Enforcement in Canada of Ship Suppliers' Liens Subject to a U.S. Choice of Law Clause

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ENFORCEMENT IN CANADA OF SHIP SUPPLIERS' LIENS SUJBECT TO A U.S. CHOICE OF LAW CLAUSE

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In its recent decision *Kent Trade and Finance Inc et al. v. JP Morgan Chase Bank et al.* 2008 FCA 399 (hereinafter "***the Lanner***"), the Federal Court of Appeal[1] revisited the issue as to when a priority is to be granted to a ship supplier (whether it is a bunkers supplier, ship chandler or other provider of ship necessaries) over the ship mortgagee, by virtue of foreign law, in the event of insufficient sale proceeds to satisfy all the ship creditors, as it is most often the case in instances following the judicial sale of a foreign vessel abandoned by its owners in a Canadian Port.

In most instances, because of the relatively large amount of the ship or fleet mortgage(s) encumbering the vessel, it is an "all or nothing" question. If the ship supplier's claim is to be ranked ahead of the mortgage, the ship supplier will normally recover its claim in full. Otherwise, he will lose everything.

The ship bunkers suppliers in *the Lanner*, relying upon U.S. choice of law clauses in their ship supplying contracts, won the latest judicial battle of the saga. Whether the Canadian jurisprudence is now totally clear is another issue though. I suspect we haven't read the last word from our Canadian Courts on the topic.

A few Basic Principles and General Background

Traditionally, under the laws of most countries deriving their maritime law from English law, the ship supplier does not have the benefit of a maritime lien for its claim for unpaid ship supplies. All the ship supplier has is a statutory right to proceed *in rem* (i.e. allowing him to arrest) against the supplied vessel (or, possibly, one of its sisters) provided that:

i) he contracted with the owners of the vessel or with someone having the authority to bind the owners as agent; and

ii) there was no change of ownership between the time of supplying the vessel and the time of its arrest and, in the case of claim against a sister ship of the supplied vessel;

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[1] Leave to appeal to the Supreme Court of Canada was denied on June 4th, 2009

More importantly for our present purposes, the holder of a statutory right *in rem* does not have the benefit of any priority or privilege (an important characteristic of a maritime lien). In case of insufficiency of the sale proceeds further to the judicial sale of the vessel, the supplier's claim will be ranked with all other unsecured creditors after payment of the holders of valid maritime liens (crew wages, salvage claims etc., to name a few) and mortgagees if there is anything left after their payment. In most cases, the ship mortgage(s) is (are) the vessel's main charge in terms of value such that there is seldom anything left for those ranking behind the mortgage. On the other hand, the ship creditors ranking ahead of the mortgage normally make a full or decent recovery.

This result is considered unfair in other systems of laws. In those countries having adopted into their laws the provisions or similar principles as those found in the *Maritime Liens and Mortgage Convention, 1926,* (such as France), the ship supplier benefits from a temporary maritime lien status for a fairly short period of six (6) months after the supplying of the vessel.

It is, however, under the laws of our immediate neighbour and main trading partner, the United States of America, that ship suppliers are statutorily granted the most favourable maritime lien status a ship supplier may enjoy insofar as this author knows.

In *the Lanner*, the U.S. statutory provision granting a lien to ship suppliers (section 41342 of the *Commercial Instruments and Maritime Liens Act*, 46, U.S.C., 1994) was quoted as follows:

> *§31342. Establishing maritime liens*
>
> *(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.*

It is to be noted that the above quoted provision does not refer to a person contracting for the provision of necessaries but to "a person providing necessaries". Whether the contract for the supplying of the vessel has to be entered into in the United States of America or whether the supplies have to be delivered in a U.S. port for giving rise to U.S. maritime lien are just not specified.

