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RECONSIDERING THE LAW ON MARITIME LIENS FOR BUNKER SUPPLIERS' CLAIMS

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Reconsidering the Law on Maritime Liens for Bunker Suppliers' Claims

*Dr Victor Hugo Chacon**

This paper discusses the legal position of bunker suppliers in the wake of the OW Bunker collapse and the Hin Leong scandal. It provides a comparative analysis of recent case law on the issue from the United Kingdom, Singapore, and the United States.

The paper argues that the reasons for the historical abolition of the maritime lien for necessaries in the United Kingdom, and its restriction in the United States, are no longer compelling in the 21st century. Current circumstances, industry practice, and recent case law suggest that maintaining the 19th-century approach to enforcement of ship suppliers' maritime claims has become impractical. A more balanced approach is required.

The restoration of the maritime lien for necessaries is a practical solution to the current problem. Granting a maritime lien to the party which bears the highest exposure in the transaction and suffers the actual loss should promote the prompt payment of bunkers, prevent suppliers' insolvencies, and help restore banks' confidence in financing the shipping industry. For decades, courts have expressed 'sympathy' for supplier claims, but the situation is reaching a point that requires more than sympathy.

Keywords: Maritime law, maritime liens, bunker suppliers, enforcement of maritime claims, public policy.

1 Introduction

Ships cannot move anything without bunkers. Bunker suppliers are fundamental to the operation of the ship and, consequently, for international trade. The availability of a reliable supplier capable of providing the right quality and quantity of fuel at a specific location, on time, and at a reasonable price, is critical in the shipping business. Investors in this business face extensive and financially burdensome regulations associated with the complex infrastructure, tanks, pipes, and barges required for this type of trade. As a result of market demands, bunkers are commonly sold on credit. The precarious legal position of suppliers in collecting their debts for bunkers sold on credit became evident in the OW Bunker bankruptcy litigation, which led to suppliers' claims being dismissed by courts in the United States, the United Kingdom and Singapore, among other jurisdictions,[1] and has been highlighted by the recent bankruptcy of another giant of the bunkering industry, Hin Leong Trading Pte Ltd. The entry into force of the IMO 2020 regulation,[2] and the ongoing consequences of the COVID-19 pandemic provided additional challenges to the industry. However, the most challenging factor has been ready access to finance.[3] The recent withdrawal of some banks from commodity finance has had a significant effect on small and medium-sized firms.[4] Banks have

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[1] See Martin Davies, 'A Comparative Analysis of National Responses to the OW Bunker Collapse' (2018) 42 Tul Mar LJ 359.

[2] Regulation 14.1.3 of MARPOL Annex VI on the sulphur content of the fuel oil used on board ships: see <https://www.imo.org/en/MediaCentre/HotTopics/Pages/Sulphur-2020.aspx>. All URLs cited in this paper were accessed on 27 November 2021.

[3] See eg, Michelle Wiese Bockman, 'Bunker Suppliers Act as Banks Cut Capital Amid Looming Credit Crunch' (*Lloyd's List*, 2 December 2020) <https://lloydslist.maritimeintelligence.informa.com/LL1134953/Bunker-suppliers-act-as-banks-cut-capital-amid-looming-credit-crunch>; Jack Jordan, 'The Bunker Industry's 2020 Fell Flat For all the Wrong Reasons' (*Ship & Bunker*, 7 January 2021) <https://shipandbunker.com/news/world/719625-feature-the-bunker-industrys-2020-fell-flat-for-all-the-wrong-reasons>; 'Feature: As Banks Retreat From Commodity Trade Finance, Who Will Fund the Bunker Industry Now?' (*Ship & Bunker*, 20 August 2020) <https://shipandbunker.com/news/world/965633-feature-as-banks-retreat-from-commodity-trade-finance-who-will-fund-the-bunker-industry-now>.

[4] Such as ABN AMRO and Société Générale, both of which were exposed in the Hin Leong bankruptcy. See Adrian Tolson, 'Banking or Bunkering? Marine Fuel Liquidity in 2021' (*Lloyd's List*, 6 January 2021) <https://lloydslist.maritimeintelligence.informa.com/LL1135307/Banking-or-bunkering-Marine-fuel-liquidity-in-2021; Declan Bush, 'Bunkerers Struggle to Get Finance in Tighter Market' (*Lloyd's List*, 21 April 2021) <https://lloydslist.maritimeintelligence.informa.com/LL1136538/Bunkerers-struggle-to-get-finance-in-tighter-market>.

effectively decided to implement stricter criteria and limit credit for a business sector that operates in a volatile market, deals with low margins, sells on credit, and is not immune to unhealthy practices.[5] No financial institution will provide credit where the collaterals are consumable products and receivables, and when the legal mechanisms for securing and collecting unpaid debts are ineffective. Although the downfall of Hin Leong may not be as catastrophic for physical suppliers as the OW Bunker debacle,[6] it raises the issue of whether the law governing the enforcement of such claims needs updating, including a reconsideration of maritime liens for bunker suppliers.

This paper analyses recent decisions in the United Kingdom, Singapore, and the United States. While London has historically been the preferred forum for international maritime litigation, and its courts have established the principles still governing in most Common Law countries, Singapore has sought to position itself as a forum for international maritime justice.[7] As Singapore is the world's largest bunker supply hub,[8] the bankruptcy of these two companies had a significant impact on local businesses, and the subsequent litigation has produced important case law. The recognition in US legislation of a maritime lien for necessaries has led suppliers to include the application of US law in the terms and conditions of their bunker supply contracts. It has also made the US the most popular forum for the enforcement of these claims. The litigation of the OWB cases in the United States produced the most significant number of decisions on the subject. The pre-eminent position of these maritime jurisdictions is reaffirmed by the BIMCO Standard Bunker Terms and Conditions 2018, which provide for a choice of English, US, or Singapore law and their arbitration systems for the settlement of disputes.[9] London ranks at the top in international maritime arbitrations by numbers, followed by Singapore at a considerable distance.[10]

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5 Tolson (n 4).

6 Marcus Hand, 'Singapore Says "No Serious Impact" on Bunkering Sector from Hin Leong Bankruptcy' (*Seatrade Maritime News*, 22 April 2020) <https://www.seatrade-maritime.com/finance-insurance/singapore-says-no-serious-impact-impact-bunkering-sector-hin-leong-bankruptcy>.

7 See Steven Chong J, 'Maritime Law in Singapore and Beyond — Its Origin, Influence and Importance', CML Working Paper Series, No 17/01, March 2017 <https://law.nus.edu.sg/cml/publications/>.

8 See MPA, *Premier Global Hub Port* <https://www.mpa.gov.sg/web/portal/home/maritime-singapore/introduction-to-maritime-singapore/premier-hub-port>.

9 Clause 24 (a). See <https://www.bimco.org/contracts-and-clauses/bimco-contracts/bimco-bunker-terms-2018#>.

10 'The Maritime Arbitration Universe in Numbers: London Remains Ever Dominant' (HFW, July 2020) <https://www.hfw.com/downloads/002203-HFW-Maritime-Arbitration-in-Numbers-July-2020.pdf>.

The predominant position of these jurisdictions means that their case law has had a global impact on the bunker industry. These decisions highlight the unfavourable situation of physical bunker suppliers for collecting debts under the current legal framework and commercial practice. Such difficulties demand a revision of these rules, including a reconsideration of the law of maritime liens. This paper discusses, on the one hand, the causes that led the English courts to exclude the maritime lien for ship suppliers in the 19th century. The rule against the suppliers' maritime lien has remained intact for almost two centuries, even though the circumstances that motivated such abolition may no longer be in place. On the other hand, the paper also discusses how the US courts have interpreted their legislation on maritime liens so strictly that it resulted in the dismissal of physical suppliers' claims. The paper addresses the current practices of the industry and discusses the necessity of legislative reform in this matter.

2 Maritime liens and the shipping industry

The maritime lien was a security device created by the Roman civil law to protect certain creditors in the shipping industry.[11] It is a secured and privileged right over maritime property, usually ships, arising by operation of law, for services done to it, or injury caused by it, accruing from the moment the claim attaches without the need of registration, and travelling with the property.[12] The lien allows specific creditors, in case of non-payment, to proceed in rem against the ship, arrest it and sell it, and collect from the proceeds with priority over regular creditors. The device has proven its efficiency for centuries. English law and Singapore law grant a maritime lien to only five types of obligations: bottomry and respondentia, master's wages and disbursement, crew wages, salvage, and collision damages.[13] The US recognises

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[11] D. 42.5.26 and D. 42.5.34 (see the translation by JAC Thomas in Alan Watson (ed), *The Digest of Justinian* (University of Pennsylvania Press 1985) vol 4, 67, 69.

[12] Griffith Price, *The Law of Maritime Liens* (Sweet & Maxwell Ltd 1940) 1; DR Thomas, *Maritime Liens* (Stevens & Sons 1980) para 12; William Tetley, *Maritime Liens and Claims* (2nd edn, International Shipping Publications 1998) 59-60.

[13] Price (n 12).

the same claims as maritime liens, but also grants liens to general average, cargo damage or loss, pollution, necessaries, and mortgage claims.[14]

The evolution of international trade, the development of sophisticated communications and navigation technology, new practices in shipping, and greater State intervention in safety matters have substantially transformed the maritime industry, and as a consequence, reduced the need for maritime liens. An overview of the current state of the industry shows that the five traditional claims granted a maritime lien are in decline or have found other forms of security. Bottomry and respondentia were instruments to obtain finance for the shipping business. They are no longer in use, as they have been replaced by the ship mortgage or newer ship finance instruments. Some new methods of shipping financing are strictly corporate transactions, not requiring the ship as a guarantee.[15] Ship leasing, for example, has become a common finance instrument in Asian markets,[16] where the major shipbuilding and shipowning nations are located.[17] Modern finance conditions and measures implemented by mortgagees have made the arrests of debtors' vessels less frequent, even in times of market distress.[18]

Advances in communications have enabled the transferring of most of the obligations that traditionally required masters' disbursements to ship management companies or ship's agents. Third-party ship management has been implemented in practice for over the last four

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[14] See Thomas J Schoenbaum, *Admiralty and Maritime Law* (6th edn, West Academic Publishing 2019) 414-16.

[15] See Stephen Girvin, 'Aspects of Ship Finance, Ship Mortgage And Their Enforcement', CML Working Paper Series, No 19/05, August 2019, 10-16 <https://law.nus.edu.sg/cml/publications/>.

[16] Cichen Shen, 'Cosco Leasing Unit to Finance 16 New Castlemaxes for Sister Company' (*Lloyd's List*, 30 November 2020) <https://lloydslist.maritimeintelligence.informa.com/LL1134907/Cosco-leasing-unit-to-finance-16-newcastlemaxes-for-sister-company>; 'Ship Leasing and More Stable US Leadership Inject Confidence into Hong Kong Maritime' (*Lloyd's List*, 2 December 2020), <https://lloydslist.maritimeintelligence.informa.com/LL1134881/Ship-leasing-and-more-stable-US-leadership-inject-confidence-into-Hong-Kong-maritime>. See also Elton Chan 'Chinese leasing', in Stephenson Harwood (ed), *Shipping Finance: A Practical Handbook* (4th edn, Global Law and Business 2018) 609.

[17] China, the Republic of Korea, and Japan are the three leaders, representing 92.5% of new building deliveries. Japan, China, Singapore, and Hong Kong rank at the top five shipowning nations. See *Review of Maritime Transport 2020* (UNCTAD) 40-41 , https://unctad.org/system/files/official-document/rmt2020_en.pdf>.

[18] Charles Buss, 'Ship Mortgages: Enforcement and Remedies', in Bariş Soyer and Andrew Tettenborn (eds), *Ship Building, Sale and Finance* (Routledge 2016) 151.

decades.[19] The implementation of novel and detailed international regulations regarding safety, pollution, and crewing, among others, prompted shipowners to hire more specialised companies to undertake such tasks.[20] Ship management companies take charge of the technical and operational control of vessels, and crewing and maintenance, including the recruitment, training, and appointment of ship and shore-based personnel.[21] Ship agents represent the shipowner at seaports to provide for the ship's needs. They deal with repairs, storing, and victualling, arranging berths, tugs, harbour pilots, launches, and ordering stevedores, cranes, and equipment.[22] They also fulfil the master's requirements for bunkers, stores, provisions, cash, laundry, engine and deck repairs, crew repatriation, and completion of customs and immigration and health formalities.[23] These services are often paid for in advance. Agents often prepare and send a 'tentative pro-forma disbursement account' with the charges that the owner must pay in advance before the ship's arrival.[24]

Master and seafarer wages have found new forms of protection with the adoption of the Maritime Labour Convention 2006.[25] The Convention requires that Member States ensure that recruitment and placement agencies operating in their territories establish a system of protection, by way of insurance or other means, to compensate seafarers for monetary loss that may result from the failure of the relevant shipowner to meet its obligations under the seafarer's employment agreement.[26] Furthermore, shipowners must provide financial security to ensure repatriation and wages in case of abandonment, covering outstanding wages up to four months, and other entitlements contractually granted.[27] These provisions

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[19] Ira Breskin, *The Business of Shipping* (9th edn, Cornell Maritime Press 2018) 217.

[20] Ibid 218.

[21] Alan E Branch and Michael Robarts, *Branch's Elements of Shipping* (9th edn, Routledge 2014) 291, 303.

[22] Ibid 303.

[23] Ibid.

[24] Breskin (n 19) 248.

[25] Signed on 23 February 2006, Geneva; entered into force on 20 August 2013. it has been ratified by 98 States, including the largest open-ship registry States, covering 91% of the world's merchant fleet. See 'Maritime Centenary Challenge: reaching 100 ratifications of the MLC, 2006 (ILO, 23 January 2019) <https://www.ilo.org/global/standards/maritime-labour-convention/WCMS_664151/lang--en/index.htm>.

[26] MLC Standard A.1.4.5(c)(vi); See also Guideline B5.3 on labour-supplying responsibilities.

[27] MLC Reg 2.5, Standard A2.5.2.

facilitate the collection of wages by seafarers without the need to arrest vessels to enforce the maritime lien. However, the effectiveness of this mechanism is still debatable.[28]

The implementation of new technologies in navigation has also produced a significant decrease in the number of collisions and damage done by ships. This is evidenced in the continuous decline in the number of casualties in the last decade.[29] There has been a similar drop in reported salvage claims.[30] Salvage operations are often performed under contracts such as Lloyd's Open Form, which contain arbitration clauses.[31] This has resulted in a scarcity of salvage litigation, as acknowledged in *The Tramp,* where David Steel J stated that '[s]alvage claims in this court are rare. This is a tribute to the efficiency of the Lloyd's Salvage Arbitration system.'[32]

Shipping technologies have also helped to reduce the number of claims for general average and cargo damage. The same goes for pollution claims. Further, the number of oil spill casualties has substantially declined in the last decade.[33] The adoption of international Conventions establishing compulsory insurance against oil or bunker contamination has provided at least a minimum standard of protection.[34]

The current situation demonstrates that, among all the industry players, an essential party lacking effective protection is the provider of goods and services to ships, particularly the bunker supplier. Although a maritime lien for ship suppliers is recognised by the laws of the US, Canada, and other Civil Law countries, the conditions required for its creation have

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[28] Eugene Cheng Jiankai, 'The Effectiveness of the Maritime Labour Convention's Financial Security Certificates in Resolving Claims for Unpaid Seafarers' Wages' [2021] LMCLQ 124.

[29] In the last decade the total losses for casualties at sea have declined by 50%, as have the numbers of shipping incidents. See 'Safety and Shipping Review 2021' (Allianz, 2021), 4, 10, <https://www.agcs.allianz.com/content/dam/onemarketing/agcs/agcs/reports/AGCS-Safety-Shipping-Review-2021.pdf>.

[30] The International Salvage Union reported 191 salvage operations in 2020, compared to 214 in 2019. See International Salvage Union, Annual Review 2020, 9 <https://www.marine-salvage.com/wp-content/uploads/2021/07/ISU_Annual_Review_2020.pdf>.

[31] FD Rose, David Steel, Richard A Shaw, *Kennedy & Rose: The Law of Salvage* (8th edn, Sweet & Maxwell / Thomson Reuters 2013) para 14-003.

[32] [2007] EWHC 31 (Admlty), [2007] Lloyd's Rep 363 [2].

[33] Since 2010, the yearly average of large oil spills has been 1.8, with no case reported in 2020. See ITOPF, 'Oil Tanker Spill Statistics 2020' <https://www.itopf.org/knowledge-resources/data-statistics/statistics/>.

