ADMIRALTY LAW – THE FLYING DUTCHMAN OF CROSS-BORDER INSOLVENCY

The Hon Justice Steven Rares*

1. For millennia, man has sailed in ships to the corners of the known world. Those journeys, at least when undertaken peacefully, almost always involved some trading activities, even if their purpose was simply to victual the ship for the return voyage. In these endeavours, the ships and their masters incurred debts to foreigners far away from their home jurisdictions. From these beginnings Professor William Tetley[1] states that the Island of Rhodes had begun to develop an unwritten *lex maritima* by the 9th or 8th centuries BC. Prof Tetley noted that this led, first, to the Digest of Justinian recording some principles of sea law and later to Rhodian sea-law scholars in Byzantium, formulating provisions dealing with maritime liens and ship mortgages.

2. The great English commercial judge, Lord Mansfield CJ said in 1759[2]:

> "… the maritime law is not the law of a particular country, but the general law of nations."

3. Over time, each major maritime jurisdiction has developed its own, adapted, legislative and judicial regimes for dealing with matters of Admiralty. Lord Halsbury LC stated that the English and Scottish Admiralty law was derived from the laws of Oleron, supplemented by the civil law[3]. This law established principles and rules for dealing with various categories of claims that could be enforced against the ship itself – the action *in rem* – and the person, usually the

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[1] William Tetley QC, 'The General Maritime Law – The Lex Maritima' (1994) 20 *Syracuse Journal of International Law and Commerce* 105 at 109-112

[2] *Luke Lyde* (1759) 2 Burr 882 at 887, as Scott LJ noted in *the Tolten* [1946] P at 155

[3] *Currie v M'Knight* [1897] AC 97 at 102: see too at 106 per Lord Watson; *The Tolten* [1946] P at 155-156 per Scott LJ; Tetley, above n 1, at 110

owners, by their agent the master, who incurred the liability – the action *in personam*. There is, remarkably, a distinct and relatively international legal system that today enforces maritime claims, as can be seen from Judge Wang's paper. In his 2009 William Tetley Lecture at Tulane University, Justice Allsop[4] said:

> "As Professor Tetley makes clear[5] the varied arrangements of different legal systems through the maritime lien, the action *in rem*, the action *in personam* and maritime attachment have the effect of creating a coherent and harmonised (though not uniform) system of enforcement of maritime claims. Personal claims are transformed by the exercise of maritime jurisdiction by maritime courts into secured claims over defined and quarantined property, taking their ranking by reference to well-known harmonised rules, regulated in part by international convention[6]and in part by the general law."

4. In general, the presence of a ship is what enlivens jurisdiction in Courts of Admiralty. This may be the only local connecting factor. So, Admiralty jurisdiction can be exercised by courts of the forum in proceedings brought by one foreigner against another equally foreign party[7]. A number of international conventions may be relevant to resolving issues that arise in disputes involving ships and Admiralty, particularly the 1952 Arrest Convention (*International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, Brussels 1952*). However, that Convention does not represent or constitute customary international law[8]. In addition, the more recent *Model Law on Cross-Border Insolvency* of the United Nations Commission on International Trade Law (UNCITRAL) may be added to the list.

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4 President of the Court of Appeal Supreme Court of New South Wales: The 2009 William Tetley Lecture, Tulane University, *Maritime Law – the Nature and Importance of its International Character*, 15 April 2009 at [49]; see too: *The Tolten* [1946] P at 142 and 148 per Scott LJ.

5 William Tetley QC, *International Maritime and Admiralty Law* (2002) Ch 10.

6 *International Convention for the Unifications of Certain Rules Relating to Maritime Liens and Mortgages 1926* (the 1926 Lien Convention); *International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967* (the 1967 Lien Convention); *International Convention on Maritime Liens and Mortgages 1993* (the 1993 Lien Convention)

7 However, the discretion whether or not to exercise the jurisdiction is a separate topic: see e.g. *Puttick v Tenon Ltd* (2008) 238 CLR 265 at 276 [27], 277 [29] per French CJ, Gummow, Hayne and Kiefel JJ; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Spiliada Maritime Corp v Causalex Ltd* [1987] AC 460; *The Atlantic Star* [1974] AC 436 esp at 468D-F per Lord Wilberforce citing *Canada Malting Co Ltd v Paterson Steamships Ltd* 285 US 413 (1931) esp at 421-423 per Brandeis J for the Court

8 *The Atlantic Star* [1974] AC 436 at 464B per Lord Wilberforce

5. Once sea trading developed, multinational business followed. Early examples were the British East India Company and its Dutch counterpart. And, in time, as we know, international trade and commerce expanded beyond the transactions involved with sea trading. With the ever expanding reach of multinational corporations came multinational insolvencies[9].

6. In more recent years, and even before the adoption by many common law jurisdictions of the Model Law some degree of international co-operation in corporate insolvency has been achieved by judicial practice. This was exemplified in *In re HIH Insurance Ltd*[10]. There, the House of Lords held that under s 426 of the *Insolvency Act 1986* (Imp) a liquidator in an ancillary winding up could be directed by the Court of that jurisdiction not to apply the local law for distribution but instead to remit the assets to the principal liquidator for distribution to all creditors according to the rules for distribution in the jurisdiction of incorporation[11]. Today, the *Model Law on Cross-Border Insolvency* has rationalised and systemised insolvent administrations in more than one jurisdiction. It represents an attempt to impose a "universalist" approach on cross-border insolvencies[12]. And the approach of their Lordships was

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9 In the first half of the twentieth century; an insolvent corporation with assets and or liabilities in more than one jurisdiction could be wound up under the legislation of each jurisdiction. And, if a surplus was realised in an ancillary winding up only the balance remaining after paying the claims of local creditors then be made over to the liquidator in a place of incorporation: *Primary Producers Bank v Hughes* (1931) 32 SR (NSW) 14 at 19-20 per Harvey CJ in Eq; *In Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196 at 207, 209-210 per Maugham J; *In Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 per Scott V-C

10 [2008] 1 WLR 852

11 *HIH* [2008] 1 WLR at 859-860 [19]-[21], 861 [28] per Lord Hoffmann, 864 [43] per Lord Phillips of Worth Matravers, 872 [63] per Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury at 876-877 [78]-[81]

12 A useful working definition of this approach is outlined by a Canadian scholar, Professor J S Ziegel, 'Ships at Sea, International Insolvencies, and Divided Courts' (1998) 29 *Canadian Business Law Journal* 417 at 417:

