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Comment

ADMIRALTY JURISDICTION AND BENEFICIAL OWNERSHIP

Some Unanswered Questions

The Min Rui
[2016] 5 SLR 667

The recent decision of the High Court in *The Min Rui* brought into focus the approach to be taken when determining the beneficial ownership of a vessel for the purpose of establishing the admiralty jurisdiction of the court. The case raised two interesting questions. First, in an interlocutory jurisdictional challenge, what is the standard of proof to be applied in determining whether the defendant was the beneficial owner of the vessel at the time the action was brought? Second, in this context, what law governs the issue of beneficial ownership? While the High Court did not conclusively deal with these questions, its decision does point towards what the possible answers might be.

Senthil **SABAPATHY**
BA (Oxford), BCL (Oxford);
Justices' Law Clerk, Supreme Court of Singapore.

I. Facts

1 When a vessel is arrested by a plaintiff, the defendant may turn around and say: that is not my ship – or at least, that is not my ship *anymore*. More precisely, the defendant may allege that, at the time the action was brought, it was neither "the beneficial owner of that ship as respects all the shares in it [n]or the charterer of that ship under a charter by demise" within the meaning of s 4(4)(i) of the High Court (Admiralty Jurisdiction) Act[1] ("HCAJA"). If so, then the High Court's admiralty jurisdiction would not be established and the plaintiff's *in rem* action would fail. After all, a plaintiff has no business arresting a ship in which the defendant had no interest when the action was brought. This was precisely the objection raised by the defendant in *The Min Rui*.[2]

1 Cap 123, 2001 Rev Ed.
2 [2016] 5 SLR 667.

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2 The facts of the case are uncomplicated. In June 2014, the plaintiffs, two Brazilian companies, shipped a consignment of steel structures on board the *Min Rui* for carriage from China to Brazil. The vessel was owned by the defendant, Min Rui Shipping Co Ltd, and registered in Hong Kong. There was apparently bad weather en route and the cargo was lost and/or damaged by the time the vessel arrived at the port of discharge in August 2014. So, the plaintiffs brought an admiralty action in Singapore against the defendant for failure to take reasonable care of the cargo. The *in rem* writ was issued on 16 December 2015 – this date was pivotal as it was when "the action was brought" for the purposes of the HCAJA.[3] Hence, for the plaintiffs to establish admiralty jurisdiction, they had to prove that the defendant was either the beneficial owner or demise charterer of the vessel on that date.

3 Meanwhile, the defendant sold the vessel to another party, Qidong Shipping Ltd ("Qidong"). The sequence of the sale is important, and was as follows:

> (a) In October 2014, the defendant entered into a memorandum of agreement for the sale of the vessel, which was governed by English law. The buyer of the vessel, Qidong, intended to register the vessel in Panama following the sale.
>
> (b) Thus, in November 2014, it obtained a Patente Provisional De Navegacion ("Panamanian provisional licence") from the Panama maritime authority. This was a temporary licence which allowed the vessel to sail under the Panamanian flag while the application for an official Panamanian navigational licence was pending.
>
> (c) On 9 December 2014, a bill of sale was executed in favour of Qidong in which the defendant acknowledged receipt of the purchase price of US$3.75m.

4 Crucially, on 12 December 2014 – four days before the plaintiffs commenced their admiralty action in Singapore – the defendant delivered possession of the vessel to Qidong at Qingdao, China. The executed bill of sale was handed over to Qidong that day; it was not, however, formally notarised as required under the terms of the memorandum of agreement. Nevertheless, Qidong took delivery of the vessel. Later, on 16 December 2014 (that is, the same day the plaintiffs commenced their action in Singapore), the defendant submitted a notice to the Hong Kong Shipping Register to close the ship's registration. This was done on 7 January 2015, following which the vessel ceased to be

3 High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) s 4(4)(i); *The Monica S* [1967] 2 Lloyd's Rep 113.

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registered with Hong Kong as the flag state. Subsequently, the bill of sale was formally notarised and the vessel was finally registered in the name of Qidong in Panama in February 2015.

II. The defendant's setting aside application – First instance decision

5 The vessel was arrested in early February 2015. Following the arrest, the defendant brought an application to set aside the plaintiffs' *in rem* writ. It argued that the High Court's admiralty jurisdiction was not established because the beneficial ownership of the vessel had passed from the defendant to Qidong before 16 December 2015. At first instance, the assistant registrar dismissed the jurisdictional challenge.[4] It was undisputed that the defendant remained the registered owner of the vessel on the Hong Kong Shipping Register on 16 December 2016. The ship's register was *prima facie* evidence of her true ownership,[5] and the issue was whether the defendant had displaced this evidence. The asst registrar noted that the matter before him was an *interlocutory* application brought on the basis of *affidavit evidence alone*; neither party had applied to cross-examine the other side's witnesses. He, thus, relied on the observations made by Chan Sek Keong CJ in *The Bunga Melati 5*[6] that factual disputes in a jurisdictional challenge "can only be decided on the basis of oral evidence and cross-examination of the witness or deponent, *unless the defendant is able to produce undisputable and conclusive evidence that the requisite jurisdictional fact does not exist*" [emphasis added].[7] The asst registrar judged that this standard of proof applied to the setting aside application. Consequently, he found that the defendant had not adduced "undisputable and conclusive evidence" that its challenge should succeed "at this time" given the *prima facie* evidence of the ship's registration in its name and certain deficiencies in the sale documentation. The asst registrar emphasised, however, that this was not a *conclusive* finding as the court at the liability stage would be entitled to come to a differing opinion based on evidence which might surface at trial. This is a point which bears closer examination and will be explored later.

6 In the course of his decision, the asst registrar also made two points on the applicable law, relying on the decision of Tan Lee Meng J (as he then was) in *The Makassar Caraka Jaya Niaga III-39*[8]

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4 High Court Summons No 1621 of 2015, *The Min Rui* (25 November 2015, unreported).
5 *The Ohm Mariana ex Poeny* [1993] 2 SLR(R) 113 at [34].
6 [2012] 4 SLR 546.
7 *The Bunga Melati 5* [2012] 4 SLR 546 at [124].
8 [2011] 1 SLR 982.

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("*The Makassar*"). First, he held that Singapore law as the *lex fori* governed the question of whether the defendant was the beneficial owner of the ship at the time the action was brought. Second, notwithstanding the first point, the court may take into account "relevant aspects of the relevant foreign law for a better picture of how ships may be owned or transferred in order to determine who has the beneficial ownership under that foreign law".[9] These legal principles were not central to the asst registrar's decision. The only foreign law evidence adduced was on the effect of the Panamanian provisional licence under the laws of Panama; but this evidence was rightly judged to be irrelevant as the transfer of title in the vessel – which was registered in Hong Kong, sold pursuant to a sale agreement governed by English law and delivered to the buyer in China – did not have any connection with Panamanian law.