[34] Eg, International Convention on Civil Liability for Oil Pollution Damage 1992; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992; International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

become almost impossible to meet under current commercial shipping practices. A similar situation occurs with the statutory right of action in rem, as will be explained below.

3 The bunker industry

The shipping industry consumes around 300 million mt of bunker annually, representing US$150 billion on the average worldwide market a year.[35] Sailing schedules require a bunkering schedule showing the bunkering ports of call and the amounts required.[36] Shipping liners commonly arrange bunker supplies through service contracts in order to reduce costs, and especially to avoid the typical fluctuation of prices at different ports and times.[37] These arrangements commonly involve the participation of bunker brokers or traders. Bunker brokers started operating before World War II, but their role grew in importance following the 1973 oil crisis; once fuel prices rose, shipowners realised that fuel supply represented their highest single operating cost, and that they needed the assistance of specialists.[38] Brokers, therefore, act for buyers in locating and negotiating with physical bunker suppliers, but without taking any credit risk or selling on their own terms; they merely bring the parties together.[39]

Bunker intermediaries started emerging in the late 1980s and early 1990s, serving to mitigate purchasers' risks in a very fragmented market caused by 'corporate restructuring, budget pressure, declining fuel quality, [and] … volatile pricing', among others.[40] Bunker traders hold stocks of marine fuel at specific ports, or buy from physical suppliers for ship operators at nominated ports at a particular time.[41] The traders then sell the bunkers in their own name, at a higher price, but on the physical suppliers' credit.

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35 Breskin (n 19) 226; Wiese Bockmann (n 3).

36 Breskin, ibid.

37 Sugoutam Ghosh, Loo Hay Lee, and Szu Hui Ng, 'Bunkering Decisions for a Shipping Liner in an Uncertain Environment with Service Contract' (2015) 244 European Journal of Operational Research (2015) 792.

38 Neil Cockett, *Neil Cockett on Bunkers* (LLP 1997) 105–06.

39 Ibid 103, 105; Marisa Femenia, 'Ignorance About the Difference Between Brokers, Traders and Physical is Pervasive – Using a Broker Reduces Risk' (*Ship & Bunkers*, 5 July 2016) <https://shipandbunker.com/news/features/industry-insight/321592-ignorance-about-the-difference-between-brokers-traders-and-physicals-is-pervasive-using-a-broker-reduces-risk>. See also Chelsea Crews, 'Rethinking Necessaries Liens in the Aftermath of the OW Saga' (2017) 42 Tul Mar LJ 115, 116.

40 Cockett (n 38) 106.

41 Ibid 107.

The arrangements between these parties are grounded on convenience and trust.[42] It is more efficient for a ship management company to contact a bunker broker or trader to secure the provision of fuel at different ports, at a fixed price, instead of negotiating with different local suppliers at each specific port at which the ship calls. For a physical supplier, it is more practical to accept regular nominations from a known trader than to grant credit to unknown ship managers or agents each time there is a demand for bunker fuel. Following the OWB scandal, trust in bunker traders declined significantly, and this had a negative impact on their business.[43] By 2016, it was reported that some actors preferred to buy bunkers directly from physical suppliers, in order to avoid the multiple parties that contracting with bunker traders inevitably involves.[44]

Bunkering is one of the most significant expenses incurred by a shipowner or time charterer operating a ship. During the era of high oil prices, bunker prices peaked at around US$500 per mt, meaning that bunkering accounted for about three-quarters of the operating cost of a container ship.[45] For these reasons, although some terms and conditions require payment in advance, [46] a vast majority of the industry relies on credit. Charterers and shipowners require credit to finance their business, making selling on credit a market demand that bunker suppliers must accept in order to remain competitive. The BIMCO Bunker Terms 2018, for example, provide for a 30-day credit period.[47] Traders and physical suppliers try to secure payment for the supply of bunkers by three main mechanisms:

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[42] 'Bomin: Bunker Traders Still Play a Key Role in Risk Management' (*Ship & Bunker,* 20 October 2016) <https://shipandbunker.com/news/world/374359-bomin-bunker-traders-still-play-a-key-role-in-risk-management>.

[43] It was reported that by 2016, bunker traders needed margins of US$3 to US$4/mt while they were selling for US$1/mt. See 'After a Tough 2016, What Can The Bunker Industry Expect in 2017?' (*Ship & Bunker*, 6 January 2017) <https://shipandbunker.com/news/features/industry-insight/310344-after-a-tough-2016-what-can-the-bunker-industry-expect-in-2017>.

[44] See n 42.

[45] D Ronen, 'The Effect of Oil Price on Containership Speed and Fleet Size' (2011) 62 Journal of the Operational Research Society 211.

[46] Trevor Harrison, *Legal Issues in Bunkering, An Introduction to the Law Relating to the Sale and Use of Marine Fuels* (Petropost Ltd 2011) para 4.19.

[47] Clause 8(a).

- First, a retention of title clause mechanism (ROTC), which states that the supplier retains title to the fuel until payment is received. As English law often governs bunkering contracts, the Sales of Goods Act 1979 (UK) (SGA) allows the parties to determine when the title passes from the seller to the buyer.[48] The terms and conditions commonly state that the seller remains the legal owner, and the buyer is in possession of the fuels solely as a bailee until payment is received.[49] The Sales of Goods Act 1999 (Singapore) allows for the same construction.[50]

- The second mechanism is commonly used when the transaction involves a bunker trader, and consists of the creation of a parallel contract between the physical supplier and the ship, introducing its terms and conditions in communications with the ship's agent and in the delivery receipt. This delivery receipt is signed by the master or the chief engineer. Where this occurs, the physical supplier presents itself, not as the sub-contractor of the bunker trader, but as the actual supplier, making the trader appear as a broker or agent.[51] This is usually inconsistent with other contracts agreed between the physical supplier and the trader, and between the latter and the buyer.[52]

- The third mechanism involves the application of US law to the contract, in order to assert a contractual maritime lien over the vessel.

The most recent case law, primarily resulting from bunkers suppliers' insolvencies, has undermined all of these mechanisms. In the past few years, the bunker industry has seen a series of bunker supplier insolvencies,[53] two of which had a significant impact: OW Bunker and Hin Leong.

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48 Section 17(1).
49 Harrison (n 46) para 4.47.
50 Cap 393, s 17(1).
51 'OW Bunker – Fact and fiction' (*Norton Rose Fulbright*, July 2016) <https://www.nortonrosefulbright.com/en/knowledge/publications/59f18c28/ow-bunker---fact-and-fiction>.
52 Ibid.
53 See Tolson (n 4). Eg Aegean Marine Petroleum Network, Coastal Oil (Singapore) Pte Ltd, Panoil Petroleum Pte Ltd, Tankoil Marine Services Pte Ltd.

3.1 The OW Bunker collapse

The details of the insolvency and subsequent litigation surrounding OW Bunker have been extensively reported in court decisions,[54] and in academic[55] and trade journals.[56] The company started operating in the 1980s, initially as a physical supplier and later as a trader, becoming one of the largest industry players, claiming 7% of the global market.[57] On 19 December 2013, the company signed a credit facility with ING Bank for US$700 million, warranted by an Omnibus Security Agreement (OSA) over all the company receivables.[58] On 7 November 2014, the group declared bankruptcy. The downfall was attributed to an internal fraud committed by senior employees in a subsidiary based in Singapore, Dynamic Oil Trading, and a risk management loss totalling US$275 million.[59]

The bankruptcy forced shipowners and charterers, on the one hand, to apply for interpleader relief to avoid ship arrest, or having to pay twice for their bunkers. Some companies even preferred to pay twice to avoid ship arrest.[60] On the other hand, physical suppliers intervened in these interpleader proceedings or arrested the relevant ships, claiming payment for their bunker supplies. Among the claims, the biggest creditors were companies registered in Singapore.[61] ING Bank requested payment from customers, appeared before courts arresting

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54 *Precious Shipping Public Company Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] SGHC 187, [2015] 4 SLR 1229 [1]–[3].

55 Davies (n 1); Crews (n 39); Jingchen Xu and Beiping Chu, 'Shelter in the Storm: Interpleader Proceedings as Protection for Shipowners in the Wake of the OW Bunker Bankruptcy' (2018) 92 American Bankruptcy LJ 553; Ifigeneia Xanthopoulou, 'The OW bankruptcy and the resulting legal issues' (2016) 52 Tort Trial & Insurance Practice LJ 159.

56 Alessandro Mauro, 'OW Bunker: How One of the World's Largest Marine Fuel Traders Went From IPO to Bankruptcy – Part 1, Founding to IPO' (*Ship & Bunker,* 1 January 2015) <https://shipandbunker.com/news/features/industry-insight/649431-ow-bunker-how-one-of-the-worlds-largest-marine-fuel-traders-went-from-ipo-to-bankruptcy-part-1-founding-to-ipo>; 'OW Bunker: From IPO to Bankruptcy – Part 2, Falls Bring Bad News' (*Ship & Bunker*, 8 January 2015) <https://shipandbunker.com/news/features/industry-insight/262188-ow-bunker-from-ipo-to-bankruptcy-part-2-fall-brings-bad-news>.

57 OW Bunker Press Release, 5 March 2014 <http://hugin.info/160189/R/1766322/599688.pdf>; Mauro (n 56).

58 See *Cockett Marine Oil DMCC v Ing Bank NV* [2019] EWHC 1533 (Comm), [2019] 2 Lloyd's Rep 541 [60]–[61].

59 Mauro (n 56); Crews (n 39) 115.

60 Eg XO Shipping and TKB Shipping. See Niklas Krigslund, 'ING Bank looks like the winner in OW Bunker cases' (*Shippingwatch*, 30 January 2019) <https://shippingwatch.com/Services/article11157966.ece>.

61 Opet Trade Singapore Pte Ltd (US$25m), Petrochina International (US$23m), BP Singapore, Vitol Asia, among others. See Mathias Ørsborg Johansen, Tomas Kristiansen and Ole Andersen, '100 Oil Companies

ships, or challenged the physical supplier's claims. Although OW Bunker entities were entitled to only a fractional amount of those sales, most courts granted the total payment to the bank, dismissing the physical suppliers' claims.[62]

3.2 The Hin Leong downfall

Hin Leong was one of the major players in Singapore's oil industry. Its founder, Lim Oon Kuin, started in the oil distribution business in 1965, and in 1973 incorporated Hin Leong Trading Pte Ltd.[63] Ocean Traders Pte Ltd (Ocean Traders), Hin Leong's fleet manager, operated over 150 vessels, most of them bareboat chartered from other companies in the same group.[64] Hing Leong and Ocean Traders filed for moratorium relief in the High Court of Singapore on 17 April 2020.[65] Although their downfall was attributed to the fall in oil prices and the Covid-19 pandemic, these events revealed that the company had 'not being making profits in the last few years', and had hidden losses of US$800 million over ten years, reporting debts of around US$3.85 billion owed to 23 banks.[66] Hin Leong was also one of the largest creditors of OW Bunker in Singapore, claiming to be owed over S$20 million.[67]

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have Claims in OW Bunker' (*Shippingwatch*, 13 November 2014) <https://shippingwatch.com/suppliers/article7202409.ece>; 'Couche-Tard Subsidiary Tops List of 100 OW Bunker Creditors' (*Bunker Index*, 20 November 2014) <https://www.bunkerindex.com/news/article.php?article_id=14107>. Another eight companies made claims in Singapore courts amounting US$21.5m, including Hin Leong Trading, Equatorial Marine Fuel Management Services, Bunker House Petroleum, Golden Island Diesel Oil Trading, Sirius Marine, Mitsui & Co Energy Trading Singapore, and Panoil Petroleum. See 'OW Bunker's Global Debt and the Claims So Far' (*Bunker Index*, 19 November 2014) <https://www.bunkerindex.com/news/article.php?article_id=14102>.

[62] See David Osler, 'Physical Suppliers Should 'Get Lost', Says OW Bunker QC' (*Lloyd's List*, 22 March 2016) <https://lloydslist.maritimeintelligence.informa.com/LL021484/Physical-suppliers-should-get-lost-says-OW-Bunker-QC>.

[63] See Eric Yep, 'After Hin Leong: Collapse of a Singaporean Oil Prodigy' (*S&P Platts,* 24 September 2020) <https://www.spglobal.com/platts/en/market-insights/blogs/oil/092420-after-hin-leong-collapse-of-a-singaporean-oil-prodigy>.

[64] Including Xihe Holdings Pte Ltd, Xihe Capital Pte Ltd, and its subsidiaries. See *The Ocean Winner* [2021] SGHC 8, [2021] 4 SLR 526 [4].

[65] Ibid [6]. See also Eric Yep, 'Oil trader Hin Leong Tells Debtors to Pay Banks, Cancels Bunker Supplies from Apr 18' (*S&P Global Platts*, 17 April 2020) <https://www.spglobal.com/platts/es/market-insights/latest-news/oil/041720-oil-trader-hin-leong-tell-debtors-to-pay-banks-cancels-bunker-supplies-from-apr-18>.

[66] Among them ABN AMRO and Société Générale, both exposed to this bankruptcy to the extent of $300m and $200m, respectively. See Yep (n 65); Jessica Jaganathan, Seng Li Peng, Chen Aizhu, 'Exclusive: Head of Oil Trader Hin Leong Didn't Disclose $800 Million Losses — Court Filing' (*Reuters*, 19 April 2020) <https://www.reuters.com/article/us-singapore-oil-hinleong-exclusive-idUSKBN2210EK>.

[67] Eric Yep, 'Second OW Bunker Unit in Singapore Files for Liquidation' (*Wall Street Journal*, 18 November 2014) <https://www.wsj.com/amp/articles/second-ow-bunker-unit-in-singapore-files-for-liquidation-1416304395>.

Two subsidiaries of Hin Leong were dedicated to bunker supplies. Ocean Bunkering Services Pte Ltd (Ocean Bunkering) and Hin Leong Marine International Pte Ltd were ranked respectively as the third and 17th largest bunker suppliers in Singapore in 2019.[68] Ocean Bunkering owned 14 licensed barges and chartered others, supplying 10-15 per cent of the total bunkering in Singapore.[69] It discontinued operations in April 2020, and its licence was suspended in October 2020.[70] In December 2020, Ocean Bunkering's management announced the company's winding up and called for a creditors' meeting.[71] The list of creditors amounted to 27 companies with liabilities of US$42 million.[72] It was also reported that the fall of Hin Leong caused the movement of some sales to China and the UAE.[73]

4 Recent decisions on bunker suppliers' claims

Bunker suppliers are no different to other claimants in having an action in personam against the debtor. This avenue, however, is often ineffective, as obtaining security may be challenging, and the debtor may also be a company without assets. Bunker traders work on low-profit margins and usually do not have the financial capacity to back the high cost of marine fuel. A similar problem may arise if the action is directed against the charterer. These, and other 'complexities of international maritime commerce', make this avenue 'considerably more problematic than is the case with maritime liens'.[74]

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68 Roslan Khasawneh, Anshuman Daga and Jessica Jaganathan, 'Hin Leong's Judicial Manager Offers Sale of Singapore Bunkering, Lubricant Supplier' (*Reuters*, 8 October 2020) <https://www.reuters.com/article/singapore-oil-hinleong-idAFL4N2GZ16J>.

69 Eric Yep, 'Factbox: Hin Leong Collapse Ripples through Singapore's Petroleum Supply Chains' (*S&P Global Platts,* 6 May 2020) <https://www.newsbreak.com/news/1560469081730/factbox-hin-leong-collapse-ripples-through-singapore-s-petroleum-supply-chains>.

70 Roslan Khasawneh, 'Singapore Suspends Licences of Hin Leong's Bunkering Unit OBS' (*Reuters*, 19 October 2020) <https://www.reuters.com/article/singapore-oil-hin-leong-bunker-idUKL4N2HA2KK>.

71 'Ocean Bunkering Set for Liquidation Following Hin Leong Scandal' (*Ships & Bunker*, 7 December 2020) <https://shipandbunker.com/news/apac/829472-ocean-bunkering-set-for-liquidation-following-hin-leong-scandal>.

72 See 'OBS to Wind Up Operations; Creditor List Alleges Estimated USD 42 Million Debt' (*Manifold Times,* 7 December 2020) <https://www.manifoldtimes.com/news/obs-to-wind-up-operations-creditor-list-alleges-estimated-usd-42-million-debt/>.