A Particular Characteristic of *Canadian Maritime Law*

In *The Halcyon Isle* [1980] 2 Lloyd's Law Rep. 325, the majority of the Privy Council held that a maritime lien is a remedy and that, therefore, it is a procedural matter in nature such that both its

recognition and ranking ought to be decided under the law of the *lex fori,* i.e. where the ship was arrested (in that case: English law), even though the New York ship repairer's claim would give rise to a valid maritime lien enforceable with priority over the ship mortgage had the ship been arrested in the United States in that matter.

Our Supreme Court of Canada did not adopt the rationale of the majority of the Privy Council in *The Halcyon Isle.*

In *The Ioannis Daskalelis* [1974] S.C.R. 1248, a Greek ship subject to a Greek ship mortgage had been repaired at the very same New York shipyard than the *Halcyon Isle* under a ship repair contract subject to the laws of the United States of America. The ship repair contract also provided that the shipyard was entitled to a maritime lien securing the same.

Our Supreme Court nevertheless seems to have limited its reliance upon the sole fact that the necessary repairs were furnished in New York in its determination that the U.S. ship repairer's claim gave rise to a maritime lien enforceable in Canada. The Court dealt with the question as to whether that U.S. maritime lien took precedence over a mortgage claim. In the Court's view, the question of ranking was procedural in nature. It therefore had to be determined in accordance with the law of Canada (i.e. the *lex fori*). Since, under Canadian maritime law, maritime liens are ranked ahead of mortgages, the Court held that this was to remain the case even though a Canadian ship repairer's claim would only have given rise to a statutory right *in rem* ranking below the mortgage had the ship been repaired in Canada.

This is how U.S. and foreign maritime liens became increasingly recognized and the source of much debate in the Federal Court of Canada; Canadian law being more advantageous for U.S / foreign lien holders than the law of the other countries whose shipping law is based upon English law.

While *The Halcyon Isle* had great influence and was followed in most Commonwealth or former Commonwealth countries (Australia, Malta, New Zealand, the Bahamas, Singapore, South Africa etc. to name a few), the recognition of U.S. ship supplier's or ship repairer's liens in the United States as well as in Canada, together with the numerous ports and lengthy coast lines of those countries, might have given ideas to those drafting terms and conditions for ship repairers, bunkers and ship suppliers for their services rendered or supplies delivered in ports outside the United States of America.

Efforts to extend the benefits of *The Ioannis Daskalelis* doctrine to non-U.S. ship suppliers by way of a U.S. choice of law and lien clause

While there is one reference in *The Ioannis Daskalelis, supra,* to the fact that the ship repair contract in that case was subject to U.S. law (page 1251) and while the Supreme Court cited in support of its ruling two decisions quoting statements to the effect that the substantive right of the creditor claiming a lien status depends upon the proper law of the transaction (page 1254) or upon the proper law of the contract (page 1256), it is pointed out that the Supreme Court of Canada expressed itself solely in terms of the "claim for necessary repairs **furnished** in the

United States" (pages 1254 & 1259). In other words, it is not clear from *The Ioannis Daskalelis* whether any one of the facts that the ship was repaired in the United States, by an American ship repairer, under a contract stating to provide a lien under U.S. law, or whether all those facts taken altogether were determinant in the Court's ruling. The Supreme Court of Canada only referred to the place of performance of the repairs (i.e. where they were "furnished") in the more obvious passages of its *ratio decidendi.*

Be that as it may, *The Ioannis Daskalelis* was opening a door for those claiming the benefit of a U.S. maritime lien pursuant to a contract subject to U.S. law even though the supplier was not an American company and/or even though the subject necessaries had not be delivered at a U.S. port.

U.S. choice of law and lien clauses in ship supplying contracts had first been elaborated and popularised by bunkers suppliers. Indeed, other than the mortgagees, bunkers suppliers are perhaps the most frequent and significant ship creditors. Some of them being linked to major international oil companies, they may have had a better capacity to retain legal counsel to better secure their claims. Because of the significant amounts often at stake, Bunkers suppliers are often the only ones up to a good legal fight against the vessel's mortgagee(s) (often banks) over the proceeds of ship's judicial sales in the more difficult periods for the shipping industry.