III. High Court's decision

7 On appeal, Belinda Ang Saw Ean J disagreed with the asst registrar's decision on the jurisdictional challenge. The main issue before her was whether beneficial ownership of the vessel had passed from the defendant to Qidong before the action was brought on 16 December 2015. There was also a preliminary issue as to the *bona fides* of the sale transaction. As was argued before the asst registrar, the plaintiffs alleged that the sale of the vessel was a sham. Ang J easily disposed of this allegation as the contemporaneous documentary evidence as a whole supported the existence of a genuine contract for sale and purchase. She also noted that the deficiencies in the sale documentation pointed out by the plaintiffs were more apparent than real. This was a finding on the facts, which need not trouble us further.

8 On the main issue, Ang J essentially agreed with the asst registrar that the principles set out by Tan J in *The Makassar* applied and that the statutory requirement of beneficial ownership must be decided by applying Singapore law as the *lex fori* but "having regard to the proper law of the sale contract and the legal effect of the transfer of property".[10] Ang J's observations on the governing law will be discussed shortly. She also agreed that expert evidence adduced on Panamanian law was largely not relevant.[11]

9 However, Ang J parted ways with the asst registrar's decision by finding that the beneficial ownership of the vessel had passed to Qidong before the action was brought. She first held that the plaintiffs could not

9 *The Makassar Caraka Jaya Niaga III-39* [2011] 1 SLR 982 at [9].
10 *The Min Rui* [2016] 5 SLR 667 at [11].
11 *The Min Rui* [2016] 5 SLR 667 at [63].

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simply rely on the entry in the ship's register in the defendant's name. The ship's register was merely *prima facie* inference of ownership which could be displaced by evidence that someone else was the beneficial owner for the purpose of s 4(4)(i) of the HCAJA.[12] There was sufficient such evidence before the court. In particular, the terms of the memorandum of agreement were consistent with the normal rule that the parties intended to pass property at the point of delivery of the bill of sale, exchange of closing documents and physical delivery of the vessel.[13] While the bill of sale had not been notarised at the time of delivery, Ang J assessed that this was only a procedural requirement; the absence of notarisation did not affect the substantive rights *vis-à-vis* the parties at the point of closing.[14] Hence, beneficial ownership as respects all the shares in the vessel had passed from the defendant to Qidong when the vessel was delivered on 12 December 2015. The plaintiffs had failed to establish admiralty jurisdiction.

10 Again, the findings of the High Court on when property passed under the memorandum of agreement were specific to the facts of the case. They do not give rise to any issues of general interest. But Ang J's refusal to adopt the evidential approach of the asst registrar and her remarks on the applicable choice of law principles give rise to two interesting questions of law which are of practical importance. First, in an interlocutory jurisdictional challenge, what is the standard of proof to be applied in determining whether the defendant was the beneficial owner of the vessel at the time the action was brought? Second, in this context, what law governs the issue of beneficial ownership? Each of these questions will be examined in turn, along with the possible answers to them following *The Min Rui*.

IV. Standard of proof

11 The evidential question was at the heart of the asst registrar's decision. Unfortunately, the issue was not expressly addressed by Ang J in the High Court's grounds of decision. Having said that, it is clear that she did not agree with the asst registrar that the defendant needed to produce "undisputable and conclusive evidence" that the requirement of s 4(4)(i) of the HCAJA was not satisfied. Though this decision was right as a matter of authority and principle, in this author's respectful view, it would have been preferable if the High Court had explicitly determined the issue for the benefit of future admiralty litigants.

12 *The Min Rui* [2016] 5 SLR 667 at [29].
13 *The Min Rui* [2016] 5 SLR 667 at [73] and [74].
14 *The Min Rui* [2016] 5 SLR 667 at [50].

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12 Some background is required. In the landmark Court of Appeal decision of *The Bunga Melati 5*, V K Rajah JA (who delivered the decision of the court) agreed with the analysis of the High Court judge, which was also Ang J incidentally, that s 4(4) of the HCAJA could be broken down into five steps.[15] It was recognised that differing standards of proof applied to each of these steps depending on whether the step related to a "jurisdictional fact", a "jurisdictional question of law" or a "non-jurisdictional matter of fact or law".[16] For our purposes, only two of the five steps are relevant: steps 1 and 5.

13 Under step 1, the plaintiff has to prove, *on the balance of probabilities*, that the jurisdictional facts under the limb it is relying on in s 3(1)(*d*)–3(1)(*q*) of the HCAJA exist; and show *an arguable case* that its claim is of the type or nature required by the relevant statutory provision. For example, if the plaintiff alleges that it supplied bunkers to the defendant's vessel which remain unpaid for – a claim that would fall within s 3(1)(*l*) of the HCAJA – it will have to prove, on a balance of probabilities, that there was in fact bunker supplied to the vessel for her operation. That would be a jurisdictional fact, a fact which needs to be proven as a condition precedent for the court to have admiralty jurisdiction. In addition, the plaintiff would also have to satisfy the court that there is an arguable case that its claim for unpaid goods is a claim of a type falling within s 3(1)(*l*). This issue concerns a jurisdictional question of law. Next, for step 5, it has to be proved, *on the balance of probabilities*, that the relevant person liable *in personam* was, at the time when the action was brought: (a) the beneficial owner of the offending ship as respects all the shares in it or the charterer of that ship under a demise charter; or (b) the beneficial owner of the sister ship as respects all the shares in it. This is the step which was in issue in *The Min Rui*. Reading both the High Court judgment of Ang J in *The Bunga Melati 5*[17] together with that of Rajah JA in the Court of Appeal, it might appear that the answer to the evidential question posed above is clear – proof on a balance of probabilities is required for step 5 because it concerns a jurisdictional fact.

14 The difficulty arises from the supplementary observations made by Chan CJ in *The Bunga Melati 5* on how the above standards of proof may have to be adjusted in an *interlocutory challenge to the existence of a jurisdictional fact on affidavit evidence alone*. For convenience, such a challenge shall be referred to as an "interlocutory factual challenge" in this article. The learned Chief Justice first noted that, under our adversarial system of justice, factual disputes can only be decided on the

15 *The Bunga Melati 5* [2012] 4 SLR 546 at [112].
16 *The Bunga Melati 5* [2012] 4 SLR 546 at [107].
17 *The Bunga Melati 5* [2011] 4 SLR 1017.