"*International insolvency jurists have long classified counties and their conflict of laws rules according to their willingness to recognise and give effect to foreign insolvency orders and judgments. Those regimes that are hospitable to extending such recognition are labelled universalist; those that deny such recognition are classified as territorialist*."

see, generally, The Hon JJ Spigelman 'Cross Border Insolvency: Co-operation or Conflict' (2009) 83 *Australian Law Journal* 44: J Clift, 'The UNCITRAL Model Law on Cross-Border Insolvency

acknowledged and emulated by Judge Glenn in a recent decision recognising the primacy of Danish proceedings under the Model Law in the insolvency of a Danish shipowner[13]

7. Over the centuries, individual nations and their courts have developed Admiralty and maritime law to provide a suite of measures offering practical, and local, recourse against the ship itself, in addition to her owners and others interested in the voyage. This is achieved by the two distinct procedures of an action *in rem* and an action *in personam*. The most powerful and unique remedy is, of course, the action *in rem*. It is the signature of Admiralty jurisprudence. In it, the *res* (ship or other property) is itself the defendant so as to answer for liabilities incurred in respect of its operation. I will leave to one side other aspects such as the extension of liability of the *res* to answer for a sister or surrogate ship.

8. In an illuminating judgment, Binnie J writing for the Supreme Court of Canada[14], discussed the development of Admiralty law as follows:

> "25 Shipping was one of the earliest activities that required international cooperation in the regulation of the rights and obligations of its participants. "For the cradle of our maritime law we must turn to the Mediterranean Sea where the sea commerce has had a continuous history for nearly five thousand years": *Benedict on Admiralty* (7th ed. (loose-leaf)), vol. 1, at p. 1-4; and see generally W. Tetley, *Maritime Liens and Claims* (2nd ed. 1998), at pp. 7-8. Maritime lawyers were forced to confront the need for rules to govern international commerce centuries before the "universalist approach" became a key issue in bankruptcy. Seamen, salvors, ship chandlers, repairers and other suppliers of

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-- A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency' (2004) *Tulane Journal of International and Comparative Law* 307; A J Berends, 'The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 *Tulane Journal of International and Comparative Law* 309; J L Westbrook, 'Locating the Eye of the Financial Storm' (2006-2007) 32 *Brooklyn Journal of International Law* 1019; S L Bufford, 'Center of Main Interests, International Insolvency Case venue, and Equality of ARMS: The Eurofood Decision of the European Court of Justice' (2006-2007) 27 *Northwestern Journal of International Law and Business* 351; K Anderson, 'Testing the Model Soft Law Approach to International Harmonisation: A Case-Study Examining the UNCITRAL Model Law on Cross-Border Insolvency' (2004) 23 *Australian Yearbook of International Law* 1; A Trichardt, 'The UNCITRAL Model Law on Cross-Border Insolvency' (2002) 6 *Flinders Journal of Law Reform* 95; A Ranney-Marinelli, 'Overview of Chapter 15 Ancillary and Other Cross-Border Cases (2008) 82 *American Bankruptcy Law Journal* 269

[13] *In re Atlas Shipping A/S* 404 BR 726; 2009 AMC 1150 at fn 18; (Bkrtcy SDNY)

[14] *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)* [2001] 3 SCR 97 at 923-924 [25]-[26]

essential goods and services to the ship in foreign ports required some assurance of payment. They looked to the ship. Common rules were essential because suppliers dealt with ships from many countries and the Masters found themselves in distant ports in an age when communications with ship owners were slow and unreliable. In maritime commerce, "rules of practical convenience commanding general assent are a virtual necessity": *Laane and Baltser v. Estonian State Cargo & Passenger Steamship Line*, [1949] S.C.R. 530, *per* Rand J., at p. 545. See also: *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683, at p. 695. Practicality required an *in rem* proceeding against the ship as distinguished from an *in personam* action against the shipowner. The need for predictability and uniformity was so strong that even the common law courts, ever protective of their own ways, ceded jurisdiction to specialized courts of admiralty applying a largely international law of maritime commerce. As Professor Tetley, *supra*, writes, at p. 56:

> [M]aritime law as we know it today is civilian in nature, finding its source in the *lex maritima* (the law maritime) which is a part of the *lex mercatoria* (the law merchant). Maritime law was codified, international law and, in England, it was apart from, and opposed to, its nearly mortal enemy, the common law.

26 The *in rem* interest in ships took many forms, some created by statute, others by mortgage, still others by possession. One of the most ancient and effective forms of security was (and is) the maritime lien."

9. The legal theory underpinning how arrest, "provisional arrest", maritime attachment or, as the French say, "saisie conservatoire" operates, varies from jurisdiction to jurisdiction. But such arrests, as I will call them, are different from steps taken to enforce judgments by execution after judicial determination of parties' rights in an action: i.e. attachment, as English law would describe it, or "saisie exécutoire" as the French would[15]. The *1952 Arrest Convention* was drafted to reflect the more limited English conception of the right to arrest a ship as security for the categories of claims capable of being brought as proceedings *in rem*. Australian and English law draw on, but are not governed by, the provisions of that convention.

The Australian Position in Admiralty

10. As most people are aware, Australia is surrounded by sea. For most of the last 200 years it has been engaged in very substantial sea trading, exporting primary

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[15] F Berlingieri (ed), *The Travaux Préparatoires of the 1910 Collision Convention and of the 1952 Arrest Convention* (1997, CMI) at 248-249, 296-297, Art 1(2) definition of "arrest" and "saisie" at 471

products such as wheat, wool and a variety of minerals like coal and iron ore. Australia's Constitution conferred power on its federal parliament to make laws in any matter of Admiralty and maritime jurisdiction[16]. This power was used to support the enactment of the Australian *Admiralty Act 1988* (Cth). That Act is based on a scholarly and comprehensive report on *Civil Admiralty Jurisdiction*[17] prepared by the Law Reform Commission in 1986.

11. Broadly the Act recognises that proceedings *in rem* can be brought in respect of:

    (1) proprietary maritime claims, being ones concerned with ownership of ships or other interests in ships or their freight and enforcement of judgments[18];

    (2) general maritime claims, being claims in 22 categories of liability including claims for damage done by a ship, damage to cargo, claims for freight, salvage, general average, towage, repair, crew wages, disbursements on account of the ship by the master, charterer or agent and significantly, for the enforcement of arbitral awards[19];

    (3) maritime liens, such as liens for salvage, damage done by a ship, wages of the master or crew members and master's disbursements[20].

