ARE U.S. CHOICE OF LAW CLAUSES

IN CONTRACTS FOR THE SUPPLY OF NECESSARIES

WORTH THE PAPER THEY ARE WRITTEN ON?

Presented by:

The Honourable Mr. Justice Marc Nadon
Federal Court of Appeal
Canada

[1]On two occasions in the past few years, my Court, the Federal Court of Appeal, had to decide whether the incorporation of a United States ("U.S.") choice of law provision in a contract for the supply of bunkers to a ship, at the request of a charterer, in a port outside of the U.S. and Canada, was sufficient to create a maritime lien in favour of the supplier.

In the first case, *Kent Trade and Finance v. J.P. Morgan Chase Bank*[2] ("*The Lanner*"), our Court gave an affirmative answer to that question. In a second case, *World Fuel Services Corp. v The Ship "Nordems"*[3] ("*The Nordems*"), we gave a negative one.

In both decisions, a number of important issues had to be addressed, namely the law applicable to the supply of bunkers as between the shipowners and the supplier and if U.S. law was applicable, whether under that law, the supplier benefited from a maritime lien. As foreign law is a fact which must be proven before Canadian courts, expert affidavit evidence of learned U.S. counsel was adduced by both sides to demonstrate the state of the law in the U.S.

This paper is entitled "ARE U.S. CHOICE OF LAW CLAUSES IN CONTRACTS FOR THE SUPPLY OF NECESSARIES WORTH THE PAPER THEY ARE WRITTEN ON?". The answer, which is neither a yes nor a no, depends obviously on the circumstances of each case, but also on the very important differences between U.S. and Canadian law with regard to the supply of necessaries to a ship. More particularly, the law in the U.S., contrary to that of a number of countries (which include Canada and most jurisdictions where the maritime law is based on English maritime law), recognizes a maritime lien for the supply of necessaries to a ship[4].

In order to address these issues properly, I need to set out the distinctions between our law and yours and to provide you with some historical background to the present case law. That will then allow me to review both *The Lanner* and *The Nordems* and to explain why, in my view, we arrived at different conclusions. I will also attempt to determine, with some trepidation, what the state of the law is in your country. Finally, I will offer you my thoughts regarding the impact of the U.S. choice of law clause on the conflict of law analysis.

The Supply of Necessaries in Canada and in the U.S

The supply of necessaries in the U.S., by reason of the *Commercial Instruments and Maritime Liens Act*[5] (the "*Maritime Liens Act*"), are presumed to have been

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[1] I wish to thank my former law clerk, Thomas Lipton, now an associate with the law firm of Ropes and Gray in Boston, for his invaluable research and help in the preparation of this paper.
[2] [2009] 4 F.C.R. 109.
[3] (2010), 415 N.R. 100.
[4] David W. Robertson and Michael F. Sturley, "Recent Development in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits", (2009) Vol. 33 Tulane Maritime Law Journal 381. Other countries which grant suppliers of necessaries a maritime lien are Brazil and France.
[5] 46 U.S.C., section 31341.

contracted on the credit of the ship. More particularly, the Maritime Liens Act recognizes a maritime lien in favour of a supplier who provides necessaries to a ship, such as bunkers, "on the order of the owner or a person authorized by the owner"[6]. A charterer is one of the persons presumed under the *Maritime Liens Act* to be authorized to procure necessaries to the ship. Thus, there exists a legislative presumption that a charterer has authority to bind a shipowner's ship for necessaries. That presumption can only be rebutted by proof that the supplier had actual knowledge of the charterer's lack of authority to bind the ship. Unless the presumption is rebutted, U.S. law confers on a supplier a maritime lien enabling him to arrest the ship and to enforce his claim[7].

Under Canadian law, the situation is entirely different. No maritime lien is created in favour of a supplier of necessaries. Pursuant to sections 22 and 43 of the *Federal Courts Act*[8], a supplier of necessaries enjoys a statutory right *in rem* against the ship if the necessaries were requested by the owner or someone authorized by him. Thus, personal liability of the owner is a *sine qua non* condition for the exercise of the right. There is also, as under U.S. law, a presumption that the necessaries were provided on the credit of the ship, but that presumption is a much weaker one in that proof of actual knowledge on the part of the supplier of the charterer's lack of authority is not necessary for a successful rebuttal of the presumption.

Under Canadian law, there exist important distinctions between a maritime lien and an ordinary action *in rem*, often referred to as a statutory right *in rem*. Maritime liens, as you are all aware, come into being at the time of their creation, i.e. when a transaction is entered into or, for example, when a collision occurs. On the other hand, statutory rights *in rem* are created when proceedings are commenced to enforce them. Maritime liens, contrary to statutory rights *in rem*, follow the ship irrespective of its ownership. Thus, statutory rights *in rem*, following a legitimate transfer of ownership, are not enforceable against the ship or its new owners, although the owners of the ship at the time of the events giving rise to the statutory right remain personally liable. Those whose claims benefit from a maritime lien enjoy a priority position which precedes that of mortgage creditors and ordinary creditors. Thus, the possessor of a maritime lien is a secured creditor in bankruptcy proceedings, while the holder of a statutory right *in rem* will, generally speaking, not be considered as a secured creditor[9].

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[6] Section 31342 of the *Maritime Liens Act* provides as follows: " (a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner … (1) has a maritime lien on the vessel; (2) may bring a civil action *in rem* to enforce the lien; and (3) is not required to allege or prove in the action that credit was given to the vessel. (b) This section does not apply to a public vessel."

[7] See: Gilmore and Black, "The Law of Admiralty", 2d ed (Mineola, N.Y: The Foundation Press, Inc., 1975), pp. 670 et seq., for a full discussion of the history of the presumption under U.S. law.

[8] R.S. 1985, c. F-7.

[9] For a full discussion of these points, see the decisions of this Court in: *Marlex Petroleum Inc. v. "Har Rai" (The)*, [1984] 2 F.C. 345 (C.A.), [1984] A.M.C. 1649, affirmed by the Supreme Court of Canada at [1987] 1 S.C.R. 57 ("*The Har Rai*"); *Imperial Oil Ltd. v. Petromar Inc.*, [2002] 3 F.C. 190, [2002] A.M.C. 536 ("*Imperial Oil*"); and *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907 ("*The Brussel*").

In summary, Canadian maritime law, contrary to American maritime law, does not recognize a maritime lien in favour of a supplier of necessaries. Further, under our law, personal liability of the shipowner is a requirement for a successful action *in rem* by a supplier of necessaries, whereas under American law where the supplier is entitled to a maritime lien, personal liability of a shipowner is not required for a successful outcome of the supplier's action.

I should point out, however, that our law was recently amended in order to give suppliers of necessaries carrying on business in Canada a maritime lien against a foreign ship, on the condition that the supply was provided at the request of the owner or a person acting on his behalf[10].

The Choice of Law

In Canada, the conflict of law rules which determine the proper law of the transaction or the law governing the relationship between the supplier of necessaries and the owner and his ship are those of the forum. In *Tropwood A.G. v. Sivaco Wire & Nail Co.*[11], Chief Justice Laskin, writing for the Supreme Court, explained the rules as follows:

> What is raised by the appellant, shortly put, is whether it is open to the Federal Court, in exercising its jurisdiction in the matter brought before it, to determine, pursuant to conflict of law rules of the forum, a choice of law rule to govern the determination of the suit. In the present case, the Federal Court has jurisdiction over the appellant and over the cause of action and there is a body of law which it can apply. It is my opinion that this body of law embraces conflict rules and entitles the Federal Court to find that some foreign law should be applied to the claim that has been put forward. Conflicts rules are, to put the matter generally, those of the forum. It seems quite clear to me that s. 22(3) of the *Federal Court Act*, which I have already referred to, envisages that the Federal Court, in dealing with a foreign ship or with claims arising on the high seas may find it necessary to consider the application of foreign law in respect of the cause of action before it.[12]

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[10] See: *Act to Amend the Marine Liability Act and the Federal Courts Act and to Make Consequential Amendments to Other Acts*, S.C. 2009, c. 21, s. 139.
[11] [1979] 2 S.C.R. 157.
[12] *Ibid.*, at 166-167.

To this I should add that when asked to apply the substantive law of another country, a Canadian court is bound to apply a choice of law analysis which reflects Canadian conflict of law rules[13].

