins*, while generally supporting the *lex situs*, does speculate that this might be displaced in favour of the port of registry, at least if a vessel is at sea.[8]

validity of a transfer of title to a Swedish ship physically situated in the Netherlands – should it be Swedish, Dutch or English?

[5]A term to be preferred to the law of the flag, if only because some flag states comprise more than one jurisdiction.

[6]In this we are being careful to follow Staughton LJ's methodical analysis in *Macmillan Inc v Bishopsgate Investment Trust Plc (No. 3)* [1996] 1 W.L.R. 387, 391–92. In this analysis he carefully distinguished the three phases of (a) characterisation of the issue; (b) the rule establishing a connecting factor; and (c) selection of the appropriate legal system. This paragraph deals with (a); the rest of the article with (b) and (c).

[7]Most of these, being contractual issues, will fall to be decided under the Rome I Regulation (Regulation (EC) No 593/2008 of 17 June 2008). But that Rome I needs to be carefully prevented from encroaching on proprietary issues affecting third parties was made clear by the European Court of Justice (admittedly in a different context) in *BGL BNP Paribas SA v TeamBank AG Nürnberg* (Case C-548/18) EU:C:2019:848; [2019] I.L.Pr. 39, a case that remains just as relevant post-Brexit.

[8]See L Collins and J Harris (eds) *Dicey, Morris & Collins on the Conflict of Laws* (16th edn, 2023), Paras 23-56–23-59.

This article analyses the authorities. It then goes on to suggest that however contradictory they look, there is a neat way of reconciling them, or at least most of them, and reaching a solution that reflects both principle and common sense.

B. The authorities

1. *The* lex situs

For tangible moveables other than ships, no-one seriously doubts that the *lex situs* governs.[9] If an asset was situated in Ruritania at the relevant time, an English court will respect a proprietary interest validly gained under Ruritanian law, whether consensually[10] or otherwise.[11] Furthermore, despite some old contrary authorities based on reasoning at times hard to fathom,[12] there is a clear line of cases strongly supporting the view that this rule applies to ships too. Hence when a property-changing event occurs while a vessel is in a Ruritanian port or waters,[13] its effect falls to be determined by Ruritanian law.

The first is the 1867 mortgage case of *Hooper v Gumm.*[14] A brand-new American-built ship fresh off the slipway in Massachusetts was mortgaged there;[15] having sailed to England, she was bought by a good faith purchaser in London without notice of the earlier mortgage. The Court of Appeal in Chancery seems to have been clear that on principle the mortgagee should prevail, since his

[9]See *Dicey, Morris & Collins on the Conflict of Laws* (16th edn, 2023), Rule 141.
[10]Representative authorities include *Cammell v Sewell* (1860) 5 H & N 728*; Winkworth v Christie, Manson & Woods Ltd* [1980] Ch. 496; *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 W.L.R. 387, 399–400 (Staughton LJ); and *Air Foyle Ltd v Center Capital Ltd* [2002] EWHC 2535 (Comm); [2003] 2 Lloyd's Rep. 753, esp at [46].
[11]For the latter, see in particular the Soviet expropriation cases: notably *Luther v James Sagor & Co* [1921] 3 K.B. 532, *Paley Olga (Princess) v Weisz* [1929] 1 K.B. 718 and *Re Banque des Marchands de Moscou* [1952] 1 T.L.R. 739.
[12]Notably *The Eliza Cornish* (1853) Spink's Ecc & Ad 36 (title derived from valid public auction of British vessel in Portuguese territory ignored, apparently because contrary to the "law maritime"), and *Simpson v Fogo* (1863) 1 H & M 195 (judicial sale of British vessel in New Orleans for the benefit of creditors not recognised in England even though effective in Louisiana: Louisiana practice said to be "contrary to law and to what is required by the comity of nations"). But *The Eliza Cornish* was discountenanced in *Cammell v Sewell* (1860) 5 H & N 728; and *Simpson v Fogo* was disapproved by Scrutton LJ in *Luther v James Sagor & Co* [1921] 3 K.B. 532, 558, and in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 A.C. 853, 922 by Lord Reid. See too the Australian decisions in *Devine Shipping Pty Ltd v BP Melbourne* (1994) 3 Tas R 456, 465 and *Sirius Shipping Corporation v Ship "Sunrise"* [2006] NSWSC 398 at [66]-[71].
[13]A question mark lies over vessels exercising innocent passage through territorial waters, which cannot be discussed here. It is arguable that giving effect to littoral states' pretensions to change the ownership of such vessels by virtue of their mere adventitious presence offends at least the spirit of Art 24 of the Law of the Sea Convention 1982.
[14](1867) L.R. 2 Ch App 282.
[15]Since she was mortgaged by her American builder-owners as soon as constructed, it is virtually a certainty that she was physically there at the time.

mortgage was valid under the law of the place where the vessel had been at the time of its creation.[16] Admittedly the purchaser ultimately won: but this was on the entirely separate ground that the mortgagee was estopped from enforcing his charge because, to ease the sale, he had deliberately connived at the omission of any mention of the mortgage in the ship's papers presented to the buyer.

In the second, *Castrique v Imrie*[17], a Liverpool-registered ship was arrested in France and sold by the French court to a new buyer, who brought her back to England. The new buyer's title was upheld, despite doubts as to the validity of the claim underlying the arrest. Admittedly, the main decision was on the basis that the French judicial condemnation had been equivalent to an English Admiralty court's judicial condemnation *in rem*.[18] Nevertheless it is noteworthy that three of the judges involved in this decision took a wider view, and suggested that the fact that the vessel had been in France and that the sale gave the buyer good title under French law was itself sufficient.[19] Furthermore, there is some more recent support, albeit in a slightly different context, for this wider view. In *Air Foyle Ltd v Center Capital Ltd*[20] Gross J held that where an aircraft was judicially sold in the Netherlands so as to give good title to the buyer under Dutch law, that title would be recognised here simply because the aircraft had been in the Netherlands at the time. The fact that the judicial sale was not equivalent to an Admiralty *in rem* sale because Dutch law recognised no such institution was, he said, irrelevant.