12. The *Admiralty Act* expressly provides, in s 29, for one further purpose to be served by an arrest when proceedings have been properly commenced *in rem*. This recognises the crucial role of arbitration as a servant of international maritime trade and commerce. A ship or other property under arrest, or security put up for its release, can be retained by the Court as security for the satisfaction of any arbitral award as well as any foreign judgment[21].

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16 *Constitution of the Commonwealth of Australia*, s 76(iii)
17 ALRC 33
18 ss 4(2), 16
19 ss 4(3)(a)-(w), 17
20 ss 6(a), 15
21 see *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 87-88 [165], 94-95 [192]-[193] per Allsop J, Finn and Finkelstein JJ agreeing; see too *Fiona Trust & Holding Corp v Privalov* [2008] 1 Lloyd's Rep 254 at 260 [31] per Lord Hope of Craighead

13. Critically, the *Admiralty Act* maintains the distinction between proceedings *in rem* and those *in personam* when it provides in s 31 for the differential consequences of judgments against, first, the ship or other property (which are limited to their value) and, secondly, against a defendant who has entered an appearance and would be personally liable if sued in proceedings *in personam*. Next, s 36 provides that the power to arrest a ship under the *Admiralty Act* overrides the powers in all other laws, including Australian State or Territory laws, to detain the same ship in relation to a civil claim that may be commenced as an action *in rem*, even when it has been detained prior to the arrest.

The Australian Cross-Border Insolvency Act and Model Law

14. The *Cross-Border Insolvency Act* gives the force of law in Australia to the Model Law, as affected by that Act[22]. The Model Law both supports and supplements the *Bankruptcy Act 1966* (Cth) and most of Ch 5 of the *Corporations Act 2001* (Cth)[23]. As most ships likely to be involved with cross border insolvency issues will be owned by companies, not individuals, I will discuss the Model Law questions in respect of corporations.

15. It is important to appreciate that the Model Law and the relevant provisions of the *Corporations Act* are concerned with an insolvent debtor whose assets and liabilities are to be administered[24]. The functions of the Federal Court of Australia and the Supreme Courts of the States and Territories under Art 4 of the Model Law,[25] relating to recognition of foreign proceedings and co-operation with foreign courts, include attaining objectives of the Model Law, such as the fair and efficient administration of cross border insolvencies that protects the interests of all creditors, the debtor and any other interested persons and the protection and maximisation of the value of the debtor's assets[26].

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22 s 6

23 see ss 8 and 20; Pts 5.2 and 5.4A and s 601 CL of the *Corporations Act* are largely left unaffected; and s 22 provides for the Model Law to Supplant Div 9 of Pt 5.6 and Pt 5.7

24 see s 10

25 see s 10(b)

26 Preamble to the Model Law pars (c) and (d)

16. A foreign representative, such as a liquidator, can apply to an Australian Court for recognition of foreign judicial or administrative proceedings under a foreign State's laws relating to insolvency that place the assets and affairs of the debtor under the control or supervision of a foreign court for the purpose of re-organisation or liquidation[27]. A foreign main proceeding is one that takes place in the State where the debtor has the centre of its main interests[28]. Unless there is proof to the contrary, Art 16(3) provides that the centre of the debtor's main interests is presumed to be its registered office (or, in the case of an individual his or her habitual residence). This may be of significance for creditors with claims against a ship owned by a company with a registered office in a country that permits the ship to fly a flag of convenience. Under the Model Law, other foreign proceedings are ones in States where the debtor has an "establishment" being a place where it carries out a non-transitory economic activity with human means and goods or services[29].

17. A distinction between the legal personality of the debtor and the debtor's assets is fundamental to the operation of the Model Law. The question arises how those two distinct concepts interact with proceedings *in rem*. Such proceedings have, at least, the effect of treating the *res* as the, or a, debtor.

18. Once proceedings are filed for recognition of a foreign proceeding, the Model Law provides important consequences. First, the Court can grant provisional or interim relief, including, orders staying execution against the debtor's assets, staying the commencement or continuation of proceedings concerning the debtor's assets, rights, obligations and liabilities and entrusting the administration of the whole or part of the debtor's affairs located here to the foreign representative or someone else[30].

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27 see Arts 2(a), (6)
28 Art 17(2)(a)
29 Arts 2(f), 17(2)(b)
30 Arts 19(d), 21(c)

19. Secondly, once a foreign main proceeding is recognised, usually,[31] a stay is imposed by Art 20 against the commencement or continuation of any proceedings concerning the debtor's assets, rights, obligations and liabilities. There is also a stay preventing execution against any of its assets[32]. In addition to that automatic stay, Art 21 provides:

> "Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:
>
> (*a*) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (*a*) of article 20;
>
> (*b*) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (*b*) of article 20;
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> …"

20. Australia used its powers under Art 20(2) to apply the existing provisions of the *Corporations Act* as conditions relating to the scope, modification and termination of the automatic stay of proceedings against the debtor company[33]. Broadly speaking, the likely result of an Australian Court giving recognition to a foreign main proceeding under Art 20 is that proceedings and enforcement processes against the debtor and its assets will be stayed. However, the Court then has a wide discretion to vary or lift the automatic stay in individual situations. I will consider this issue below in relation to proceedings *in rem*.

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31 subject to the provisions of most of Ch 5 of the *Corporations Act* except Pt 5.2 and Pt 5.4; see s 20 and Art 20(2). The first exception (Ch 5.2) deals with a corporation's position in relation to and after the appointment by a secured creditor of a receiver or controller of its property and the incidents of that situation. The second exception (Ch 5.4A) deals with the powers of the Court to wind up a corporation for reasons other than its insolvency.

32 Art 20(1)(a) and (b)

33 s 16(b) of the *Cross Border Insolvency Act 2009* (Cth); see *Corporations Act 2001* (Cth) ss 440B, 440D, 467(7), 471B, 471C, 500, 587; see S Derrington, 'The Interaction Between Admiralty and Insolvency Law' (2009) 23 *Australia & New Zealand Maritime Law Journal* 20; Derrington & Turner, *The Law and Practice of Admiralty Matters* (2006) Ch 8 Part B

21. The domestic court must also co-operate with foreign courts and representatives, including directly communicating with them[34]. In some cases, judges have written to their foreign counterparts for the purpose of the proceedings[35].