73 Yep (n 69).

74 See *ING Bank NV v M/V Temara* 892 F3d 511, 515 (2d Cir 2018), 2019 AMC 1521, 100 Fed R Serv 3d 1495.

Under English and Singapore law, the only in rem option available for suppliers is a statutory right of action in rem.[75] Statutory rights of action in rem were introduced as grounds for jurisdiction in rem in the Admiralty Court Act 1840 (UK).[76] The current requirements were established in the Administration of Justice Act 1956 (UK), which introduced into English law the concepts of the Arrest Convention 1952.[77] Such statutory rights of action in rem are enforceable by an action against the offending ship or a sister ship when the shipowner or charterer is the liable person at the moment when the cause of action arises and is the beneficial owner in respect of all the shares in the offending or sister ship, or the demise charterer of the offending ship at the time of the issue of the writ.[78] The claimant must show evidence connecting any of these persons as liable for the claim.[79]

In the US, by contrast, suppliers are granted a maritime lien under the Commercial Instrument and Maritime Liens Act (CIMLA).[80] According to § 31342 of CIMLA, to assert the maritime lien the supplier is not required to prove that the credit was given to the vessel, but must prove three elements: (1) that the goods or services provided are necessaries; (2) that the claimant provided the necessaries to a vessel; and (3) that the entity provided the necessaries on the order of the owner or a person authorised by the owner.[81] CIMLA in §31341(a) establishes a presumption of persons with authority to contract necessaries, which includes the 'owner, the master, a person entrusted with the management of the vessel at the port of supply; or an officer or agent appointed by the owner, a charterer, an owner pro hac vice; or an agreed buyer in possession of the vessel'.

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75 See the Senior Courts Act 1981 (UK), s 20(2)(m) (SCA); High Court (Admiralty Jurisdiction) Act 1961 (Singapore), s 3(1)(l) (HCAJA).

76 See AM Tettenborn and FD Rose, *Admiralty Claims* (Sweet & Maxwell 2020) para 2–043.

77 These were replicated in HCAJA. See art 3 of the International Convention Relating to the Arrest of Sea-Going Ships 1952. See also *The Eschersheim* [1976] 2 Lloyd's Rep 1, 5.

78 SCA, s 21(4); HCAJA, s 4(4).

79 See *The Bunga Melati 5* [2012] SGCA 46, [2012] 4 SLR 546 [115]; KS Toh, *Admiralty Law and Practice* (3rd edn, LexisNexis 2017) 109.

80 46 USC § 31342.

81 See *M/V Temara* (n 74) 519.

4.1 The United Kingdom

The English courts have delivered two relevant decisions related to the OWB disaster. Both cases commenced in arbitration, where the buyer of the bunkers sought to avoid paying twice. The physical suppliers did not intervene in these cases, as some of them had been paid. The decisions, however, had an impact on them.

The Res Cogitans[82] analysed the application of the SGA to the bunker supply contract and the validity of the ROTC as a mechanism to secure credit. The Supreme Court controversially held that the bunker supply was not a sale of goods contract, as traditionally understood, but a sui generis contract of license to use the bunkers.[83] Therefore, as the SGA did not apply, there was no requirement to transfer the title to the bunkers. ING Bank was allowed to collect the price of the bunkers as a simple debt. This novel construction has been the subject of substantial academic criticism.[84] The result may be interpreted to mean that a bunker trader can profit from the full price of the physical supplier's bunkers, without having to pay for them, or have the title to them, even when there is no prospect that the trader will later pay for them. The practical effect of this decision is the invalidation of the ROTC as a mechanism for securing payment. This mechanism, however, was always a weak device, considering that any expectation of taking control of the bunkers after 30 days or more from its dispatch was utterly unrealistic. By that time, the bunkers would already have been consumed.

The second decision, *The M/V Ziemia Cieszynska,*[85] analysed the interplay of two or more conflicting sets of terms and conditions governing the same bunker supply. The buyers challenged the London arbitration clause in the OW Bunker Group (OWBG) terms and conditions. The OWBG contract contained a clause allowing for the variation of terms if the

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82 *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd* [2016] UKSC 23, [2016] AC 1034, [2016] Lloyd's Rep 589 (UKSC).

83 Ibid [34], [39].

84 Michael Bridge, 'The UK Supreme Court Decision in "The Res Cogitans" and the Cardinal Role of Property in Sales Law' (2017) SJLS 345; Louise Gullifer, '"Sales" on Retention of Title Terms: Is the English Law Analysis Broken?' (2017) 133 LQR 244; George Theocharidis, 'All About Freedom of Contract? Bunker Supply Arrangements Post-*Res Cogitans* in Global Context' (2018) 49 JMLC 127; Kelvin FK Low and Kelry CF Loi, 'Bunkers in Wonderland: A Tale of How the Growth of Romalpa Clauses Shrank the English Law of Sales' [2018] JBL 229.

85 See n 58.

physical supplier 'insisted' that the buyer was also bound by its terms, in which case, the third-party supplier's terms would prevail, including the incorporation of a different jurisdiction clause.[86] The buyer alleged the application of the physical supplier's terms which contained a Greek law and jurisdiction clause. The Court rejected the argument because of a lack of evidence that the physical supplier had 'insisted' that its terms bound the buyer.[87]

The Court briefly addressed the risk that the buyer would end up paying twice and held that such a possibility was not at stake, because the buyer had the benefit of an indemnity from the supplier.[88] The buyer that had directly paid one of the physical suppliers would have to request the return of the money mistakenly paid or, if necessary, start proceedings against the supplier. This decision demonstrates the difficulty in making applicable the physical supplier's terms and conditions as part of the mechanism of a direct contract between the physical supplier and the final buyer, even if they are invoked by the latter.

4.2 Singapore

4.2.1 The OW Bunker cases

The downfall of OW Bunker resulted in three decisions from the Singapore courts. *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd*[89] decided 13 consolidated applications for interpleader relief by bunker purchasers and involved 11 physical suppliers who also joined in the proceedings. The seller's claim was in contract, while the physical suppliers claimed for breach of fiduciary agent/bailment and tort of conversion, both based on the ROTC. Other bases of claims included breach of collateral contracts between the physical supplier and the purchaser, unjust enrichment, and a maritime lien under US law.[90] The High Court analysed these causes of action and, based on the particular circumstances, dismissed them because none of them asserted 'that the physical supplier has a *contractual*

86 Ibid [39].
87 Ibid [42], [45].
88 Ibid [2].
89 *Precious Shipping* (n 54).
90 Ibid [35]–[55].

right to be paid the price of the bunkers under the Purchaser-Seller contract'.[91] On the question of a maritime lien, the High Court categorically stated that 'the Singapore courts would never decide in favour of the party asserting a maritime lien over unpaid bunkers simply because such a lien (which is subject to the *lex fori*) does not exist under Singapore law'.[92] The implied outcome was that the purchasers had to pay the sellers or their assignee, ING Bank.

In the second case, *The Xin Chang Shu,*[93] the shipowner contacted OW Bunker China Ltd for bunker supplies. OW China bought the bunkers from OW Bunker Far East (Singapore) Pte Ltd, which, in turn, contracted with a physical supplier to service the ship. The physical supplier never contracted with the shipowner, but nonetheless arrested the vessel under a statutory right of action in rem. It alleged that OW Singapore had acted as an agent of the shipowner, based on agency by estoppel, stating that the shipowner had failed to instruct the OWB companies to make known that they were not acting as its agents. This argument failed, the writ in rem was struck out, the warrant of arrest was set aside, and the supplier was ordered to pay damages for wrongful arrest.[94] This was not a surprising result. Presenting the intermediary, or even the time charterer, as an agent in support of an argument that the contract was entered into with the shipowner or the demise charterer to assert a statutory right in rem has been alleged many times in court, with the same negative result.[95] The same pattern occurred in *The Bunga Melati 5,*[96] where the physical supplier argued that its contractual counterpart, an intermediary company, had acted with apparent authority from the shipowner as its agent. The claimant even suggested that the shipowner and the bunker trader had entered into an intentional device or 'conspiracy' to shield the shipowner against liability.[97] The Court of Appeal rejected all these allegations.

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91 Ibid [83]. Italics by the Court.
92 Ibid [52].
93 [2015] SGHC 308, [2016] 1 SLR 1096.
94 This decision of the High Court could not be appealed for procedural reasons: see [2016] SGHC 93.
95 See *The Bunga Melati 5* [2012] SGCA 46, [2012] 4 SLR 546 [70]; *The AA V* [1999] SGHC 274, [1999] 3 SLR(R) 664; *The Yuta Bondarovskaya* [1998] 2 Lloyd's Rep 357; *Sunly Petroleum Co Ltd v The Owners of The Ship or Vessel 'Lok Maheshwari'* [1996] SGHC 212.
96 [2016] SGCA 20, [2017] 1 Lloyd's Rep Plus 38.
97 Ibid [22].

The third case, *The Luna,*[98] concerned a local supplier which sold bunkers to OW Far East (Singapore) Pte Ltd and Dynamic Oil Trading Pte Ltd. Three contracts were signed in September and October 2014 for consignments loaded onto six different barges.[99] These barges were under time charter, and the commercial agreements were with the OW entities, not the supplier. The fuel was not for the barges' consumption, but for delivery to OWB clients' vessels.[100] Once the fuel was loaded onto the barges, the supplier requested a bill of lading, naming itself as the shipper. In November 2014, when the OWB scandal was widely known, the supplier demanded delivery of the cargo. This was, however, impossible, as the fuel had already been consigned to third-party vessels. The supplier proceeded in rem against the barges, claiming that the defendants were liable for a breach of contract, bailment, conversion, negligent misrepresentation, and/or damage to its reversionary interest.[101] Under ordinary circumstances, delivering cargo without a bill of lading constitutes a clear breach of contract. However, the Court of Appeal analysed the wording of the bill of lading, its relation with the underlying agreement and the surrounding circumstances, and concluded that this bill of lading was not intended to operate as a document of title and could not be used as a risk management instrument against the barges in case of the buyers' default.[102] While the decision was contrary to the supplier's interest, deciding otherwise would have made an innocent party pay for the debts of the OWB companies, an outcome that was not acceptable either.

4.2.2 The Hin Leong case

The Hin Leong Trading collapse led to a decision that provided an extensive analysis of statutory rights of action in rem that exposed the vulnerability of maritime supply creditors under the current rules. Though the plaintiff was a bunker supplier, the claim was not for supplies to ships. In *The Ocean Winner*,[103] PetroChina International (Singapore) Pte Ltd filed in rem writs against four vessels demise chartered by Ocean Tanker Pte Ltd, Hing Leong's

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98 [2021] SGCA 84.
99 Ibid [7]-[8].
100 Ibid [6].
101 Ibid [16], [19].
102 Ibid [75].
103 [2021] SGHC 8, [2021] 4 SRL 526.

chartering arm, a few days after the latter companies filed for moratorium relief.[104] The plaintiff was the owner of cargo on board the vessels, and claimed for misdelivery of its cargo.[105] Ocean Tanker appeared in the proceedings and applied to set aside or strike out the writs under s 211B of the Singapore Companies Act[106] which prohibits the commencement of any proceeding against the company in moratorium, or any execution, distress, or any other legal process against the company's property without leave of the Court. The Court stated that s 211B was not intended to defeat or deny the creation of any *substantive* legal right,[107] and that issuing the writ in rem was necessary to secure the statutory right of action in rem.

The statutory right of action in rem was 'potentially at risk of being *destroyed* by the shipowner,' considering that it 'can simply and effectively defeat the plaintiff's *in rem* claim by terminating the bareboat charters with the charterers' agreement and accept physical redelivery of the vessel before the writ is filed'.[108] The requirement for a statutory right of action in rem, that the vessel must be under the ownership or the demise charterparty of the relevant person at the moment the action is brought can easily be circumvented by the cancellation of the bareboat charter when the companies are within the same group. Ocean Tankers had chartered most of those vessels from Xihe Group, a group of companies also related to the Hing Leong group, and wanted to return them.[109] As more parties issued writs against the vessels, one of Xihe's directors declared that Xihe had '*decided to terminate 42 of the bareboat charterparties in order to protect their vessels*'.[110] PetroChina's claim in rem could be permanently prevented if the shipowner terminated the bareboat charter and the vessels were redelivered before filing the writ in rem.[111] The High Court held that filing the writ merely created a security interest for the plaintiff or crystallised the statutory right of

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[104] Ibid [1], [4]. PetroChina ranked as the largest bunker supplier by volume in Singapore in 2019, and fourth in 2020. See MPA, *Bunker Statistics* <https://www.mpa.gov.sg/web/wcm/connect/www/a3977a1e-e3c8-4f0f-a49b-2ff82da39ecf/List+of+all+bunker+ suppliers+by+volume+2020.pdf?MOD=AJPERES>. Ocean Tanker chartered or operated over 150 vessels, most of them bareboat chartered from other companies in the same group.

[105] Ibid [8].

[106] See now Insolvency, Restructuring and Dissolution Act 2018, ss 64(8)(c)-64(8)(d). Cp Insolvency Act 1986 (UK), s 130(2).

[107] *The Ocean Winner* (n 103) [61].

[108] Ibid. Italics by the Court.

[109] Ibid [4], [62].

[110] Ibid [62]. Italics by the Court.

[111] Ibid [77].

action in rem over the vessel. Filing a writ in rem, the Court stated, could not be considered the commencement of proceedings because the action only commenced when the writ was served.[112] By contrast, a maritime lien accrued and attached to the ship from the moment the cause of action arose, with the filing of the writ of summons marking the commencing of proceedings.[113]

The plaintiff also argued that the writ in rem was against the ship, not against Ocean Tankers, and that the ships were not its property.[114] The High Court held that an action in rem was against the res in so far as the person liable in personam did not appear in the process, because it only became a mixed action after the shipowner or the charterer entered an appearance in the proceedings.[115] As the mere issuance of the writ did not represent the commencement of proceedings, the process was strictly in rem against the vessel, not against the company.[116] However, after the appearance of Ocean Tankers, it was transformed into a mixed action. The claimant needed the leave of the Court to proceed to serve the writs in rem and arrest the vessels.[117] The writs only had the effect of making the claimant a secured creditor, a preferential category of creditor in the eventual vote for the company's proposed scheme. They were not a step in the enforcement of the claim.[118]

Another aspect of this decision was the characterisation of the statutory right of action in rem as a 'substantive legal right', which contrasts with the common law position which categorises such rights as a mere remedial or procedural instrument. If maritime liens have a merely procedural character, as defined by the Privy Council in *The Halcyon Isle*,[119] a statutory right of action in rem, being 'inferior to a maritime lien',[120] should be a procedural remedy as well.

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112 Ibid [58], [65].
113 Ibid [59].
114 Ibid [18].
115 Ibid [68].
116 Ibid [69].
117 Ibid [70].
118 Ibid [78], [95].
119 *Bankers Trust International Ltd v Todd Shipyard Corp (The Halcyon Isle)* [1981] AC 221, [1980] 2 Lloyd's Rep 325 (PC).
120 Toh (n 79) 282; Thomas (n 12) para 578.

4.2.3 The Posidon

The Posidon,[121] although not related to these bankruptcies, deserves some attention because it presents another challenge for suppliers. If physical suppliers assert a statutory right of action in rem and obtain a favourable judgment, they still face the challenge of competing with maritime lien creditors and mortgagee banks. In this case, the suppliers intervened in proceedings for the enforcement of a ship mortgage. As the suppliers' claim ranked below the mortgage, its sole argument was to invoke an alteration of the order of priority under principles of equity, an avenue possible only under very exceptional circumstances to 'prevent an obvious injustice'.[122]

The supplier alleged that the bank had control of the vessels since at least July 2014 and had authorised and approved the bunker purchases after that date. Thus, it argued that the bank had benefitted from the suppliers knowing of the shipowner's insolvency.[123] Based on the authorities, the Court underlined three aspects that had to be proved to alter the order of priorities: (i) that the mortgagee had knowledge of the shipowner's insolvency; (ii) that it was fully aware, in advance, of the nature of expenditure that constitutes a competing claim; and, (iii) that the expenditure was for some benefit of the mortgagee.[124] These requirements set a high threshold that was challenging to achieve. Although the bank was aware of the shipowner's compromised financial situation, this was considered a 'short-term cash flow difficulty'.[125] Concerning the other two requirements, it was known that payments to the mortgagee and any profits were dependent on the operation of the ship, which was only possible if bunkers were supplied.[126] The Court held that these facts were insufficient in view of the authorities, which demanded full awareness in advance of the arrangement of supplies.[127] The Court dismissed the suppliers' application, as none of the elements were proved.