The following is a brief summary of some of the most recent and salient Canadian cases focussing on the apparent evolution of the Canadian Court's attitude toward U.S. ship suppliers' lien involving a U.S. Choice of law clause, a non-U.S. supplier or a delivery of ship supplies outside the United States of America:

- *Fraser Shipyard & Industrial Centre Ltd. v The "Atlantis Two"*, (1999) 170 F.T.R., varied in part (July 28, 1999) No. T-111-98 (F.C.T.D.)

  This matter involved various claimants including the suppliers of necessaries claiming U.S. maritime liens. Without much discussion of the contractual terms (if there were any in writing), the late Prothonotary Hargrave granted and gave a priority over the mortgagee to the claims of the U.S. suppliers (Strachan, Hellenic and Atlantic Steamer Supplies) who had supplied various goods, ranging from soap, spare parts, food and tools, to the ship in U.S. Ports. Those were essentially straight applications of the decision of the Supreme Court of Canada in *The Ioannis Daskalelis.* Only the part of the claim of Hellenic for attorney's fees was declined on the basis that there was no maritime lien in the U.S. for same.

  Prothonotary Hargrave disallowed at first instance the claim of the U.S. company Mega Marine for the supplying of cylinder heads sold F.O.B. Houston, Texas, but who had in fact to be delivered on board the ship in Australia and Vancouver. The Prothonotary found that there was no evidence that the goods were, in fact, delivered to the vessel and held therefore that no maritime lien arose. Interestingly, he wrote at paragraph 80 and 81 of his decision:

> [80] *There is a requirement, under American law, that necessaries must be furnished to a ship. The requirement does not mean, for example, that putting bunkers aboard a third party's barge and then delivering them to a ship in an American port insulates a ship from a maritime lien merely because a middleman was involved. Rather, this American rule, of having to actually furnish the necessary to the ship, is based upon the wording of section 971 of the United States Code, requiring necessaries to be furnished to a vessel, wording which has not changed appreciably in its current version. (...)*
>
> *[81] In the present instance there is no evidence that the cylinder heads were furnished to the Atlantis Two. The matter falls outside of those cases involving a middleman, such as a bunker barge operator, delivering the bunker supplier's fuel in which case the supplier of the fuel does in fact have a maritime lien against the ship receiving the fuel. Rather the situation is closer to that described in Piedmont Coal. Mega Marine, by selling F.O.B. Houston, did not itself, or by an agent, furnish the cylinder heads directly to the Atlantis Two. Mega Marine may have some in personam right, but has not proven a maritime lien against the Atlantis Two. Mega Marine will not share in the sale proceeds.*

On appeal, Rouleau J. found that the shipping invoices indicated that the cylinder heads were to be shipped to a specifically identified vessel (the "Atlantis Two"). This, he held, was sufficient to establish delivery to the vessel and to find a valid U.S. maritime lien even though the actual deliveries took place outside the United States. Thus, unlike with *The Ioannis Daskalelis,* a U.S. maritime lien was recognized even though the necessary was "furnished" to the ship outside the United States of America.

With respect to the remaining claim of Unitor, a Norwegian company, who had delivered marine supplies through its agent, Unitor Ships Service Inc., of New Jersey, USA, to the *Atlantis Two* in Mexico and in Vancouver, both Prothonotary Hargrave and Rouleau J., relying upon U.S. expert evidence that Unitor benefitted from a maritime lien under U.S. law even though the supplies had been delivered outside the United States of America, held that Unitor benefitted from a U.S. maritime lien as against the *Atlantis Two* for the supplies delivered to that vessel. The decision is silent as to whether the supplying contract was governed by U.S. law.