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basis of oral evidence and cross-examination of the witness or deponent. He specifically identified two problems with applying a balance of probabilities standard to an interlocutory factual challenge.[18] First, it might result in the premature determination of the plaintiff's action. He used the example of a claim for unpaid bunkers where the defendant's factual challenge, under step 1, is that no bunkers were supplied to the vessel at all. If such a dispute was to be decided in favour of the plaintiff at the interlocutory stage, it would be entitled to judgment as the defendant would have no defence to be tried on the facts subsequently at trial. Second, the balance of probabilities standard may be incongruent with the requirement that the plaintiff only has to prove that it has an arguable case on the law; if this threshold is met, then the claim should ordinarily proceed to trial. Hence, Chan CJ was of the view that it would be procedurally unjust for factual challenges to be disposed of solely on the basis of affidavit evidence without a full trial of the issue "unless the defendant is able to produce undisputable and conclusive evidence that the requisite jurisdictional fact does not exist".[19] This was the *dictum* which the asst registrar relied on in *The Min Rui*. Notably, Chan CJ also stated that this principle "must apply to all the steps outlined in the Judge's advisory in relation to a factual challenge".[20] This sentence, taken on its own, might suggest that the asst registrar was right in applying the "undisputable and conclusive evidence" standard to the defendant's jurisdictional challenge under step 5.

15 However, the above observations by Chan CJ have to be read subject to the following critical passage in which the learned Chief Justice discussed the solution to the procedural problems that he had identified:[21]

> 128 In my view, the correct procedural position as to how a court should proceed adjudicating over a factual challenge at the interlocutory/jurisdictional stage was stated by the New Zealand Court of Appeal in *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37 …
>
> > …
> >
> > [20] In *I Congreso del Partido* Robert Goff J decided that the question of jurisdiction had to be determined on the motion to set aside the writ and could not be dealt with as an issue in the substantive proceeding. … We are in respectful agreement with the following observation of Robert Goff J at p 1199:

18 *The Bunga Melati 5* [2012] 4 SLR 546 at [125].
19 *The Bunga Melati 5* [2012] 4 SLR 546 at [124].
20 *The Bunga Melati 5* [2012] 4 SLR 546 at [124].
21 *The Bunga Melati 5* [2012] 4 SLR 546 at [128]–[129].

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> … it cannot be right for the decision on [jurisdiction] to be allowed to depend on the decision of some issue to be tried in the actions. If there is no jurisdiction as against [the party disputing ownership], they should not be troubled with the actions at all; indeed it cannot be decided whether the actions can be allowed to proceed until the question of jurisdiction has been determined.

> [21] But, though holding that the matter of jurisdiction had to be dealt with on the motion, Robert Goff J said that evidence would be admitted for the purpose of the ruling on jurisdiction and there could be oral evidence, for example, by cross-examination of deponents of affidavits. In *Baltic Shipping* this Court said that ownership must, if in issue, be decided on the motion to set aside and must be decided on evidence and not merely on pleadings. *It seems to us that, even allowing for the urgency of the matter, there is no reason why the High Court should not allow an adjournment of the application to set aside the proceeding to give time for the assembling of the necessary evidence and, if necessary, for deponents to be brought to this country for cross-examination so that the important question of ownership, or any other factual issue arising under s 5 as a matter going to jurisdiction, can be determined without undue haste and consequent prejudice to a party which perhaps may not have immediate access to all relevant factual materials.* If the application to set aside is heard in this manner it will be little different from a R 418 hearing.

> …

129 In my view, the court's approach as described in the italicised words in the above passage meets the requirements of procedural justice in determining factual challenges under step 1 in an admiralty action. The court must conduct a trial of the issue *at the interlocutory/jurisdictional stage*, if the defendant seeks a conclusive finding of fact from the court. However, if the defendant is only prepared to rely on its affidavits, the court will only be able to determine the disputed issue on a preliminary basis. Consistent with the nature of the hearing, there can be no finding of fact on the balance of probabilities, but only on a *prima facie* basis that, on the facts, the court has jurisdiction. Although there will be no conclusive finding towards the disputed jurisdictional fact(s) *under step 1* at the interlocutory stage, the issue of jurisdiction will merge at the *liability stage* with the issue of whether the plaintiff has proved its claim on the facts on the balance of probabilities, and the court at the liability stage would be entitled to come to a differing opinion from the court at the interlocutory stage based on evidence beyond contested affidavits which might surface *at trial*. However, at the liability stage, '[t]he court is not deciding if there is good cause for it to assume jurisdiction – it is deciding if there is good cause for it to give judgment for the plaintiff'

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> (*The Jarguh Sarwit (CA)* at [44]). It does not matter how the standard of proof (at the interlocutory/jurisdictional stage) is labelled provided it is understood that a factual dispute cannot be *conclusively* decided on contested affidavit evidence alone.
>
> [emphasis in original]

16 Two points need to be disentangled from this passage. First, there is the suggestion, taken from the New Zealand Court of Appeal's decision in *Vostok Shipping Co Ltd v Confederation Ltd*[22] ("*Vostok*") and first made by Robert Goff J (as he then was) in the English High Court case of *I Congreso del Partido*[23] ("*Congreso*"), that the court can allow oral evidence and cross-examination *if necessary* even at the interlocutory stage. This is uncontroversial and is a remedy that can be applied to *all* interlocutory factual challenges regardless of the particular step or fact which is in dispute. It has nothing to do with the applicable standard of proof *per se*.

17 Second, there is the separate proposal that interlocutory factual challenges arising *from step 1* ought to be decided on a *prima facie* or preliminary basis rather than on a balance of probabilities if the defendant is only prepared to rely on its affidavits. If this lower evidential threshold is met, then the matter should be allowed to proceed to trial, according to Chan CJ, where the same issue "will merge at the liability stage with the issue of whether the plaintiff has proved its claim on the facts on the balance of probabilities". At that stage, the trial judge, after hearing full oral evidence, would be entitled to take a different view from that reached at the interlocutory stage. Chan CJ did not cite any authority for this proposed procedural approach. Nevertheless, it makes good practical sense in relation to factual challenges *arising from step 1*. This is because step 1, unlike the other steps laid down in *The Bunga Melati 5*, *directly and necessarily relates to the merits of the plaintiff's claim*. Going back to the example of a claim for unpaid bunkers, the factual dispute over whether bunkers were supplied to the ship at all is one which concerns *both* the court's admiralty jurisdiction and the merits of the claim. That is the reason why its conclusive determination at the interlocutory stage, on a balance of probabilities, may result in the premature disposal of the plaintiff's claim and would be difficult to reconcile with a finding that there is otherwise an arguable case on the law (that is, the two difficulties identified by Chan CJ noted above). Hence, in this context, assessing a factual challenge on a *prima facie* basis at the interlocutory stage so that the true facts may be conclusively determined at trial is sensible and just.