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[121] [2017] SGHC 138, [2018] 3 SLR 372, [2017] 2 Lloyd's Rep 390 [12].
[122] Ibid [24].
[123] Ibid [2].
[124] Ibid [27]. See also *The Pickaninny* [1960] 1 Lloyd's Rep 533.
[125] Ibid [80]–[81].
[126] Ibid [39].
[127] Ibid [86].

4.3 The United States

OWB's bankruptcy brought the US courts a significant number of interpleader relief applications. One of the first decisions from a Court of Appeals was *ING Bank NV v M/V Temara,*[128] which set up the parameters followed in most of the later cases. ING Bank and CEPSA International BV, the physical supplier, claimed a maritime lien for the same supply of bunkers. The District Court held that none of them was entitled to a lien. The physical supplier did not have the lien because it acted on the orders of OW USA, not from the owner or someone authorised by the owner.[129] CEPSA also alleged unjust enrichment and trespassing against the ship, along with a breach of contract in personam against ING and OWB. These actions were all dismissed. On unjust enrichment, the Court held that, although maritime law allows claims for unjust enrichment, they do not constitute a maritime lien and must be enforced in an action in personam.[130]

The contractual seller, OW Bunker & Trading A/S, did not have a lien either, because it had not 'provided' any bunker to any vessel. The District Court stated that the seller had not assumed any financial risk: 'It did not itself physically supply any of the bunkers, and it is undisputed that it never paid any supplier that did … Thus, a maritime lien here would not fulfill its essentially protective function; it would instead award a windfall.'[131] The provider, stated the Court, must bear some risk to be granted a maritime lien, which, as a protective device, should not exist when there is no risk to protect.

On appeal, the Second Circuit Court of Appeals affirmed the decision regarding the physical supplier claims but reversed it regarding the seller's lien. Based on principles of contractual law, the provision of goods could be performed by a subcontractor.[132] The Court discarded the risk analysis by the District Court, stating that the direct seller, OW Denmark, assumed the risk of non-performance, because if the physical supplier failed to deliver, it would be liable to the buyer; and if the buyer did not pay, OW Denmark would have to pay to OW USA,

128 *M/V Temara* (n 74).
129 *ING Bank NV v M/V Temara* 203 F Supp 3d 355, 367 (SDNY 2016), 2016 AMC 2387.
130 Ibid 369.
131 *ING Bank NV v Temara* Not reported in Fed Supp 8 (SDNY 2016), 2016 WL 6156320, 2016 AMC 2946.
132 *M/V Temara* (n 74) 519.

which was the entity that contracted with CEPSA.[133] The Court reached the same conclusion in other cases related to this bankruptcy.[134] Likewise, the Courts of the Fifth,[135] Ninth[136] and Eleventh[137] Circuits adopted the same construction, and denied the maritime lien, as the physical supplier did not supply on the orders of someone with authority to bind the ship.

Suppliers also invoked the exception adopted in the Eleventh Circuit which allows subcontractors to assert the lien. In *Barcliff LLC v M/V Deep Blue*,[138] the Court stated that a subcontractor might have a lien if the shipowner was sufficiently aware and involved in the work, so it might be said that the subcontractor was working for the owner.[139] This exceptional rule arises from repairers' claims where the work required continuous performance on board the ship with the owner's knowledge and supervision, or the shipowner had knowledge or selected a specific subcontractor.[140] However, when the exception was invoked in *Galehead, Inc v M/V Anglia,*[141] a claim for bunker supplies, the Court stated that this exception applies '[w]here the level of involvement between the owner and the third-party provider was significant and ongoing during the pertinent transaction'.[142] This standard, adopted for ship repairers, was obviously inadequate for the supply of bunkers. Bunker supply is a one-off operation performed in a couple of hours and does not require more than the signature of the master, or more commonly, by the chief engineer of the confirmation or delivery receipt. The Court concluded that this 'ratification' by the chief engineer cannot be qualified as a 'significant-and-ongoing involvement'.[143]

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[133] Ibid 520.

[134] *Chemoil Adani Pvt Ltd v M/V Maritime King*, 894 F 3d 506 (2018), 2018 AMC 1908; *ING Bank NV v M/V Voge Fiesta* 741 Fed Appx 18 (2018); *Aegean Bunkering (USA) LLC v M/T Amazon* 730 Fed Appx 87 (2018); *O'Rourke Marine Services LP LLP v M/V Cosco Haifa* 730 Fed Appx 89 (2018); *ING Bank NV v Jawor M/V* 730 Fed Appx 94 (2018); *Nippon Kaisha Line Ltd v Nustar Energy Services* Inc 745 Fed Appx 414 (2018); *Clearlake Shipping Pte Ltd v NuStar Energy Services Inc* 911 F 3d 646 (2018), 2019 AMC 385.

[135] *Valero Marketing & Supply Company v M/V Almi* Sun 893 F 3d 290 (2018), 2018 AMC 1564; *NuStar Energy Services Incorporated v M/V Cosco Auckland* 760 Fed Appx 245; *ING Bank NV v Bomin Bunker Oil Corporation* 953 F 3d 390 (2020), 68 Bankr Ct Dec 138.

[136] *Bunker Holdings Ltd v Yang Ming Liberia Corp* 906 F 3d 843 (2018), 2018 AMC 2484, 18 Cal Daily Op Serv 10,042, 2018 Daily Journal DAR 10,108.

[137] *Barcliff LLC v M/V Deep Blue* F 3d 1063 (11th Cir 2017).

[138] Ibid.

[139] Ibid 1071.

[140] *Stevens Technical Services Inc v United States* 913 F 2d 1521, 1991 AMC 2497 (11th Cir 1990); *Marine Coatings of Alabama Inc v United States* 932 F 2d 1370, 1991 AMC 2487, 37 Cont Cas Fed (CCH) P 76,137 (11th Cir 1991).

[141] 183 F 3d 1242, 1999 AMC 2952 (11th Cir 1999).

[142] Ibid 1244, 1245-46.

[143] *Barcliff* (n 137) 1073.

The exception was applied in *US Oil Trading LLC v M/V Vienna Express.*[144] The Second Circuit Court of Appeals vacated the decision of the District Court denying a lien for the physical supplier,[145] and remanded the case to decide whether the buyer, Hapag-Lloyd, had required the seller to appoint this particular physical supplier. The buyer had requested the OW entity quotes from physical suppliers and selected and expressly indicated its name in the purchase order to perform the job. The Court referred to the exception that recognises the maritime lien for subcontractors where 'an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance'.[146]

In *NCL (Bahamas) Ltd v OW Bunker USA Inc*,[147] the Court decided on a situation similar to *M/N Ziemia Cieszynska.*[148] The buyer, pursuing an injunction against arbitration in London, invoked the OWB terms and conditions clause, which allowed these terms to be varied if a third party both supplied the fuel and insisted on the application of its terms. The physical supplier was a Greek company whose terms and conditions established a Greek jurisdiction. The District Court granted the preliminary injunction. On appeal, the Court of Appeals vacated the decision and remanded the case for the District Court to determine whether the physical supplier had firmly insisted on the application of its terms.

The only case with a favourable result for the physical supplier was *Martin Energy Services LLC v M/V Bravante IX*.[149] The physical supplier brought an action in personam against the shipowner for breach of contract and quantum meruit, and a quasi-in rem claim against another vessel of the same shipowner, seeking an attachment under Rule B of the Supplemental Rules for Admiralty and Maritime Claims. Under the laws of the State of Florida, a quantum meruit claim can succeed where the plaintiff shows that: (1) it conferred a benefit on the defendant; (2) the defendant had knowledge of the benefit; (3) the defendant accepted or retained the benefit; and (4) the circumstances are such that it would be

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[144] 911 F 3d 652 (2d Cir 2018), 2019 AMC 394.

[145] See *Clearlake Shipping Pte Ltd v OW Bunker (Switzerland) SA* 239 F Supp 3d 674 (SDNY 2017), 2017 AMC 627.

[146] *The Vienna Express* (n 144) 662-63.

[147] 745 Fed Appx 416 (Mem) (2d Cir 2018).

[148] See n 85.

[149] 733 Fed Appx 503 (11th Cir 2018), 2018 AMC 1217.

inequitable for the defendant to retain the benefit without paying its fair value.[150] The District Court stated that the defendant had received a benefit from the physical supplier, which it had accepted and documented in the bunker delivery certificate.[151] The Court ordered that the price of the bunkers be paid to the supplier, with ING Bank receiving the amount that corresponded to the resellers' price. On appeal, the Circuit Court of Appeals stated that under Florida law, in the absence of a contract between the shipowner and the OW Bunker entities in bankruptcy, the supplier could recover on quantum meruit from the shipowner for the benefit it had received, [152] and thus affirmed the decision.

5 Reconsidering the maritime lien for necessaries

5.1 The flaws of the current legal regimes

The unfavourable outcomes for physical suppliers in the cases discussed above resulted from ineffective contractual terms for securing credit, unhealthy commercial practices, and outdated statutes and case law incapable of responding to modern commercial practice. These results might be understandable if they occurred due to the creditors' own negligence, but not when resulting from defective law. Leaving any creditor without an effective remedy is not, and cannot be, an acceptable outcome. As industry practices and contractual terms are best left to the market, the focus here is on the legal flaws in the existing law.

In the case of a debtor's insolvency, relevant insolvency laws oblige the supplier to compete with other creditors, and this may result in their obtaining a partial remedy. However, these processes can be complex, lengthy, expensive, and ultimately unproductive, particularly when suppliers are categorised as unsecured creditors. The transnational nature of maritime companies frequently leads to cross-border insolvency issues, which entail even greater complexity.[153] It may be argued that in the context of the bankruptcies that generated the case law discussed here, the suppliers' remedy was to participate in the insolvency process of

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[150] Ibid 506.
[151] Ibid.
[152] Ibid.
[153] See J Xu, *Maritime Cross-Border Insolvency under the UNCITRAL Model Law Regime* (Hart Publishing 2020) 16.

the OWB Group. That may have been a possibility, except for the fact that ING Bank was seeking to collect and retain the totality of the receivables granted by the omnibus security agreement. It was known that the OW entities were entitled to only a fraction of those sales. Nevertheless, the bank attempted to collect the full price and did not intend to pay any supplier.[154]

In order to assert a statutory right of action rem or a maritime lien under US law, suppliers face two challenges generated by current shipping industry practices. The first is the extended use of one-ship company systems. The second is the participation of bunker intermediaries.

5.1.1 Corporate structures in the shipping business

The modern maritime industry operates through complex corporate structures that frequently anonymise the actual beneficiaries of the ships' business. Registered shipowners are usually one-ship companies with no assets other than the particular ship. Such companies are commonly part of a bigger group of corporations, composing a structure that sometimes might be created with not very ethical purposes.[155] The implementation of this system dates back to the Companies Act 1862 (UK),[156] which introduced the concept of individual corporate personality. Its current extensive practice, however, was a response to the adoption of the concept of 'sister ship arrest' introduced in the Arrest Convention 1952.[157] Article 3 of the Convention allows the arrest of any ship, provided it is within the same ownership when the claim arose and at the moment of the arrest. As each company is considered an independent legal person and autonomous business entity regardless of the community of shareholders, registering every ship in a fleet under a different company prevents the arrest of other vessels not related to the claim. For financers, the system is beneficial as it prevents the vessel from

[154] See *M/V Temara* (n 131) 8: 'But O.W. Bunker is in bankruptcy and ING has made it clear that even if were to recover on O.W. Bunker's behalf, it has neither obligation nor intention to pay the physical suppliers.'

[155] Martin Davies, 'In Defense of Unpopular Virtues: Personification and Ratification' (2000) 75 Tul L Rev 337, 364.

[156] Martin Davies, 'The Future of Ship Arrest', in Paul Myburgh (ed), *The Arrest Conventions: International Enforcement of Maritime Claims* (Hart Publishing 2019) 309.

[157] International Convention Relating to the Arrest of Sea-going Ships, signed on 10 May 1952 in Brussels, in force since 24 February 1956. Julie Clegg 'Introduction', in Stephenson Harwood, *Shipping Finance* (n 16) 14.

being affected by unrelated claims,[158] although it may also represent a risk as the company has no other assets from which repayment can be sought, requiring other forms of security.[159] Apart from preventing sister ship arrest, this mechanism offers some benefits in managing fleets and fiscal purposes.[160]

For the ship's commercial operations, the one-ship registered owner might enter into a bareboat charter party with another company, which, in some cases, might be a subsidiary of the company managing the one-ship company,[161] as evidenced in *The Ocean Winner.*[162] The latter would take on the status of shipowner pro hac vice and would assume the responsibilities of the registered shipowner. This company might then enter into a time charter party with another company, which, in turn, might enter into a voyage charter party with yet another company. The time charterer in this scenario would normally assume the obligations to contract for provisions for the vessel, including bunkers.[163] Along with these legal entities, ship management companies and ship agents also intervene in the ship's operations and are the parties which commonly request goods and services for the ship.

The one-ship company represents a challenge for the statutory right of action in rem. In terms of the Arrest Convention 1952, a statutory right of action in rem can be asserted if the registered owner or the bareboat charterer has contracted for the supplies. However, under the sort of commercial arrangements outlined above, the shipowner or the demise charterer rarely, if ever, contract with the supplier directly, such that either of them is 'the relevant person' liable for the debt. These complex structures are also detrimental for other claimants, including cargo owners.[164] Similar problems occur in the context of the maritime lien under US law, given the requirement that the necessaries must have been provided on the order of the owner or a person authorised by the owner.

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[158] Ibid 16.

[159] Ibid.

[160] Francis Rose, 'Raising the Corporate Sail' [2013] LMCLQ 566; Belinda Ang, 'Arrest and Cross Border Insolvency: The Singapore Experience', in Myburgh, *The Arrest Conventions* (n 156) 223.

[161] Erik Göretzlehner, *Maritime Cross-Border Insolvency: An Analysis for Germany, England & Wales, and the USA* (Springer International Publishing 2019) 70; Victoria Athanassopoulou, *Schiffsunternehmen und Schiffsüberlassungsverträge* (Mohr Siebeck 2005) 117.

[162] See text to nn 109–10.

[163] Howard Bennett (gen ed), *Carver on Charterparties* (2nd edn, Sweet & Maxwell 2021) para 7-054.

[164] See Paul Myburgh, 'Elusive Carrier, Time Bars, and Salvation Through Arbitration' (2020) 26 JIML 325; Martin Davies, 'The Elusive Carrier: Whom do I Sue and How? (1991) 19 Australian Business L Rev 230.

Although the one-ship company system allows for the limitation (or total avoidance) of the shipowner's liability, courts have treated it as a legitimate instrument.[165] It has been tolerated even when it can also be utilised to jeopardise a claimant's right to act in rem or to circumvent the payment of obligations. The antidote to the one-ship artifice is lifting or piercing the corporate veil, but this is constrained in most jurisdictions to very particular circumstances, mainly in fraud cases.[166] However, the system is now under scrutiny and has started facing some limitations in some jurisdictions.[167] For example, it was used as an argument to support the registered shipowner's inability to provide security to release a ship from arrest. The English Court of Appeal rejected this allegation as it was aware that, as the shipowner was part of one of these corporate structures, resources could be obtained from its shareholders.[168]

5.1.2 Bunker intermediaries

The second challenge is that, even if the shipowner or the bareboat charterer contracts the supply of bunkers, this is frequently done through the intervention of bunker intermediaries, such as the OWB entities, in most of the cases discussed above. Bunker traders, as explained, are a necessary feature of the market, but their intervention creates the impression that the physical bunker supplier is providing bunkers on the trader's orders and credit, rather than the shipowner's or demise charterer's orders and credit. This scenario impedes the ability of

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165 See *The Skaw Prince* 1994 SGHC 18, [1994] 3 SLR(R) 146 [19]; *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] SGHC 45, [2013] 2 SLR 543 [41]; *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] SGHC 181, [2014] 4 SLR 832 [131]; *Simgood Pte Ltd v MLC Shipbuilding Sdn Bhd* [2015] SGHC 303, [2016] 1 SLR 1129 [195].

166 See Francesco Berlingieri, *Berlingieri on Arrest of Ships* (6th edn, Informa Law from Routledge 2017) ch 13; Aleka Mandaraka-Shepard, *Modern Maritime Law* (3rd edn, Informa Law from Routledge 2013) 135.