[16]This is suggested by the judgments of both Lord Chelmsford at 286 ("His legal title to the ship would, of course, be determined by American law … ") and Turner LJ at 289 ("In order to determine what the rights of these parties now are, it must be ascertained what their rights were at the time when the purchase in question was made, and in order to ascertain this, resort must be had to the American shipping law.").This case is regarded by Tomlinson J in *The WD Fairway* [2009] EWHC 889 (Admlty); [2009] 2 Lloyd's Rep. 191 at [97] as pointing to the *lex situs* rather than the law of registration. It is submitted that Tomlinson J was right, though to be fair a contrary conclusion was drawn in the Australian decision in *Tisand Pty Ltd v Owners of Ship MV "Cape Moreton"* (2005) 143 F.C.R. 43 at [144]-[148].

[17](1869) LR 4 HL 414.

[18]This has never been controversial: see A Tettenborn and F Rose, *Admiralty Claims* (2nd edn), para 4–066 and eg *The City of Mecca* (1881) 6 P.D. 106, 116 (Lush J) and also *Minna Craig SS Co v Chartered Mercantile Bank of India* [1897] 1 Q.B. 460.

[19]See Keating J, giving his advice to the House of Lords at (1869) LR 4 HL 414, 437–39; Blackburn J at 429; also Bramwell B in the Exchequer Chamber at (1860) 8 CBNS 405, 430. (How the appeal from the latter to the former took nine years is unexplained.)

[20]*Foyle Ltd v Center Capital Ltd* [2002] EWHC 2535 (Comm); [2003] 2 Lloyd's Rep. 753, esp at [764]. See too the decision of the Eastern Caribbean Court of Appeal in *The Phoenix* [2014] 1 Lloyd's Rep. 449, especially at [35]–[37], which seems to have taken the same line over North Korean and Chinese judicial sales, specifically following Blackburn J on the point. Of course, if the foreign sale does not purport to override the pre-existing proprietary right anyway, the issue does not arise: see, eg, *The Charles Amelia* (1868) L.R. 2 A & E 330 and *The Goulandris* [1927] P. 182 (foreign sales *cum onere*: rights in vessel of maritime lienholder preserved).

The third case is *The WD Fairway*[21] in 2009. Following disastrous collision damage, a Dutch-registered vessel was towed to a port in Thailand. Her hull insurers paid for a total loss and then elected, as was their right, to claim the assured's interest in the wreck.[22] Thereupon the vessel's owners, who wished to defeat the insurer's claim, collusively sold her to an associated company of theirs. Tomlinson J held the owners' ploy effective. His reasoning was that even assuming the insurer had originally got a proprietary interest in the hulk, if under Thai law the sale gave the buyers clear title free from it, then English law should give effect to that title.[23] Indeed, this point was largely admitted, the only question being a technical one over the application of *renvoi*.[24]

To these three decisions can be added a number of authorities on expropriation. A typical one is *The Jupiter (No 3)*[25] in 1927. There Hill J ignored Soviet decrees purporting to nationalise Russian-registered vessels precisely because the vessels had been outside Russia at the time. Another is the carefully-reasoned Scots decision in *The El Condado*,[26] refusing during the Spanish civil war to recognise Spanish government requisitions of Spanish vessels abroad held by anti-government forces.[27] (Despite doubts temporarily thrown on them in a couple of Second World War cases,[28] the correctness of these decisions is now beyond question.[29])

[21][2009] EWHC 889 (Admlty); [2009] 2 Lloyd's Rep. 191; also *The WD Fairway (No 2)* [2009] EWHC 1782 (Admlty); [2009] 2 Lloyd's Rep. 420.

[22]Under, it would seem, either s63(1) or s79 of the Marine Insurance Act 1906: see [2009] EWHC 889 (Admlty); [2009] 2 Lloyd's Rep. 191 at [36] and [63]. Cf *Scottish Marine Insurance Co v Turner* (1853) 1 Macq 334.

[23]See *The WD Fairway (No 2)* [2009] EWHC 1782 (Admlty); [2009] 2 Lloyd's Rep. 420 at [215]-[219]. Note also Beatson J in the aircraft case of *Blue Sky One Ltd v Mahan Air Ltd* [2010] EWHC 631 (Comm) at [154].

[24]The insurers argued that the *lex situs* which fell to be applied for these purposes included Thai law's own conflicts rules, which arguably referred back to English law; the owners, that *renvoi* was excluded. The owners were held to be right.

[25][1927] P. 122.

[26]1939 S.C. 413. There is no relevant distinction between English and Scots law in relation to this case.

[27]The issue arose quite frequently but was often sidetracked, since if the crews on board the vessels acquiesced in the decrees and declared for the regime in question, sovereign immunity against attacks on a state's possessory title frequently pre-empted matters. This happened in the earlier Russian Revolution case of *The Jupiter* [1924] P 236 and the Spanish Civil War cases of *The Cristina* [1938] A.C. 485 and *The Arantzazu Mendi* [1939] A.C. 256.