Administration under Ch 5.3A of the *Corporations Act*

22. Australian law permits a corporation that is or is likely to become insolvent to go into administration[36]. The purpose is to enable the corporation, its creditors and the administrator to explore whether some re-organisation of the debtor would preserve it or its business or as much of these as possible. And, if that were not possible, they would explore how to obtain the best return to the creditors in a winding up[37]. All of this occurs within a tight time frame, usually within about two months, although the Court can extend the time.

23. During this period ss 440D and 440F of the *Corporations Act* impose a very broad stay, retraining both secured and unsecured creditors from proceeding against the debtor and any of its property except with the leave of the Court. And, creditors cannot enforce their guarantees against directors of the debtor or their spouses, de factor spouses or relatives[38] The statutory purpose of restraining secured creditors in this way is to facilitate the possibility of the creditors reaching an overall solution that can employ the debtor's most significant and valuable assets: i.e. the assets most likely to be given as security to creditors. In addition, Div 7 of Pt 5.3A contains a number of exceptions protecting secured creditors from the automatic stay.

Winding Up under the *Corporations Act*

24. The other major form of resolving a corporate insolvency in Australia is by a winding up of the debtor. The *Corporations Act* creates an automatic stay once

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34 Art 25, 26

35 see e.g. *CSL Australia Pty Ltd v Britannia Bulkers PLC* (USDC : SDNY 8 September 2009: 2009 WL 2876250 (S.D.N.Y.) at 4: *In re Atlas Shipping A.S.* 404 BR 726; 2009 AMC 1150 (Bankr SDNY 2009)

36 Ch 5.3A of the *Corporations Act*

37 s 435A

38 s 440J

the Court orders[39], or the creditors or members resolve[40], that the company be wound up. The stay prevents the commencement or continuation of proceedings against the company except with leave of the Court. However, the legislation then descends into perplexing, and unnecessary, differences between court ordered and voluntary windings up.

25. Where the Court orders a winding up, then, under s 471B, proceedings "*... in relation to the property of the company*" and "*enforcement process in relation to such property*" are prevented except with leave of the Court. Thus, a ship or proceedings *in rem* may be affected. However, s 471C provides that nothing in s 471B "*... affects a secured creditor's right to realise or otherwise deal with its security*".

26. In contrast, under s 500(1), after the passing of a resolution for a voluntary winding up, any "*... attachment, sequestration, distress or execution put in force against the property of the company ... is void*". However, the Court presumably can grant leave to take or continue such action or proceedings under s 500(2). There does not appear to be any express exception for secured creditors comparable to s 471C in a voluntary winding up[41].

Debtors, Ships, Assets and *Res*

27. What justification exists in insolvency situations for treating *in rem* proceedings with maritime claims and liens differently to ordinary creditor's claims against their debtors? First, a ship is peripatetic. Secondly, it is often uncertain who is the owner at any precise time. Shipping registers, such as that maintained in Lloyd's Registers of Shipping and of Shipowners are not always reliable, especially since ships can be sold or chartered after the latest update is provided to the registry. This difficulty has been adverted to by Martin Davies[42]. And the registers are not necessarily conclusive of who the true owner or charterer is if

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39 s 471B(a)

40 s 500(2) and see too 587

41 That is similar to the position in England when *In re Aro Co Ltd* [1980] Ch 196 at 202D-E was decided.

42 'In Defense of Unpopular Virtues: Personification and Retification' (2001) 75 *Tulane Law Review* 337 at 349-350, 363-364

something occurs to make knowing this important. Thirdly, when a ship calls at a port and someone, such as a ship's agent, engages stevedores, orders fuel or necessaries, such as food, or repairs, it is not always clear for whom that person is acting: the owner or a charterer. Once the ship leaves port with a bill unpaid, obtaining payment from the person in fact liable is not always easy. Fourthly, shipowners often flag their vessels in places remote from where they do business, with legal systems that are not always well regarded.

28. The justification for the right to arrest a vessel is that "… *ships are owned and trade internationally, and unless a claimant can gain immediate security for a claim he may never have the opportunity effectively to pursue it*" [43]. This doctrine was rationalised in similar terms over a century earlier by Dr Lushington who said "*an arrest offers the greatest security for obtaining substantial justice, in furnishing a security for prompt and immediate payment*[44]".

29. Lord Simon of Glaisdale observed appositely in a dissenting speech dealing with the principle of "forum non conveniens"[45]:

> "(8) Ships are elusive. The power to arrest in any port and found thereon an action in rem is increasingly required with the custom of ships being owned singly and sailing under flags of convenience. A large tanker may by negligent navigation cause extensive damage to beaches or to other shipping: she will take very good care to keep out of the ports of the "convenient" forum. If the aggrieved party manages to arrest her elsewhere, it will be said forcibly (as the appellants say here): "The defendant has no sort of connection with the forum except that she was arrested within its jurisdiction." But that will frequently be the only way of securing justice.
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> (9) "Forum-shopping" is, indeed, inescapably involved with the concept of maritime lien and the action in rem. Every port is automatically an admiralty emporium. This may be very inconvenient to some defendants, but the system has unquestionably proved itself on the whole as an instrument of justice."

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43 *In re Aro* [1980] Ch at 206A-B per Stephenson, Brandon and Brightman LJJ; *The "Volant"* (1842) 1 W Rob 383; see too *The "Cella"* (1888) 13 P Div 82 at 88 per Fry LJ

44 *The "Volant"* (1842) 1 W Rob at 387.

45 *The Atlantic Star* [1974] AC at 472H-473B; cited by Binnie J with approval in *Holt Cargo* [2001] SCR at 948-949 [93]-[94]

30. In *Holt Cargo*[46] Binnie J identified the sound policy reasons for treating the action *in rem* as an exception to the universalist approach to cross-border insolvency. His Lordship said:

> "27 The reason for this privileged status for maritime lien holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships (as indeed was the case here, where initially Holt named the wrong corporation as ship owner). Merchant seamen will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage. The Master may be embarrassed for lack of funds, but the ship itself is assumed to be worth something and is readily available to provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence. The appellant Trustees' claim to "international comity" in matters of bankruptcy must therefore be weighed against competing considerations of a more ancient and at least equally practical international system -- the law of maritime commerce."