- *Governor and Company of the Bank of Scotland v The "Nel"*, (August 2, 2000) No. T-2416-97 (F.C.T.D.), [2000] F.C.J. No. 1305

The only ship supplier to succeed in that case was Alpha Bunkering, a bunkers supplier who had "supplied" (through a local supplier) bunkers to the "Nel" during its transit of the Panama Canal. The contract to supply the bunkers consisted of telex exchanges which provided that the supplying was to be subject to the terms and conditions of the actual local supplier. Those terms and conditions stipulated that American law was to apply. The bunkers supplier argued that the contract to supply the bunkers was governed either by Panamanian law or by American law and that, in either case, it had a priority by virtue of *The Ioannis Daskalelis*. The Court accepted that Panamanian law gave the

supplier a priority but held that, because of the choice of law clause, Panamanian law did not apply. The Court then considered the effect of American law. The mortgagee filed an affidavit of an expert on American law to the effect that although American law gave a supplier of necessaries a priority over a mortgage for necessaries supplied within the United States, it did not give a priority for necessaries supplied outside the United States. While Prothonotary Hargrave was prepared to agree that the mortgagee's proof on U.S. law might be a proper statement of U.S. law regarding the ranking of liens under American law, Canadian conflicts of laws rules, including *The Ioannis Daskalelis* rule, provides that the recognition of a foreign maritime lien is to be determined by American law while the actual ranking of priorities is to be determined by Canadian law. He therefore held that since the lien was a maritime lien travelling with the ship, such a lien, under Canadian law, has priority over the mortgage.

In light of the above, as Canadian law was apparently getting more and more favourable to whoever might be able to claim the benefit of U.S. law by way of a choice of law clause, Canadian lawyers, including the undersigned (see the clause quoted below in *The Lanner*), gave it a try drafting contractual clauses purporting to extend the benefits of *The Ioannis Daskalelis* ruling to Canadian ship suppliers. But then the pendulum swung back.

***Imperial Oil Limited v Petromar Inc.*, 2001 FCA 391**

The issue in that complex factual case was whether the supplying of two Canadian product tankers, trading mostly within Canadian ports, with oil lubricants under a contract made by their manager with corporations in the United States gave rise to a maritime lien under U.S. law or merely a statutory right *in rem* under Canadian maritime law.

Both Canadian ships were owned by a Canadian company (Imperial Oil) which had in turn bareboat chartered them to a Canadian corporation, Socanav (after assignments of the charterparties). The bareboat charterparty provided that the contractual relationship between Owners and Charterers was to be construed according to the maritime laws of Canada.

At some undisclosed date, Socanav entered into an agreement with a U.S. ship manager, Star Ship Management ("Star"). This agreement was not (or could not) be adduced in evidence. Star contracted with the U.S. supplier Petromar for the supplying of marine lubricants to the vessels. This ship supplying agreement was subject to U.S. law. Petromar, in turn, had a contract with the U.S. oil company Exxon for the actual supplying of lubricants to the vessels in Canada (Montreal and Sarnia) as per Petromar's instructions. Exxon's contract provided for the application of U.S. law and for the benefit of a U.S. maritime lien over the supplied vessels. Petromar paid the lubricants to Exxon but, at some point, was not reimbursed by either Star or Socanav.

At trial, the Judge recognized that there were a number of factors connecting the matters in issue to both Canada and the United States. However, the most significant factors in his opinion were the contracts relating to the supply of lubricants, both of which applied American law. In the result, the Trial Judge held that the contracts for the supply of lubricants were governed by American law such that Petromar benefitted from a maritime lien.

On appeal, the Federal Court of Appeal reviewed the nature of maritime liens and noted that such **liens arise not from contract but by operation of law**. The Court distinguished (if not set aside as bad law) the "Atlantis Two". The Court concluded that the Trial Judge had correctly determined that the law to be applied was the law with the "closest and most substantial connection" to the transaction and that this involved weighing various factors. The Court of Appeal held, however, that the Trial Judge erred in holding that the United States contracts were the most significant factors. The Court of Appeal considered that the most significant factor was that the lubricants were delivered in Canada compounded with the facts that both the owners and the bareboat charterer had their base of operations in Canada where the vessels traded. When those factors were weighed with the other factors connecting the transactions to the U.S.A, the proper law was held to be the law of Canada. As a result, the appeal was allowed and Petromar was held NOT to benefit from a maritime lien.