[28]See *Lorentzen v Lydden & Co Ltd* [1942] 2 K.B. 202 and *O/Y Wasa SS Co Ltd v Newspaper Pulp & Wood Export Ltd* (1949) 82 Lloyds L Rep 936, where English courts gave worldwide effect to what were effectively exiled allied governments' nationalisation decrees over vessels registered in their territory. Both decisions can tactfully be characterised as influenced by the need to bolster a desperate war effort come what might: compare A Briggs, *The Conflict of Laws* (5th edn), Chapter 7, n.69, and generally D Osborne, "Foreign Law and Property in England" [2004] *Cambridge Law Journal* 567.

[29]See *Peer International Corpn v Termidor Music Publishers Ltd* [2003] EWCA Civ 1156; [2004] Ch. 212 at [31]-[45], where the Court of Appeal expressly overruled

Admittedly the support here is indirect, since the actual holding in the expropriation cases is the converse to the *lex situs* thesis: namely, that English courts will *not* enforce registration state laws nationalising or requisitioning vessels *outside* the relevant state's jurisdiction.[30] Nevertheless, both decisions fairly clearly accepted that effect would have been given to such decrees if the vessels had been present there at the relevant time.[31]

2. *The law of the registry*

So much for the *lex situs*. However, there are also cases where the *lex situs* has seemingly been sidelined in favour of the law of the place of registry. True, some of these decisions do not really involve choice of law as such: they include holdings, for example, that in determining who owns a ship, registration as owner under the law of the place of registry is compelling evidence,[32] or that where a rule of English law refers to a vessel's registered owner this almost certainly means the registered owner under the law of the state of registry.[33] But other decisions do involve a genuine choice of law issue, and have been taken as demonstrating that the law of the place of registry applies.[34] Most arise from the fact that many national ship registration laws also lay down a procedure that must be followed to create a valid mortgage.[35]

Lorentzen v Lydden [1942] 2 K.B. 202. *O/Y Wasa*, which simply followed *Lorentzen*, must fall with it.

[30]Which is certainly the rule with other forms of property; eg *United States v Abacha* [2014] EWCA Civ 1291; [2015] 1 W.L.R. 1917.

[31]See *The Jupiter (No 3)* [1927] P 122, 140–42 (Hill J); and *The El Condado* 1939 S.C. 413, 427 (Lord Aitchison), 438 (Lord Wark).

[32]See *The Tian Sheng No 8* [2000] 2 Lloyd's Rep. 430, 433; also *Vostok Shipping Co Ltd v Confederation Ltd* [1999] NZCA 220; [2000] 1 N.Z.L.R. 37 at [25]. But the inference can, it seems, be rebutted: see eg the Australian decision in *Tisand Pty Ltd v Owners of MV Cape Moreton* (2005) 219 A.L.R. 48 (registered owner not "owner" under Australian arrest jurisdiction legislation where vessel sold at sea).

[33]Examples include ss153 and 154 of the Merchant Shipping Act 1995 (tanker oil and bunker pollution liability under the Civil Liability Convention 1969–1992 and the Bunkers Convention 2001 respectively); and the strict liability provisions of s74 of the Harbours, Docks and Piers Clauses Act 1847 (*BP Exploration Operating Co Ltd v Chevron Shipping Co* [2001] UKHL 50; [2003] 1 A.C. 197).

[34]Especially in the Commonwealth: eg M Davies & A Dickey, *Shipping Law*, (4th edn), para 10.40 (Australia); T K Sing, *Admiralty Law and Practice*, p322 (Singapore). South Africa's legislation on maritime claims against ships specifically provides for this: it refers to "a claim in respect of any mortgage, hypothecation or right of retention of, and any other charge on, the ship, *effected or valid in accordance with the law of the flag of a ship*" (Admiralty Jurisdiction Regulation Act 1983, s11(4)(d) (italics supplied)).

[35]In the context of the UK, see the Merchant Shipping Act 1995, Schedule 1, paras 2(1) and 7(2). See too D Osborne, G Bowtle & C Buss, *The Law of Ship Mortgages* (2nd edn), Chap.4, concluding after long analysis that for mortgages the relevant system is the law of the registry.

These cases involve alleged mortgagees of foreign ships seeking to enforce their rights in England, or to make claims against the proceeds of ships arrested here. The holdings are consistent: wherever the vessel was at the time it was created, the underlying mortgage will be recognised for these purposes if validly concluded according to the law of the place of registry; and conversely a person trying to make good a claim in England as mortgagee of a Ruritanian ship who cannot show that the formalities required by Ruritanian law have been satisfied will prima facie fail.[36]

In addition to these, there is one decision in New Zealand applying similar reasoning to ownership. In *Vostok Shipping Co Ltd v Confederation Ltd*[37] an issue arose as to who owned a vessel for the purpose of arrest when she had allegedly been sold mid-voyage: it was held that, the ship having been Russian-registered, the starting-point had to be Russian law.

It has admittedly been suggested that the registry law cases represent a special case of the *lex situs*, either because a foreign ship possesses an artificial *situs* in her place of registration,[38] or because she counts as a piece of floating flag territory.[39] But it is suggested that this view has little if anything to recommend it. The whole argument has an inescapable air of unreality about it;[40] the artificial situs thesis has been roundly rejected elsewhere,[41] and the "floating territory"

[36]Examples include *The Byzantion* (1922) 12 Lloyds.L.R. 9, *Samuel v Dumas* [1924] A.C. 431, 443–44 (on principle mortgage over Greek ship must take Greek form), and *The Pacific Challenger* [1960] 1 Lloyd's Rep. 99, 104–08 (when validity of mortgage on Liberian ship impugned, Liberian law regarded as obviously dispositive). See also *The Angel Bell* [1979] 2 Lloyd's Rep. 491, 495 (no legal mortgage over Panamanian vessel where Panamanian formalities not complied with). Cf D Osborne, G Bowtle & C Buss, *The Law of Ship Mortgages* (2nd edn), 84.