31. The practical effect of Admiralty proceedings *in rem*, of course, in general, stands outside the Model Law's aspiration for an orderly distribution of an insolvent debtor's assets amongst its creditors. This is a new aspect to what one commentator[47] described as a "law war" between Admiralty and insolvency jurisdictions. Academic commentary on this area of interaction is expanding[48]

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[46] [2001] 3 SCR at 925 [27]; drawing on Lord Simon's exposition *Holt Cargo* [2001] 3 SCR at 948-949 [93]-[94]

[47] Ramsay McCullough, 'Law Wars: The Battle Between Bankruptcy and Admiralty' (2007) 32 *Tulane Maritime Law Journal* 457

[48] There is certainly a deal of literature on the topic, see, eg, John Levingston, 'Admiralty and Insolvency Courts in Conflict' (2008) 82 *Australian Law Journal* 849; Sarah Derrington, 'The Interaction Between Admiralty and Insolvency Law' (2009) 23 *Australian and New Zealand Maritime Law Journal* 30; John Stranburger, 'The ABC's of Admiralty and Bankruptcy in Concert or Conflict' (1990) 21 *Journal of Maritime Law and Commerce* 273; Melissa KS Alwang, 'Steering the Most Appropriate Course Between Admiralty and Insolvency: Why and International Insolvency Treaty Should Recognise the Primacy of Admiralty Law over Maritime Assets' (1996) 64 *Fordham Law Review* 2613; Gary F Seitz, 'Interaction Between Admiralty and Bankruptcy Law: Effects of Globalisation and Recurrent Tensions' (2009) 83 *Tulane Law Review* 1339; William Tetley QC, 'Conflicts of Law Between the Bankruptcy Courts Admiralty: Canada, United Kingdom, United States and France' (1995) 20 *Tulane Maritime Law Journal* 257; Edward M Keech, 'Problems in the Liquidation and Reorganisation of International Companies in Bankruptcy' (1985) 59 *Tulane Law Review* 1239.

and earlier this year the Federal Court of Australia held a national seminar on the topic[49].

32. But it is hardly surprising that Admiralty jurisprudence has developed a special status for maritime liens and maritime claims recognised by the *lex fori* (law of the place of the proceedings). As Professor Tetley has noted:

> "[p]re-judgment security is of the highest importance to the maritime creditor, who always faces the threat of being unable to recover his debt from an impecunious or unscrupulous debtor, if the debtor's ship — the main asset on which so many maritime creditors depend in extending credit — should sail away without the debt being paid[50]."

The Australian Action *in rem*

33. The law relating to the nature and incidents of an action *in rem* in Australia[51], New Zealand[52] and, seemingly, Singapore[53] is no longer coherent with the law in England since the controversial and conceptually problematic decision of the House of Lords in *The Indian Grace*[54].

34. Following the decision in *Comandate*[55], under Australian law an action *in rem* is an action against the ship and not its owner or demise charterer, at least before a relevant person has entered an unconditional appearance. Indeed, in *Aichhorn & Co KG v The Ship MV "Talabot"*[56] Menzies, Gibbs and Mason JJ said:

> "In *Northcote v. Owners of the "Henrich Bjorn"* (1886) 11 App Cas 270 at 276-277 , Lord Watson described an action in rem as follows:
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> > 'The action is in rem, that being, as I understand the term, a proceeding directed against a ship or other chattel in which the plaintiff seeks either to have the res

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49 Federal Court of Australia: Admiralty and Maritime Law Nationwide Seminar 21 May 2009; papers available on the Admiralty page of the Court website and in Vol 23 No 1 (2009) of Australian and New Zealand Maritime Law Journal at https://maritimejournal.murdoch.edu.au/index.php/maritimejournal

50 William Tetley QC, 'Arrest, Attachment and Related Maritime Law Procedures' (1999) 73 *Tulane Law Review* 1895 at 1898

51 *Comandate* 157 FCR 45

52 *Raukura Moana Fisheries Ltd v The Ship "Irina Zharkikh* [2001] 2 NZLR 801 at 821-822 [90]-[96] per Young J

53 *Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 3 SLR 721 as explained by Allsop J in *Comandate* 157 FCR at 75 [103]

54 *Republic of India v India Steamships Co Ltd (The Indian Grace) (No 2)* [1998] AC 878

55 157 FCR at 81 [128]-[129]

56 (1974) 132 CLR 449 at 454-455

> adjudged to him in property or possession, or to have it sold, under the authority of the Court, and the proceeds, or part thereof, adjudged to him in satisfaction of his pecuniary claims.'

The essential nature of an Admiralty action in rem is concisely stated by the learned authors of Dicey and Morris: Conflict of Laws, 8th ed. (1967), at p. 214:

> 'Its primary object is to satisfy the plaintiff's claim out of the res. For the essence of the procedure in rem is that the res may be arrested and sold by the court to meet the plaintiff's claim, provided it is proved to the satisfaction of the court.'"

35. Their Honours later observed in passing that the action *in rem* is not simply against property, but indirectly impleads its owner and that, once an appearance is entered, the action proceeds as an action *in personam*[57]. But, as Gibbs J explained in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[58], even so, " *... it does not cease to be an action in rem:*[59]". In *The Broadmayne*[60] Bankes LJ identified the advantage of the action remaining as one *in rem*, even when it was proceeding as an action *in personam*. He said that in an exceptional, but appropriate, case the Court could order the arrest of the ship.

36. Now under the *Admiralty Act*, there is a distinction in the jurisdiction to proceed *in rem* on a maritime lien or a proprietary maritime claim on the one hand[61], and on a general maritime claim, on the other[62]. In the latter situation, the plaintiff's title to sue depends upon the existence of a critical jurisdictional fact, namely the identity and specified capacity of a relevant person at each of the time at which, first, the cause of action arose, and secondly, the proceeding is commenced. Each of ss 17, 18 and 19 addresses a discrete basis on which the plaintiff may sue. Thus, for example, under s 17 a plaintiff may commence proceedings *in rem* on a general maritime claim only if, at that time, the owner of the ship or property is the same person who, earlier, when the cause of action arose, was the owner, charterer or in possession or control of the ship or property.

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57 *Aichhorn* 132 CLR at 456

58 (1976) 136 CLR 529 at 536

59 *The Broadmayne* [1916] P 64 at 77; *The Banco* [1971] P 137 at 151 and the *Conoco Britannia* [1972] 2 QB 543 at 555

60 [1916] P at 77 as Allsop J pointed out recently in *Comandate* 157 FCR at 81 [129]

61 ss 15(1) and 16

62 ss 17, 18, 19

37. In *The Indian Grace*[63], Lord Steyn concluded that, in substance, the owner was always a party to the action *in rem* as an incident of its commencement, regardless of whether that owner appeared. Allsop J rejected that view in *Comandate*[64]. He identified a number of criticisms, powerfully demonstrating that the effect of their Lordships' decision would be to make the action *in rem* a once for all procedure that would deny the plaintiff the right to proceed later *in personam*. This result would prejudice a plaintiff if the owner did not appear in the proceedings *in rem* and the *res*, when sold, realised insufficient proceeds, because of its inherent lack of value or because of the need to pay out other claimants[65].