Furthermore, the common law contractual choice of law rules provide that the proper law of the contract will usually be the law selected by the parties to govern their contract. However, where the parties have not expressly selected their law or where no selection can be inferred, the applicable law will be that to which the transaction has the closest and most real connection[14]. Thus, barring the application of principles of public policy, parties to a contract are free to expressly choose their governing law. Absent such a choice, the court will weigh all relevant factors to determine the law of the country to which the transaction has the closest connection. Consequently, where the closest connection is to U.S. law, Canadian courts will give effect to that law as, in the words of Mr. Justice Harrington, the judge at first instance in *The Nordems,* "… our sense of public policy is not offended"[15].

Under Canada's choice of law rules, a court will give effect to the law of another jurisdiction whenever it concludes that the transaction or the tort is governed by another system of law. Hence, again in the words of Mr. Justice Harrington, "Canada is an attractive forum to necessaries men who enjoy a maritime lien under the proper law of their transaction in that in ranking priority, our law gives the necessaries men the status of a maritime lien, a status which a Canadian necessaries man does not enjoy"[16].

However, that is not, for example, the situation in England, where the Judicial Committee of the Privy Council (the "Privy Council"), in *Bankers Trust International Ltd. v. Todd Shipyards Corp.*[17] (*The Halcyon Isle*) found that the determination of priorities, i.e. whether a claim was entitled to the rank of maritime lien, was a matter of procedure rather than a matter of substance and, thus, subject to the law of the forum. Because the Privy Council in *The Halcyon Isle* refused to follow the approach taken by the Supreme Court of Canada in *Todd Shipyards Corp. v. Altema Compania Maritima S.A.*[18] ("*The Ioannis Daskalelis"*), a few words about *The Ioannis* Daskalelis and *The Halcyon Isle* are in order.

In *The Ioannis Daskalelis*, the issue was whether the cost of repairs to the ship in the U.S. entitled the claimant to a ranking ahead of the mortgagee. After stating that it was not disputed that by virtue of the Maritime Liens Act, Todd Shipyards' claim for repairs gave rise to a maritime lien in the U.S. and that such a claim for repairs made in Canada did not entitle a ship repairer to a maritime lien under Canadian

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[13] See: *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R.801 at para. 29; *Ontario Bus Industries Ltd. v. Federal Calumet (The)*, [1992] 1 FC 245 at 252 (TD), affirmed [1992] 150 N.R. 249 (FCA).
[14] See: Jean-Guy Castel, *Canadian Conflicts of Law*, 4th ed. (Toronto: Butterworth, 1997).
[15] Reported at (2010), 366 F.T.R. 118, para. 36.
[16] *Ibid.* at para. 14.
[17] 1981 A.C. 221 (P.C.), (1980) 2 Lloyds Rep. 325, 1980 AMC 1221.
[18] [1974] S.C.R. 1248, [1974] 1 Lloyd's Rep. 174, [1973] AMC 176.

law, the Supreme Court referred to its decision in *The Ship "Strandhill" v. Walter W. Hodder Co.*[19] (*"The Strandhill"*), where it had been argued that the Exchequer Court of Canada [the predecessor court to the Federal Court and the Federal of Appeal of Canada] had no jurisdiction to enforce by action *in rem* a lien created by the law of the U.S. under facts and circumstances that would not give rise to a maritime lien under British admiralty law. In *The Strandhill*, the issue was not one of priority between competing claimants, but one concerned only with the jurisdiction of the Exchequer Court to entertain the action. The Supreme Court determined that issue by holding that the Exchequer Court had jurisdiction to enforce a claim for necessaries secured by a maritime lien, even though the right had been acquired under the law of a foreign country.

In *The Ioannis Daskalelis,* relying on the decision of the English Court of Appeal in *The Colorado*, the Court asserted that the nature of the right *in rem* was to be determined according to the *lex loci*. Mr. Justice Ritchie, writing for the Court, made the following remarks:

> … it nevertheless appears to me that *The Colorado* is authority for the contention that where a right in the nature of a maritime lien exists under a foreign law which is the proper law of the contract, the English courts will recognize it and will accord it the priority which a right of that nature would be given under English procedure.[20]

adding that:

> Although the supplier of necessaries is not entitled to a maritime lien under Canadian law and all the cases cited by the learned author are concerned with claims which are so recognized in this country, these cases nevertheless clearly indicate that a valid maritime lien takes priority over a mortgage, and as the claim for necessary repairs furnished in the United States is recognized as creating that particular kind of lien and as being enforceable as such in Canadian courts, if follows, in my opinion, that the appellant's claim in this case must be accorded priority over the mortgage held by the respondent.[21]
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> [Emphasis added]

Thus, our Supreme Court views maritime liens as substantive rights and, as a result, will recognize and enforce these rights created under a foreign law. However, the

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[19] [1926] S.C.R. 180, [1927] AMC 244.
[20] *The Ioannis Daskalelis, supra*, Footnote 16, para. 15.
[21] *Ibid.*, para. 23.

priority to be given to the lien will be determined by Canadian law, the law of the forum.

I now turn to *The Halcyon Isle*.

The HALCYON ISLE was a British ship subject to a mortgage in favour of an English company. While the ship was in the port of New York in March 1974, Todd Shipyards effected repairs to the ship and supplied her with necessaries. On September 5, 1974, the ship was arrested in Singapore in an action *in rem* brought in the High Court of Singapore by the mortgagee. On March 6, 1975, the ship was sold by order of the Court, but the proceeds of sale were insufficient to satisfy all of its creditors. The question that arose for determination was whether the claim of the mortgagee should rank ahead of that of Todd Shipyards.

The High Court of Singapore held in favour of the mortgagee but the Court of Appeal reversed, holding that Todd Shipyards' claim ranked in priority to that of the mortgagee. Adopting an approach similar to that taken by Canadian courts, the Court of Appeal held that a maritime lien was not a mere procedural remedy and that the substantive rights acquired by Todd Shipyards under American law ought to be recognized as valid rights and given effect to in determining the question of priority. In concluding as it did, the Court of Appeal of Singapore heavily relied on the reasoning of our country's Supreme Court in *The Ioannis Daskalelis*. The Privy Council explained the reasoning of the Court of Appeal of Singapore in the following terms:

> In coming to the conclusion in the instant case that, because it would have given rise to a maritime lien under its *lex causae* (United States law) to which effect would be given by an American Court applying U.S. law as the *lex fori*, the Necessaries Men's claim was therefore entitled to the same priority over mortgages as maritime liens as a class enjoy over mortgages under the law of Singapore as the lex fori, the Court of Appeal were greatly influenced by the decision of the Supreme Court of Canada in *The Ioannis Daskalelis* [1974] 1 Lloyd's Rep 174 that under Canadian law, which in admiralty matters is derived from English law, American Necessaries Men took priority over mortgagees of a Greek ship. There had been a previous decision of the Supreme Court of Canada in 1926 *The Strandhill* [1926] 4 DLR 801 in which it had been held that American Necessaries Men could proceed to enforce their claim by an action in rem against the ship notwithstanding a subsequent change in ownership; but this earlier decision expressly left open the question whether priorities between competing claims would be determined by Canadian law. A subsequent decision of the Canadian Court of Exchequer had determined that priorities were to be determined by Canadian law, *The Astoria* [1931] Ex CR 195. In overruling The Astoria the

> Supreme Court of Canada in *The Ioannis Daskalelis* relied strongly on the judgment of the English Court of Appeal in *The Colorado*, a case that was not concerned with a claim to a maritime lien at all.[22]

In concluding that the question of the right to proceed *in rem* against a ship as well as that of priority between competing claimants against proceeds of its sale in an action *in rem* fell to be determined by the law of the forum since the events that gave rise to the claim had occurred in Singapore, the Privy Council held that the Supreme Court of Canada in *The Ioannis Daskalelis*, had misunderstood the judgment of the English Court of Appeal in *The Colorado*. Rather, in the Privy Council's view, English authorities were to the effect that in the application of English rules of conflict of law, maritime claims were classified as giving rise to maritime liens which were enforceable in English courts where and only where the events on which the claim was founded would have given rise to a maritime lien in English law if those events had occurred within the territorial jurisdiction of the English Court. Lord Diplock, for the majority, explained that position as follows:

> Their Lordships are accordingly of opinion that in principle, in accordance with long-established English authorities and consistently with international comity as evidenced by the wide acceptance of the *International Convention of 1952 on the Arrest of Sea-going Ships*, the question whether or not in the instant case the Necessaries Men are entitled to priority over the Mortgagees in the proceeds of sale of the "Halcyon Isle" depends upon whether or not if the repairs to the ship had been done in Singapore the repairer would have been entitled under the law of Singapore to a maritime lien on the "Halcyon Isle" for the price of them. The answer to that question is that they are not. The Mortgagees are entitled to priority.
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> In the instant case as in the two Canadian cases of *The Strandhill* and *The Ioannis Daskalelis*, the claim of the Necessaries Men is for the price of repairs to the ship. Such a claim, wherever the repairs were done, whether in Singapore or abroad, may well invite sympathy since the repairs may have 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 recognized as giving rise to maritime liens under the

[22] (1980) 2 Lloyd's Rep. 325 at 330-331.