[37][1999] NZCA 220; [2000] 1 N.Z.L.R. 37, especially at [28] (where Russian ship purportedly sold while on the high seas, held that Russian law as the law of registration had to form the starting point of any inquiry as to her ownership).

[38]See *Dicey, Morris & Collins*, 16th edn, para 23E-056 ("A merchant ship may at some times be deemed to be situate at her port of registry"); also *The Jupiter* [1924] P. 236, 239 (Hill J), and dicta in the Australian decision in *Tisand Pty Ltd v Owners of MV Cape Moreton* (2005) 219 A.L.R. 48 at [144]-[148] ("There seem to us to be powerful reasons for giving effect to the law of the country of register as the lex situs in relation to questions of title, property and assignment").

[39]See, for example, the mortgage case of the *The Angel Bell* [1979] 2 Lloyd's Rep. 491, 495 ("A ship is, in effect, a floating piece of the nation whose flag it wears and there is, therefore, an analogy between foreign land and foreign ships"); also Lord Donaldson in *The Evpo Agnic* [1988] 1 W.L.R. 1090, 1096 (ship "for some purposes part of the floating territory of that country and subjecting it to the laws of that country").

[40]Cf the scepticism shown by Tomlinson J in *The WD Fairway* [2009] EWHC 889 (Admlty); [2009] 2 Lloyd's Rep. 191 at [90]-[103]; *also Air Foyle Ltd v Center Capital Ltd* [2002] EWHC 2535 (Comm); [2003] 2 Lloyd's Rep. 753, esp at [40] (Gross J).

[41]For instance, *Trustees Executors & Agency Co Ltd v Inland Revenue Commrs* [1973] Ch 254 (large Jersey-registered yacht docked at Southampton counts as an asset in the UK, and not in Jersey, for tax purposes).

conception is if anything even more dubious.[42] In addition, the artificial *situs* argument is also irreconcilable with the expropriation decisions referred to above: if a ship had an artificial *situs* in its home port, then there would be no difficulty about recognising an expropriation decree by the state of registry. Perhaps most importantly, however, the idea of an artificial *situs* is a cop-out. There may be good reasons for giving effect to property transactions taking place under the law of a vessel's registry; but the case for them needs to be made on its own merits rather than by way of a transparent fiction.

3. *English law*

Aside from the *lex situs* and the law of the place of registry as candidates for the governing law, at least as regards equitable rights there is also a third, namely English law. This may seem surprising: but there is clear authority in favour of it. This is the decision in *The Angel Bell (No 2)*[43] referred to above. As noted above Donaldson J refused to recognise a formal legal mortgage over a Panamanian ship where the proper Panamanian legal formalities had been skimped. But there was a further twist to the tale. The would-be Panamanian mortgage had been preceded some weeks earlier by a more or less formal agreement to create it, at which time the loan monies had been advanced. That earlier transaction, said Donaldson J, would have been sufficient in English law to create an equitable mortgage there and then; furthermore, such a mortgage would be given effect here.[44] It did not matter, he continued, that the vessel had been abroad at the time, or that the Panamanian law of the vessel's registry did not recognise an equitable interest of this kind: the equitable mortgage would be recognised by an English court. This was on the basis, not so much of English law applying as the law of the forum, but of the rule that equity acts *in personam*, and hence can at least indirectly affect rights in property outside the jurisdiction.[45]

[42]See, for example, *R v Esop* (1836) 7 Car. & P. 456 and *Chung Chi Cheung v R* [1939] A.C. 160 (Turkish ship docked in London, and Chinese ship in Hong Kong, held emphatically to have been situated where they physically were for criminal jurisdiction purposes). Another example is the old Canadian case of *Cantieri Riuniti Dell'Adriatico Di Monfalcone v. Gdynia Ameryka Linje Zeglugowe Spolka Akcyjna* [1939] 4 D.L.R. 491, where a Nova Scotia court repelled a fairly preposterous plea that a Polish ship berthed in Halifax was legally in Poland and thus could not have mortgage enforcement proceedings served on her in Canada. See too also the comments in A McNair & A Watts, *The Legal Effects of War* (4th edn, 1957), 441.

[43][1979] 2 Lloyd's Rep. 491. Compare the much earlier decision in *The Nicolaos Pappis* (1921) 9 Lloyds L.R. 493, where Hill J seems to have reached a similar result.

[44]*Ibid* at 496–97. The issue in *The Angel Bell* was not strictly whether the mortgage could be enforced, but whether the owners' entering into the agreement triggered a clause assigning to the lenders the proceeds of certain insurance policies in the event of the vessel being mortgaged (which it was held to do). However, nothing turns on this.

[45]See *Penn v Lord Baltimore* (1750) 1 Ves. Sen. 194 discussed below.

The Angel Bell was a mortgage case: but the implications of its reasoning go a good deal further. In particular, logically it must extend to an agreement to sell a vessel, at least where specifically enforceable,[46] in such a way as to give the buyer an immediate equitable interest. And sure enough, in the New Zealand decision in *Vostok Shipping Co Ltd v Confederation Ltd*[47] mentioned above, exactly this was held to be the case. Where A, the owner of a Russian ship, agreed to sell her to B, B was held thereafter to be her beneficial owner, with a right that would be given effect under the law of New Zealand for the purpose of the law of arrest.[48]

Yet again, for the purpose of the right of arrest it appears never to have been in doubt that whatever the law of a vessel's registry or *situs*, English law will for arrest purposes recognise a trust of her where she is transferred into the hands of a bare legal nominee.[49] Another possible instance would be where a hull insurer pays out on a total loss and elects to take over the owner's interest, in such a way as to gain as a matter of English law an immediate equitable title.[50]

C. A proposed rule

At first sight, the authorities cited above seem contradictory. If one case applies the *lex situs* to proprietary interests while another applies the law of the place of registry, then (you might have thought) they cannot both be right. Again, if the law of the registry controls issues concerning the validity of mortgages on foreign vessels, we cannot consistently at the same time recognise English-style equitable securities; and so on.