In the undersigned's opinion, both the trial and appeal divisions erred by mostly relying upon the American case of *Lauritzen v. Larsen* (a tort law case with respect to an injury sustained by an American seaman onboard a Danish Ship in Cuban waters). The fact that *Lauritzen v. Larsen* was followed in subsequent U.S. maritime lien cases (like in the "M.V. Tento") does not make it any more authoritative under Canadian law. The basic and widely recognized principle of conflict of laws here in Canada is that the forum applies its own conflict of law rules (See for instance: *Ontario Bus Industries Inc. v. the Ship "Federal Calumet"*, (1992) 150 N.R. 149 (FCA)). Besides, the Federal Court of Appeal, while quoting it, apparently omitted the opening words of their citation of Prof. Tetley, *Maritime Liens and Claims*, whereby it is essentially in the absence of statutory or contractual direction that connecting factors shall be relied upon.

With all due respect, the decision of the Supreme Court of Canada in *The Ioannis Daskalelis* should not simply have been mentioned "*en passant*" by the Federal Court of Appeal. It is the landmark decision in Canada on the determination of conflict of laws in foreign maritime lien matters. It should have been applied or clarified.

The aftermath of *Imperial Oil Limited v Petromar Inc,* gave rise to uncertainty in the subsequent Canadian case law. In particular:

- In *Richardson International Ltd. v The "MYS Chikhacheva"* et al., (2002) FCA 97, the Federal Court of Appeal "followed" *Imperial Oil Limited v Petromar Inc, supra* to the limited and acceptable extent that the determination of the proper law of a contract is to be solved by considering the contract as a whole (here, a series of agreements). This was an appeal from a decision of the Trial Division allowing Richardson's claim for necessaries supplied to the "Mys Chikhacheva". Richardson, a U.S. company, and one of the Defendants, Starodubskoe, had entered into a complicated series of agreements relating to the re-fitting of a vessel, the supply and purchase of fish products and the supply by the Plaintiff of provisions to the "Mys Chikhacheva". Starodubskoe went bankrupt and The "Mys Chikhacheva" was arrested in Nanaimo, British Columbia for the necessaries supplied to her and paid for by Richardson. The Owners of the arrested ship resisted Richardson's claim arguing, *inter alia*, that the Plaintiff had no maritime lien for necessaries. The trial Judge considered the issue of applicable law and concluded that the contracts were governed by American law. In reaching this conclusion the trial Judge

noted that the agreements called for American law, that the place of arbitration was Seattle, that the currency of payment was US dollars, that payments were to be made in Washington and that interest was fixed by reference to the prime rate of the U.S. Bank of Washington. The trial Judge accepted the evidence of the Plaintiff's expert on American law that, under American law, the Plaintiff had a maritime lien for the necessaries supplied and paid for by the Plaintiff. The Court of Appeal upheld the trial Judge's determination of the proper law.

- In *Kirgan Holding SA v The "Panamax Leader"*, 2002 FCT 1235, Kirgan, a Panamanian company, had entered into a contract with the agent (Tor) acting for the demise charterer (Tonga of St-Vincent and the Grenadines) of the Defendant Maltese ship owned by the Maltese company (Pacific Pearl) for its supplying with bunkers in Malta. The bunkering contract between Kirgan and Tor contained a U.S. choice of law clause. Bunkers were supplied to the ship by local sub-contractors of Kirgan (Bominflot of Germany) and were not paid for by the demise charterer who became bankrupt. Kirgan therefore arrested the defendant ship during its call at the Port of Quebec. The owner of *the "Panamax Leader"* argued that they were not a party to the bunkering contract and that Kirgan had no right to a lien over the vessel. The Judge applied U.S. law and held that the demise charter had the presumed authority to bind the ship under U.S. law such that Kirgan could assert a lien unless it had been specifically notified of the lack of authority of the demise charterer. Since it had not been so notified, Kirgan was held entitled to a lien for the bunkers supplied. *Imperial Oil Ltd. v. Petromar Inc.* was, it would seem to me, artificially distinguished on the basis that, in *the "Panamax Leader"*, the bareboat charterer had complete possession of the ship (but so was the situation too with Socanav in the Imperial Oil case). The agent "Tor" was the equivalent of "Star" in the Imperial Oil matter. Applying *Imperial Oil Ltd. v. Petromar* to the facts of *the "Panamax Leader"*, one could very well have sustained that it is the law of Malta were the bunkers were supplied and were the owners were incorporated which should have applied despite the U.S choice of law clause in the contract between Kirgan and Tor in the absence in evidence of the contract between Tor and the demise charterer Tonga.

