Navigating the Murky Waters of Foreign Maritime Liens:

How effective is a US choice of law in a bunker supply contract between the supplier and time charterer for obtaining a necessaries lien?

Candidate number: 5501
Submission deadline: 15.05.16
Number of words: 17,974
# Table of contents

1 INTRODUCTION .............................................................................................................. 1  
   1.1 The research problem and why it is interesting ..................................................... 1  
   1.2 The methodology, structure and scope ................................................................ 3  

2 THE MARITIME LIEN .................................................................................................... 5  
   2.1 Introduction ........................................................................................................... 5  
   2.2 The historical origins of the maritime lien .............................................................. 5  
   2.3 The nature of the maritime lien .............................................................................. 6  
   2.4 Substantive right vs. procedural remedy ................................................................. 8  
   2.5 The personification theory ....................................................................................... 10  
   2.6 The International framework .................................................................................. 11  
   2.7 Conclusion ............................................................................................................. 12  

   3.1 Introduction ........................................................................................................... 13  
   3.2 The status of necessaries claims in the United States .............................................. 14  
   3.3 The application of US law ....................................................................................... 16  
      3.3.1 Finding the proper law .................................................................................... 16  
      3.3.2 The divided appeals circuits .......................................................................... 19  
      3.3.3 Discussion ....................................................................................................... 28
3.4 Conclusion: Are US choice of law clauses effective before a US court? .......... 36

4 THE APPLICABILITY OF A US CHOICE OF LAW CLAUSE IN OTHER JURISDICTIONS ........................................................................................................... 37

4.1 Introduction ........................................................................................................... 37

4.2 The United Kingdom .............................................................................................. 38
  4.2.1 The status of necessaries claims ........................................................................ 38
  4.2.2 The application of US law .................................................................................. 40

4.3 Canada .................................................................................................................. 41
  4.3.1 The status of necessaries claims ........................................................................ 41
  4.3.2 The application of US law .................................................................................. 43

4.4 Australia ............................................................................................................... 46
  4.4.1 The status of necessaries claims ........................................................................ 46
  4.4.2 The application of US law .................................................................................. 47

4.5 Scandinavia .......................................................................................................... 52
  4.5.1 The status of necessaries claims ........................................................................ 52
  4.5.2 The application of US law .................................................................................. 53

4.6 Conclusion: Are US choice of law clauses effective outside of the US? .............. 54

5 PRACTICAL CONSIDERATIONS FOR BUNKER SUPPLIERS ....................... 55

6 PRACTICAL CONSIDERATIONS FOR SHIPOWNERS ................................. 57

7 STEERING CLEAR OF MURKY WATERS ....................................................... 59

8 TABLE OF REFERENCE ......................................................................................... 62
1 Introduction

1.1 The research problem and why it is interesting

“Other than the mortgagees, bunker suppliers are perhaps the most frequent and significant ship creditors.”¹ The ability to obtain bunkers at any given port is essential for international shipping and it is standard practice to supply on credit.

In the event that the time charterer has ordered bunkers² and subsequently becomes insolvent before paying, the supplier³ may find that they have few options for recovering their loss. Practically speaking, it is unlikely that they will recover payment from the charterer. Moreover, as it is standard for the supply terms to allow the vessel to consume the bunkers within the credit period, there will often be little left of the bunkers for the supplier to retrieve.

The ability to claim a maritime lien⁴ against the vessel then becomes particularly pertinent for the supplier. This powerful security right arises by operation of the law, survives a change in the vessel’s ownership and is enforced through the arrest of the vessel. Once the vessel is arrested, the court has the power to order a sale of the vessel and distribute the proceeds amongst the creditors. If the supplier manages to secure a lien, they will be given the highest priority as a creditor.⁵ This is important because, as ships are often heavily

² The time charterer will usually be responsible for the bunkers under the time charterparty. See for example: Gentime cl. 13(b) (BIMCO).
³ Note: in this thesis the bunker ‘supplier’ refers to the party contracting for the sale of bunkers and not the physical supplier.
⁴ The particular type of maritime lien relevant to this paper is the lien for the provision of necessaries to the vessel (which includes bunkers).
⁵ Paramount statutory charges such as harbour dues etc. which are expressly given priority over liens
mortgaged, there will be little left of the sale proceeds once the mortgagee is paid. On the other hand, without a lien the supplier is likely to have no remedy.

As a starting point, when the vessel is arrested in a jurisdiction other than where the lien ‘arose’, the arrest jurisdiction will apply its own private international rules to determine whether the supplier is entitled to a lien. As the vessel could be arrested in any port, and where it is arrested may be outside of the control of the supplier, whether the forum is favourable to foreign maritime liens is often a matter of luck. Hence, suppliers will frequently try to reduce the uncertainty of the forum’s approach by making their supply terms subject to a law which recognises a lien for necessaries suppliers. In practice, suppliers will often choose US law, as the US is one of the few jurisdictions which provides a necessaries lien.\(^6\) This is notwithstanding that the transaction may have no connection to the US.