> law of Singapore, nor is this what the judgment of the Court of Appeal in the instant case purports to do. The argument for the Necessaries Men that was accepted by the Court of appeal was not confined to claims for necessaries. It was that wherever a maritime claim of any of the kinds listed in paragraphs *(d)* to *(q)* of section 3(12) of the High Court (Admiralty Jurisdiction) Act gives rise to a maritime lien under its own *lex causae*, as could be the case with claims of every kind referred to in the list, even including damages for breach of charterparty if the *lex causae* was United States law, the High Court of Singapore is required by Singapore law to give the claim priority over earlier and subsequent mortgagees and over all claims for the price of necessaries supplied to the ship in Singapore itself or in any other country under whose domestic law claims for necessaries do not attract a maritime lien.[23]

That Judgment was not unanimous. Two of the Law Lords, Lords Salmon and Scarman, dissented. In their view, a maritime lien was a substantive property right given by the law a security for the claim attaching to it as soon as the cause arose. Thus, if the English Court was of the view that the claim, under the *lex loci*, was a valid maritime lien, the *lex fori* would give the claim the priority to which it was entitled under English law. Thus, a maritime lien created under foreign law would rank ahead of a mortgage. In coming to this conclusion, Lords Salmon and Scarman stated in clear terms that the approach taken by the English Court of Appeal in *The Colorado* was, as a matter of principle, the correct approach.

The Halcyon Isle was not a case about the incorporation of a U.S. choice of law provision in a supply contract, but a case where the necessaries, i.e. the repairs to the ship, had been provided to the ship while she was in an American port. Even in those circumstances, the majority of the Privy Council was not prepared to recognize the substantive nature of the right conferred upon the ship repairer by U.S. law. It is clear, in my view, that the majority was unwilling to allow U.S. suppliers of necessaries to enjoy rights which were not available to, if I may so refer to them, their English colleagues. My review of the authorities leads me to side with the position adopted by our Supreme Court in *The Ioannis Daskalelis* and by the two dissenting Law Lords, which, I believe, is the only view that can be supported on principle.

I now turn to our decision in *The Lanner*.

***The Lanner*:**

Before our Court was an appeal from a decision of Madam Justice Gauthier of the Federal Court, wherein the learned Judge assessed the claims of a number of suppliers of necessaries over the proceeds of sale of THE LANNER. That decision

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[23] *Ibid.*, at 333-334.

resulted from an appeal of the decision of a Prothonotary who held that the mortgagee's claim ranked ahead of those of the Necessaries Men. THE LANNER was arrested and sold in Canada. By the time the appeal reached our Court, four claims remained at issue. Bunkers had been supplied to the ship in Spain, Canada, Trinidad and Singapore. The supply contracts, save one, contained a U.S. choice of law clause. The remaining contract contained an arbitration clause which provided that all disputes were to be determined in accordance with the laws of the State of Washington.

Madam Justice Gauthier concluded that the U.S. law provisions could not apply, as there was no evidence that the shipowners were personally liable under the contract. In her view, there was no evidence that the vessel's manager had authority from its owners to bind the vessel since the contract between the owners and the manager was not before the Court. Although she did not have to decide the point, Madam Justice Gauthier opined that maritime liens would not arise under American law in the circumstances of the case, agreeing with the mortgagee's expert witness that U.S. law would not provide a lien where the necessaries were supplied by a foreign supplier to a foreign ship in a foreign country.

The majority opinion of the Court of Appeal, written by Chief Justice Richard, began by asserting that under Canadian law, a supplier of necessaries was entitled only to a statutory right *in rem* and not to a maritime lien, adding that on the authority of *The Ioannis Daskalelis*, the ranking of claims fell to be decided by the law of the forum and that a statutory right *in rem* ranked below the claim of a mortgagee, which claim ranked below maritime liens.

The Court then highlighted the suppliers' argument that they were entitled to maritime liens by reason of the U.S. choice of law provision in their contracts and that, as a result, they were entitled to priority over the mortgagee, noting that the mortgagee's position was that American law was not the applicable law and, even if it was, U.S. law did not provide for a maritime lien in the circumstances of the case.

The Chief Justice began his analysis by addressing the conflict of law issue. More particularly, he indicated that the first step in a conflict of law analysis was the determination of the nature of the question at issue. Having determined the nature of the question, the Court then had to determine what choice of law rule applied to the legal category, i.e. a tort or a contractual issue. Applying the choice of law rule would then lead to the jurisdiction whose law should apply to the matter. That law, being foreign law, had to be pleaded and proven to the court's satisfaction[24].

The Chief Justice then turned to the contracts before the Court, noting that the Supreme Court of Canada, in *Spar Aerospace Ltd. v. American Mobile Satellite*

[24] See: Castel and Walker, *Canadian Conflict of Laws*, 6th ed., loose-leaf, vol. 1, (Markham: Lexis-Nexis, 2005) at 3.1, 3.2, 7.1 and 7.4); Dicey Morris and Collins, *The Conflict of Laws*, 14th ed., vol. 1 (London: Sweet and Maxwell, 2006) at 2-001 to 2-045.

Corp.[25], had made it clear that in determining conflict of law issues, a court had to keep in mind the principles of comity and order, so as to encourage certainty and predictability in marine transactions involving more than one jurisdiction.

The Chief Justice began that part of his analysis by pointing out that absent an expressed or implied choice of law by the parties to a contract, the proper law thereof was the law of the jurisdiction which had the closest and most substantial connection to the transaction[26]. This led him to make the following remarks:

> While the contractual choice of law clause in the contract should dictate the proper law of the maritime transaction, I acknowledge that maritime liens are extra-contractual rights. Therefore, I do not foreclose the possibility that, where a maritime transaction is so strongly connected to a jurisdiction, this jurisdiction's substantive law, rather than the choice of law clause in the contract, should govern the transaction. […][27]

In forming that view, the Chief Justice drew attention to that part of Mr. Justice Stone's decision in *Imperial Oil* where Mr. Justice Stone held that the U.S. choice of law clause did not govern the transaction because all of the relevant factors, i.e. the place of the ship's registration, the shipowner's and charterer's residence and the place of the delivery of the bunkers, were all in Canada. In reaching that conclusion, Mr. Justice Stone considered the decision of the Supreme Court of the U.S. in *Lauritzen v. Larsen*[28] ("*Lauritzen"*) and that Court's 1959 decision in *Romero v. International Terminal Operating Co.*[29] ("*Romero*") wherein the *Lauritzen* approach was extended.

The Chief Justice then turned to the relevant facts and held that Madam Justice Gauthier had erred in concluding that there was no contractual relationship between the shipowner and the supplier, adding that the mortgagee did not contest the fact that the management agreement entered into by the shipowner and its manager was before the Trial Judge and that that agreement clearly provided authority to the manager to, *inter alia*, make arrangements for the supply of bunkers to the ship.

In fairness to Madam Justice Gauthier, I wish to state that, notwithstanding the fact that the parties to the appeal took a different position, the management contract was not before her when she rendered her decision. That fact was acknowledged by my colleague Mr. Justice Pelletier, who dissented in *The Lanner*, in remarks made at the Canadian Maritime Law Conference held for the judiciary in Ottawa in May 2011.