167 South Africa introduced in the Admiralty Jurisdiction Regulation Act 1982 the concept of 'associated-ship arrest' allowing the arrest of ships linked within the common control of s shipowning company. See Graham Bradfield, 'Arrest of Associated Ships', in Myburgh*, The Arrest Conventions* (n 156) ch 2. In the United States, courts assess the problem under the 'alter ego' concept: see Martin Davies in Myburgh, *The Arrest Conventions* (n 156) 313.

168 *Natwest Markets Plc (Formerly Known as the Royal Bank of Scotland Plc) v Stallion Eight Shipping Co Sa* (The 'MV Alkyon') [2018] EWCA Civ 2760, [2019] 1 Lloyd's Rep 406 [34]: 'The shipowner may be a one-ship owning company registered in the Marshall Islands, but it appears to be part of a larger shipping group (though there is some uncertainty as to its size). It was submitted on behalf of the Shipowner that it was speculation to consider whether the shipowner could provide security by means of its indirect shareholders.'

the physical bunker supplier to meet the requirement for a statutory right of action in rem or a maritime lien. It also results in the anomalous situation that an intermediary company which does not assume a high risk in the transaction and is only expecting a minimal commission from the sale, is the only party who is entitled to proceed in rem against the ship, while the party that provides the bunkers, undertakes the real risk of the transaction, and suffers the actual loss cannot do so. The general rule, then, is that where there are multiple parties involved, the further removed the owner is from the selection of the actual physical supplier, the less likely it is that the latter can proceed in rem or claim a lien against the vessel and demand payment from the vessel directly.[169]

Therefore, the requirements for enforcing these types of claims through an action in rem, set over half a century ago, appear unsuitable for the industry's current commercial needs. As discussed below, the evident shortcomings in the legal regime for collecting suppliers' credits arise from public policies prevalent in the 19th century. When confronted with the realities of current practices, it is clear that the law of maritime liens is no longer fit for purpose and needs to be reconsidered.

5.2 The exclusion of maritime liens for necessaries in English law

The peculiar position of material men has its roots in court decisions of almost two centuries ago. The maritime law applied by the English admiralty courts was based on Roman civil law,[170] which granted a privilege over the ship's price to those lending money for building, equipping, repairing, and arming the ship.[171] However, in what is considered the first treatise on shipping law in England, Lord Tenterden affirmed that the common law had not adopted the relevant Roman law rule concerning repairs and necessaries furnished.[172] English material men's claims were thus excluded from the admiralty courts,[173] partly due to the long historic

169 Xanthopoulou (n 55) 171.
170 See, eg, DC Jackson, *Enforcement of Maritime Claims* (4th edn, Informa Law from Routledge 2005) para 1.29; Tetley (n 12) 34-35; Edward F Ryan, 'Admiralty Jurisdiction and the Maritime Lien: A Historical Perspective' (1968) 7 W Ontario L Rev 173, 187.
171 See n 11.
172 Charles Abbott, *A Treatise of the Law Relative to Merchant Ships and Seamen* (E & R Brooke and J Rider 1802) para 104.
173 Since about the 14th century when a statute of Richard II prohibited the Admiralty Courts to decide on matters that did not occur on the high seas: see 15 Richard 2, c 3.

rivalry with the common law courts, which had exclusive jurisdiction over these claims, as the repairs were performed on land. [174]

Hence, repairers and suppliers had no access to an action in rem and ship arrest to enforce their claims. Attempts to enforce such claims in the admiralty court were subject to orders of prohibitions by the common law courts. Nevertheless, Lord Holt LCJ, in three decisions between 1688 and 1703, denied the prohibition, asserting that the admiralty court had jurisdiction for these claims, because such claimants had no remedy in the common law courts.[175] The common law courts continued enforcing the rule that only repairs or supplies performed abroad could be granted an action against the ship, so actions for repairs performed in England against funds resulting from ships' sales were dismissed. [176] Nevertheless, the admiralty court exercised jurisdiction and granted payment for the same claims from the ship's sale proceeds in seven cases between 1760 and 1833.[177] Furthermore, Lord Mansfield decided cases in favour of material men.[178]

In 1835, the Privy Council in *The Neptune*[179] reversed a decision of the admiralty court[180] and categorically held that material men were not entitled to enforce a maritime lien for repairs on the ship performed in England or the proceeds of any judicial sale. This judgment clarified the exclusion of the maritime lien, although, until 1940, the position in English law was still

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[174] Stanley Morrison, 'The Remedial Powers of the Admiralty' (1933) 43 Yale LJ 1, 3; Price (n 12) 7–8, 30; Ryan (n 170) 173; Jackson (n 170) para 1.22.

[175] *Cossart v Lawdley* (1688) 3 Mod Rep 244, 87 ER 159; *Benzen v Jeffries* (1696) 1 Ld Raym 152, 91 ER 999: 'For if the King's Bench allows hypothecation, and yet denies the remedy, it will be a manifest contradiction'; *Johnson v Shippen* (1703) 2 Ld Raym 982, 92 ER 154. See comments of these cases in the dissenting opinion of Rares J in *Reiter Petroleum Inc v The Ship 'Sam Hawk'* [2016] FCAFC 26, [2016] 2 Lloyd's Rep 639 [306]–[311].

[176] See, eg, *Watkinson v Bernadiston* (1726) 2 P Wms 367, 368; 24 ER 769, although this was a claim of a master for disbursement paid to tradesmen for work done on the ship, provisions, material, and seafarer's wages; See also *Buxton v Snee* (1748) 1 Ves Sen 154, 27 ER 952; *Ex parte Shank* (1954) 26 ER 151, 1 Atk 234.

[177] *The Neptune* (1835) 3 Knapp 94, 118-19. The Privy Council discarded all of them because, among other reasons, none had been challenged on appeal.

[178] *Rich v Coe* (1777) 2 Cowp 636, 98 ER 1281. The same judge expressed a different view in *Wilkins v Carmichael* (1779) 1 Doug 101, 99 ER 70. But later, in a case for supplies he stated that 'the tradesman has likewise a specific lien on the ship itself' in *Farmer v Davies* (1786) 1 TR 108, 109, 99 ER 1000, 1001. Price (n 12) 31.

[179] *Hodges v Sims (The Neptune)* (1835) 3 Knapp 94, 116-17, 12 ER 584.

[180] *The Neptune* (1834) 3 Hagg Adm 129, 166 ER 354.

considered uncertain.[181] The House of Lords later confirmed that there was no lien for necessaries provided to a foreign vessel or on the high seas.[182]

As the earlier case law before *The Neptune* seemed inconsistent, public policy played an essential role in the rejection of this maritime lien. The Privy Council emphasised the 'extensive importance' of the issue, not only for the parties, 'but also to the commercial world at large'.[183] Public policy considerations did not favour the maritime lien, as granting this to every necessary man who supplied the ship would open up the possibility of frequent ship arrests and impede ships from sailing.[184] In *The Neptune*, Sir John Nichols asserted that 'if every person who supplied any necessary to a ship, had the right at any time to arrest her, vessels would hardly ever be able to sail without paying the uttermost penny, and in many cases would be exposed to the most extortionate demands'.[185] This policy was grounded in England's dependence on public transportation; while industrial production was the origin of national wealth, shipping was needed for its distribution.[186] The courts limited the maritime liens to very few claims[187] so that ships could keep trading without interruption from arrest.

Nevertheless, concern about excessive arrests appeared to decline with the enlargement of the jurisdiction of the Admiralty Court. Shortly after *The Neptune,* the introduction of the Admiralty Court Act 1840 (UK) granted jurisdiction to claims for necessaries only against foreign vessels.[188] The Merchant Shipping Act 1844 (UK) established the maritime lien for master's wages.[189] In 1851, *The Bold Buccleugh* considered the maritime lien for collision damages, and the Privy Council stated that 'in all cases where a proceeding in rem is the

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181 Jackson (n 170) para 18.9.

182 *Donald Johnson v John Alexander Black (The Two Ellens)* (1872) LR 4 PC 161, 8 Moo NS 398, 17 ER 361; *The Heinrich Bjorn* (1885) 10 PD 44, (1886) 11 App Cas 270. See also Price (n 12) 32, 36.

183 *The Neptune* (1835) 3 Knapp 94, 113.

184 Price (n 12) 30.

185 3 Hagg Adm 129, 146.

186 Ibid; Edgar Gold, *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (DC Heath & Co 1981) 73–74, 81, 83; Jurgen Basedow, 'Common Carriers – Continuity and Disintegration in US Transportation Law' (1983) 13 Transp LJ 1, 8-9. See also Ryan (n 170) 188.

187 See *The Sam Hawk* (n 175) [70].

188 Section 6.

189 Section 16. It was later confirmed in the Merchant Shipping Act 1854 (UK), s 191. See Price (n 12) 64; Thomas (n 12) para 315.

proper course, there a maritime lien exists'.[190] The result was that only claims for wages, salvage, collision, and bottomry and respondentia gave rise to maritime liens under English law.[191] Later, the Admiralty Court Jurisdiction Act 1861 (UK) expanded the jurisdiction again to other types of claims, including cargo claims, regardless of the nationality of the ship. Claims for necessaries were allowed in rem, provided that the necessaries were supplied in any port other than the ship's homeport, and the shipowner was not domiciled at the moment of commencing the proceedings in England or Wales.[192] Although these claims did not constitute a maritime lien, they allowed for ship arrest. Finally, the Merchant Shipping Act 1889 (UK) introduced the lien for master's disbursements.[193] The consistent expansion of the jurisdiction of the admiralty court and the introduction of new maritime liens suggests that, at least since the second half of the 19th century, the prevention of excessive ship arrests was unlikely the primary concern militating against a maritime lien for necessaries. Moreover, this conclusion is also confirmed by the fact that, maritime claimants, including ship suppliers, had a relatively easy access to ship arrest under English law, which, among other reasons, has been one of the pillars for the consolidation of England as an international maritime forum.

The unfavourable case law on material men claims emerged, primarily, from cases where the challenger was a mortgagee. While, as noted above, *The Neptune* abolished the maritime lien for material men in England, *The Two Ellens*[194] expressed concern about the effect on new purchasers and confirmed that there was no maritime lien for necessaries provided abroad. In *The Colorado,*[195] priority over an English repairer was given to a French bank for a hypotheque that did not have the character of a lien under French law. As a requirement for altering the order of priorities in favour of material men, *The Pickaninny*[196] required full knowledge of the mortgagee of the repairs and the mortgagor's insolvency. Forty years ago, unclear, or inconsistent precedents were also a problem for the Privy Council when deciding *The Halcyon Isle*.[197] The authorities cited in support by Lord Diplock did not address this

[190] *Harmer v Bell (The Bold Buccleugh)* (1851) 7 Moo 267, 284.
[191] Ibid.
[192] Section 5.
[193] Price (n 12) 65; Thomas (n 12) para 354.
[194] See n 182.
[195] *Hills Dry Docks & Engineering Co Ltd v Colorado* (1923) 14 Ll L Rep 251.
[196] [1960] 1 Lloyd's Rep 533.
[197] See n 119.

specific question; indeed, their application was debatable, as demonstrated by the strong dissent by Lords Salmon and Scarman.[198] The public policy adopted since the 19th century played again, and with more clarity, a paramount role in this decision. Lord Diplock stated that:

> [t]he United Kingdom policy, reflected in its refusal to ratify the International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages 1926, had been to keep down to a minimum the number of maritime liens that should be recognised, so as to prevent what can be described as 'secret charges' arising and gaining priority over mortgagees and subsequent purchasers for the value of the ship.[199]

To be consistent with this policy, the Privy Council characterised the maritime lien as a procedural remedy, depriving the right of the foreign repairer lienholder under foreign law to take priority over the mortgagee. *The Halcyon Isle* marked the departure of the maritime lien from its original character of a substantive right of security.

The reasoning in these judgments underlines that the primary public policy concern against maritime liens was to prevent secret charges that may affect new purchasers and mortgagees. Understandably, mortgagees, primarily banks, should be afforded some protection. They were, and continue to be, essential for international trade and economic growth, making it necessary to create security and certainty to encourage them to continue financing the shipping industry. Apart from this, the money banks invest in financing shipping is derived from wealthy investors and the savings of regular customers. Failing to recoup their investments might affect a large number of people. Therefore, repairers and suppliers' claims were excluded from the group of maritime liens; however, they had other remedies or instruments of security.

In the 19th century, an action in personam was, as noted in *The Heinrich Bjorn*,[200] more effective than today, because shipowners were identifiable persons and were more likely to

[198] Ibid 242–50.
[199] Ibid 240. See also CA Ying, 'Priorities and the Foreign Maritime Lien' (1983) 8 Adel L Rev 95; Toh (n 79) 278.
[200] See n 182, 278–79.

own sufficient assets to respond to a claim in personam. This was a time when the one-ship company practice was not so popular, considering that it was introduced in 1862 in the UK Companies Act. Furthermore, repairers and suppliers had other mechanisms to secure their credit. First, in the case of ship's repairs, as in the majority of these cases, such claimants had a possessory lien upon the vessel, which could only be lost if the vessel was allowed to leave port.[201] Second, if supplies were required at a foreign port where the master had no source of finance, the creditor could be protected by a maritime lien in the form of a bottomry bond.[202] Third, if the supplies and services were immediately necessary for the operational benefit of the ship and were personally contracted by the master, he, in turn, had a maritime lien for master's disbursements, which included both liabilities actually paid, and future payments owed.[203] Therefore, if public policy demanded the exclusion of this maritime lien, the courts of that time could also adopt that approach because the material men were not totally unprotected. In contrast, bunker suppliers today have none of these mechanisms at their disposal.

5.3 The change of characterisation of the maritime lien under Singapore law

As a former Crown colony, Singapore follows the common law system and does not grant a maritime lien for necessaries. It is noteworthy, however, that the Singapore courts originally recognised the substantive character of the maritime liens and allowed the priority of the repairer's claim over the mortgagee under foreign law. *The Halcyon Isle* originated in Singapore, where the Court of Appeal, in a judgment delivered by Wee Ching Jin CJ, [204] reversing the decision of the High Court, [205] stated that:

[201] Jackson (n 170) paras 20.19, 20.32; Tetley (n 12) 645–46. See also *The Nestor* 1 Summ 73 (1831) 18 F Cas 9, 12, No 10,126.

[202] Thomas (n 12) paras 373, 389. Also, in the United States, in *The Nestor* (n 201) 11: 'A material-man, who furnishes supplies in a foreign port, or to a foreign ship, relies on the ship itself as his security. He may, if he pleases, insist upon a bottomry bond with maritime interest, as the security for his advances; in which case, he gives credit exclusively to the ship, and must take upon himself the risk of a successful accomplishment of the voyage.'

[203] Thomas (n 12) paras 342, 346, 350, 360. At least since its introduction in the Merchant Shipping Act 1889 (UK).

[204] [1977] SGCA 13, [1977–1978] SLR(R) 238.

[205] [1977] SGHC 2, [1977–1978] SLR(R) 11.

> [a]part from authority, we are of the opinion that [in] principle the courts of this country ought to recognise the substantive right acquired under foreign law as a valid right and to give effect to that recognition when determining the question of priorities between the ship repairers and the mortgagees of the res.
>
> …
>
> Similarly, having ascertained that under American law a person who furnishes in America repairs to a ship acquires a valid maritime lien on the ship, a Singapore court, applying Singapore remedies, would rank a claimant who has a valid maritime lien, which is in its nature a substantive right in the ship, above a claimant who has a mortgage over the ship.[206]

The decision of the Privy Council reversing this conclusion and establishing that maritime liens are a procedural remedy subject to the lex fori, was at the time binding in Singapore. As a former Crown Colony, Singapore was subject to the principle of stare decisis,[207] until it decided to depart from the judicial control of the United Kingdom. In 1993, the Application of English Law Act[208] established the continuation of English law, including principles and rules of equity, as part of the law of Singapore 'so far as it is applicable to the circumstances of Singapore and its inhabitants, and subject to such modifications as those circumstances may require'.[209] A year later, the Judicial Committee (Repeal) Act 1994 discontinued appeals to the Privy Council.[210] Shortly afterwards, the Court of Appeal issued a Practice Statement (Judicial Precedent), stating the non-binding effect of previous decisions of the Privy Council when such decisions 'would cause injustice to any particular case or constrain the development of the law in conformity with the circumstances of Singapore'.[211] Since then, Singapore has departed from English law in many respects,[212] but there has been no such departure in the case of maritime liens. The courts have continued to cite *The Halcyon Isle* as authority for the principle that a maritime lien is not a substantive right, as categorised by the Court of Appeal in 1977, but when assessing its jurisdiction in rem and priorities, the lex fori

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206 [1977] SGCA 13, [1977–1978] SLR(R) 238 [19], [33]. In their dissenting judgments in the Privy Council Lords Salmon and Scarman stated that they agreed 'that the issue in this appeal should be approached on the basis of principle, and we attach great weight to the view of the Republic's Court of Appeal as to what the law of Singapore ought in principle to be'. See *The Halcyon Isle* (n 119) 243.