22 [2000] 1 NZLR 37.

23 [1978] 1 QB 500.

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18 By contrast, factual challenges arising from the other steps identified in *The Bunga Melati 5* may not have anything to do with the merits of the plaintiff's claim at all. The remainder of this section will focus on the requirement under step 5 that the defendant must have been the beneficial owner or demise charterer of the vessel at the time when the action was brought. In most cases, this is a fact which would have no bearing on the plaintiff's cause of action. It is hornbook law that a defendant's liability is assessed at the time when the cause of action accrued rather than when the action is later brought. In *The Min Rui*, for instance, it was not disputed that the defendant was the owner of the vessel at the time when the cargo was lost and/or damaged (that is, when the cause of action arose), and would be the party liable in an action *in personam*.[24] So, the beneficial ownership of the vessel *at the time the action was brought* was an issue which *related solely to the court's admiralty jurisdiction and the plaintiffs' right to arrest the vessel to obtain prejudgment security*. In other words, there was no overlap with the merits of the claim and the dispute over beneficial ownership would not have "merged at the liability stage" with the substantive issues to be determined at trial. In such cases, it would be inappropriate and unprincipled for the disputed jurisdictional fact to be determined on a *prima facie* basis pending trial. As Goff J held in *Congreso*, if there is no jurisdiction then the defendant should not be troubled with the action at all.[25]

19 Extending Chan CJ's proposed procedural approach to interlocutory factual challenges under step 5, which do not touch on the merits of the case, would also be contrary to established common law authority. In *Congreso*, the defendant similarly argued that it was not the beneficial owner of the vessel at the time when the action was brought. Just as under s 4(4) of the HCAJA, this was a requirement for the English High Court's admiralty jurisdiction to be established.[26] The plaintiff responded by submitting that it would be wrong for the court to decide the point on affidavit evidence alone. The proper course, it contended, would be for the action to be allowed to proceed given that there was "a reasonably arguable case" that the defendant had beneficial ownership.[27] The question of the defendant's title, it was suggested, could be ordered to be tried as an issue in the action. Goff J unequivocally rejected this submission. He held that even though there was only

24 *The Min Rui* [2016] 5 SLR 667 at [5].

25 *I Congreso del Partido* [1978] 1 QB 500 at 536; see also *The Bunga Melati 5* [2011] 4 SLR 1017 at [86].

26 UK Administration of Justice Act 1956 (c 46) s 3(4) (now UK Senior Courts Act 1981 (c 54) s 21(4)). The English provisions form the basis for the statutes on admiralty jurisdiction in common law countries including Australia, Hong Kong, New Zealand and Singapore.

27 *I Congreso del Partido* [1978] 1 QB 500 at 535.

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affidavit evidence before him, it could not be right for the decision on the question of jurisdiction to be allowed to depend on some issue to be tried in the action. The matter could not be allowed to proceed until the jurisdictional question was determined as a preliminary issue.[28] Goff J's ruling on this point was followed in subsequent English cases including *The Aventicum*.[29] That case confirmed that the burden is on the plaintiff to prove on a balance of probabilities that the ship was beneficially owned by the defendant at the time when the action was brought.[30] These authorities have subsequently been adopted in other jurisdictions with similar provisions to s 4(4) of our HCAJA such as Australia,[31] Hong Kong[32] and New Zealand.[33]

20 Closer to home, the argument that the court should "leave the door open" for the requirement of beneficial ownership to be dealt with at trial as long there is a good arguable case that the requirement is made out was specifically raised before and rejected by M Karthigesu J (as he then was) in *The Andres Bonifacio*.[34] In reaching this finding, the learned judge expressly adopted the English cases including *Congreso* and *The Aventicum*. These cases were also followed in *The Temasek Eagle*,[35] where Choo Han Teck JC (as he then was) applied the balance of probabilities test to an interlocutory factual challenge on beneficial ownership.[36] Hence, the asst registrar's decision in *The Min Rui* to apply a *prima facie* standard of proof to the issue of beneficial ownership was clearly contrary to precedent.

21 There is, however, the recent judgment of the Court of Appeal in *The Chem Orchid*[37] in which Chao Hick Tin JA, in the context of an interlocutory factual challenge under step 5, considered and expressly approved of Chan CJ's proposed procedural approach as follows:[38]

> We agree with the views of Chan CJ, which make eminent sense in the context of a ship arrest. A ship arrest can sometimes (and, indeed, may often) take place under urgent conditions, with the ship spending only

28 *I Congreso del Partido* [1978] 1 QB 500 at 536.
29 [1978] 1 Lloyd's Rep 184.
30 *The Aventicum* [1978] 1 Lloyd's Rep 184 at 186.
31 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* [1994] HCA 54 at [46].
32 *The Rolita* [1989] 1 HKC 160 at 163.
33 *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37 at [19] and [39].
34 [1991] 1 SLR(R) 523 at [14]–[18]. The appeal against the High Court's decision was on a different point and was, in any event, dismissed: see *The Andres Bonifacio* [1993] 3 SLR(R) 71.
35 [1999] 2 SLR(R) 647.
36 *The Temasek Eagle* [1999] 2 SLR(R) 647 at [15]. The jurisdictional challenge was decided on affidavit evidence alone and the judgment indicates that the matter arose from applications in chambers: see *The Temasek Eagle* at [2].
37 [2016] 2 SLR 50.
38 *The Chem Orchid* [2016] 2 SLR 50 at [48].