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[25] 2002 SCC 78; [2002] 4 S.C.R. 205.
[26] See: *Imperial Life Insurance Co. of Canada v. Colemenares*, [1967] S.C.R. 443 at 448; *Ontario Bus Industries Ltd. v. Federal Calumet (The)*, [1992] 1 FC 245 at 252 (TD), affirmed [1992] 150 N.R. 249 (FCA).
[27] *The Lanner, supra*, Footnote 1, at para. 26.
[28] (1953), 345 U.S. 571.
[29] (1959), 358 U.S. 354.

Because of his view, the Chief Justice held that effect had to be given to the U.S. choice of law provision agreed to by the parties. With respect to the claim of CP 3500 International Ltd., whose contract contained an arbitration clause rather than a choice of law clause, the Chief Justice held that the arbitration clause, which provided for the arbitration to be held in accordance with the laws of the State of Washington, was indicative of the proper law of the contract. For that proposition, he referred to the House of Lords' decision in *Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement S.A.*[30]. Thus, all of the contracts were to be governed by U.S. law, since none of the relevant factors or a combination thereof pointed to another jurisdiction which had a closer or more substantial connection to the transactions.

This led the Chief Justice to review the American decisions on which the experts relied for their opinion as to the state U.S., so as to determine whether, in the circumstances, U.S. law would grant a maritime lien to the suppliers. First, the Chief Justice noted, based on the expert testimony, that there was disagreement in the U.S. District Courts and the Circuit Courts of Appeals as to whether a maritime lien was created where a non-US supplier provided necessaries to a foreign vessel in a foreign port. More particularly, he reviewed the cases put forward by the mortgagee for the proposition that the Maritime Liens Act did not apply to foreign suppliers providing necessaries to foreign vessels in a foreign port, namely:*Trinidad Foundry and Fabricating Ltd. v. M/V K.A.S. Camilla*[31] ("*The Camilla*"), *Metron Communications Inc. v. M/V Tropicana*[32] ("*The Tropicana*"), *Swedish Telecom Radio v. M/V Discovery 1*[33] ("*The Discovery 1*"); and *Triton Marine Fuels Ltd. S.A. et al. v. M/V Pacific Chukotka et al*.[34] ("*The Pacific Chukotka*"). He then reviewed the Ninth Circuit Court's decision in *Trans-Tec Asia v. M/V Harmony Container et al.*[35] ("*Trans-Tec*"), where the Court held that admiralty law was extra-territorial by nature and that because the parties to the supply contract had chosen American law as their law, the application of U.S. law would not interfere with the sovereignty of other nations.

After noting that *Trans-Tec* was the only decision where a U.S. Court of Appeals had decided the issue on facts undistinguishable from those before our Court, i.e. a foreign vessel operated by non-U.S. corporations, to which supplies had been provided in a foreign port by a non-U.S. company under a contract subject to U.S. law, and that the Court of Appeals for the Ninth Circuit's decision was the most recent expression of the law from a U.S. appellate court, the Chief Justice held that U.S. law would grant a maritime lien to the claimants and, as a result, the liens were enforceable in Canada.

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[30] [1970] 2 Lloyd's Rep. 99 (H.L.).
[31] 966 F.2d 613 (11th Cir. 1992.
[32] 1993 AMC 1265 (S.D. Fla. 1992).
[33] 712 F.Supp. 1542 (S.D. Fla. 1988).
[34] 504 F.Supp. 2d 68 (D. Md. 2007).
[35] 518 F.3d 1120 (9th Cir. 2008).

In concluding as he did, the Chief Justice made it clear that he was not deciding that the U.S. choice of law provision would be given effect to in a situation where the shipowner was not a party to the supply contract. That question, as we will shortly see, was the question before us in *The Nordems*.

Mr. Justice Pelletier, contrary to the Chief Justice, would have concluded that the suppliers, other than CP 3500 International Ltd., were not entitled to a maritime lien for necessaries in the circumstances of the case. The dissent, however, reaches that conclusion in a very unexpected way and I will therefore deal with it briefly.

Mr. Justice Pelletier began his analysis by noting that the application of the Maritime Liens Act was dependent on the jurisdiction in which the vessel was arrested and sold. For example, if that happened within the jurisdiction of the Ninth Circuit, then the *Maritime Liens Act* was interpreted to confer a maritime lien.

In making these remarks, Mr. Justice Pelletier noted that a decision made by a U.S. Circuit Court of Appeals did not have precedence over the decisions of another Circuit Court in that the decisions remained good law within the geographical limits of the circuit in which the decision was made, adding that the U.S. Supreme Court had not yet been called upon to determine the question and that, hence, there was no decision on its part binding all U.S. courts.

Mr. Justice Pelletier then pointed out that THE LANNER had been arrested and sold in Canada, i.e. outside of the U.S., so that the transaction did not fall within the geographical jurisdiction of any of the circuits of the U.S. Federal Court of Appeals and that, as a result, there was "… no basis for preferring the jurisprudence of one circuit of the U.S. Federal Court of Appeals over another"[36].

He then asserted that the state of the law applicable to the transactions could not be determined on the basis of the cases on which the experts were relying because an important fact was absent, namely the presence of THE LANNER in a port within the geographical jurisdiction of one of the circuits of the U.S. Court of Appeals. Consequently, in his view, the proof of foreign law failed, not because of the conflicting expert opinions, but because the ship had not been arrested in one of the American jurisdictions. Mr. Justice Pelletier explained his view as follows:

> Had the arrest and sale occurred at a U.S. port, the jurisprudence of the Court of Appeals for that circuit would have been applied and the matter resolved. Where the arrest and sale occur outside the United States, and no tie to any particular circuit is proven, then the U.S. law applicable to that transaction has not been proven.[37]
>
> (Emphasis added)

[36] *The Lanner, supra*, Footnote 1, para. 53 of the dissenting Reasons.
[37] *Ibid.*, para. 56.

Thus, in Mr. Justice Pelletier's view, since there was no satisfactory proof of foreign law, the law of the forum, i.e. the law of Canada, applied. As our law did not grant a maritime lien for the supply of necessaries to a vessel, the claims for priority over the mortgagee of two of the suppliers, Kent Trade and Praxis Energy, could not succeed because the U.S. choice of law provision in their contracts did not invoke the law of any particular jurisdiction in the U.S. Thus, as the ship had not been arrested and sold in the U.S. and that there was "no tie to any particular circuit", one could not conclude that the jurisprudence of any of the circuits was applicable.

With respect to the claim of CP 3500 International Ltd., where the contract provided for arbitration pursuant to the laws of the State of Washington, and that Washington was within the geographical jurisdiction of the Ninth Circuit, the law to be applied to that transaction was the law as interpreted by the Ninth Circuit of the U.S. Federal Court of Appeals in *Trans-Tec*. Consequently, applying that decision to CP 3500 International Ltd.'s claim, Mr. Justice Pelletier held that the supplier was entitled to a maritime lien and thus was entitled to priority over the mortgagee.

I now turn to *The Nordems*.

The Nordems

The case pertained to bunkers supplied at the request of a sub-charterer without the knowledge or consent of the shipowner. The ship, registered in Cyprus, was owned and managed by German entities. It had been sub-chartered to a Korean entity, Parkroad. Parkroad ordered the bunkers from World Fuel Services Seoul, a division of World Fuel Services Singapore. Parkroad's contract was with World Fuel Services Singapore or World Fuel Services, an American company. One provision of the contract said that the sale would be governed by the laws of the U.S. Finally, the bunkers were supplied at Cape Town, South Africa, and were never paid for because Parkroad went bankrupt. World Fuel Services arrested the ship in Canada.

The only factual distinction of relevance between *The Nordems* and *The Lanner* is that in *The Nordems*, there was no contract between the supplier and the shipowner. In all other respects, the cases were undistinguishable.

The Judge at first instance had first to decide whether the shipowner was bound by contract to pay for the bunkers and, if not, whether the presumption that the necessaries were ordered on the credit of the ship had been rebutted. He concluded that the shipowner was not a party to the contract for the supply of the bunkers and that the presumption had been rebutted. This led the Judge to the conclusion that if the governing law was Canadian maritime law, the supplier's action, both *in rem* and *in personam* was bound to fail, since the shipowner was not personally liable for the supply of the bunkers. The Judge then turned to the question of the applicable law.