38. I think too that there is a further conceptual difficulty with the reasoning in *The Indian Grace*[66]. The mere arrest of the ship does not effect the exercise of jurisdiction over the owner personally. The ship must be present in the court's jurisdiction for proceedings *in rem* to be capable of valid service[67]. There is no "long-arm" jurisdiction for service of a writ of arrest outside the territorial limits of the court. Ordinarily, a court's jurisdiction over a person depends upon his or her amenability to being served effectively so as to be bound by the result in accordance with principles of private international law. Hence, most superior courts have "long-arm" provisions in their rules enabling process to be served on a defendant in another country or jurisdiction[68]. While a shipowner, or other relevant person may feel a sense of practical compulsion to enter an appearance after his ship has been arrested in proceedings *in rem*, he need not do so. Indeed, as a matter of practical reality, the owner will not appear if by doing so he submits to the jurisdiction and becomes personally liable for the difference between the value of the *res* and the judgment sum in the *in rem* action[69].

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63 [1998] AC at 909A-B
64 157 FCR 45
65 *Comandate* 157 FCR at 79 [118]
66 [1998] AC 878
67 *MV Talabot* 132 CLR at 456
68 see too: *Civil Admiralty Jurisdiction* ALRC 330 [136]
69 This reality has long been known: *The Tolten* [1946] P at 145 per Scott LJ

39. The unsatisfactory consequence of *The Indian Grace*[70] is that it fails to provide a coherent relationship between its putative joinder of the owner by the service of the proceedings *in rem* in the arrest of the ship and the patent absence of any personal submission to the jurisdiction by a non-appearing owner. That owner can thus enjoy all of the benefits of a judgment *in rem* but eschew the detriment of any personal liability for any difference in value between the judgment sum and what the *res* realises when sold, a point Allsop J tellingly made[71].

40. Curiously, although most legal systems recognise various categories of claims as giving rise to a maritime lien, as does s 15 of the *Admiralty Act*, the concept is not easy to define. Indeed, the learned author of the leading English text DR Thomas: *Maritime Liens*[72] cited Sheen J's apposite observation that it was not surprising that a maritime lien had not been defined in legislation "*... because it is more easily recognised than defined*"[73].

41. The cases acknowledge that a maritime lien attaches to the ship or other property at the time that the circumstance occurs for which proceedings are later taken *in rem* to enforce the lien, such as a collision, the rendering of salvage services[74], the owner's default in paying the wages of the master and crew or repaying the master disbursements made on behalf, and with the authority, of the owner[75].

42. The seminal decision of *The Bold Buccleugh*[76] characterised a maritime lien as a right or privilege attaching to the *res* to be carried into effect by a proceeding *in rem*. The right or privilege, once attached to the *res*, remains in place and ordinarily it will prevail in proceedings *in rem* against a ship in priority to subsequent changes in ownership, or mortgages. The lien does not include, or require, the holder of the right to have possession of the *res*; rather, it is in the nature of an hypothecation without possession[77].

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70 [1998] AC 878
71 *Comandate* 157 FCR at 79 [118]
72 (1980) at [11]
73 *The Father Thomas* [1979] 2 Lloyd's Rep 64 at 68
74 *The Tolten* [1946] P at 144 per Scott LJ; DR Thomas, *Maritime Liens* (1980) at [266]ff
75 Thomas, above n 74, at [355]ff
76 *Harmer v Bell (The Bold Buccleugh)* (1852) 7 Moo. P.C. 267 at 284-285 [13 ER 884 at 890-891]
77 *The Bold Buccleugh* 7 Moo. P.C. at 284-285 [13 ER at 890-891]

43. A person who obtains a maritime lien arising from damage done by a ship[78] anywhere in the world can bring proceedings in Admiralty *in rem* against the ship here[79]. So, if negligent navigation of a ship causes damage to another ship on the "*high seas*" or to property or personal injury to an individual, the person suffering the damage obtains, at that moment, a maritime lien that attaches to the ship[80]. The maritime lien is for the amount of the damage sustained by the injured party. As a security, that lien has priority not only over the interest of the ship's owner, but also over any interest of her mortgages[81]. It may be that this lien will also take priority over liens for earlier salvage, seaman's wages and bottomry bonds[82]. But, it is not possible to discuss the priorities of maritime liens here – indeed the Australian Law Reform Commission eschewed a similar task, leaving the issues to be decided by courts when necessary[83].

44. Importantly for present purposes, maritime liens survive the sale of a ship unless the sale is made by the Admiralty Court[84]. In *The Tolten*[85] Scott LJ said:

> "In my view the law maritime of 'damage,' as administered in our admiralty court, vests a right of action in any person, who suffers an injury anywhere in the world either to his person or to his property, whether movable or immovable, afloat or ashore, when caused by the maritime fault of the owner of a ship, he being responsible for the acts or defaults of his servants."

45. The reason why the maritime lien for damage by a ship creates such a significant intrusion into the proprietary and security rights of other persons' interests in the ship was explained over a century ago by Lord Watson. He said that the policy behind imposing the lien was that:

> "…when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy against the corpus of the offending ship and should not be restricted to a personal

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78 *Admiralty Act 1988* (Cth) s 15(2)(b)

79 *The Tolten* [1946] P at 147

80 *The Tolten* [1946] P at 158 per Scott LJ; *Mersey Docks and Harbour Board v Turner (The Zeta)* [1893] AC 468 at 482-485 per Lord Herschell LC

81 *The Bold Buccleugh* 7 Moo PC 667 applied by Fuller CJ giving the judgment in the court in *Moran v Sturges* 154 US 256 (1894) at 282; *Currie* [1897] AC at 105

82 [1897] AC at 106; Thomas, above n 74, Ch 9 esp at [426], [434]-[438]

83 ALRC 33 at [257]

84 *The Tolten* [1946] P at 145-146 per Scott LJ

85 [1946] P at 147; see too at 166 per Somervell LJ and 170 per Cohen LJ

> claim against her owners, who may have no substantial interest in her and may be without means of making due compensation."