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> a fleeting moment within the waters of Singapore – in such a situation, the arresting party may often be able to obtain only a limited amount of information which sufficiently supports the grant of an *in rem* writ and the issue of a warrant of arrest. The defendant may wish to set aside the *in rem* writ and the warrant of arrest, and it can choose to do so relying only on affidavit evidence. If it so chooses, findings made by the court on disputed facts based only on affidavit evidence at an interlocutory hearing, which facts impinge on the court's admiralty jurisdiction, will necessarily be *prima facie* non-conclusive as the requirements of procedural justice would not have been fully complied with. The issue of jurisdiction will then merge with the plaintiff's substantive claim at the trial, which will have to be proved by the plaintiff on the balance of probabilities …

22 At first glance, it may appear that the above comments by Chao JA extend Chan CJ's proposal that interlocutory factual challenges ought to be decided on a *prima facie* basis beyond factual challenges arising from step 1 to all other interlocutory factual challenges, including under step 5. An appreciation of the facts of *The Chem Orchid* makes clear that this is only partially true, and that the case does not undermine the analysis that Chan CJ's proposed procedural approach should not be extended to interlocutory factual challenges *which do not touch on the merits of the case*. In the *The Chem Orchid*, the jurisdictional challenge, under step 5, was based on an assertion that the party alleged to be liable *in person* was not the demise charter of the vessel at the time the writ *in rem* was issued because the charterparty had been terminated earlier by a notice issued in April 2011. The claim by the plaintiffs was for unpaid bunkers, non-delivery of cargo and breach of a charterparty. Crucially, these causes of action all arose in May and June 2011 after the April 2011 notice. There was, thus, an overlap between the jurisdictional challenge and the merits of the case: if the charterparty had indeed been terminated in April, then the plaintiffs' causes of action would necessarily have failed. This is the reason why, concurrently with the jurisdictional challenge, the defendant also brought applications to have the *in rem* writs struck out pursuant to O 18 r 19 of the Rules of Court.[39] This was an important point which was identified by Chao JA, who observed that "the grounds relied on by [the defendant] to challenge the court's jurisdiction were the same as the grounds which could defeat the Creditor's substantive claims in the *in rem* writ".[40] In those circumstances, it was proper for the court to assess the interlocutory factual challenge on a *prima facie* basis; the issue of jurisdiction would have merged with the plaintiffs' substantive claims at the trial, allowing the dispute to be resolved conclusively with the benefit of oral evidence.

39 Cap 322, R 5, 2014 Rev Ed.

40 *The Chem Orchid* [2016] 2 SLR 50 at [53].

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23 Finally, besides principle and authority, it would also be practically undesirable for interlocutory factual challenges to be decided on a *prima facie* basis where the relevant fact does not touch on the merits of the case. In the case of step 5 – and keeping in mind that the ship's register is, on its own, *prima facie* evidence of beneficial ownership[41] – a dilution of the standard of proof would essentially mean that the court could never look behind the register at the interlocutory stage except in the clearest of cases or unless the defendant is prepared to adduce more than affidavit evidence. This would result in unnecessary costs being incurred, particularly if a case is allowed to proceed to full trial and it is ultimately discovered that the court has no jurisdiction to begin with. The concern about procedural injustice arising from the court deciding facts on affidavit evidence alone should not be overstated either. In many cases, the issue of beneficial ownership would turn on an objective interpretation of documentary evidence such as the ship's certificate of register, the sale agreement and the bill of sale. Indeed, this is how Ang J decided the case in *The Min Rui*. In such instances, it is difficult to see why oral evidence would be useful, let alone necessary.[42]

24 Therefore, there are strong reasons against generally extending Chan CJ's proposed procedural approach to the requirement of beneficial ownership. The same analysis could be extended to factual challenges arising from the other steps laid down in *The Bunga Melati 5* which do not overlap with the merits of the case. Having said that, it must be conceded that the current legal position in Singapore is not as clear as one would wish. As noted above, there are passages in Chan CJ's supplementary observations which, when taken alone, suggest that a dilution of the balance of probabilities standard is warranted in *all* interlocutory factual challenges regardless of the step or fact which is in dispute. So, it is understandable why the asst registrar in *The Min Rui* fell into error. While the High Court's correction of that error is welcome, the fact that Ang J did not specifically deal with this point in her grounds of decision or elaborate on why she declined to follow the asst registrar's approach to this question means that we still await definitive guidance on this important practical issue.

41 *The Opal 3 ex Kuchino* [1992] 2 SLR(R) 231 at [11]; *The Min Rui* [2016] 5 SLR 667 at [29].

42 See Toh Kian Sing SC, *Admiralty Law and Practice* (LexisNexis, 3rd Ed, 2017) at p 114, where it is submitted that "it does not *invariably* follow that a finding of fact on a balance of probabilities cannot be made on affidavit evidence", and that there ought not to be "a *blanket* rule correlating the finding of a jurisdictional fact with the manner (trial or affidavit evidence) and extent (conclusive or preliminary finding) in which that fact is sought to be proved" [emphasis in original].

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V. Governing law

25 The second question concerns the law which governs the determination of beneficial ownership under s 4(4) of the HCAJA. Here, there was substantial analysis of the issue by Ang J. Her analysis, however, was not conclusive and understandably so. In *The Min Rui*, the issue of the governing law arose tangentially and the only foreign law evidence adduced was that of Panamanian law. As noted by both the asst registrar and the High Court, this evidence was of limited relevance as the law of Panama had no connection to the transfer of the title to the vessel. So, Ang J had no reason to delve in depth into this complicated area of law. Having said that, her observations on this issue were cogent and useful. They clearly point towards the approach which the Singapore courts should take in ascertaining the beneficial ownership of vessels for the purposes of establishing admiralty jurisdiction.

26 Before turning to the solution which *The Min Rui* points towards, there are two other possible analyses worth examining. First, there is what Paul Myburgh, who has written extensively on this topic,[43] has called the "exclusive *lex fori* approach".[44] As the name implies, there is no role for foreign law under this analysis; only the law of the forum is applied to assess beneficial ownership. This approach has rightly been criticised as simplistic and unduly parochial.[45] It would lead to inconsistent outcomes in different jurisdictions and encourage forum shopping. In addition, as the Full Court of the Federal Court of Australia noted in *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (ex Freya)*[46] ("*The Cape Moreton*"), an approach which applies the *lex fori* exclusively would be odd as it would mean that a foreign vessel's ownership would be determined without any regard to any statute dealing with registration and its legal consequences.[47] These shortcomings are the reason why there is no common law jurisdiction which has adopted such a rigid stratagem, as we shall see.

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43 Paul Myburgh, "Conflict of Laws and Vessel Ownership: *The Cape Moreton*" [2005] LMCLQ 430; "Arresting the Right Ship: Procedural Theory, The *In Personam Link* and Conflict of Laws" in *Jurisdiction and Forum Selection in International Maritime Law* (Martin Davies ed) (Kluwer Law International, 2005) ch 8.

44 Paul Myburgh, "Arresting the Right Ship: Procedural Theory, The *In Personam Link* and Conflict of Laws" in *Jurisdiction and Forum Selection in International Maritime Law* (Martin Davies ed) (Kluwer Law International, 2005) ch 8, at p 306.

45 See Paul Myburgh, "Arresting the Right Ship: Procedural Theory, The *In Personam Link* and Conflict of Laws" in *Jurisdiction and Forum Selection in International Maritime Law* (Martin Davies ed) (Kluwer Law International, 2005) ch 8, at pp 306–311.

46 [2005] FCAFC 68; 219 ALR 48.