207 Bala Reddy and Jill Tan, *Law and Practice of Tribunals in Singapore* (Academy Publishing 2019) para 2.20.

208 Act 35 of 1993, cap 7A.

209 Section 3.

210 Act No 2 of 1994.

211 [1994] SGCA 148, [1994] 2 SLR 689. See also Reddy and Tan (n 207).

212 See Kwan Ho Lau, 'The 1994 Practice Statement and Twenty Years on' [2014] SJLS 408.

reigns supreme.[213] Other courts in the common law world have followed this judgment of the Privy Council.[214]

5.4 The stricti iuris interpretation approach in the United States

The recognition of a maritime lien for material men by the United States law appears with clarity since the beginning of the 19th century. [215] Following the English approach, it excluded the lien for repairs or supplies in their ships' home ports,[216] or when the owner was present, and the contract was inferred to be with the owner himself.[217]

In 1910, the US Congress enacted the Federal Maritime Liens Act (FMLA), now renamed the Commercial Instruments and Maritime Liens Act, establishing for the first time a statutory maritime lien for necessaries in a common law country.[218] The Supreme Court in *Piedmont & Georges Co v Seaboard Fisheries Co*[219] explained that the purpose of the Act was: 1) to remove the distinction of granting a maritime lien for necessaries provided at a foreign port but denying it when the vessels were furnished at its home port or State; 2) to relieve the materialmen of the burden of proving that credit was given to the ship even where the owner contracted in person or was present at the port where they were ordered, but preserving the obligation to prove that it was under the order of the owner or someone acting by his

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213 *The Andres Bonifacio* [1993] SGCA 70, [1993] 3 SLR(R) 71 [35]; *Precious Shipping* (n 54) [51]; *The Posidon* (n 121) [12]; *The Echo Star ex Gas Infinity* [2020] SGHC 200, [2020] 5 SLR 1025 [29].

214 See, eg, *Mobil Sales & Supply Corp v The Pacific Bear* [1978–79] HKLR 125; *Transol Bunker BV v MV Andrico Unity (The Andrico Unity)* 1989 (4) SA 325; *Empire Shipping Co Inc v The Shin Kobe Maru* (1991) 32 FCR 78; *ABC Shipbrokers v The Offi Gloria* [1993] 3 NZLR 576; *Morelines Maritime Agency Ltd* v *Proceeds of the Sale of the Ship Skulptor Vuchetich* 1998 AMC 1727 (Fed Ct); *Oceanconnect UK Ltd* v *Angara Maritime Ltd (The Fesco Angara)* [2010] EWCA Civ 1050, [2011] 1 Lloyd's Rep 399 [51]; *The Sam Hawk* (n 175).

215 *Stevens v The Sandwich* 1 Pet Adm 233, 23 F Cas 29, 31, No 13,409 (D Md 1801): 'The reason of the lien to ship-carpenters for repairs, independent of considerations of policy, even among contending mortgagees, is, that such services preserve the specific thing from destruction, and securing such subsequent creditors does not injure prior mortgagees or creditors, since the pledge is increased in value, in proportion to such services.'

216 See *Woodruff v The Levi Dearborn* 4 Hall L J 97, 30 F Cas 525, 526, No 17,988 (D Ga 1811); *The General Smith* 17 US 438, 443 (1819), 1819 WL 2186, 4 LEd 609, 4 Wheat 438.

217 See *The St Jago de Cuba* 22 US 409, 417 (1824), 1824 WL 2692, 6 LEd 122, 9 Wheat 409.

218 Act of June 23, 1910, c 373, 36 Stat 604. See Coast Guard Authorization Act of 1989, Pub L 101-225, Dec 12, 1989, 103 Stat 1908, 1924 <https://www.govinfo.gov/content/pkg/STATUTE-103/pdf/STATUTE-103-Pg1908.pdf>.

219 254 US 1, 41 S Ct 1, 65 L Ed 97, 2001 AMC 2692 (1920).

authority; and 3) to simplify the issue into a single federal statute.[220] Apart from these elements, the Act did not intend to change the general principles of the law of maritime liens.[221]

Although this device, established by statute, has the purpose of protecting suppliers, as the parties which assume the highest risk in the transaction, the strict interpretation of the provision requiring supply to be 'on the order of the owner or a person authorised by the owner' has rendered it ineffective under current shipping practices. Physical suppliers, appearing as subcontractors, cannot assert the lien because the general contractor, the bunker trader, is not presumed to have authorisation from the owner.[222] Courts have recognised that, by following this construction, physical suppliers would inevitably end up not being able to collect their debts,[223] but nonetheless continue interpreting the Act against its purpose. This narrow construction is based on the notion that maritime liens are 'stricti juris and will not be extended by construction, analogy or inference,' and that 'as a general rule, maritime liens are disfavoured by law'. Both assertions are grounded on decisions of the Supreme Court issued in the middle of the 19th century, long before the enactment of the FMLA, and deciding different situations.

Vandewater v Mills (The Yankee Blade)[224] was a claim for damages resulting from a breach of an agreement that the Court identified as a special and limited partnership in the business of transportation of freight and passengers. The plaintiff alleged that such damages equated to a maritime lien arising from a charterparty. The Court refused to extend the lien to this kind of damages, stating that:

> But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore '*stricti juris*,' and cannot be extended by construction, analogy, or inference. 'Analogy,' says Pardessus, (Droit

[220] Ibid 11–12.

[221] Ibid 11.

[222] *Tramp Oil & Marine Ltd v M/V Mermaid I* 805 F 2d 42, 46 (1st Cir 1986), 1987 AMC 866; *Port of Portland v M/V Paralla* 892 F 2d 825, 827 (9th Cir 1989), 1990 AMC 846; *Integral Control Sys Corp v Consol Edison Co of New York* 990 F Supp 295, 301 (SDNY 1998), 1998 AMC 1905; *Lake Charles Stevedores Inc v Professor Vladimir Popov MV* 199 F 3d 220 (5th Cir 1999), 2000 AMC 2273.

[223] *M/V Temara* (n 74) 523.

[224] 60 US 82, 19 How 82, 1856 WL 8745, 15 L Ed 554, 2011 AMC 296 (1856).

> Civ., vol. 3, 597), 'cannot afford a decisive argument, because privileges are of *strict right*. They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another.'[225]

The strict interpretation demanded by the Court referred to the non-extension of a maritime lien to damages that in no way constituted an obligation secured by a maritime lien. The Court referred concretely to the lien of the cargo interest on the ship and stated that 'this lien, being stricti juris, will not be extended by construction.'[226]

After the enactment of the FMLA, the Supreme Court in *Piedmon*t cited *The Yankee Blade* to support the same concern about the prejudice that the secrecy of the maritime lien may cause to previous mortgages or purchasers and reiterated that maritime liens are 'stricti-juris and will not be extended by construction or analogy'.[227] The main discussion in this case was whether the claimant had 'provided goods to a vessel.' The supplier had delivered coal to the shipowner, which used part of the coal for its vessels and the rest in a factory. The Court held that the supplier had not provided the coal to a vessel; hence, no maritime lien was attached to any vessel. The case did not address the element of who has authorisation to contract necessaries for the ship, but it is the leading authority supporting the strict construction of this aspect.

After *Piedmont*, the Supreme Court addressed the interpretation of the Act in two more cases. In the first, *Krauss Bros Lumber Co v Dimon SS Corp*,[228] the Court stated that '[w]hile it is true that the maritime lien is secret, hence is stricti juris and not to be extended by implication, this does not mean that the right to the lien is not to be recognized and upheld, when within accepted supporting principles, merely because the circumstances which call for its recognition are unusual or infrequent'.[229] In the second case, *Dampskibsselskabet Dannebrog*

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225 Ibid 89.

226 Ibid 91.

227 *Piedmont* (n 219) 12; also in *Osaka Shosen Kaisha v Pac Exp Lumber Co* 260 US 490, 499, 43 S Ct 172, 174; 67 L Ed 364 (1923) on a lien for damage for the non-performance of a contract of affreightment; *The President Arthur* 279 US 564, 568, 49 S Ct 420, 421, 73 L Ed 846 (1929), on the right to waive the maritime lien.

228 290 US 117; 54 S Ct 105, 78 L Ed 216 (1933).

229 Ibid 125.

v Signal Oil Co,[230] the Supreme Court decided on a bunker supply claim where a charterer ordered the bunkers. The charterers were not, at the relevant time, presumed to have authority to bind the ship to a maritime lien. The Court decided the conflict attending to the manifest purpose of the statute, which 'was intended to operate in aid of those who supply necessaries to ships, and it correspondingly restricted the rights of the owners of the vessels'.[231] Such a purpose would not be properly served if the concept of 'management of the vessel' was restricted to its navigation, but rather it 'is a broader term connoting direction and control for the purpose for which the vessel is used'.[232] Hence, a time charterer, having the management of the vessel, and without a no-lien provision in the charterparty, has authority to obtain necessaries, and the supplier can rely on the credit of both the vessel and the person ordering it.[233] The Court stated that charging the supplier with the burden of resolving the ambiguities of charterparties would hinder the purpose of the Act.[234] The construction attended the purpose of the Act,[235] and the principle of 'stricti juris' was not even mentioned in the decision. This appears to be the latest decision of the Supreme Court addressing the interpretation of the act on a bunker supply claim. After 80 years, the industry has substantially changed, but lower courts have preferred to deny the Act's purpose on the ground of the 'strictness' of the lien.

The non-lien clauses contained in charterparties continued to be an obstacle for suppliers to assert a maritime lien. Suppliers had the duty to inquire if the person ordering the supplies has authority to bind the vessel, or if the owner had prohibited the charterer from incurring maritime liens.[236] Failure to comply with this duty deprived the suppliers of a maritime lien if the charterparty contains a no-lien clause.[237] As ascertaining this information was not always possible, particularly when trade was booming which meant that speed was required in provisioning vessels, the US Congress removed this requirement in an amendment passed in

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230 310 US 268, 60 S Ct 937, 84 L Ed 1197, 1940 AMC 647 (1940).
231 Ibid 272–73, 279.
232 Ibid 279.
233 Ibid 275, 280.
234 Ibid 280.
235 Ibid 272–73, 279.
236 *See Trans-Tec Asia v M/V Hamony Container* 518 F3d 1120 (9th Cir 2008), 2008 AMC 648, 694-95. Crews (n 39) 118.
237 *S Coast SS Co v Rudbach* 251 US 519, 523, 40 S Ct 233, 64 L Ed 386 (1920); *United States v Carver* 260 US 482, 490, 43 S Ct 181, 182, 67 L Ed 361 (1923).

1971. The purpose of this amendment was addressed in *Atlantic & Gulf Stevedores Inc v M/V Grand Loyalty*,[238] where the Fifth Circuit Court of Appeals expressed the view that the legislative history of this section demanded, after the amendment, a more liberal application to fulfil the intention of the Congress to facilitate stevedores and suppliers to access the maritime lien.[239] The Court stated that the stricti juris construction affects the creation of new maritime liens, but it 'does not affect the mechanism of the imposition of traditionally recognized varieties of maritime liens'.[240] Therefore, a chief officer of the ship was a 'person to whom the management of the vessel is instructed', and an '[a]uthorization, actual or fairly presumed, given prior to or during rendition of services, or ratified subsequent to rendition will suffice'.[241] Under this precedent, a bunker delivery receipt signed by the master or the chief officer during or after the supply would serve to grant a maritime lien to the physical supplier. However, in later cases, the Fifth Circuit returned to the strict interpretation.[242]

The second statement supporting this line of decisions, that 'as a general rule, maritime liens are disfavored by the law' appears in *Itel Containers Int'l Corp v Atlanttrafik Exp Serv Ltd.*[243] This decision, and that of *In Re Container Application International*,[244] attribute this assertion to *Piedmont,* where the latter stated that the Supreme Court 'recognized that maritime liens are disfavored in the law because they are secret ones that might operate to the prejudice of prior mortgagees or of purchasers without notice'.[245] *Piedmont* did indeed state that maritime liens are stricti iuris, but such a statement does not equate to being disfavoured by the law, so as to support a construction contrary to the interests of the party that it is

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238 *Atlantic & Gulf Stevedores Inc v M/V Grand Loyalty* 608 F2d 197 (5th Cir 1979), 1980 AMC 1716.

239 Ibid 201: 'We are of the further opinion that § 971 et seq. is not to be viewed through the constricting glass of Stricti juris, or as some would suggest, Strictissimi juris. We view the legislative history of these sections to mandate a more liberal application than that which existed prior to the 1971 amendments to the Maritime Lien Act. Our review leads us inexorably to the conclusion that it was the intent of the Congress to make it easier and more certain for stevedores and others to protect their interests by making maritime liens available where traditional services are routinely rendered.'

240 Ibid 202.

241 Ibid 200, 202.

242 See *Lake Charles Stevedores* (n 222) 226, 231; *Valero Mktg & Supply Co v M/V Almi Sun* (n 135); *ING Bank NV v Bomin Bunker Oil Corp* (n 135).

243 982 F2d 765, 768 (2d Cir 1992), 1993 AMC 609. It was mentioned in a dissenting opinion in *Krauss Bros Lumber Co v Dimon SS Corp* (n 228) 126: 'Secret liens are not favored, they should not be extended by construction, analogy, or inference, or to circumstances where there is ground for serious doubt.'

244 *In Re Container Application International* 233 F3d 1361 (11th Cir 2001), 2001 AMC 967, 37 Bankr Ct Dec 32, 14 Fla L Weekly Fed C 181.

245 Ibid 1366.

supposed to protect. *Piedmont* does not assert that maritime liens are to be discouraged. On the contrary, it states that the maritime lien 'had its origin in the desire to protect the ship' and that it was 'developed as a necessary incident of the operation of vessels'.[246]

Other courts have relied on a statement in another Supreme Court decision from the 19th century.[247] In *People's Ferry Co v Beers (The Jefferson)*,[248] the Supreme Court decided whether admiralty jurisdiction had cognisance of a claim related to shipbuilding. It was stated that 'it must be borne in mind that liens on vessels encumber commerce, and are discouraged; so that where the owner is present, no lien is acquired by the material man; nor is any, where the vessel is supplied or repaired in the home port.'[249] This judgment asserted the state of the law at that time, where the owner's presence or supplies at the home port represented other alternatives for the supplier to collect its credit, making it unnecessary to compromise the ship. Once Congress abolished these exceptions in the FMLA, this 'encumbrance' was legitimised as the only resort for suppliers.

The Supreme Court has not suggested that maritime liens should be disfavoured; such an assertion would contradict the description presented in other cases. For example, in *The St Jago de Cuba,* the Court stated that the whole purpose of providing admiralty jurisdiction and a lien to these claims was 'to furnish wings and legs to the forfeited hull, to get back for the benefit of all concerned; that is, to complete the voyage'.[250] In the landmark case of *The Nestor*, Story J also said that the doctrine of the maritime liens 'was easily transferred into the early codes of maritime nations, from its general convenience, and the sound policy of multiplying the resources of credit of the masters and owners of ships in cases of necessity'; and that '[i]t allows the party to give credit, because it is for the general benefit of the navigation and trade'.[251] In *Dannebrog,* it was held that 'the lien is given for supplies which are necessary to keep the ship going'.[252] Circuit courts have also echoed the benefit of

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[246] *Piedmont* (n 219) 9.

[247] *Sweet Pea Marine Ltd v APJ Marine Inc* 411 F 3d 1242 (11th Cir 2005); *Cianbro Corp v George H Dean Inc* 596 F 3d 10 (1st Cir 2010), 2010 AMC 1189; *Portland Pilots Inc v Nova Star M/V* 875 F 3d 38, 44 (5th Cir 2017); 2017 AMC 2705.

[248] 61 US 393, 20 How 393, 1857 WL 8491, 15 L Ed 961, 2010 AMC 2677 (1857).

[249] Ibid 401–02.

[250] *The St Jago de Cuba* (n 217) 416. See also *The Poznan* 9 F 2d 838, 845 (2nd Cir 1925), 1925 AMC 1289.