46. This examination of the nature of a proceeding *in rem* and a maritime lien sets a context in which to discuss the impact on them of the automatic stay imposed by Art 20 of the Model Law. Australia, like most nations now, has not limited the protection given to the creditors on their debtor becoming insolvent.

Leave to proceed *in rem* after insolvency

47. Does a plaintiff seeking to proceed *in rem* or to enforce a maritime lien need leave of the Court to do so after a debtor goes into administration or begins to be wound up? In *Morris v The Ship "Kiama"*[86] Carr J granted leave under s 440D to crew members to seek to enforce their maritime liens and other maritime claims against a ship owned by a company in administration under Ch 5.3A of the *Corporations Act*. He said that they should be entitled to establish that they were secured creditors. Carr J held that the principles of Admiralty law applied and hence the ordinary considerations for granting an exception to the automatic stay under the Act did not govern the Court's discretion.

48. A usual object of suing *in rem* is to obtain security. This is achieved once the arrest is made[87]. Previously under English law, a plaintiff was granted leave to proceed against a shipowner in liquidation where, before the winding up order was made, he had issued or commenced proceedings *in rem*[88]. This was to be so even if the ship had not been arrested under the plaintiff's writ. This is likely to be the same as the Australian position, as the Australian Law Reform Commission anticipated in its Report[89]. In the United States of America Congress enacted Ch 15 of the *Bankruptcy Code* in 2005[90]. This largely gave

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86 [1998] FCA 256 at pp 9, 11-12; 16 ACLC 945

87 *In re Aro* [1980] Ch at 207H-208D-E per Stephenson, Brandon and Brightman LJJ

88 *In re Aro* [1980] Ch 196

89 ALRC 33 at [258]

90 This amendment was made by the *Bankruptcy Abuse Prevention and Consumer Protection Act* 2005 (US).

effect to the Model Law[91]. Under §1520 the automatic stay affects secured, as well as unsecured creditors, like the position that previously existed in England[92].

49. By issuing proceedings *in rem*, and before service and actual arrest of the ship, in an insolvency of the shipowner, the plaintiff is treated as a secured creditor entitled to enforce, at any time, the writ of arrest against his own, not the insolvent company's, property[93]. In *In re Aro Co Ltd*[94] Stephenson, Brandon and Brightman LJJ, a strong English Court of Appeal, decided that the holder of a maritime lien ranked as a secured creditor for the purposes of insolvency legislation. They held that the holder of a maritime lien would be automatically granted leave to enforce its charge, despite the existence of a winding up order. They held that service of the writ was not necessary to create or perfect the status of a secured creditor that the plaintiff had obtained merely by commencing the proceedings *in rem*[95]. This is similar to the result reached independently by Carr J in the "*Kiama*"[96].

***In rem* Sales**

50. The dogged durability of a maritime lien that has attached to a ship creates important practical consequences for persons who later seek to deal with her. Indeed, in *The Tolten*[97] Scott LJ discussed what he described as the

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91 see generally, S A Melnik, "United States" in L C Ho (ed), *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (2009).

92 In contrast now the *Cross-Border Insolvency Regulations 2006* (UK) implement the Model Law in England (see generally L C Ho, "England" in L C Ho (ed), above n 90. Those provisions modify Arts 20(2) and (3). The automatic stay in Art 20(1) has the same effect as that provided in the *Insolvency Act 1986* (UK) (s 130(2) of the *Insolvency Act 1986* provides for the automatic stay, s 248(a) protects the rights of secured creditors in an insolvency. Leave is required to proceed against the assets of a company, however, this will "*automatically be given*" in the context of enforcement of a right *in rem*, whether it be a maritime lien or a statutory right *in rem: In re Aro* [1980] Ch at 205C)). However, Art 20(3)(a) provides that the stay and suspension referred to in Art 20(1) does not affect any right to take any steps to enforce security over the debtor's property.

93 *In re Aro* [1980] Ch at 204B-C, 209B-E

94 [1980] Ch at 205C-D

95 [1980] Ch at 211A-B

96 16 ACLC 945

97 [1946] P at 149-153

interdependence between the Admiralty law concepts of maritime lien and limitation of shipowners' liability[98]. He said that Continental European and English law created maritime liens automatically and simultaneously with the cause of action so as to confer a true proprietary charge on the ship and freight in favour of the creditor[99].

51. In order to enforce the maritime lien the creditor is entitled to bring proceedings *in rem* to put into operation what Scott LJ described as 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 amongst the lien creditors in accordance with their several priorities, and subject thereto rateably*"[100]. Once the Court orders a sale, usually all the creditors come in prove their claims – it is a small industry in that sense.

52. The *Admiralty Act* contemplates that ships and other property arrested will be sold and the proceeds of sale applied[101]. A sale in an action *in rem* is, as Scott LJ noted, the only means of passing a clear title to a purchaser. The Court can, of course, order the sale of a ship or other property pending the final hearing of the underlying claims in the proceedings *in rem* if it is necessary to prevent wastage of the relevant asset. One example may be where the expense of maintaining the ship, including employing a skeleton crew, pending resolution of the dispute would diminish whatever value she may eventually fetch[102]. And, of course, if perishable cargo is involved, a prompt sale may be the only realistic choice to realise any value.

53. What happens if a ship is sold by a liquidator or under an order of a court exercising insolvency jurisdiction such as under the Model Law? Such a sale

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98 He had been a member of an English delegation negotiating an arrest Convention in the CMI Paris Conference of May 1937.

99 *The Tolten* [1946] P at 450: see too *Moran v Sturges* 154 US 256 (1894) at 278 and 282 per Fuller CJ giving the opinion of the Court. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence of mortgages.

100 *The Tolten* [1946] P at 145-146

101 see ss 24, 31(3), 36(5) and 41(2)(g) which provides a rule making power for sale of a ship

102 *The "Convenience Container*" [2007] 3 HK LRD 575 at [90] per Reyes J, at [97] and [163] per Stone J and Ma CJHC agreeing

does not operate in the same way as a sale by order of the Admiralty Court. The two jurisdictions deal with changes in status. But, because of the reach and operation of Admiralty law principles, or the general law of the sea, most jurisdictions recognise the authority of a sale by an Admiralty Court as passing a clear title. Such a title will be free from maritime liens attached to the ship or other *res*.