- *Royal Bank of Scotland PLC v The "Golden Trinity" et al.*, 2004 FC 795

This was a hearing to determine the priorities to the proceeds of sale from three vessels owned by various one ship companies mortgaged under fleet mortgages. The main claimants were the mortgagees of the vessels and Tramp Oil & Marine Limited, bunkers supplier which had supplied bunkers to the various vessels and to alleged sister ships of the vessels. Tramp Oil sought priority over the proceeds of the vessels' judicial sales by alleging a maritime lien. The Court allowed Tramp Oil's claim in respect of the bunkers supplied at an American port through the agency of an American supplier on the basis that Tramp Oil was subrogated to the American supplier's maritime lien created under American law. It is noteworthy that in reaching this conclusion the Court applied American law even though Tramp Oil's terms and conditions specified English law. The Court did so on the basis of *Imperial Oil v Petromar*, *supra*, and the fact that there was no real connection with England, the jurisdiction selected in Tramp Oil's standard trading conditions.

***The Lanner:* *Kent Trade and Finance Inc. v. JPMorgan Chase Bank*, 2008 FCA 399, reversing 2005 FC 864 (Proth. Morneau), reversed in part 2006 FC 409 (Gauthier, J.)**

The initial priority hearing before Mr. the Prothonotary Morneau involved, as competing claimants over the proceeds of the judicial sale of the vessel, the mortgagee and 15 suppliers of necessaries. Prior to the hearing, the Bank (the mortgagee) had, wisely, satisfied the direct claims of all the claimants which had supplied the "Lanner" in U.S. ports. Therefore, the claims which were left to be adjudicated where those for necessaries supplied in ports outside the United States or in the United States to "sister ships" of the "Lanner". Equitable subordination of the claim of the mortgagee was also argued, without success, but this point is beyond the scope of this paper. The Prothonotary rejected all of these arguments.

Before the prothonotary, the argument was made by some of the suppliers that they had maritime liens through the application of American law based upon the U.S. choice of law clauses found in their supply contracts even though the resulting supplies had not been supplied to the Lanner in U.S. ports.

Relying extensively on the dicta of the Federal Court of Appeal (from paragraphs 41 through 59, inclusive) in *Imperial Oil Limited v Petromar Inc, supra,* Mr. the Prothonotary Morneau held that such choice of law clauses were not determinative. The applicable law was the law of the jurisdiction with the closest and most substantial connection to each particular transaction and the Prothonotary, after having reviewed the factual circumstances of each claim concluded that none of them were subject to U.S. law.