[251] *The Nestor* (n 201) 12–13.

[252] *Dannebrog* (n 230) 280.

maritime liens. The description provided in *Titan Nav Inc v Timsco Inc*[253] is particularly eloquent:

> These vintage security devices endure and are protected because of their commercial usefulness. Despite the advent of instant communications, and the availability of sophisticated international financing, the ability of a ship's master to bind his vessel in rem continues to facilitate the prompt supply of goods and services. Similarly, liens under the law of general average permit the ship's master to make expeditious decisions regarding imperiled cargo; salvage liens encourage sailors to save property which would otherwise be lost; and liens arising out of collisions and other torts give innocent parties a source of financial responsibility, even though ultimate responsibility may lie with a distant and unreachable individual or corporation.[254]

These characteristics were summarised in *M/V Temara*. The Court described the maritime lien as a convenient instrument to promote maritime commerce encouraging prompt payment and the existence of reliable suppliers, both essential to maritime commerce.[255] The lien constitutes a benefit for both the ship and the supplier, as the former can obtain credit for necessaries, while the latter has a special right of security on the ship.[256] It facilitates 'maritime commerce by reducing the counterparty risk associated with supplying a vessel that may not return to the same port again'.[257] However, although the convenience of this instrument is greatly praised, the Court then returns to the statement that the law disfavours maritime liens.[258] After this recollection of the maritime liens' nature and functions, one may wonder why a device that offers these benefits for both parties could be discouraged or disfavoured by law? Furthermore, one may ask, why would the US Congress establish by statute this mechanism, to then discourage its implementation? Nothing in the statute or the purpose of the Congress, nor in the decisions of the Supreme Court, suggests that maritime liens are disfavoured.

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253 808 F 2d 400 (1987), 1987 AMC 1396.

254 Ibid 404. See also *Astor Trust Co v EV White & Co* 241 F 57, 60 (4th Cir 1917), LRA 1917E,526, 154 CCA 57: 'the central idea of a maritime lien, namely, the equitable right, springing from the necessities of commerce, to hold the vessel itself for something done or furnished to it which enables it to continue in service, and without which its earning power would be greatly reduced, if not destroyed.'

255 See n 128, 515.

256 Ibid 518.

257 Ibid 519.

258 Ibid.

The Court sustained the adverse application in the need to prevent the proliferation of liens, a situation that could be detrimental to maritime commerce.[259] This argument is debatable in the statements of the same decision. The proliferation of liens could only be problematic when there is a proliferation of debts because '[t]he lien arises when the debt arises'.[260] However, if the maritime lien encourages prompt payment, as the Court pointed out, no vessel should be subject to arrest, as the threat of the possibility of enforcement of the lien would make buyers pay. In any case, the prevention of the proliferation of liens is the responsibility of charterers and shipowners. Hence, this argument seems insufficient to thwart legitimate creditors by adopting an unfavourable construction of a statute enacted to protect them, on the ground that its enforcement is detrimental to commerce. This construction has resulted in the supplier's maritime lien being a deceptive device at US law. It appears that it is an appropriate instrument when ships require credit, but not when it needs to be enforced. Maritime liens are not disfavoured or discouraged by law, but by District and Circuit courts under arguments that, like their counterparts in the United Kingdom and Singapore, respond to public policies of the 19th century.

5.5 Current practice

The law of maritime liens has been underpinned and shaped by considerations of public policy.[261] Public policy, as a principle of judicial interpretation, seeks to ensure that nothing that is contrary to the public good at large, or that ignores the community's current needs, can be lawfully done.[262] Preference is given to the community interest, and this overrides the contractual rights of the immediate parties to the dispute if it affects the rights of the community.[263] English law addressed the particular needs of 19th-century society by reducing the list of maritime liens to a minimum. By contrast, the United States adopted a different approach based on Civil Law principles and recognised the maritime lien for repairers. The former reduced the list of maritime liens to the minimum, while the latter, at the other

[259] Ibid.
[260] Ibid 518.
[261] See Thomas (n 12) [5], [422].
[262] See *UKM v Attorney-General* [2018] SGHCF 18, [2019] 3 SLR 874 [106].
[263] Ibid.

extreme, listed a broad number of claims secured by them.[264] Such approaches placed each of them at opposite corners of the industry. The difficulty with this approach is that the commercial practices and societal needs that underpin public policy change with the times.[265] Rules adopted one or two centuries ago based on concerns of excessive arrests or prejudices regarding the secrecy of the maritime lien may not be appropriate or valid today.

5.5.1 Excessive arrests

Although preventing excessive arrests was not the main reason for the exclusion of the maritime lien, it is indisputable that it is in the public interest to have vessels sailing without interruption, preventing any unnecessary detention which will affect supply chains. It cannot be denied that any paralysis of ship operations is a disruptive event affecting shipowners, charterers, cargo owners, crew members, ports, financers, and, ultimately, consumers.[266] However, it is not necessarily the case that the restatement or amendment of the maritime lien would produce frequent or excessive arrests disrupting international trade.

Considering the number of ships involved in daily commercial activities, ship arrest is a rare event. There are many reasons for this. First, as discussed above, the claims granted a maritime lien are now redundant, in decline or have found other forms of security.[267] Even in countries where legislation contains a maritime lien for necessaries, or where the Maritime Liens and Mortgage Convention 1926 is in force, there is no evidence of an excessive number of arrests for this type of claim, or that arrests have substantially disrupted ship operations. Second, given the implications and cost, ship arrest is often the last resort for many legitimate claimants. Third, a legitimate claimant acting in good faith is exposed to the threat of wrongful arrest if its claim is unsustainable.[268] The scarcity of wrongful arrest cases further suggests that this acts as an effective deterrent.[269] Fourth, in some jurisdictions, such as Singapore, ship arrest law requires a strict duty of full and frank disclosure for an arrest, which raises the

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[264] *The Halcyon Isle* (n 119) 333.
[265] *UKM v Attorney-General* (n 262) [109]. See also *Davies v Davies* [1887] 36 Ch D 359, 364, 396–97.
[266] See *The Vasiliy Golovnin* [2008] SGCA 39, [2008] 4 SLR 994 [51].
[267] See above Part 2.
[268] Toh (n 79) 210.
[269] Although its dissuasive effect has been lessened in *The Vasiliy Golovnin* (n 266) [120].

required standard and effectively prevents abuse.[270] An arrest is not immediately ordered, but is subject to preliminary judicial scrutiny.[271] Fifth, ships are covered by P&I insurance, and LOUs are admissible in most countries to release ships from arrest.[272] The Clubs have offices and correspondents worldwide, and LOUs can be issued within a few hours and transmitted electronically. In some cases, security can be arranged even before the vessel is arrested. Lastly, the system for the arrest and release of ships is fast and effective, providing round-the-clock service in most jurisdictions. Therefore, the 19th-century concern that multiple arrests would significantly impede shipping schedules is no longer sufficient to deny legitimate actors in the maritime industry the only effective instrument for recovering their debts.

5.5.2 The secret character of the maritime lien

In *The Halcyon Isle*, Lord Diplock expressed the view that the secret character and priority of maritime liens would affect mortgagees and new buyers. However, his main concern was the 'secret character' of the maritime lien, not its priority, because he also stated that, as a matter of policy, it might not be unreasonable to prioritise the claims of the material men.[273] In the United States, the Supreme Court expressed exactly the same concern.[274]

This ground of public policy was contestable at the time,[275] and is even more so today. The fact that the maritime lien does not require registration does not mean that it must remain secret. In the 1970s, a bank in England might not be aware of repairs performed on a ship in

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[270] Ibid. See *The Rainbow Spring* [2003] SGCA 31, [2003] 3 SLR(R) 362 [37]; EJ Cheng, 'Fulfilling the Duty of Full and Frank Disclosure in Arrest of Ships — Identifying, Consolidating and Presenting Material Facts' (2017) 29 SAcLJ 317.

[271] *The Bunga Melati 5* (n 79) [114]–[116]; Toh (n 79) 119.

[272] The Singapore High Court has held that it has authority to order a claimant to accept an LOU from a reputable P&I Club: see *The Arcadia Spirit* [1988] SGHC 8, [1988] 1 SLR(R) 73. See also P Myburgh, 'P&I Club Letters of Undertaking and Admiralty Arrests' (2018) 24 JIML 201.

[273] *The Halcyon Isle* (n 119) 242.

[274] *Vandewater v Mills* (n 224) 89; *Piedmont* (n 219) 12; *Osaka Shosen Kaisha v Pacific Export Lumber Co* (n 227) 500: 'Whatever cases may have been decided otherwise disregarded the universal fact that no lien arises in admiralty except in connection with some visible occurrence relating to the vessel or cargo or to a person injured. This is necessary in order that innocent parties dealing with vessels may not be the losers by secret liens, the existence of which they have no possibility of detecting by any relation to any visible fact.'

[275] See Ying (n 199) 101.

the United States, as occurred in *The Halcyon Isle* itself. However, this is not a convincing argument today, as there is hardly anything that is secret in the 21st century, where legal access to data from customers is available everywhere, anytime. In the United States, it is even possible to record and discharge maritime liens by a statutory procedure.[276]

The ship finance sector has developed contractual obligations for mortgagors, which enable mortgagees to have access to relevant information,[277] which may include any liabilities incurred by ships. Thus, shipowners undertake to keep the ship free from any lien or encumbrance; if arising, they must be removed within a short period of time. This can be achieved if the owner pays its invoices in a timely fashion or secures the claim if the ship is arrested or threatened with arrest.[278] Failing to comply with these obligations can be considered a default.[279] Once the mortgagor's possible default comes to light, such contracts permit banks to implement 'self-help remedies', which, depending on the particular circumstances, may not be fully effective, but broaden the bank's possibilities for recovery.[280] These include taking possession and management of the ship, the issuance of an irrevocable power of attorney to sell the ship as mortgagee in possession, or the pledge of the shares in the registered shipowner's company to the bank.[281] For decades, lending banks have also secured loans by taking mortgages on other ships for the same loan or taking an assignment of earnings, time charter rights, or P&I insurance compensation in case of a total or partial loss.[282] Furthermore, as the borrower is usually a one-ship company, mortgagees regularly seek additional security, including a personal guarantee or a guaranty and indemnity from the ultimate parent company or ultimate beneficial owner of the borrower.[283] Hence, mortgagees can discover 'secret' liens and mitigate the effect of their priority through other guarantees that secure the full payment of the loan.

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[276] See 46 USC § 31343; Schoenbaum (n 14) 422.

[277] David Osborne, Graeme Bowtle and Charles Buss, *The Law of Ship Mortgages* 2nd edn (Routledge, 2016) [8.2.5].

[278] Ibid [8.2.3] and [8.3.3]; J Clegg 'The ship mortgage – Introduction', in Stephenson Harwood LLP (n 16) 163.

[279] Osborne (n 277) [11.2.1], [11.5.1].

[280] Charles Buss, 'Ship Mortgages: Enforcement and Remedies', ch 10 in B Soyer and A Tettenborn (eds.) *Ship Building, Sale and Finance* (Routledge, 2016) 151.

[281] Ibid.

[282] See *Citibank NA v Hobbs Savill & Co Ltd (The Panglobal Friendship)* [1978] 1 Lloyd's Rep 368 371; Ian Mace, 'The assignment of insurances, earnings, charter rights and requisition compensation' in Stephenson Harwood LLP (n 16) 277.

[283] Sheila Obhrai, 'Other security', in Stephenson Harwood LLP (n 16) 295.

In the case of the purchase of second-hand ships, the onus is on the buyer to carry out a thorough inspection of the ship and conduct due diligence on the seller and the ship's history to determine what is being bought and the seller's background.[284] Masters are under an obligation to record all aspects of the ship's activity in the ship logbook, including bunkers and other supplies received. Electronic logbooks are now permitted, and this means that they can easily be transmitted. Managers and agents must also keep records of expenses incurred and evidence of payments made. A certificate from the ship's registry can reveal encumbrances, and an examination of specialised web portals and conversations with brokers should assist in determining the ship's areas of trading, detentions by port state control, previous arrests by creditors, or casualties in which the ship has been involved.[285] A good faith seller should not oppose disclosing this information to a potential buyer. Hence, a thorough investigation should reveal any unpaid liabilities or potential maritime liens. Moreover, if a lien is not discovered, ship sale agreements contain clauses making the seller responsible for such hidden liabilities.[286] The purchaser may also request a guarantee from the seller or retention of part of the price in an escrow account or, as a last resort, may buy insurance to cover pre-existing maritime liens.[287] These actions or options may produce some inconvenience, but they demonstrate that purchasers have instruments at hand to secure their investment.

Another potential consequence of the 'secrecy' of the maritime lien is that a time charterer may redeliver a ship to the shipowner encumbered with maritime lien debts for which the former was responsible. This ground is, however, also contestable. To begin with, there is no party better placed than the shipowner to assess the financial condition and creditworthiness of the charterer.[288] Under a time charterparty, shipowners are responsible for the ship's operation, and the master, who is the employee of the shipowner, records any bunkers supplied in the ship's logbook. Shipowners have mechanisms to discover unpaid supplies and can request the charterer to provide evidence of payment of all liabilities, enabling them to

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[284] William Maclachlan, 'The Practicalities of Ship Sales in the Current Market', ch 9 in Soyer and Tettenborn (n 280) 137.

[285] Ibid 139. See also Malcolm Strong and Paul Herring, *Sale of Ships: The Norwegian Saleform* (3rd edn, Sweet & Maxwell 2016) paras 12–19.

[286] See cl 9 of the 1987 and 1993 Saleform, and cl 9 the 2011 Singapore Ship Sale form; Strong and Herring, ibid ch 12; Thomas (n 12) para 18.

[287] Maclachlan (n 284) 139–40.

[288] Davies (n 155) 403.

take prompt action if no evidence of payment is forthcoming. Time charterparties also always include a clause granting the shipowner a lien upon all cargoes and sub-freights for any amount due under the charter.[289] This includes payments made by the shipowner for obligations that were the charterer's exclusive responsibility and for which it is entitled to be reimbursed, including the cost of bunkers.[290] Furthermore, shipowners and charterers are well aware of the standard general terms and conditions of bunker suppliers and routinely agree to the application of US law in supply contracts to create a maritime lien. To prevent the creation of liens for bunker debts, shipowners may also assume responsibility for the payment of bunkers.[291] Time charterparties usually provide for payment of hire in advance and cash advances for the ship's ordinary disbursements.[292] It could be agreed that charterers would advance such a payment, and thus, the ship's management pays for that or, at least, requests evidence of such payments periodically. This would be a straightforward mechanism to secure that bunkers are paid for, and would prevent possible detentions of vessels for those debts. Nevertheless, shipowners may not be concerned about potential litigation resulting from these claims because, as a bunker industry specialist said, they are aware of the current 'unevenness of bunker law'.[293]

While mortgagees, the purchasers of second-hand ships and shipowners have diverse mechanisms to discover 'secret' maritime liens, control the risks, and protect and secure their credit, investment and property, ship suppliers do not have similar avenues of redress.

6 Discussion

An analysis of the reasons for the exclusion of the maritime lien for necessaries in the United Kingdom, and its restriction in the United States, together with the current circumstances and practice of the industry and the recent case law, suggest that maintaining the 19th century approach has become impractical. At that time, English society required protection for the shipowning industry and its financiers as a pivotal engine of the industrial revolution and

[289] Clause 18 of the 1946 NYPE, and cl 23 of the 1993 and 2015 versions of the NYPE.
[290] See Terence Coghlin et al, *Time Charters* (7th edn, Routledge 2014) paras 30.1–30.3.
[291] Xanthopoulou (n 55) 172.
[292] Clauses 11(a) and 11(d) of the NYPE 93; cls 11(a) and 11(f) of the NYPE 2015.
[293] Cockett (n 38) 296.

consequently economic growth. That approach was undoubtedly reasonable at the time, considering that material men had other ways to secure and enforce their claims. Nonetheless, as argued above, current circumstances and societal needs have changed.[294]

This is even more the case for countries such as Singapore, which hosts 41 local and international licensed investors supplying marine bunkers, making the city State the world's largest bunker supply hub. This hub status allows one to observe with more clarity the impact that an outdated legal framework can have on the industry. The number of Singapore licensed suppliers experienced a continuous drop from 73 in 2012, to 41 in 2021.[295] Some suppliers considered merging or leaving the industry,[296] while the licences of others were cancelled for unethical practices.[297] It is noteworthy that five of the physical suppliers claiming in the *Precious Shipping* case had left the market by 2017.[298] While it cannot be certain that the inability to collect debts was the primary cause for the decline in numbers, this, in all likelihood, played a role. The failure of these companies has also had an adverse effect on the banks that financed them.