It is submitted, however, that there is a neat way round the problem. We need to remember two things. One is that, strictly speaking, the question to be asked where private international law issues arise over ownership is not what system of law governs the *existence* of proprietary interests, but rather what system of

[46]As ship sale agreements often (though not invariably) are, on the basis that most ships are seen as unique chattels. See eg *Behnke v Bede Shipping Co Ltd* [1927] 1 K.B. 649, and also *The Messiniaki Tolmi (No 2)* [1983] 2 A.C. 787, 797 (Lord Roskill) and *The Star Gazer* [1985] 1 Lloyd's Rep. 370.

[47][1999] NZCA 220; [2000] 1 N.Z.L.R. 37. Oddly enough, *The Angel Bell* was not cited to or by the court; but the result is entirely congruent.

[48]Under the New Zealand eqiuvalent of s21(4)(i) of the Senior Courts Act 1981. Note that the vessel was not in New Zealand when this happened; and also that the fact that Russian law as the law of the place of registration might recognise no such institution was seen as irrelevant.

[49]See eg *The Aventicum* [1978] 1 Lloyd's Rep. 184 (admitting the possibility, though no nomineeship found on the facts); *and The Saudi Prince* [1982] 2 Lloyd's Rep. 255 (nomineeship found). In neither case was the situs of the ship at the time seen as being of the remotest relevance.

[50]Under either s63(1) or s79 of the Marine Insurance Act 1906: see n 22 above. Compare *The WD Fairway* [2009] EWHC 889 (Admlty); [2009] 2 Lloyd's Rep. 191 at [63] (Tomlinson J). The actual result in that case may cause problems (see below): but they are not, it is suggested, insuperable.

law applies to their *creation* or *transfer*. As *Dicey, Morris & Collins* put it, "A title to a tangible movable acquired or reserved […] will be recognised as valid in England if the movable is removed from the country where it was situated *at the time when such title was acquired*, unless and until such title is displaced by a new title acquired in accordance with the law of the country to which it is removed."[51] And secondly, it is suggested that we need to accept that where ships are concerned, there might be more than one answer to the question of what the applicable law is for determining proprietary interests in a foreign ship.[52]

The true rule, it is suggested, is as follows. Where an issue arises in an English court over whether a given transaction has given X a proprietary interest in a foreign ship, the court will recognise X's rights if that transaction satisfies any one of three criteria. The first is that it was effective under the law of the physical *situs* of the ship at the time of its creation. The second, applicable to consensual transfers but not expropriations, is that it was effective under the law of the registry. The third is that the transaction amounts to a declaration of trust or an agreement capable as a matter of English law of creating a trust or other equitable interest (such as an equitable mortgage) in favour of X by virtue of the rule that equity acts *in personam* and will enforce a promise it sees as binding on the conscience of a person wherever the subject-matter happens to be. These criteria, it should be emphasised, are disjunctive. If any one is satisfied, the fact that some other potentially relevant law might deny the transaction effect is irrelevant.[53]

For example, imagine that a Ruritanian-registered vessel owned by X is sold to Y while physically present in a Utopian port. Suppose further that she then comes to England, whereupon Y and X each claim to be her owner, X arguing that the sale was ineffective to divest its title. Which law applies? Rather than seeing this as forcing a choice between Ruritanian and Utopian law as *lex situs*

[51] *Dicey, Morris & Collins*, 16th edn, Rule 142 (emphasis added). See too eg Staughton LJ in the non-marine case of *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 W.L.R. 387, 399.

[52] This may sound outlandish. But the idea of multiple laws potentially sufficing to validate a transaction is not unheard-of elsewhere in the conflict of laws. In family law, for instance, a marriage taking place in Ruritania where one of the parties is a member of HM Forces is regarded as valid in England if *either* the local formalities are fulfilled, *or* the parties nominate a part of the UK and the marriage is formally valid according to the law of the latter (*Dicey, Morris & Collins*, 16th edn, paras17-001–17-021). So too, under Art 1 of the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, applied by the Wills Act 1963, dispositions by will are formally valid provided that they satisfy any one of a number of laws, such as those of the nationality or alternatively the domicile of the testator.

[53] To this extent, it is suggested that the general rule stated for chattels in *Dicey, Morris & Collins* (16th edn), Rule 141(2) (" … a transfer of a tangible movable which is invalid or ineffective by the law of the country where the movable is at the time of the transfer is invalid or ineffective in England") does not apply in full force to ships. This suggestion is defended below.

and registry law respectively, there is nothing illogical in saying that either will do. In other words, if the sale passed a valid title to Y under either Utopian or Ruritanian law, then Y's title should be recognised in England as prevailing over X's.