Because of his view that the shipowner was not a party to the contract, the Judge opined that the U.S. choice of law clause had "less significance than otherwise",

adding that the courts had not been consistent "in the manner in which they ascertain the proper law"[38]. Later on in his Reasons, the Judge stated that "absent a contract, we must tote up the points of contact"[39]. In performing that exercise, the Judge relied on our Court's decision in *Imperial Oil* where, as I indicated earlier, Mr. Justice Stone adopted the approach taken by the U.S. Supreme Court in *Lauritzen*.

He then reviewed the relevant factors so as to determine whether U.S. law had the closest and most substantial connection with the transaction. He found that it did not, but rather, that the applicable law would have been that of South Africa. However, because no proof had been offered with respect to South African law, the Judge concluded that the applicable law was the law of Canada. Although that determination was sufficient to dispose of the case before him, the Judge went on to determine whether American law, had it been applicable, would have granted the supplier a maritime lien. After considering the expert evidence before him and, more particularly, after reviewing the authorities submitted by the experts, he concluded that on the facts as they existed before him, American law required more than a U.S. choice of law provision in a contract to which the owners were not privy in order to confer a maritime lien upon a supplier of necessaries. In his view, three key elements were absent: (i) the bunkers had not been supplied in the U.S.; (ii) the ship had never traded in the U.S.; and (iii) the ship had not been arrested in the U.S.

In concluding that if applicable, U.S. law would not recognize a maritime lien in favour of the supplier, the Judge made it clear that he was satisfied that the decision of the Court of Appeals for the Second Circuit in *Rainbow Line, Inc. v. m/v Tequila*[40] ("*Rainbow Line*") (1973), reflected the true state of U.S. law. In making this finding, the Judge rejected the approach taken by the Ninth Circuit Court of Appeals in *Trans-Tec* (2008). that of the Fourth Circuit Court of Appeals in *The Pacific Chukotka*[41] (2009) and that of the Fifth Circuit in *Liverpool and London Steamship Protection and Indemnity Assn. v. Queen of Leman MV et al.*[42] ("*Queen of Leman*") (2002).

The Judge's decision was appealed to us and we dismissed the appeal. We held that the Judge had made no error in finding that the shipowner was not a party to the supply contract, that the presumption had been rebutted and that U.S. law did not govern the transaction at issue. Because those findings were determinative of the appeal, we did not determine whether the Judge was correct in his view of U.S. law.

In dismissing the appeal, we made it clear that we were giving the U.S. choice of law provision no weight whatsoever because the shipowner was not a party to the contract. We stated our position as follows:

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[38] *Supra*, Footnote 13, para. 52.
[39] *Ibid.*, para. 67.
[40] 490 F.2nd 1024, 1973 AMC 1431.
[41] The Judge's reference to *The Pacific Chukotka* is to the decision of the Court of Appeals for the 4th Circuit, reported as *Triton Marine Fuels v. m/v Pacific Chukotka*, 575 F.3d. 409, 2009 AMC 1885.
[42] (2002), 296 F.3d 350 (5th Cir.).

> In my view, a situation where a shipowner, as in *The Lanner*, has contracted with a supplier and has agreed to the insertion of a U.S. choice of law clause in the contract, poses no difficulty to giving, as Richard C.J. did, prime consideration to the law chosen by the parties. However, where, as here and in *Imperial Oil*, there is no contract between the shipowners and the supplier of necessaries, and the shipowners have not, by their attitude and conduct, misled the supplier into believing that the purchaser was authorized to act on their behalf, I am inclined to the view that the choice of law provision should not be given any weight.[43]

Had we decided that U.S. law was applicable, here are my thoughts on what we could have possibly said with respect to the question of whether U.S. law would recognize a maritime lien in favour of the supplier.

In *The Lanner*, the Chief Justice indicated that the question which the Court had to decide was whether U.S. courts would recognize a maritime lien where a foreign supplier provided necessaries to a foreign ship in a foreign port. I agree with that formulation of the question. However, the Judge at first instance in *The Nordems* seems to have taken a different view of that question when he said:

> I am called, as a matter of fact, to determine what American law is, not what an American Court would decide if the Nordems had been arrested in the United States rather than in Canada. An American Court would apply its own conflict of law rules, just as a Canadian Court applies its conflict of law rules. …[44]

I am not sure that I totally understand the point made by the Judge, but I agree with him that if an American court had heard the case of *The Nordems*, it would necessarily have applied its own conflict of law rules with, as we will see, a different result and different consequences.

I would note that the fact that the Judge refused, in effect, to follow the Chief Justice's view of the law in the U.S., as set out in *The Lanner*, may appear somewhat surprising. It must be remembered that the Judge was not bound by the determination made by our Court in *The Lanner* with regard to U.S. law, because those findings were findings of fact[45]. However, the point was made by the English Divisional Court in *Parkasho v. Singh*[46], that "… findings of foreign law are "a question of fact of a peculiar kind". Because of their particular nature, findings of fact with regard to foreign law were held to be reviewable on a standard of correctness

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[43] *The Nordems, supra*, Footnote 2, para. 85.
[44] *Supra*, Footnote 13, para. 85.
[45] See: *Hunt v. T&N plc* 1993, 4 S.C.R. 289 at 306.
[46] [1967] 1 All E.R. 737 at 746 (approved by the English Court of Appeal in *Bumper Development Corp. v. Commissioner of Police of the Metropolis*, [1991] 4 All E.R. 638 at 645.

by the Ontario Court of Appeal in *General Motors Acceptance Corp. of Canada v. Town and Country Chrysler Ltd.*[47].

Because of the Judge's view, and we agreed with him on this point, that the shipowner was not a party to the contract, the U.S. choice of law provision carried no weight in determining the applicable law of the transaction. As a consequence, the Judge found, and again we agreed with him, that the proper law of the transaction was not U.S. law. However, in determining whether U.S. law would grant the supplier a maritime lien, the Judge used the fact that the shipowner was not a party to the contract to conclude that U.S. law would not grant a maritime lien. In distinguishing the Fourth Circuit's decision in *The Pacific Chukotka*, for example, he reasoned as follows:

> With respect, a step was missing in the *Pacific Chukotka* analysis. The United States statute did not apply of its own force, but rather by way of a choice of law clause in a contract to which the owners were not party. On the general principles of agency applicable in the United States, I accept that absent other connecting factors the court has to first find the owners were bound by the contract before applying American substantive law. I find as a matter of fact that the *Tequila* reflects American law.[48]

Elsewhere in his Reasons, the Judge indicated that the cases on which the supplier was relying were cases where the ship had either been arrested in the U.S. or security had been provided in the U.S. to prevent the arrest of the ship. Thus, in his view,

> If this matter were to proceed in a United States court, the presence of the ship by way of arrest would be lacking. The Court would be limited to declaring whether or not a United States maritime lien attached. The *Queen of Leman* places considerable emphasis on the law of the place where rights can be enforced which, in this case, is Canada.[49]

The Judge added that the court in *Trans-Tec* had not been concerned with "the potential extra-territorial application of American law because apart from the security posted in the United States, the ship regularly sailed into California"[50].

In my view, the Judge erred in this approach. He appears to have rejected the cases on which the supplier relied on for the proposition that U.S. law would, in the circumstances of *The Nordems*, attach a maritime lien to its claim on the ground that those cases were not relevant because THE NORDEMS had not been arrested in

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[47] (2007), 88 O.R. (3d) 666, 2007 ONCA 904 at paragraphs 35-36.
[48] *Ibid.*, paragraph 84.
[49] *Ibid.*, paragraph 79.
[50] *Ibid.*, paragraph 80.

the U.S. That conclusion, with respect to Mr. Justice Harrington, appears to fly in the face of our Court's decision in *The Lanner* and, more particularly, in the face of the thrust of the decisions rendered by three circuit courts of appeals. The Second Circuit decision in *Rainbow Line* appears to be an anomaly in American jurisprudence on the question at issue. The overwhelming consensus is that in circumstances similar to those of *The Nordems*, U.S. courts would recognize a maritime lien in favour of the supplier.