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294 The UK's share of ownership only represents 2.6% of global tonnage. See *Review of Maritime Transport 2020* (UNCTAD) (n 17) 41–42. Ship finance services have also dropped, although marine insurance business accounts for more than a quarter of the global market. See David Osler, 'London, Legacy of Maritime Expertise' (*Lloyd's List*, 30 August 2019).

295 See 'Singapore Bunker Supplier Count Drop to 41 on Pacific Bunkering Exit' (*Ship & Bunker,* 25 August 2021) <https://shipandbunker.com/news/apac/397394-singapore-bunker-supplier-count-drops-to-41-on-pacific-bunkering-exit>.

296 The exit of some players from the industry is also attributed to challenges arising from IMO 2020. See Surabhi Shahu and Jeslyn Lerh, 'Singapore's 2019 Bunker Fuel Outlook Seen Positive Amid Industry Restructure, Changing Rules' (*S&P Global Platts*, 11 December 2018) <https://www.spglobal.com/platts/es/market-insights/latest-news/shipping/121118-singapores-2019-bunker-fuel-outlook-seen-positive-amid-industry-restructure-changing-rules>; 'Official: Bomin exits Singapore and Antwerp bunker markets' (*Manifold Times,* 21 September 2018) <https://www.manifoldtimes.com/news/official-bomin-exits-singapore-and-antwerp-bunker-markets/>; 'Matrix Marine Fuels Pte Ltd Decides to Undergo Voluntary Liquidation' (*Manifold Times,* 8 March 2021) < https://www.manifoldtimes.com/news/matrix-marine-fuels-pte-ltd-decides-to-undergo-voluntary-liquidation/>.

297 See 'Singapore's Shrinking and Expanding Bunker Market' (*Riviera Newsletter,* 16 February 2018) <https://www.rivieramm.com/news-content-hub/news-content-hub/singapores-shrinking-and-expanding-bunker-market-1-53032>. However, the industry has recently become more stable, reporting higher volumes sales in 2020 than in previous years, and new players have also joined the market. See Maritime and Port Authority of Singapore 'Joint Media Release by MPA and ESG: Singapore's Oil Trading and Bunkering Sectors Boosted with Entry of Two Global Bunkering Companies' (20 April 2020) <https://www.mpa.gov.sg/web/portal/home/media-centre/news-releases/detail/9e0e284e-192a-4a55-aed4-b924d8708d08>; 'Singapore Bunker Demand Heads Back Towards 50 Million MT/Year' (*Ship & Bunker*, 14 December 2020) <Singapore Bunker Demand Heads Back Towards 50 Million MT/Year>.

298 Transocean Oil Pte Ltd, Uni Petroleum Pte Ltd, Universal Energy Pte Ltd, Panoil Petroleum Pte Ltd, and Tankoil Marine Services Pte Ltd went into insolvency.

An example of this is found in *CIMB Bank Bhd v World Fuel Services (Singapore) Pte Ltd*.[299] The plaintiff bank claimed under a debenture deed assigned to it over all goods and receivables from a local supplier, Panoil Petroleum Pte Ltd (Panoil), as a guarantee for a loan.[300] Panoil was among the physical suppliers claiming in the *Precious Shipping* case and filed for bankruptcy in 2017.[301] The bank sued the bunker trader but could not recover its debts because of a set-off clause in the agreement with the trader.[302] Similarly, although the Hin Leong or Ocean Bunkering bankruptcies cannot be attributed to unpaid bunkers, their collapse has affected at least 23 banks financing the commodity, which reported losses of US$3.85 billion,[303] leading some of the banks to decide to stop financing the sector.[304] Hence, if the public policy that motivated the exclusion or restriction of the maritime lien for necessaries attempted to provide protection for banks, applying the same rule in the modern context appears to be detrimental to other banks. Maintaining the same approach is acting like a boomerang hitting the same finance sector, as the undermining or collapse of unpaid suppliers directly affects the financial institutions supporting them.

The hardships of physical suppliers seeking remedies for collecting debts are known, but the solutions proposed do not seem feasible. Courts have recommended 'selling on different payment terms like payment in advance or payment on delivery'.[305] Indeed, the most straightforward solution is not to sell on credit. However, such an alternative may arguably not be reasonable or beneficial for the industry. As mentioned above, bunkers are one of the most significant expenses incurred in a voyage. If the bunker industry adopts such a radical measure, this may negatively impact shipowners, charterers, and their financers. Such parties will have to disburse, in advance, large amounts of cash while assuming the risk of non-performance or a deficient supply in quantity or quality. Denying or limiting credit would also

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[299] [2021] SGCA 19, [2021] 1 SLR 1217.

[300] Ibid [6]. The loan facility was secured by 'all goods and/or the receivables and documents representing the goods financed by CIMB as security'.

[301] The licence was not renewed in 2017. See Maritime and Port Authority of Singapore, *Port Maritime Circular No 11 of 2017* (31 August 2017) <https://www.mpa.gov.sg/web/wcm/connect/www/97c0ec3d-e42b-495e-9ab3-3ccc7b617bae/pc17-11.pdf?MOD=AJPERES>.

[302] [2021] SGCA 19, [2021] 1 SLR 1217 [82]–[94].

[303] Jaganathan (n 66)

[304] Tolson (n 4).

[305] *The Posidon* (n 121) [94]. Also suggested in *The Sam Hawk* (n 175) [63]; *The Yuta Bondarovskaya* (n 95) 366.

reduce competitiveness among bunker suppliers as only big players may assume the risks. As recent bankruptcies have shown, however, no company is too big to fail.

During the discussions leading to the Maritime Liens and Mortgages Convention 1993, it was recommended that suppliers of goods and services should make credit risk assessments before granting credit automatically.[306] Practising due diligence or credit assessment on every potential purchaser before granting credit may be another option, but it is impractical. Assessing the financial capacity of any company can be a complex process which may increase transaction costs and delay the required service. Sometimes such assessments are not entirely accurate and require frequent updates, while buyers may be reluctant to disclose their financial information to suppliers. As is the case with denying credit, the inconvenience of this proposal is that these measures will equally affect all charterers and shipowners. In contrast, a maritime lien would only affect those who are in default of their obligations. Moreover, the maritime lien acts as a deterrent for non-payment, as the threat of ship arrest should encourage charterers to pay on time and shipowners to be vigilant that those debts are promptly paid. A maritime lien attaching the ship has the effect of passing the risk of non-payment to the party in the best position to control and prevent it.

In the absence of the availability this instrument, another option for bunker suppliers is to shop for a more convenient forum and enforce these claims in jurisdictions which recognise maritime liens for necessaries. The favourite forum for enforcement of these claims used to be the United States, but after the approach in the interpretation of the CIMLA, suppliers may have to seek other options. Given the criticism of forum shopping, this is an undesirable option, but it is one of a limited number of options available to suppliers.

It might be argued that a new discussion on the subject is unnecessary as it was the subject of debate for the drafting and adoption of both the 1967 and 1993 Maritime Liens and Mortgages Conventions. It must be observed, however, that the last significant analysis of the subject occurred almost 30 years ago during the deliberations leading to the 1993 Convention.

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[306] United Nations/International Maritime Organization, *Report of the Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages*, vol 2, A/CONF.162/8, (21 July 1993) [14] <https://unctad.org/system/files/official-document/aconf162d8_en.pdf>.

The general approach of this Convention was also to keep the list of maritime liens at a minimum, in order to encourage ship finance.[307] At that time, however, the participation of bunker intermediaries was not as prominent as it is today.[308] Apart from this, a crucial argument for excluding the supplier's maritime lien was based on the existence of modern communications. Since the discussions leading to the 1926 Convention, one of the arguments against such a maritime lien was the existence of new communication technologies enabling the master to contact the owner to request funding for the ship's necessaries,[309] or to check on the shipowner's or charterer's creditworthiness.[310] This argument is based on the assumption that the reason for granting the lien was the impossibility of obtaining funds from the owner to provide the goods and services urgently required by the ship.[311] This reasoning is inaccurate. Since Roman times when this device was created, shipowners usually travelled with their ships, and this practice continued into the Middle Ages.[312] Hence, the reason for the maritime lien was not the absence of the owner at the place where the necessaries were requested, and the master being short of cash to pay for them. The primary function was to provide security for a debt contracted by the owner or the master when they lacked funds to pay for them. Thus, the existence of modern telecommunications and wire transfers systems as an argument for denying the maritime lien is simply irrelevant, as the industry continues providing bunkers on a credit basis because the market so demands.[313]

After *The Halcyon Isle*, the United Kingdom and Singapore do not recognise maritime liens for necessaries, even if they are granted under foreign law, or if the parties agree on the application of US law in the bunker suppliers' terms and conditions. This position has been supported by the argument that to recognise such foreign maritime liens would result in placing foreign creditors in a more favourable position than local creditors.[314] This concern is doubtless reasonable, but almost all bunker suppliers, local or foreign, include similar clauses

[307] Ibid para 10.
[308] See text to n 40.
[309] F Berlingieri, 'The Maritime Lien for "Necessaries" in the 1926 Brussels Convention on Maritime Liens and Mortgages' (2005) 10 Revue de Droit Uniforme 587, 588. Instantaneous communication and electronic transfer of funds were also discussed in *The Sam Hawk* (n 175) [63].
[310] See *Marine Oil Trading Ltd v Motor Tanker Paros* 287 F Supp 2d 638 (ED Vir 2003), 2003 AMC 1298.
[311] Berlingieri (n 309) 590.
[312] See Walter Ashburner, *The Rhodian Sea Law* (Clarendon Press 1909) cxxxv–cxxxvi. This practice, however, seems to decline by the end of the 18th century. See Abbott (n 172) para 83.
[313] See text to n 254.
[314] See, eg, *The Sam Hawk* (n 175) [83].

in their contracts, making the apparent disparity unreal if the freedom of contract reflected in such contractual agreements were to be respected. Nevertheless, if the point is that local law does not recognise this 'procedural remedy' for a specific creditor, the relevant question ought to be why domestic creditors are more poorly protected than foreign creditors.

It is, therefore, arguable that a more balanced approach is required. Continuing a rule based on past public policies may not respond to the prevailing current needs of the public and international trade. The need to revise this approach appears critical, considering a new element that was not at sight two centuries ago: the urgent demand for the shipping industry to move towards decarbonisation. The threat of climate change has prompted the industry to reduce carbon emissions, a goal that depends on new ship designs, technology, and types of fuel. The production of LNG, methanol, ammonia, blue hydrogen, biomass, and other alternative fuels requires new infrastructure, and is more expensive than fossil fuels.[315] If the suppliers of these new products face the same hardships in collecting their debts as traditional suppliers have, the interest of investors and their financers in participating in this new industry will be substantially lessened.

In this new seascape, the warning of Lords Salmon and Scarman in their dissenting judgment in the *Halcyon Isle* seems prophetic. Noting the lack of international uniformity in the law governing maritime liens, they held that '[i]n such confusion policy is an uncertain guide to the law. Principle offers a better prospect for the future.'[316] The dissenting Judges endorsed the decision of the Singapore Court of Appeal declaring the substantive character of the maritime lien and recognising the maritime lien under US law for ship repairers based on 'the balance of authorities, the comity of nations, private international law and natural justice'.[317] The majority of the Privy Council did not deny the value of ship repairers, and acknowledged that there were good reasons for recognising and giving priority to necessaries men's claims. However, they felt constrained by a policy adopted long ago, that they were unwilling to change:

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315 Nidaa Bakhsh, 'No One Single Fuel Solves Shipping's Decarbonisation Dilemma' (*Lloyd's List*, 22 September 2021).

316 *The Halcyon Isle* (n 119) 244.

317 Ibid 246.

> Such a claim, wherever the repairs were done, whether in Singapore or abroad, may well invite sympathy since the repairs may be added to the value of the ship and thus to the value of the security to which the mortgagees can have resort. As a matter of policy such a claim might not unreasonably be given priority over claims by holders of prior mortgages the value of whose security had thereby been enhanced. If this is to be done, however, it will, in their Lordships' view have to be done by the legislature. It is far too late to add, by judicial decision, an additional class of claim to those which have hitherto been recognised as giving rise to maritime liens under the law of Singapore; nor is this what the judgment of the Court of Appeal in the instant case purports to do.[318]

A similar approach has been adopted more recently in a recent landmark Singapore case, *UKM v Attorney-General*.[319] Although not an admiralty case, the case presents a detailed analysis of public policy in court decisions. The Chief Justice explained that in judge-made law — such as maritime liens — the courts have the role of making the law and have the responsibility for changing the law, not only for individual cases, but also, for the common good.[320] However, the Court also explained that its power to establish or change the law was limited when this represented such a significant development that legislative action would be more appropriate.[321] As there are clear legal and economic implications associated with amending the approach to maritime liens, it is unlikely that the courts will embark on the task of updating the law. Indeed, Common Law courts worldwide are reluctant to vary the principles inherited from English law and based on past public policy considerations.

7 Conclusions

The supply of bunkers is essential for an industry that is said to be responsible for carrying 90% of international trade.[322] The recent bunker litigation has demonstrated the flaws in outdated statutes, case law principles, and ineffective contractual devices, which are unsuitable for modern commercial practice. While other industry players can secure their credit in many

[318] Ibid 241–42.
[319] *UKM v Attorney-General* (n 262).
[320] Ibid.
[321] Ibid.
[322] See, eg, International Chamber of Shipping (ICS) 'Explaining Shipping' <https://www.ics-shipping.org/explaining/>.

ways, bunker suppliers have been left without an effective remedy, and the proposed solutions are impractical or even detrimental to the industry. The situation has become critical because the insolvency of some suppliers has led some banks to withdraw from financing marine fuel. Understandably, banks cannot grant loans guaranteed by a consumable product upon which suppliers have no retention of title, nor can they collect receivables through an action in rem or a maritime lien. The restoration of the maritime lien for necessaries is a practical solution. Granting a maritime lien to the party that bears the highest exposure in the transaction and suffers the actual loss should promote the prompt payment of bunkers, prevent suppliers' insolvencies, and help restore the banks' confidence in financing this industry.

The reasons underlying the restrictive approach on the maritime lien for necessaries in the 19th century were understandable and even acceptable. However, applying the same rule today is not. The number of maritime liens is more limited than ever. Two are essentially obsolete, while the other three have been replaced by other forms of security or are in decline. The secret character of the maritime lien, which was the main reason for denying it, no longer poses a threat for those parties whom the public policy originally attempted to protect. They have mechanisms to discover the lien and prevent any financial damage that may result from it.

The necessity for a clear and defined security or remedy for suppliers has become more urgent, given the imperative need to transition to non-fossil fuels. Investment in environmentally friendly sources for ship propulsion may be discouraged if banks are reluctant to finance suppliers under the current legal framework.

Courts have left updating the law to Parliaments, but this task may not necessarily require statutory law reform. It would suffice to respect the freedom of contract expressed by the parties in accepting the terms and conditions of supply that include the application of US law on this aspect,[323] a term of which shipowners and other players are fully aware.

[323] As seems to have been recognised in arbitration: See (2021) 1977 LMLN 6.

It is accepted that any proposal for a restatement of maritime liens is a long shot. Reconsidering the law on maritime liens involves the analysis of many complex issues that fall beyond the scope of this paper. While the arguments presented above may be labelled as mere academic advocacy, the problem has been the subject of criticism for a long time[324] but has been largely ignored. For decades, courts have expressed 'sympathy ' for supplier claims,[325] but the situation is reaching a point that requires more than sympathy. Applying an approach based on public policy principles established in the 19th century appears inadequate, and the undesirable consequences are now manifest. Current public policy should contemplate a fresh reconsideration of the law of maritime liens, at least in so far as necessaries are concerned.

[324] Davies (n 155); Paul Myburgh, 'The Ship Supplier's Lien: Taking a (Maple) Leaf Out of the Canadian Statute Book?' (2010) 18 Asia Pacific L Rev 279; Steven Rares, 'Maritime liens, renvoi and conflicts of law: the far from *Halcyon Isle*' [2014] LMCLQ 184.

[325] *The Halcyon Isle* (n 119) 242; *The Yuta Bondarovskaya* (n 95) 366; *ING Bank v M/V Temara* (n 74) 523.