Again, suppose a mortgage is executed over a Ruritanian-registered vessel in Ruritania, and the question then arises whether the would-be mortgagee can arrest her in England to enforce its rights.[54] There is nothing incoherent in saying, as the court did in *The Angel Bell*,[55] that the mortgagee gets a valid security for these purposes if either the agreement was sufficient to create a legal Ruritanian mortgage, or alternatively it satisfied the criteria for an equitable mortgage in England.[56]

One further point also follows: if there are two or more successive transactions satisfying these criteria under different laws that clash, logically it must be the final one that counts.[57] Suppose a Ruritanian-registered vessel docked in Utopia is mortgaged to X in a transaction valid under Ruritanian but not Utopian law, but shortly afterwards is the subject of a Utopian government decree expropriating her and transferring title to Y absolutely. In such a case it is submitted that X's mortgage, though initially good, would be displaced, and were the vessel to be brought to England Y would take free of it.[58] Alternatively, suppose a slight variation on the facts of *The Angel Bell*. Imagine that, as in that case, the owner of a Ruritanian vessel agrees to mortgage her to X in a transaction ineffective under Ruritanian law but adequate to create a first equitable mortgage in England; but now also imagine that the same owner later executes a valid Ruritanian mortgage in favour of Y which under Ruritanian law overrides X's rights. Were the vessel subsequently to be arrested in England, X's interest as first mortgagee would be displaced in favour of Y.[59]

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[54]Under s20(2)(c) of the Senior Courts Act 1981, which refers generically to any mortgage or charge, and is widely construed: A Tettenborn & F Rose, *Admiralty Claims* (2nd edn), paras 2-018–2-019.

[55]This was essentially the situation in *The Angel Bell* [1979] 2 Lloyd's Rep. 491, referred to above.

[56]Since equitable mortgages are expressly stated to give rise to a right of arrest: Senior Courts Act, s20(7)(c).

[57]This point is actually quite orthodox: compare J-G Castel, *Canadian Conflict of Laws* (4th edn), para. 326, and see also *Dicey, Morris & Collins* (16th edn), Rule 142 ("A title to a tangible movable … will be recognised as valid in England if the movable is removed from the country where it was situated at the time when such title was acquired, *unless and until such title is displaced by a new title acquired in accordance with the law of the country to which it is removed"*) (italics supplied).

[58]Compare *Liverpool Marine Credit Co v Hunter* (1867) L.R. 3 Ch. App. 479 (mortgage of British ship in England, followed by execution sale after her arrival in Louisiana, which by Louisiana law overrode mortgage; execution creditors allowed to keep benefit of execution).

[59]As indeed is the case under the general law not involving ships: see *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 W.L.R. 387 (later bona fide purchase valid under *lex situs* recognised by English law as defeating earlier rights subsisting in

D. Defence of the proposed rule

Can the proposed rule outlined above be reconciled with the authorities, and does it make sense? It is suggested that, by and large, the answer to both questions is Yes.

1. *Reconciliation with the authorities*

Turning first to the cases said to support the idea that proprietary issues are governed by the *lex situs* on the one hand, or alternatively by the law of the registry on the other.[60] It turns out that virtually all of these would be decided the same way under the model suggested above. This is unsurprising, in so far as these decisions involve a simple giving effect to a transaction valid under the *lex situs* or, as the case may be, the law of the place of registry. Since the suggestion being made here is that either will do, they are clearly reconcilable with it.

So too, it is suggested, with cases like *The Byzantion*[61] where it was held that a person claiming to enforce their rights as mortgagee of a Ruritanian vessel must fail if they did not show a mortgage good under the formalities required by Ruritanian law. Although at first sight this might seem to cause difficulty, it has to be noted that in these cases no-one claimed that the mortgage could alternatively be validated by any other law such as the *lex situs*. Had they done so, the result might well have been different: as it was, the would-be mortgagee simply lost by default.

At first sight more problematical are expropriation cases, such as *The Jupiter (No 3)*[62] and *The El Condado.*[63] In these decisions, unlike those just mentioned, we have not only an acceptance that decrees made under the *lex situs* will be recognised, but also a converse holding that those made elsewhere, such as in the state of registry, will not. However, it is suggested that these cases do not destroy the thesis being advanced here. The reason is that they reflect, not a general principle of law, but an exceptional rule peculiar to expropriation. This principle was neatly expressed by Lord Templeman in the 1986 (non-maritime) House of Lords case of *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd.*[64] There, he referred to a "domestic and international rule which prevents one sovereign state from changing title to property so long as that property

equity), and cf too *Re Maudslay, Son & Field* [1900] 1 Ch. 602. The decisions in *The WD Fairway* [2009] EWHC 889 (Admlty); [2009] 2 Lloyd's Rep. 191 and *The WD Fairway (No 2)* [2009] EWHC 1782 (Admlty); [2009] 2 Lloyd's Rep. 420 can also be explained on this principle.

[60] See Parts B.1 and B.2 above.

[61] (1922) 12 Lloyd's L.L.R. 9; and see too the other cases listed at note 36.

[62] [1927] P. 122.

[63] 1939 S.C. 413. There is no relevant distinction between English and Scots law on the expropriation issues.

[64] [1986] A.C. 368.

is situate in another state."[65] In other words, whatever the general position in the conflict of laws, as a matter of high policy our courts will not aid any foreign state in asserting its sovereignty over assets outside its physical control. This rule is in no way inconsistent with acceptance that outside the specialised field of expropriation our courts will recognise transactions valid under the law of the registry or some law other than the *lex situs*.