54. In giving a recent judgment of the Second Circuit Court of Appeals in *In re Millenium Seacarriers Inc*[103] Judge Sotomayor discussed this problem. Her Honour said that in the United States of America:

> "… traditional admiralty law principles suggest that only a federal admiralty court acting *in rem* has the jurisdiction to quiet title to a vessel exclusively by extinguishing its maritime liens."[104]

55. And, of course, the mere fact that a shipowner enters into insolvent administration (such as being wound up) does not extinguish the maritime lien, any more than it would a mortgage[105]. In *Millenium*[106] Sotomayor J held that the persons claiming liens had submitted the jurisdiction of the bankruptcy court and were bound by its decision in relation to those liens. This was because those persons had not arrested the ship before the proceedings commenced in the bankruptcy court and, they had asserted the validity of the liens before that court. Her Honor noted that this reasoning involved a risk that a foreign admiralty court may not recognise the efficacy of a sale of the ship in the bankruptcy proceedings as extinguishing the lien[107]. However, Judge Sotomayor concluded that this was unlikely because the persons claiming the lien had actually submitted to the bankruptcy court's jurisdiction. The context of that "*submission*" appeared to be that the lien holders were asserting that the existence of the liens precluded the bankruptcy court from

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103 419 F 3d 83 (CA 2; 2005)
104 *Millenium* 419 F 3d at 93 [4, 5] footnotes and references omitted
105 *Moran* 154 US at 285 where Fuller CJ makes the point clearly
106 419 F 3d at 101-103 [14]
107 *Millenium* 419 F 3d at 103-104 [14]

selling the ships with a clear title and they had failed to withdraw their appearances when the trial judge offered them the chance to do so[108].

56. The Federal District Courts have *in rem* and *in personam* jurisdiction over admiralty claims[109]. Similarly to Australia and England, a plaintiff may seek the arrest of a ship under Supplemental Rule C of the *Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure*[110]. However, a ship may only be arrested under Rule C to enforce a maritime lien[111]. A plaintiff also may attach any property or garnishee any debt due to the defendant by a process known as Supplemental Rule B attachment. This permits a plaintiff who has an *in personam* claim cognisable in admiralty to attach any personal property of a defendant not then present within the District Court's jurisdiction[112]. This process resembles the civil law process of *saisie conservatoire*[113], and is described as a *quasi-in rem* action[114].

57. Until October 2009 Rule B's ambit was extremely broad and Rule B attachment was used to seize and freeze electronic funds transfers that passed through any New York bank account instantaneously even though the transfer was only a means of transferring US dollar money to a defendant's account elsewhere in the world[115].

58. The United States District Court for the Southern District of New York had become a lightning rod for such proceedings so that by early 2009 one-third of

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108 *Millenium* 419 F 3d at 91 [1]

109 Pursuant to 28 USC §1333; Thomas Schoenbaum, *Admiralty and Maritime Law* (2004, 4th ed) at 78-83; Tetley, above n 50, at 1928, 1932

110 Tetley, above n 50, at 1933

111 The number of maritime liens are, however, far larger in the US than in England or Australia, with claims for "'necessaries" (supplies, repairs, bunkers, etc), general average contributions, towage, and maritime insurance premiums" giving rise to maritime liens in the US. Tetley has described the US position as so broad that "maritime liens are recognised for virtually any goods or services of benefit to the navigation, management, business or purpose of the ship': Tetley, above n 50, at 1930.

112 Tetley, above n 50, at 1936-1937

113 Tetley, above n 50, at 1934

114 *The Shipping Corporation of India Ltd v Jaldhi Overseas Pte Ltd* (16 October 2009 CA:2) slip opinion at p 19

115 This mode of attachment was extremely popular: see Jillian L Benda, 'No Calm After the Storm: The Rise of the Rule B Attachment Cottage Industry' (2000) 31 *Tulane Maritime Law Journal* 95 at 107

proceedings filed there sought Rule B attachment. Over 800 writs a day were being served on banks, as Judge Cabranes wrote in a judgment agreed in by the whole of the Second Circuit Court of Appeals[116]. That Court has now concluded that funds in the process of electronic transfer in the possession of an intermediary bank are not the property of either the originator or beneficiary of the transaction. This was because the funds, and hence the *res*, were not the property of the defendant at the moment that the transfer was attached[117].

59. One can see both commonsense and the law of banker and customer at work here. The funds were being transferred between banks in order that the banks would be able to discharge their debts to their customers, not in New York, but at their ultimate destination. No doubt, many New York law firms are experiencing a sharp downturn in Rule B work.

60. Shortly before this decision, Judge Glenn in the Bankruptcy Court for the Southern District of New York delivered an important judgment applying the Model Law, as given effect in Ch 15, to the insolvency of a Danish shipowner[118]. He decided to vacate a number of Rule B attachments and to order that the funds be transferred into the hands of the Danish foreign representative. His Honor accepted the need for inter-jurisdictional comity in recognising foreign main proceedings in order to facilitate the distribution of the debtor's assets in an equitable, orderly, efficient and systematic manner, rather than in a haphazard, erratic or piecemeal fashion[119].

61. The decision in *Jaldhi*[120] has thus removed a doctrinally unsatisfactory source in Rule B of the use for a frequent potential clash between Admiralty jurisdiction and the adoption of the Model Law in cl 15. But, the potential for such clashes in the future remains in countries that have both Admiralty jurisdiction and the Model Law.

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116 *Jaldhi* CA2 : 16 October 2009 at pp 4, 6
117 *Jaldhi* CA2 : 16 October 2009 at pp 19, 23-24
118 *In re Atlas Shipping A/S* 404 BR 726
119 404 BR 726 at [8]
120 16 October 2009 CA:2

62. In cases of insolvency involving significant shipping lines, there may well be the need for courts exercising Admiralty jurisdiction over the line's ships or other property to consider whether the Model Law ought be applied. Once again, those courts will be astute to protect the interests of persons with maritime claims or liens from adventitious invocation of the Model Law. But, there may be something to be said for a fair and orderly administration of a significant multinational insolvency, providing this does not prejudice the rights of holders of maritime liens and other maritime securities.

Conclusion

63. The historical underpinnings of admiralty law and its centrality to world trade require it to remain a distinct and significant influence in international trade and commerce. Over a long period, admiralty law has given effect to the expectations of shipowners, traders and others affected by the operations of ships in adjusting their rights in its own unique, somewhat diffuse, but overall harmonious fashion. While the Model Law will also offer opportunities for rational and harmonious administration of insolvent shipowners' affairs, it should not be allowed to override the important demands and safeguards of maritime law evolved and applied internationally over millennia.