47 *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (ex Freya)* [2005] FCAFC 68; 219 ALR 48 at [148].

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27 Second, at the other end of the spectrum, there is the full *lex causae* conflicts approach.[48] Under this analysis, the court determines beneficial ownership by applying the foreign law selected by the relevant choice of law rule of the forum. This law would typically be the *lex situs* which may either be the jurisdiction where the vessel is physically situated or her port of registry.[49] There are two problems with this approach. First, it is difficult to see how it can be applied in cases where the *lex situs* does not recognise beneficial ownership.[50] Second, more fundamentally, applying the *lex situs* alone would effectively mean that the court's jurisdiction would be determined by reference to the laws of another state, particularly the doctrines and principles of property ownership of that state. Nevertheless, Myburgh advocated this approach and suggested that it has been adopted in Hong Kong and Australia. He cited two authorities – the decision of the Hong Kong Court of First Instance in *The Halla Liberty*[51] and the Australian case of *Cape Moreton*. However, a closer reading of these judgments indicates that both jurisdictions have not gone so far as to disregard the domestic rules of the *lex fori* altogether.

28 In *The Halla Liberty*, the defendant was the registered owner of the vessel in Korea. But it had entered into a lease agreement to convey title to another party before the action commenced. Stone J found that the defendant had retained beneficial ownership of the vessel despite the lease agreement due to the relevant article of the Korean Commercial Code.[52] The article provided that, although title to a vessel could be transferred simply by agreement, it could not be "insisted upon against any third party" unless registered.[53] Stone J's reliance on the Korean article may suggest that he treated the *lex causae* as determinative of the issue.[54] The better analysis, though, is that he was merely ascertaining what rights the defendant had under the relevant foreign law *before* assessing whether those rights could be regarded as beneficial ownership *in the eyes of the Hong Kong court*.[55] As the learned judge

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48 Paul Myburgh, "Arresting the Right Ship: Procedural Theory, The *In Personam Link* and Conflict of Laws" in *Jurisdiction and Forum Selection in International Maritime Law* (Martin Davies ed) (Kluwer Law International, 2005) ch 8, at p 311.

49 *Dicey, Morris & Collins on the Conflict of Laws* vol 2 (Lord Collins *et al* gen eds) (Sweet & Maxwell, 15th Ed, 2012) at para 22E-057.

50 *The Andres Bonifacio* [1993] 3 SLR(R) 71 at [36].

51 [2000] 1 HKC 659.

52 Commercial Act (Republic of Korea) (Act No 1000).

53 Commercial Act (Republic of Korea) (Act No 1000) Art 743, cited in *The Halla Liberty* [2000] 1 HKC 659 at 675.

54 Paul Myburgh, "Arresting the Right Ship: Procedural Theory, The *In Personam Link* and Conflict of Laws" in *Jurisdiction and Forum Selection in International Maritime Law* (Martin Davies ed) (Kluwer Law International, 2005) ch 8, at p 303.

55 *The Halla Liberty* [2000] 1 HKC 659 at 677, citing *The Nazym Khikmet* [1996] 2 Lloyd's Rep 362.

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found, the lessee only had personal rights against the defendant, who retained the ability to pass good title to third parties. Therefore, the lessee was found to have "enjoyed no more than what would be regarded under our system as a bare legal title to the Halla Liberty, devoid of the characteristics of beneficial ownership as we understand the concept".[56]

29 Similarly, in the *Cape Moreton*, Ryan and Allsop JJ emphasised as follows:[57]

> [W]e favour an approach similar to that taken by the English Court of Appeal in *The 'Nazym Khikmet'* and *The 'Guiseppe di Vittorio'*, that the law of Australia will govern the question of the characterisation of such rights (and their existence, nature and extent) as are derived by Freya or Alico from the transaction of transfer or assignment of the ship. The existence, nature and extent of such rights created or recognised by the transaction will be governed or affected by any law that Australian rules of private international law regard as relevant. The characterisation of those rights as 'ownership' or not and of either Freya or Alico as 'the owner' is then undertaken by reference to Australian law …

30 In other words, the question posed in both cases was whether, under the relevant foreign law, the defendant enjoyed *what could be characterised under the laws of the forum* as beneficial ownership. In my view, it is this third approach, labelled the "modified *lex fori* approach" by Myburgh, which *The Min Rui* points to.

31 The modified *lex fori* approach can be traced back to the English Court of Appeal's judgment in *The Nazym Khikmet*.[58] The case arose out of the breakup of the USSR following which the vessel was transferred to the government of Ukraine. The question before the court was whether the beneficial ownership of the vessel was held by Ukraine or the Black Sea and Shipping Co ("BLASCO"), which was the party liable *in personam*. Sir Thomas Bingham MR (as he then was) identified the applicable rule as follows: whether, when action was brought, BLASCO was, under the law to which it was subject, what English law would regard as the beneficial owner as respects all the shares in the vessel.[59] He then examined the foreign law evidence which indicated that BLASCO held the vessel under a socialist regime known as full economic management. Under this regime, the state retained ownership and the power of ultimate decision over the use and exploitation of those assets for the benefit of the public. Hence, even though BLASCO

56 *The Halla Liberty* [2000] 1 HKC 659 at 677.

57 *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (ex Freya)* [2005] FCAFC 68; 219 ALR 48 at [140].

58 [1996] 2 Lloyd's Rep 362; see also *The Guiseppe di Vittorio* [1998] 2 Lloyd's Rep 136.

59 *The Nazym Khikmet* [1996] 2 Lloyd's Rep 362 at 371.

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enjoyed a wide measure of commercial discretion, it did not enjoy what English law would recognise as the rights of an equitable owner.[60]

32 *The Nazym Khikmet* illustrates the difficulty with adopting the full *lex causae* conflicts approach. The relevant foreign law, which was that of Ukraine, was premised on a fundamentally different view of property rights with no clear distinction between the public powers of the state and the private rights of an owner. In such circumstances, it would have been futile to ask who the "beneficial owner" of the vessel was without any reference to legal concepts of the *lex fori*. To deal with this difficulty, Sir Bingham MR adopted a nuanced, two-stage analysis: (a) first, the court has to determine what rights the defendant has over the vessel under "the relevant foreign law"; (b) second, it must be assessed whether these rights could be characterised as "beneficial ownership" as defined by the *lex fori*. This approach is principled for several reasons. It ensures that the court is the master of its own jurisdiction because the ultimate assessment of whether the defendant's rights are sufficient to establish admiralty jurisdiction is a question for the domestic law. At the same time, it meets the difficulties with the exclusive *lex fori* approach by giving sufficient regard to the applicable foreign law in determining the anterior issue of what the defendant's rights over the vessel actually are. Hence, it is not surprising that *The Nazym Khikmet* has been followed in other jurisdictions. These include Hong Kong and Australia, which have already been examined above, as well as New Zealand.[61]