Mr. the Prothonary Morneau then dealt with the claim of the Canadian ship supplier Calogeras for the necessaries supplied by Calogeras in United States ports but to "sister ships" of the Lanner. The contractual terms relied upon by Calogeras are quoted at paragraph 65 of his decision. They read as follows:

> *"Calogeras* (the Canadian ship supplier) *holds and is entitled to assert a maritime lien against the supplied vessel or any of its sister ships for all amount due (...) Calogeras shall be entitled to assert its maritime lien in any country where the subject vessel or its sister ships may be found. The creation and existence of a maritime lien in favour of Calogeras over the subject vessel or its sister ship shall be governed by the laws of the United States of America and the laws of the State of New York, regardless of the actual location of the port(s) where the subject deliveries were in fact effected."*

As mentioned above, the Bank / mortgagee had already paid the direct claim for necessary supplied in United States ports to the Lanner such that Calogeras' contractual extension of the scope of the lien to secure the payment of the other supplies delivered to "sister ships" of the "Lanner" (similar to the contractual extension provided for by a fleet mortgage) was not argued as it could. After relying again upon *Imperial Oil v. Petromar, supra*, Prothonotary Morneau repeated the statement found therein that a contract cannot create a maritime lien.

Such statement, it is submitted, is either incorrect or the very reliance upon a contractual choice of law to justify the existence of a lien is otherwise improper. The maritime lien for seamen's wage is another example of a maritime lien which cannot exist without an underlying contract. The ship mortgage too, while not strictly a lien, is a contract. The reality is, it is submitted, that certain maritime liens find their roots in contract, other in torts or in statutory instruments. It is the recognition at law (in a statute or in the jurisprudence) of their common attributes (*droit de suite or* survival of the lien status despite a private change of ownership in the subject property and its priority over unsecured claims which make them "maritime liens", whether their source is in contract, tort or in a statutory provision.

Anyhow, none of the suppliers in the Lanner case had American maritime lien status recognized at the conclusion of the first round before the Prothonotary Morneau.

Five of the suppliers appealed the Prothonotary's decision to a judge of the Federal Court (Gauthier J.). Madame Justice Gauthier agreed with Prothonotary Morneau that there should be no equitable subordination of the priorities in the circumstances of that case. However, the appeal Judge disagreed, in part, with the Prothonotary on the issue as to whether one of the suppliers had the benefit of a U.S. maritime lien. Specifically, although the appeal Judge agreed that the Prothonotary had applied the proper test (*Imperial Oil v. Petromar, Supra*) in his determination of the proper law, the appeal Judge disagreed with the application of that test in respect of two claimants. The appeal Judge held that the American company (Ashland Oil) benefitted from a U.S maritime lien by virtue of its terms and conditions even though the supplies had been delivered outside the United States and also granted Praxis' claim for fuel supplied in the United States.

Three of remaining unsuccessful necessaries suppliers appealed to the Federal Court of Appeal. All of them had supplied fuel or other necessaries under contracts that provided for the application of American law even though none of those suppliers were American companies or residents. None of the subject supplies had been delivered in the United States.

The Court of Appeal disagreed with the courts below and held that a contractual choice of law clause should normally govern maritime transactions, including the rights which arise from those transactions. In reaching this conclusion, the Court of Appeal acknowledged that, in certain circumstances, there may be such a strong connection to a jurisdiction to a point that the choice of law clause should not apply, such as in *Imperial Oil Ltd. v. Petromar Inc., Supra.* However, the contractual choice of law clause should normally apply.

The Court of Appeal next considered whether American law in fact gave rise to a proper maritime lien in the circumstances of each case. After having reviewing the evidence on points of US law, the majority of the Court concluded (Pelletier JA dissenting on the basis that the claimants has failed to meet their burden of proof establishing the situation under U.S. law given the contradictions in the jurisprudence depending upon the subject U.S. District Court seized with the issue) that American law would recognize a maritime lien in circumstances where a foreign supplier supplied goods in a foreign port under a supply contract governed by American law. Accordingly, the appeals were allowed and the suppliers were entitled to a maritime lien priority over the mortgage.