This leaves two apparently awkward aircraft cases. One is *Air Foyle Ltd v Center Capital Ltd*: [66] the other, *Blue Sky One Ltd v Mahan Air Ltd.*[67] In *Air Foyle*, a Russian-registered aircraft situated in the Netherlands was sold by its owners to X in a sale valid under Russian law, and subsequently to Y in a valid Dutch law sale. Faced with rival claims by X and Y, Gross J favoured Y, saying that Dutch law had to be applied as the *lex situs* to the exclusion of Russian law. In the fairly similar *Blue Sky One*, a UK-registered aircraft had, while physically at Amsterdam Airport, been mortgaged by its owners in a form valid by UK, but not Dutch, law. Beatson J reluctantly held the mortgage ineffective, deciding that he had to apply the *lex situs,* however arbitrary that might be in the case of a peripatetic chattel like an aircraft.

However, these two cases can, it is submitted, be explained in other ways. First, while it is true that *Blue Sky* does seem to contradict the alternative validity thesis advanced here (because the invalidity of the mortgage under the Dutch law of the *situs* was allowed to trump its alleged validity under the law of the place of registration), the *Foyle* case does not. The result in the latter would have been the same even under the rule outlined above: the second sale, being later in time, would have prevailed anyway. Secondly, it is suggested that in any case both cases can be distinguished. Aircraft are not the same as ships.[68] National aircraft registers, unlike shipping registers, generally have nothing to do with title:[69] if so, there is no reason why the law of the place of registration should be seen as relevant to transfers of title at all.

Having dealt with the supposed conflict between the cases supporting the *lex situs* and the law of the registry, we can deal more briefly with the other side of the

[65]See [1986] A.C. 368, 428. Note too *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2004] 1 A.C. 260; [2003] UKHL 30 at [80] (Lord Hoffmann). Compare the suggestions in J Morris, *Conflict of Laws*, 10th edn, 17–046 and Cheshire, North & Fawcett, *Private International Law* (14th edn), 137–38 that this is a free-standing principle.

[66][2002] EWHC 2535 (Comm); [2003] 2 Lloyd's Rep. 753.

[67][2010] EWHC 631 (Comm).

[68]Compare Osborne et al, *The Law of Ship Mortgages* (2nd edn), para 4.12.9.

[69]Indeed, security and similar interests in aircraft on the international stage are increasingly dealt with under the entirely separate Cape Town Convention regime: on which, see R Goode, *Official Commentary to the Convention on International Interests in Mobile Equipment and Protocol on Matters specific to Mining, Agricultural and Construction Equipment* (2021), Parts 1 and 3.

coin: the decisions in *The Angel Bell*[70] and *Vostok Shipping Co Ltd v Confederation Ltd*[71] that an English court can always give effect to an agreement that in English law would create a trust or equitable mortgage, whatever the situs or place of registration of the vessel. These cases, it is suggested, simply represent entirely orthodox doctrine. It has always been the case that equity can act *in personam* over assets abroad so as to require them to be dealt with as if the claimant had an equitable proprietary right in them.[72] Furthermore, in a series of recent authorities outside shipping, it has been held that this rule remains applicable despite the existence of a background conflict of laws context. Hence, for example, an equitable interest may be given effect to by an English court even though the property subject to it is situated in a jurisdiction that that would not recognise the interest in question, or for that matter flatly refuses to recognise trusts at all.[73] True, if property subject to such an equitable interest is later disposed of under a transaction which under the *lex situs* gives unencumbered title to a third party, the interest will disappear:[74] but that is a different matter.

The only difficulty here comes from certain dicta in *The WD Fairway (No 2)*.[75] In that case, it will be remembered, marine underwriters who had paid for a total loss opted to take over the assured's interest in the residue in such a way as would under English law have given them at the very least an automatic equitable interest. However, Tomlinson J explicitly stated[76] that because at the time the vessel was physically in Thailand, whose law would not recognise such an interest, no equitable proprietary interest could arise for an English court to enforce.

It is nevertheless suggested that two points weaken the authority of this statement. First, it was strictly unnecessary to the decision. This was because the vessel was subsequently sold in a transaction that by Thai law gave

[70][1979] 2 Lloyd's Rep. 491

[71][1999] NZCA 220; [2000] 1 N.Z.L.R. 37. See particularly at [28].

[72]Under the principle in *Penn v Lord Baltimore* (1750) 1 Ves. Sen. 194: for the details, see generally *Lewin on Trusts* (20th edn), paras 11-07–11-09.

[73]See notably *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch) and, more recently, *Akers v Samba Financial Group* [2017] UKSC 6; [2017] A.C. 424 at [34] (Lord Mance). Note too *Lightning v Lightning Electrical Contractors Ltd* (1998) 23 T.L.I. 35 (English resulting trust over land in Scotland, even though no such thing as a resulting trust in Scots law). These principles, it is suggested, are insulated from any possible attack under the Hague Convention on the Recognition of Trusts, and indeed supported, by arts 14 and 16(1) of that Convention. These allow recognition of trusts even where the Convention does not require it, and protecting a state's right to continue to apply mandatory rules that obtain even if a foreign system might otherwise govern a transaction.

[74]A proposition cemented by the Supreme Court's decision in *Byers v Saudi National Bank* [2023] UKSC 51; [2024] 2 W.L.R. 237.

[75][2009] EWHC 1782 (Admlty); [2009] 2 Lloyd's Rep. 420.

[76]See *The WD Fairway (No 2)* [2009] EWHC 1782 (Admlty); [2009] 2 Lloyd's Rep. 420 at [50] (also cf [2009] EWHC 889 (Admlty); [2009] 2 Lloyd's Rep. 191 at [80]).

unencumbered title to the buyer, a title which undoubtedly did have to be respected in England.[77] Secondly, the denial of an equitable title is in any case problematic. It is hard to reconcile not only with the decision in *The Angel Bell* (which gave effect to an equitable mortgage in the teeth of a registry law that recognised no such thing), but also with the other authorities mentioned above confirming that an English-style trust can be recognised even over assets situated in a land that recognises no possibility of an equitable interest. In short, it is suggested, with respect, that the dicta of Tomlinson J are wrong.