33 There is, however, one problem with Sir Bingham MR's formulation of the applicable rule. It is unclear what "the relevant foreign law" ought to be at the first stage of the analysis. Although the Master of the Rolls referred to the law to which BLASCO was subject, it does not appear that he intended to lay down, as a general principle, that the relevant foreign law would be the law of the defendant's domicile.[62] This point was picked up in *The Cape Moreton*, where Ryan and Allsop JJ, after a careful examination of the relevant principles and authorities, held that the law of the country of register as the *lex situs* should be given effect in relation to questions of title, property and assignment (subject to domestic statute and public policy).[63] But, as noted above, they did not advocate a full *lex causae* conflicts approach. Instead, *The Cape Moreton* was a useful refinement and clarification of

60 *The Nazym Khikmet* [1996] 2 Lloyd's Rep 362 at 374.

61 *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37 at [26] and [40].

62 See Paul Myburgh, "Arresting the Right Ship: Procedural Theory, The *In Personam Link* and Conflict of Laws" in *Jurisdiction and Forum Selection in International Maritime Law* (Martin Davies ed) (Kluwer Law International, 2005) ch 8, at p 298.

63 *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (ex Freya)* [2005] FCAFC 68; 219 ALR 48 at [146].

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the rule laid down in *The Nazym Khikmet*. It makes clear that, as a matter of Australian law at least, the "relevant foreign law" at the first stage of the modified *lex fori* approach is the law of the country of register.

34 Turning to the position in Singapore, one view which Myburgh has furthered is that Singapore is the only jurisdiction which has adopted the exclusive *lex fori* approach.[64] But a closer reading of the cases he cited and the more recent local authorities on the subject indicate that our courts have, in fact, applied a more calibrated analysis analogous to the approach taken in *The Nazym Khikmet*.

35 The case which is most often cited for the proposition that the Singapore courts apply the *lex fori* exclusively in determining beneficial ownership is *The Andres Bonifacio*.[65] In that case, the vessel was registered in the Philippines in the name of the defendant. But the vessel had been assigned to another party before the commencement of the action. The court, thus, found that the defendant was not the beneficial owner of the vessel for the purposes of establishing admiralty jurisdiction. One of the unsuccessful arguments made by the plaintiff was that the court ought to apply Filipino law as the *lex situs*. Evidence was adduced that, under Filipino law, the assignment was invalid against third parties as it had not been registered. The Court of Appeal judged that this submission was "irrelevant" in the context of s 4(4) of the HCAJA, and that the determination by the court of its own jurisdiction *in rem* depended on Singapore law as the *lex fori*.[66] These pronouncements, however, have to be read in their context. *The Andres Bonifacio* was decided *before The Nazym Khikmet*; so the Singapore court had no opportunity to consider the modified *lex fori* approach which was formulated later by the English Court of Appeal. Instead, what the plaintiff in *The Andres Bonifacio* argued for was a full *lex causae* approach under which the *lex situs* would have wholly governed the issue.[67] The court was right in rejecting this approach, for the reasons stated above. In addition, the submission that the Filipino provision on the requirement for registration ought to be applied to the defendant was not made either in the High Court or in the appellants' written case for the appeal.[68] Hence, the issue was only raised belatedly,

64 Paul Myburgh, "Arresting the Right Ship: Procedural Theory, The *In Personam Link* and Conflict of Laws" in *Jurisdiction and Forum Selection in International Maritime Law* (Martin Davies ed) (Kluwer Law International, 2005) ch 8, at pp 293–296; see also *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (ex Freya)* [2005] FCAFC 68; 219 ALR 48 at [132].

65 [1993] 3 SLR(R) 71.

66 *The Andres Bonifacio* [1993] 3 SLR(R) 71 at [35] and [47].

67 *The Andres Bonifacio* [1993] 3 SLR(R) 71 at [47].

68 *The Andres Bonifacio* [1993] 3 SLR(R) 71 at [35].

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explaining why the Court of Appeal did not explore it in detail. Nevertheless, the court acknowledged that foreign law may be relevant in a different context,[69] and the door was left open for the principles to be developed in later cases.

36 This development did take place in subsequent cases such as *The Kapitan Temkin*,[70] *The Sangwon*[71] and *The Makassar*. In both *The Kapitan Temkin* and *The Makassar*, it was expressly held that evidence of the relevant foreign law may be adduced as facts for consideration.[72] In *The Makasaar*, Tan J explained that "the court will, in the case of foreign ships, take into account relevant aspects of the relevant foreign law for a better picture of how ships may be owned or transferred in order to determine who has the beneficial ownership under that foreign law" although "Singapore law, being the *lex fori*, cannot be supplanted".[73] Likewise, the Court of Appeal in *The Sangwon* examined the expert evidence on the applicable articles of the North Korean Constitution and Civil Law[74] before coming to the view that they did not support the plaintiff's argument that all North Korean-flagged vessels could only be beneficially owned by the state.[75] In other words, as Ang J summarised the case in *The Min Rui*, foreign law was "considered to examine the ownership rights that the relevant parties had over the vessel" although the issue of beneficial ownership was "ultimately determined by Singapore law as the *lex fori* with the foreign law context characterised and analysed within the 'yardstick of the *lex fori*'".[76] This was an application of the modified *lex fori* approach in all but name.

37 In *The Min Rui*, Ang J relied on these local cases, and *The Makassar* in particular, to arrive at the view that the Singapore courts will consider evidence of relevant foreign law as facts in evidence in determining beneficial ownership although, ultimately, Singapore law, being the *lex fori*, "cannot be supplanted".[77] She did not expressly articulate how such foreign law evidence will be "considered" or "taken into account" by the court in determining beneficial ownership under Singapore law. But she did cite the relevant foreign authorities such as *The Nazym Khikmet* and *The Cape Moreton*, and was cognisant of the

69 *The Andres Bonifacio* [1993] 3 SLR(R) 71 at [36].
70 [1998] 2 SLR(R) 537.
71 [1999] 3 SLR(R) 919.
72 *The Kapitan Temkin* [1998] 2 SLR(R) 537 at [5]; *The Makassar Caraka Jaya Niaga III-39* [2011] 1 SLR 982 at [9].
73 *The Makassar Caraka Jaya Niaga III-39* [2011] 1 SLR 982 at [9].
74 Constitution of the Democratic People's Republic of Korea; Civil Law of the Democratic People's Republic of Korea.
75 *The Sangwon* [1999] 3 SLR(R) 919 at [18] and [19].
76 *The Min Rui* [2016] 5 SLR 667 at [56].
77 *The Min Rui* [2016] 5 SLR 667 at [55].