This leads me to the last part of this paper, where I would like to offer my thoughts on the effect of the U.S. choice of law clause on the conflict of law analysis,

Conflict of Law Analysis

In *Rainbow Line*[51]*,* the Second Circuit refused to apply the US choice of law clause at issue in that case. There, the ship was owned by Simpson Steamship *&* Navigation Co. ("Simpson"), which delivered it to Rainbow Line Inc. ("Rainbow") pursuant to a charterparty contract. Simpson later prematurely withdrew the ship from service and Rainbow sought damages for breach of the charterparty. An arbitration panel awarded Rainbow approximately $18,000. Subsequently, the ship was sold and charges were incurred against it. It was later arrested and sold. The Court had to decide which of the ship's creditors should be given priority.

The question before the Court was whether US law applied to the transaction. If U.S. law applied, Rainbow would hold a maritime lien for Simpson's breach of the charterparty and, as a result, would hold priority status over other creditors because its lien attached before other charges on the ship.

Rainbow argued that US law should apply because it was the applicable law intended by the parties to the charter. The Court disagreed, saying "maritime liens arise separately and independently from the agreement of the parties, and rights of third persons cannot be affected by the intent of the parties to the contract"[52].

Instead, the Second Circuit applied the Supreme Court's reasoning in *Lauritzen,* where, the Court said that maritime law resolves conflicts by "ascertaining the points of contact between the transaction and the states or governments whose competing laws are involved"[53]. Later, in *Romero,* the Court held that *Lauritzen* should be applied but added that "the controlling considerations are the interacting interests of the United States and of foreign countries"[54].

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[51] *Rainbow Line, supra*, Footnote 40.
[52] *Ibid.* at 1026 (citing *The Bird of Paradise* (1866), 72 U.S. 545 and *Piedmong & Georges Creek Coal Co. v. Seaboard Fisheries Co.* (1920), 254 U.S. 1.
[53] Cited in *Ranbow Line* at 1026.
[54] *Supra*, Footnote 27.

The Second Circuit then conducted a *Lauritzen* analysis informed by *Romero*. It found that almost all the points of contact in the transaction were with the U.S. It further found that the true owner of the ship was American and the only party who did not want U.S. law to apply had signed a contract which stipulated the use of U.S. law. It thus concluded that there were "sufficient factors" to support the application of U.S. law. The Court went on to find that Rainbow was entitled to a maritime lien.

For the purposes of my *Rainbow Line* discussion, it should be noted that, unlike many of the other cases discussed in this paper, Rainbow's maritime lien arose not from its supply of necessaries to the ship but from Simpson's breach of the charterparty. The maritime lien arose from the breach of a contract between the shipowner and the charterer rather than from the breach of a contract to which the shipowner was not privy. So, unlike most of the other cases discussed in this paper, there was a clear basis for the shipowner's *in personam* liability.

Second, *Rainbow Line* is an example of a direct application of the fundamental contract law principle articulated above: parties that are not privy to a contract are not bound by its terms. The Second Circuit found that U.S. law applied, but it did not do so by enforcing the choice of law clause in Rainbow's contract with Simpson. After all, the other creditors in the case were not parties to the contract. Instead, the Court applied U.S. law after following the conflict of law test laid out in *Lauritzen*.

Still, despite the fact that Rainbow's claimed lien arose from a breach of contract, the Court did not approach the conflict of law analysis from a contract perspective. Rainbow's contract with Simpson was not relied upon during the conflict of law analysis (although another creditor's contract with Simpson, to which Rainbow was not privy, was relied upon by the Court). Rather, the Court primarily added up the points of contact revealed by the transaction and noted that most of them were with the United States. Some points of contact were with Liberia, but no party contended that Liberian law should apply and so these contacts did not weigh heavily in the analysis. This `points of contact' approach has not been followed by the other circuit courts of appeals.

The Fifth Circuit faced this same issue in *Queen of Leman*. Liverpool and London Steamship Protection and Indemnity Association (“L&L”) provided insurance to the shipowners. Under this contract, L&L had certain rights to assert liens against the ship for the collection of unpaid premiums. Among other things, this contract contained a U.S. choice of law clause. Kappa Shipping Company Ltd. (“Kappa”), the owner of the ship became delinquent on its premiums. Soon after, Interforce Shipping Ltd. (“Interforce”) purchased the ship. Shortly after this purchase, L&L had the ship arrested because Kappa had not paid it premiums.

Interforce argued, among other things, that it should not be bound by the U.S. choice of law provision because it was not party to L&L's contract with Kappa. The Fifth Circuit disagreed for two reasons. First, the Court distinguished its earlier

holding in *Gulf Trading & Transportation Co. v. Vessel Hoegh Shield*[55] ("*Hoegh Shield*"), wherein the Court declined to use the contract conflict of law analysis because it said maritime liens were not contractual in nature. Contrary to the case at hand, the contract in *Hoegh Shield* did not have a choice of law provision governing the existence of a maritime lien. On that basis, the Court distinguished the case. Second, the Fifth Circuit said it would be anomalous to refuse to honour the choice of law clause as it applied to maritime liens. Interforce did not dispute that the contract governed the other aspects of the maritime lien — that is, all aspects of the maritime lien, except for whether a maritime lien existed. In essence, Interforce was arguing in vain against the *in rem* nature of the maritime lien itself. The maritime lien arose because of Kappa's failure to pay its debt. The lien therefore attached to the ship itself, thus binding subsequent owners such as Interforce.

The Fifth Circuit's holding in *Queen of Leman* is very different from the Second Circuit's holding in *Rainbow Line.* The Fifth Circuit applied a choice of law provision in a contract to a party that was not privy to that contract, Interforce. This outcome appears to be a violation of the aforementioned rule of contract law that a party is not bound by a contract to which he is not privy. But there is a reason for this superficially strange outcome.

At the end of *Queen of Leman,* the Fifth Circuit said that Interforce's argument against the existence of the maritime lien was essentially an attack on the *in rem* nature of the maritime lien itself. This statement is true within the context of U.S. law, where a supplier benefits from a maritime lien. A maritime lien is a charge on the ship itself, not on the shipowner. It is the ship itself which is obliged under the lien, regardless of whether the shipowner is also obliged. Moreover, under U.S. law and under Canadian law, a maritime lien arises by operation of law, not by contract. Thus, in U.S. law, Interforce's reliance on privity was irrelevant. The lien attached whether or not Interforce was privy to the contract creating the lien.

Needless to say, Interforce's privity argument would carry much more weight were it made on the basis that Canadian or English law was the applicable law. In Canada, as I have indicated, no *in rem* action by a supplier of necessaries may lie against a ship unless the claimant can also prove the shipowner is liable *in personam*. Obviously, if a claimant under Canadian law has a maritime lien, then that argument, like in the U.S., will not be successful. In England, the *in rem* action given to the supplier of necessaries can only be exercised against the debtor, not third parties. Thus, under either Canadian or English law, Interforce's lack of privity becomes more than relevant; it determinatively relieves Interforce of liability.

This difference in substantive law among different countries reveals a lacuna in the Fifth Circuit's approach in *Queen of Leman.* There, the Court was called on to decide *which* country's law applied. It responded to Interforce's argument that the company lacked privity by saying that that argument was a useless attack on

[55] 658 F.2d 363 (5th Cir.).

the *in rem* nature of the maritime lien at issue. But this response overlooked the fact that Interforce's argument is only useless in U.S. law; in English law, it is quite forceful. Thus, the Fifth Circuit implicitly approached the conflict of law issue from the perspective that U.S. law already applied. Otherwise, it would not have emphasized the *in rem* nature of the maritime lien, since this emphasis is not relevant under English law. That is, the Court loaded the conflict of law analysis in favour of finding U.S. law by approaching the analysis from a perspective relevant only in U.S. law.

Interestingly, the *Hoegh Shield* case which the Fifth Circuit distinguished in *Queen of Leman* recognized this lacuna. In *Hoegh Shield*, the supplier of bunkers arrested a ship on the basis that it had a maritime lien on the ship because it had supplied bunkers to the ship on the order of the ship's charterer. The owner of the ship was not privy to this contract.

The Court faced the issue of whether English or American law applied. Before addressing this issue, the Court explicitly said "this Court is not permitted to bootstrap its determination of choice of law by a preliminary finding that a maritime lien exists"[56]. That is, the Court expressly declined to do what the Fifth Circuit did in *Queen of Leman,* i.e. approach the conflict of law analysis from an American law perspective.