2. *Does the rule make sense?*

Assuming the rule suggested here can accommodate at least most of the authorities, does it also do what any conflicts rule should do, namely adequately balance the various different interests of the parties? It is suggested that it does.

Take first the suggestion that, as between the *lex situs* and the law of the place of registry, the court should not have to make a binary choice but instead should accept that either will do. The reason why this makes sense is that when it comes to buying, or lending against, a ship, a buyer or mortgagee has a reasonable expectation that their reliance on either will be protected.

With the law of the registry this is obvious. In the context of ship acquisition and finance, not only is the first stage of any due diligence exercise by a potential buyer or mortgagee inevitably a check on whether the contemplated transaction complies with the requirements of registry law: the assumption is generally that if according to that law the buyer gets a clear title (or security), then that will be upheld worldwide unless and until something happens to divest it.

Perhaps counter-intuitively, however, a fairly similar argument can be made about the *lex situs*. Imagine a person buying, or lending against, a vessel following some transfer that took place when she was physically in Ruritania and which was effective under Ruritanian law to transfer title (a typical example being where she has been seized and subjected to a court-ordered auction on behalf of the Ruritanian state, or a local creditor). Such a person, having relied on the law of the state having physical control over the vessel at the time of her last transfer, has the same powerful claim to be assured that in so far as the sale in fact passes clear title under that law as any other buyer of property which has been subjected to expropriation.[78]

[77]Compare *Byers v Saudi National Bank* [2023] UKSC 51; [2024] 2 W.L.R. 237, above.
[78]As in cases like *Luther v James Sagor & Co* [1921] 3 K.B. 532 or *Paley Olga (Princess) v. Weisz* [1929] 1 K.B. 718. Staughton LJ made the point neatly, again in the non-marine context, in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 W.L.R. 387, 400: "There is in my opinion good reason for the rule as to chattels. A purchaser ought to satisfy himself that he obtains a good title by the law prevailing where the chattel is, … but should not be required to do more than that."

Conversely, it is submitted that the parallel rule of "last in time," that is, that title gained under one system of law is vulnerable to a later title obtained under another, also reflects the natural limits of such reasonable reliance. The buyer or mortgagee of a Ruritanian-flagged vessel, however scrupulously they may have observed the correct Ruritanian formalities, can also be expected as a reasonable businessperson to realise that if she visits a port in Utopia, expropriation or seizure by the authorities there is always a possibility. This is quite simply a risk inherent in shipowning. Again, suppose a person buys a Ruritanian-registered vessel while she is physically in Utopia. Although the title the buyer gets under Utopian law should be respected, they must equally be taken to know that, given the importance placed by shipowners and others on the law of the registry, steps may be taken later by the previous owner to transfer that title to someone else under the law of Ruritania. In short, little or no injustice is done by always giving effect to the latest transaction.

This leaves the *Angel Bell* principle: even if a transaction creates no legal right *in rem* under either the *lex situs* or the law of the registry, it can nevertheless engender a valid equitable mortgage or other interest if English law would say so. At first sight, this looks more difficult: is it not just a piece of unjustifiable English exceptionalism cutting across the general rules of the conflict of laws relating to property transfers?

Possibly. However, principle must at times yield to pragmatism; and when looked at more closely the *Angel Bell* rule seems to do a good deal of practical justice and not to cause too much unfairness. To begin with, as between the parties themselves (and their privies, such as liquidators), it can hardly be denied that it reflects their intent. A person who agrees to grant a mortgage can hardly complain if a court orders them to behave as if they were indeed a mortgagor; so too, if they agree to sell a vessel and the buyer claims to have at least some of the rights of a buyer under a specifically-enforceable contract.

Secondly, it is worth noting that, far from being seriously subversive, when it comes to the rights of third parties the principle's effect is actually rather limited. For one thing, in practice it will only apply where either the vessel is in England, or the person against whom the claimant seeks to enforce their rights[79] is otherwise subject to the jurisdiction of the English courts.[80] Furthermore, the rights gained under the *Angel Bell* principle are themselves highly precarious. For one thing, like all equitable rights they give way to those of a good faith purchaser of a legal interest without notice; and secondly, they are subject to defeat by a

[79]For example, where an owner who has granted an English-style equitable mortgage over a vessel in some foreign country, on the lines of that encountered in *The Angel Bell* [1979] 2 Lloyd's Rep. 491, seeks to sell or encumber her in a way inconsistent with the mortgagee's rights, and the latter seeks an injunction to prevent this.

[80]An instance of this might be where the contract to grant a mortgage was not only capable in English law of giving rise to an equitable interest, but was also either made here, or governed by English law: CPR PD 6B, 3.1(6)(b), (c).

subsequent transfer. They will be destroyed, for example, by a sale or mortgage under either the law of the place where the vessel is then situated, or the law of her registry.

E. Conclusion

It is suggested here that the question of what law governs the creation of rights *in rem* in ships (in the sense of proprietary rights), far from being a minefield, is susceptible of a relatively simple answer. Essentially, an interest will be recognised in an English court if it arises under the law of the registry, the *lex situs*, or (in the case of an equitable right) the rules of English law. Such a rule not only reconciles what would otherwise be some impenetrably contradictory case-law, but also protects the interests of shipowners, mortgagees and others. If a case does arise that will put it to the test, then we will have to wait and see whether it is found to be an acceptable way out of what has previously been something of an impenetrable jungle.

Disclosure statement

No potential conflict of interest was reported by the author(s).