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distinction between the approach adopted in the former case and a full *lex causae* conflicts approach.[78] Crucially, the learned judge's discussion of *The Cape Moreton* suggests that she was unpersuaded by the merits of a full *lex causae* conflicts approach where the issue of beneficial ownership would essentially be determined by the foreign law selected by the *lex fori*'s conflict of laws rules.[79] This intimation, taken together with her later observation that Hong Kong law would have been relevant in establishing the legal consequences of registration,[80] indicates that the current position in Singapore is in line with, or at least very close to, the modified *lex fori* approach following *The Min Rui*, and that the relevant foreign *lex causae* to take into account at the first stage of the analysis is the *lex situs* of the vessel.[81]

38 Ang J, however, did also note that English law was relevant as the proper law of the memorandum of agreement, which suggests that there is still some room to argue over "the relevant foreign law" to be considered by the Singapore courts. This also raises the difficult question of which law ought to be preferred if there is a conflict between, for instance, the *lex situs* and the *lex contractus*. On this issue, Ang J's reliance on English law must be understood in light of the lack of any evidence on Hong Kong law presented to her. She was also clear that English law was only relevant to examine the nature and extent of the *contractual rights* created or recognised by the sale and delivery of the vessel.[82] It is an established principle of private international law that it is the *lex situs* which governs the *proprietary* effects of a transfer of chattels.[83] Ang J alluded to this principle at the end of her judgment, only to note that the parties did not make any submissions on the distinction between the contractual and proprietary effects of a transfer of a chattel; nor did they touch on the question of the applicable *lex situs* in the case.[84] So, she did not have to deal with this point. One suggested approach, furthered by Toh Kian Sing SC,[85] is that the question of passing of title is not "necessarily a question of preferring one position over the other but should instead be answered by looking at the totality of the evidence, including the terms of the contract of sale (and parties'

78 *The Min Rui* [2016] 5 SLR 667 at [59].
79 *The Min Rui* [2016] 5 SLR 667 at [59].
80 *The Min Rui* [2016] 5 SLR 667 at [62].
81 Toh Kian Sing SC, *Admiralty Law and Practice* (LexisNexis, 3rd Ed, 2017) at p 130, citing *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (ex Freya)* [2005] FCAFC 68; 219 ALR 48.
82 *The Min Rui* [2016] 5 SLR 667 at [64].
83 *Dicey, Morris & Collins on the Conflict of Laws* vol 2 (Lord Collins *et al* gen eds) (Sweet & Maxwell, 15th Ed, 2012) at para 24-006; *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) at para 75.315.
84 *The Min Rui* [2016] 5 SLR 667 at [75].
85 Toh Kian Sing SC, *Admiralty Law and Practice* (LexisNexis, 3rd Ed, 2017) at p 130, fn 133.

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intention to be derived therefrom), deletion and registration of previous and new ownership and mortgage from registry, protocol of delivery and acceptance, bill of sale, payment of purchase price, etc". With respect, such an approach still leaves unanswered the question of *which rights* should be given effect to, after all the evidence is considered, at the second stage of the modified *lex fori* approach when the court must assess whether the rights of the defendant can be characterised as "beneficial ownership" as defined by the *lex fori*. Inevitably, this process requires a choice to be made when the rights of the defendant under one foreign law are different from those it can assert under another. While space precludes detailed discussion of this issue, it is submitted that the position adopted in *The Cape Moreton* that the "relevant foreign law" ought to be the *lex situs*[86] is principled and ought to be adopted. It is not only in line with the established choice of law rule on the transfer of chattels, but is also expedient and points to a law which is visible to third parties, including the plaintiff, who may be interested in the vessel.

39 Before concluding this article, there is one important distinction worth noting between the law in Singapore and the other common law jurisdictions examined above. This distinction was highlighted in *The Kapitan Temkin* by G P Selvam J.[87] As he noted, unlike England (and the other common law jurisdictions which have followed *The Nazym Khikmet*), Singapore has judicially defined beneficial ownership to mean "such ownership of a ship as is vested in a person who has the right to sell, dispose of or alienate all the shares in that ship".[88] Hence, the question which a Singapore court has to answer is not whether the defendant had ownership of or held the title to the vessel *per se* or whether it could have obtained specific performance from the court,[89] but whether the defendant, at the time when the action was brought, had "the right to sell, dispose of or alienate all the shares in that ship". Consequently, foreign provisions stipulating that a particular document is conclusive evidence of ownership[90] or that only the title of a registered owner would be recognised[91] cannot, on their own, be

86 Whether the *lex situs* ought to be the law of the jurisdiction where the vessel is physically situated or the law of her port of registry is a question beyond the scope of this comment. As already noted, the Full Court of the Federal Court of Australia in *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (ex Freya)* [2005] FCAFC 68; 219 ALR 48 held that the applicable foreign law should be the law of the vessel's country of register (see para 33 above). But *cf Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins *et al* gen eds) (Sweet & Maxwell, 15th Ed, 2012) at paras 22E-057–22-059.

87 *The Kapitan Temkin* [1998] 2 SLR(R) 537 at [25].

88 *The Pangkalan Susu/Permina 3001* [1977–1978] SLR(R) 105 at [9].

89 See *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37 at [28].

90 See, *eg*, *The Kapitan Temkin* [1998] 2 SLR(R) 537 at [10].

91 See, *eg*, *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37 at [24]; *The Andres Bonifacio* [1993] 3 SLR(R) 71 at [32].

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determinative.[92] The court must still examine the evidence as a whole to ascertain if, at the time of the action, the defendant had sufficient rights of sale, disposal or alienation over the ship to be characterised as the vessel's beneficial owner *under Singapore law* even though it may not have been formally recognised as her "owner" under the relevant foreign law.

40 Admittedly, the analysis set out above was not articulated by Ang J in the same terms, and she did not make any definitive rulings on this issue. Nevertheless, *The Min Rui* does point us towards the answer to the second question identified above – in cases involving foreign vessels, the modified *lex fori* approach ought to be applied. This is an answer that is both principled and in harmony with jurisprudence of the other leading admiralty jurisdictions of the common law.

41 Thus, although it did not provide us with conclusive answers to the two questions posed above, *The Min Rui* is a welcome decision which has steered us closer to the desired harbours.

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92 See *The Kapitan Temkin* [1998] 2 SLR(R) 537 at [14].

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