In *Hoegh Shield,* the Fifth Circuit then considered how the conflict of law analysis should proceed. It declined to follow the Supreme Court's approach in *Lauritzen* on the basis that that case's approach was formulated in the context of a tort claim under a specific federal act[57]. The Court then compared the conflict of law analysis offered by the *Restatement (Second) of Conflict of Laws*[58] (the "*Restatement*") for contract-based disputes and for disputes generally. The Court declined to strictly follow the contract-based approach; instead, it seems to have followed the general approach articulated in the *Restatement*.

The general conflict of law approach in the *Restatement* applies the following test:

> In the absence of statutory directives and subject to constitutional restrictions, the relevant factors include:
> (a) the needs of the international system;
> (b) relevant policies of the forum;
> (c) relevant policies of other interested states;
> (d) the protection of justified expectations;

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[56] *Ibid.*, at 366.
[57] It is questionable whether the Fifth Circuit was correct to avoid *Lauritzen* in light of the fact that in *Romero*, the Supreme Court said that the *Lauritzen* factors always applied to conflict of law issues in the maritime context. This statement suggests that *Lauritzen* was intended to apply outside of a purely tort context.
[58] Cited in *Hoegh Shield*, at 366-368.

> (e) the basic policies underlying the particular field of law;
> (f) certainty, predictability and uniformity of result; and
> (g) ease in the determination and application of the law to be applied.[59]

The Fifth Circuit's analysis in *Hoegh Shield* recognized a crucial issue that the current Fifth Circuit overlooked in *Queen of Leman*, i.e. that a contract between a supplier and a charterer is relevant only under U.S. law and thus does not help the Court answer the question of which country's law should apply. Otherwise, a court is not approaching the conflict of law analysis from a legal system-neutral perspective and is loading the dice in favour of finding that domestic law applies. That is, the court is "bootstrapping" the conflict of law analysis.

This bootstrapping is apparent in the jurisprudence of other circuit courts of appeals. The Fourth Circuit addressed the issue of a maritime lien for a supplier of necessaries in *Bominflot Inc. et al. v. The M/V Henrich S.*[60] ("*The Heinrich S.*"). In that case, the ship was owned by a German company but was under charter to Kien Hung Shipping Co. Ltd. of Taiwan ("Kien Hung"). Kien Hung ordered bunkers for the ship from Bominflot. The owners were not privy to this contract. Kien Hung subsequently went bankrupt and never paid for the bunkers. Bominflot arrested the ship in South Carolina.

In *The Heinrich S.*, the question was whether English or U.S. law applied. The Court noted that in the General Conditions of Bominflot's contract with Kien Hung, there was a provision which said that English law applied, with certain exceptions. The Court concluded that English law applied because both parties agreed to subject their agreement to that law.

This statement is inaccurate. While it is true that Bominflot and Kien Hung consented to subject their agreement to English law, the German owners of the ship never consented to the application of English law – and they were undoubtedly a party to the case. Given that the substance of the dispute was between the owners and Bominflot and given that there was no contract between these parties, the Court's emphasis on the provisions of the contract between Bominflot and Kien Hung seems misplaced. The conflict of law analysis is not forwarded by reliance on a choice of law provision in a contract that does not bind the relevant parties. Still, the Court expressly found this provision to be determinative.

The Fourth Circuit's approach in *The Pacific Chukotka* was similar. There, once again, a supplier delivered bunkers to a ship on the order of a sub-charterer. The bunker delivery contract included a U.S. choice of law provision. The bunkers were never paid for and the sub-charterer then went bankrupt. The supplier sued to enforce its alleged maritime lien on the ship itself.

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[59] *Ibid.*, at 367.
[60] 465 F.3d 144; 2006 AMC 2510.

The shipowner argued that it was not bound by the U.S. choice of law provision because it neither consented to nor did it have knowledge of the contract containing that provision. The Fourth Circuit rejected this argument for the same reason the current Fifth Circuit rejected the same argument in *Queen of Leman:* the argument ignores the *in rem* nature of a maritime lien. Because the ship itself is the obligor of the lien, it does not matter whether the shipowner is also bound by the obligation. Thus, the privity argument cannot be accepted.

But, as in the *Queen of Leman,* the Court's approach shows an implicit bias favouring the application of U.S. law. As noted above, an owner's lack of privity in either Canada or England renders him not liable to the supplier of necessaries. It is only under U.S. law that the lack of privity is irrelevant, due to the *in rem* nature of the maritime lien. Thus, the Fourth Circuit's emphasis on the contract when conducting the conflict of law analysis reveals an unstated slant towards finding that U.S. law is applicable.

The Ninth Circuit came to a similar conclusion in *Trans-Tec*. Splendid Shipping Sendirian Berhad ("Splendid") owned the ship. It entered into a charterparty with Kien Hung Shipping Company ("Kien Hung"). Kien Hung ordered bunkers for the ship through an agent who contacted Trans-Tec. The terms and conditions of the bunkers supply contract contained a U.S. choice of law clause. The shipowner was not privy to this contract. Kien Hung never paid for the bunkers and subsequently went bankrupt. Trans-Tec sought the arrest of the ship on the basis that it had a necessaries supply maritime lien on the ship.

The Court approached the conflict of law issue from a contract perspective. The first issue it addressed was the validity of the U.S. choice of law provision in the contract between Kien Hung and Trans-Tec. True, the Court did say "we consider which country's law governs the incorporation issue as if there were no choice of law clause"[61].But this statement is not the same as the declaration of the former Fifth Circuit in *Hoegh Shield* that it would not "bootstrap" the conflict of law analysis. The difference is that the Ninth Circuit had already decided that the contract was the central issue in the conflict of law analysis and so began with the incorporation issue. If the Court had truly approached the case from a neutral perspective, it would not have approached the conflict of law issue as if the contract was crucial because – as has been repeatedly said – in other countries, such a contract is irrelevant because the shipowner is not privy to it.

Notably, in the context of deciding which country's law applies to the issue of contract formation, the Ninth Circuit followed the Supreme Court's analysis in *Lauritzen*. It also considered the non-contract based conflict of law analysis used by the Fifth Circuit in *Hoegh Shield*. Thus, the Ninth Circuit's approach was country-neutral except for its insistence that the issue of contract formation was crucial.

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[61] *Ibid.*, at 1124.

In conclusion, most of the circuit courts of appeals approach the conflict of law issue in these cases with loaded dice. Because under US law the choice of law clause is binding whether or not the shipowner is privy to it, most of the courts approach the conflict of law issue from a contract-based perspective.

Only the Fifth Circuit in *Hoegh Shield* and the Second Circuit in *Rainbow Line* dissent from this view, finding that these cases could not properly be characterized as contract cases because under the alternative foreign laws at issue, the contract was irrelevant to the outcome of the case because, under the typical fact pattern of these cases, the owner is never privy to the contract. Although *Rainbow Line* pertained to a breach of a charterparty, between the owner and the charterer, the Court made the point that it could not apply the law chosen by the parties in their contract because of its view that maritime liens arose independently of any agreement concluded by the parties. Thus, these two decisions approach the conflict of law issue from a broader, more neutral non-contract based perspective.

Characterization in Conflict of law

"Characterization" is the name given by conflicts scholars to the issue of how to approach the conflict of law analysis. Janet Walker, a Canadian scholar, describes the issue this way: "the court characterizes, or defines, the juridical nature of the question or issue upon which its adjudication is required"[62]. For example, a court has to decide whether the issue before it is contract-based or tort-based.

This distinction matters because different conflict of law tests apply, depending on the nature of the legal issues at hand. For instance, in Canada, the Supreme Court laid out a new conflict of law analysis for tort cases in *Tolofson v. Jensen*[63]. The rules for contract cases are different or, more specifically, the `points of contact' in tort and contract cases are different[64]. In a contract case, the place where the contract is signed may be a relevant factor in deciding which country's law should apply. But in tort cases, there is no contract and so that factor is inapplicable to a tort conflict of law analysis.

Characterization can be straightforward, but not always. For instance, the bunkers supply cases discussed herein defy easy categorization. Under U.S .law, they are clearly contract cases because the supplier and charterer's contract binds the ship whether or not the shipowner is privy to the contract. Under Canadian and English law, they are not contract cases because the facts disclose that the shipowners are not privy to the supply contracts and so do not serve to establish the required *in personam* liability on behalf of the shipowners. Different nations' laws point to different characterizations.