While not expressly overruling the earlier decision of the Federal Court of Appeal in *Imperial Oil Ltd. v. Petromar, Supra*, the Federal Court of Appeal in the Lanner seems to have relegated it to a case of exception and based itself on Canadian conflict of law rules as it should (no references to the U.S *Lauritzen* case were made). This latest decision of the Federal Court of Appeal is nevertheless far from being clear. For instance, compare its following excerpts:

> *(24) ... While I recognize that maritime liens are in rem rights, which arise by operation of law and not from contract, I believe that the choice of law clause in the supply contracts should generally govern maritime transactions, including the rights which may arise from these transactions...*
>
> *(25) The common law contractual choice of law rules provide that where there is an an express or implied choice of law by the parties to the contract, this law will normally govern the contract and legal rights and obligations generated by the contract...*
>
> *(26) 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 laws clause in the contract, should govern the transaction...*
>
> *(32) Since the contractual choice of law clause should normally govern and there are no other factors, or combination of factors, which indicate that another jurisdiction has a closer or more substantial connection to the maritime transactions at hand, I disagree with the decisions below and conclude that American law is the appropriate law to apply in this case.*

Conclusion

Perhaps unfortunately, leave to appeal to the Supreme Court of Canada was denied. While the decision of the Federal Court of Appeal in *the Lanner* removes a good deal of the uncertainty created by, in my opinion, *Imperial Oil v. Petromar, supra,* major difficulties remain identifying those situations "*where a maritime transaction is so strongly connected to a jurisdiction, this jurisdiction's substantive law, rather than the choice of laws clause in the contract, should govern the transaction*".

The undersigned cannot refrain from regretting the lack of judicial consideration so far given to the very words cited above and used twice by the Supreme Court of Canada in *The Ioannis Daskalelis* decision. It is claims for "necessary repairs **furnished** in the United States" which benefited from a U.S. maritime lien status. Neither is there a reference to the contract in those words nor is there one in section 41342 of the *Commercial Instruments and Maritime Liens Act*, 46, U.S.C., 1994 quoted above. It is the fact of supplying the ship which gives rise to a maritime lien in the U.S. While the statutory provision does not provide a geographical limitation for such provision of necessaries, a statute should not be interpreted as having an extra-territorial scope in

the absence of clear wording to that effect. The latest Court of Appeal decision in one of the US District Court may disagree with that but, hopefully, the law will eventually be clarified or more conclusively ascertained on this particular point. Using the place of delivery of the necessaries to the ship as the governing factor in the determination of the applicable law would achieve certainty and be consistent with the conviction of those that a maritime lien cannot be created by contract. It would also give a minimum of notice to the other third party ship's creditors and mortgagee as to the potential liabilities secured by maritime lien a ship may incur. A ship routing can be tracked. The more often it trades to and from U.S. ports, the less credit should one unsecured creditor or mortgagee advance to its owners.

The whole respectfully submitted.

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Profile:

Me Louis Buteau is a Partner and member of the firm's Maritime & Shipping, Insurance and Transportation Law Groups. He appears often before the Federal Court of Canada, Quebec and Canadian courts as well as before Canadian and international arbitration tribunals (AMAC, LMAA, FOSFA and GAFTA).

The main practice areas of Me Buteau include Transportation Law (marine, air, rail and road transportation), Insurance Law and Commercial Law matters related to marine, intermodal and air transportation. He regularly handles commercial transactions involving the sale, purchase or financing of ships and of other equipment as well as the drafting and revision of chartering contracts, shipping documentation, marine insurance policies and other commercial contracts relating to the transportation field and international commerce.

Me Buteau is a member of the Canadian and Quebec Bar Associations. He is also a member of the Canadian Maritime Law Association (CMLA), the Association of Maritime Arbitrators of Canada (AMAC) and the Canadian Board of Marine Underwriters (CBMU). In addition to his legal background, Me Buteau studied navigation at the Institut maritime du Québec in Rimouski and sailed on Canadian merchant vessels. He has been the editor of a Maritime Law column for Maritime Magazine since 1998.

Me Buteau was born in Quebec City. He graduated from Laval University with a B.C.L. in 1988 and from University College London, U.K., with an LL.M. in Maritime Law in 1992. He joined Robinson Sheppard Shapiro in 2003.

Practice Area(s):

- Maritime & Shipping Law
- Insurance Law
- Transportation Law