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[62] Janet Walker, *Canadian Conflicts of Laws*, 6th ed. (Toronto: Lexis-Nexis, 2005) §3.1, p.2 (looseleaf).
[63] [1994] 3 S.C.R. 1022.
[64] See, e.g. : Stephen Pitel and Nicolas Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010) at 269 ff.

Thus, a new question arises: which country's laws should apply to the issue of characterization? Several possibilities present themselves.

First, a court could proceed without characterizing the issue at hand by applying a very broad conflict of law analysis. This was the approach used by the Second Circuit in *Rainbow Line* and the Fifth Circuit in *Hoegh Shield.*

Second, a court could proceed by characterizing the issue using its local laws. This is the approach approved of by Stephen Pitel and Nicolas Rafferty in *Conflict of Laws*. If the claim does not strictly fit the categories available in the local law, the claim may be characterized as its closest functional equivalent. For instance, German law recognizes contracts of inheritance, but Canadian law recognizes no such contracts. However, Canadian law does recognize wills, which is a fairly close functional equivalent of an inheritance contract. Thus, if a claimant brings a contract of inheritance claim under German law, a Canadian court will conduct a conflict of law analysis from a contract perspective. This is the approach adopted by a majority of the circuit court of appeals cases discussed in this paper. It is also the approach adopted by our Court in *The Nordems*.

Third, a court could proceed by characterizing the issue by reference to both the local laws and the alleged foreign laws. This approach is endorsed by the Canadian scholar Janet Walker and by the Canadian province of Quebec in its *Civil Code.* Walker describes the approach in this way: "[w]here a plaintiff's claim is unknown to the *lex fori,* the court, in order to apply its appropriate conflict of law rule, will have to analyze this claim in the light of the foreign legal system on which it is based in order to determine into which broad legal categories or concepts of the *lex fori* it can be fitted"[65]. If the claim is unknown in the local law, foreign law can be "taken into account" when characterizing the claim.

This approach is similar to the second approach stated above, but different. The second approach similarly fits the foreign legal concept into domestic legal categories as best it can. The third approach looks more deeply at foreign law when deciding both how to characterize the claim and what category is appropriate. Perhaps this is a distinction without a difference.

Fourth, a court could proceed by characterizing the claim strictly according to foreign law. No authority adopts this approach. Indeed, to adopt it would be strange, since the question before the court at this stage is whether the foreign law is applicable at all. I include this approach solely for the sake of completeness.

Pros and Cons of the Different Characterization Approaches

My purpose in exploring the American jurisprudence is obviously not to criticize it but to point out a lacuna in the courts' explanation of their approach to this issue of maritime law. I do not think that either of the two approaches identified in the

[65] Walker, *idem*, at §3.1, p. 3-5 (looseleaf).

circuit courts of appeals jurisprudence is wrong, I just believe that a court should be explicit about its reasons for adopting one approach or the other.

The first approach – used by the Second Circuit in *Rainbow Line* and the Fifth Circuit in *Hoegh Shield* – is to acknowledge that the conflicting legal systems treat the rights arising from the supply of necessaries to a ship differently and thereby to adopt neither a contract-based nor a non-contract-based conflict of law analysis[66]. Instead, in both decisions the court used the most general conflict of law test laid out in the *Restatement (Second) of Conflict of Laws.* This test does not characterize the claim as contractual or non-contractual, but focuses on the broad goals of conflict of law.

There are several advantages to this approach. First, it is characterization-neutral and therefore country-neutral. The courts did not approach the conflict of law test as if the claim already had a contractual nature (which it does in U.S. law) or as if the claim already had a non-contractual nature (which it does in Canadian and English law). This type of approach is advantageous if a court is trying to not bias the outcome of the conflict of law test towards the application of domestic law. It treats the legal systems of all countries as equally valid and thus is most consistent with the international law principle of comity between different nations.

Second, this approach provides uniformity and certainty. Using it consistently would apply the same conflict of law test to any issue where the domestic and foreign law characterize a claim in different ways. Uniformity means that similarly situated claims will be treated in a similar manner. Certainty means that parties will know what conflict of law test a court will apply in this clash of characterizations scenario.

However, this approach does suffer from unavoidable generality. It does not look to the points of contact with each of the competing forums. Despite its explicit support for the ideas of certainty, predictability, and uniformity, the broad, policy-based nature of the analysis is unlikely to lead to certain, predictable and uniform results. When courts enter the field of general, policy-based discussions there is sometimes wide divergence among judicial perspectives which prevents certainty from winning the day.

The second approach characterizes the claim at issue according to the law of the forum. This approach has several advantages. First, forum judges know forum law. They are intimately familiar with the legal categories which exist in their domestic law and well-versed in characterizing issues that come before them in relation to those

[66] It should be recalled that the Ninth Circuit also used the conflict of laws test from the *Restatement (Second) of Conflict of Laws* in *Trans-Tec, supra,* Footnote 33. Still, I do not include this decision in this category because it used this test in order to decide which country's law governs the issue of incorporation of the choice of law provision in the contract. The focus of the contract is not characterization-neutral and so is not the same as the characterization-neutral approach of the courts in *Rainbow Line* and in *Hoegh Shield*.

categories. Second, this approach avoids evidentiary problems. In both Canada and the U.S., foreign law is a fact that must be proven by adducing evidence. Because this approach requires no specific knowledge of foreign law, no party can be harmed by its failure to adduce sufficient evidence of what the foreign law is.

On the other hand, this approach suffers from two disadvantages. First, it is not forum-neutral. By characterizing the claim purely in terms of domestic law, the court emphasizes the primacy of domestic law over foreign law. Such an approach is inconsistent with the principle of comity among nations. Second, this approach may be an incentive for defendants to "forum-shop"; that is, a defendant whose ship is subject to a maritime lien has an incentive to have the claim against it heard in a forum that is more likely to characterize the claim in such a manner that it does not bind the ship absent personal liability of the owner. The force of this disadvantage is obviously lessened by the fact that defendants rarely have control over the forum in which the claim will be heard. A defendant can challenge the plaintiff's choice of forum on the basis of forum *non conveniens,* but otherwise, has little control over which court will hear the claim.

The third approach is to consider both domestic and forum law when characterizing the claim at hand. This is the approach suggested by the Civil Code of Quebec[67] in situations where the claim is unknown to domestic law. The advantage of this approach is that it is more consistent with the principle of comity because it treats domestic and foreign law with equal concern.

The disadvantages of this approach are the mirror opposite of the advantages of the first two approaches discussed above. First, domestic judges are not familiar with foreign law - especially if the foreign law is from another legal system and/or another language. Second, foreign law must be proven as a fact, which means that the evidence adduced in court limits the scope of the court's review of foreign law. As a result, the court's characterization and application of foreign law may be inaccurate if the evidentiary record is insufficient.

Lastly, the fourth approach is to characterize the claim strictly according to foreign law. As said above, no authority adopts this approach and it is included only for the sake of completeness. The problems identified with the third approach are present in the fourth, only magnified: an American judge asked to apply Spanish law will have difficulty, especially if the evidentiary record is weak. Also, this approach has the additional disadvantage of not respecting the principle of comity, since it favours foreign law over domestic law.

My purpose in reviewing the advantages and disadvantages of the four different approaches is not to suggest the superiority of one or another. Rather, I do so only to assist courts in engaging in a more explicit reasoning process for why they

[67] At article 3078, paragraph 2, which reads as follows : "Where a legal institution is unknown to the court or known to it under a different designation or with a different content, foreign law may be taken into account."

decide to characterize claims that come before them according either to domestic or foreign law (or a combination of both). A more explicit discussion of the issue of characterization – especially in the context of the maritime lien claims discussed in this article – will be beneficial, since it would allow a court to operate with an appropriate amount of justification and transparency and it would also alert parties to the reasons for why courts decide to approach a conflict of law issue from one perspective or another.

Conclusion

I hope these comments will be of some help to you in better understanding these aspects of Canadian maritime law and the difficulty faced by our courts whenever we are asked to give effect to a U.S. choice of law provision and, hence, to determine the state of the law in your country, particularly in an area of the law where our law and yours take very different paths.

In the end, I trust that you will agree that our decisions in *The Lanner* and in *The Nordems* reached the correct result on their facts and that in interpreting your law, we did not stray too far off course.