However, this is not without its problems. Firstly, it is well-established that a maritime lien cannot be created under contract.\(^7\) It must arise as a matter of the (proper) law. Secondly, even if the supplier and time charterer are able to contractually determine the proper law, if not the availability of a lien directly, the shipowner is not a party to that contract. Thus, if the courts were to accept the choice of law, it would effectively mean that suppliers are able to indirectly contract for a very powerful and secret security in a third party’s property. This would not only affect the shipowner, but any other creditor to the ship. As the lien is an unregistered security which survives a change in ownership, neither the shipowner, future buyers, nor the other creditors would be able to assess their security in the vessel.

---

\(^6\) Countries which are a party to the 1926 Lien Convention also recognise a lien for necessaries. Due to a limited word count, this thesis will only focus on the US.

\(^7\) Note; This is different from an ordinary lien which can be granted by the property owner under a contract.
Recent developments, such as the OW Bunker litigation and the furore surrounding the Australian decision in the *Sam Hawk*, have made it particularly necessary to re-examine the tenuous relationships and terms which underpin bunker transactions.

This thesis is concerned with one aspect which has caused particular concern for suppliers and shipowners; the ability of the supplier to access security in the vessel by way of a US choice of law clause when the time charterer has failed to pay for the bunkers.

To put it more precisely, the research question to be addressed is the following: how effective is a choice of US law in a bunker supply contract between the supplier and time charterer for the supplier’s ability to access a maritime lien over the vessel?

In answering this question, this thesis will also step back and consider whether these clauses could be made more effective and evaluate whether necessaries liens in general are the most practicable mechanism for the supplier to secure payment.

### 1.2 The methodology, structure and scope

As the effectiveness of the US choice of law clause depends on how widely it is accepted, a range of jurisdictions will be considered in addressing this thesis problem. Likewise, an analysis of the courts’ approaches will be useful for identifying possible strategies for both the supplier and shipowner to safeguard their security in the vessel. Moreover, it will provide the basis for an overall assessment of the viability of necessaries liens as an internationally recognisable form of security.

As vessels could be arrested within any jurisdiction with a port, this thesis has necessarily been limited to a handful of particularly relevant jurisdictions. Particular attention is paid to the position of the US as it is the subject of this discussion and the approach taken by the courts will influence other jurisdictions’ application of US law. The UK position is also relevant due to its controversial stance on foreign maritime liens and its influence over Commonwealth jurisdictions. Likewise, Canada and Australia are interesting as they
attempt to move away from the UK position and balance the competing interests. Scandinavia offers a contrasting perspective being traditionally ship-owning and civil law jurisdictions.

Structurally, this thesis is divided into three main parts. The first part; Chapter 2 will introduce the key characteristics of a maritime lien and highlight the differing understandings of liens across the chosen jurisdictions. This will provide the framework for the discussions in parts two and three.

Part two will analyse the approaches of the chosen jurisdictions to determine the effectiveness of the choice of law clause. Chapter 3 will discuss the US position and Chapter 4 will consider the approaches taken in the UK, Canada, Australia and Scandinavia. For each jurisdiction this thesis will first consider the status of necessaries liens within that forum, followed by an analysis of the forum’s treatment of foreign maritime liens including the role of the choice of law clause. The first step is necessary because if the forum will not recognise foreign liens or accept the choice of law, it will assess the claim under its own laws.

Lastly, based on the findings in part two, part three will address practical considerations for the supplier in Chapter 5, as well as possible recommendations for the shipowner in Chapter 6. Chapter 7 will then question whether maritime liens are the most appropriate mechanism for the supplier to secure repayment or, alternatively, whether other common forms of security used in international transactions would be more effective.
2 The Maritime Lien

2.1 Introduction

The maritime lien is a peculiar form of security reserved for admiralty law and has been heavily shaped by the international nature of mercantile trade and the need to protect creditors’ rights in constantly moving property. However, the perception and scope of the maritime lien varies quite significantly between jurisdictions and attempts to harmonise these liens on an international level have encountered little success.

2.2 The historical origins of the maritime lien

The maritime lien has its origins in Byzantine-Rhodian customary sea law and the *lex maritima* of medieval Europe. The *Rôles of Oléron* are widely considered one of the earliest and most important codifications of these customary laws. The *Rôles* are thought to have originated on the Island of Oléron in the twelfth century and spread along the western coastal states of Europe, including England and Scotland, and as far North as the Baltic Sea. Of note are also the *Consolato del Mare* from the Western Mediterranean and the *Laws of Visby*, which were first printed in Copenhagen at the beginning of the sixteenth century. Combined, these codifications influenced the drafting of the *Ordonnance de la Marine* of 1681, as well as other commercial codes of European civilian jurisdictions, and were accepted in the common law jurisdiction of England. Therefore, the civil law codification of the ancient customary maritime laws provided the basis for modern Admiralty law, including the concept of the maritime lien.

---

8 Tetley (2002) at 440-441.
10 Tetley (2002) at 440-441.
11 Ibid.
12 Ibid at 442.
2.3 The nature of the maritime lien

A discussion on the nature of the maritime lien inevitably necessitates reference to *The Bold Buccleugh*, one of the leading, and most cited, English judgments on the characteristics of a maritime lien. In *The Bold Buccleugh*, Sir John Irvis referred approvingly to the civil law origins of the lien and the US decision of Justice Story in *The Nestor* before summarising the maritime lien as a:

“claim or privilege [which] travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached”.  

This was further expanded upon by Lord Justice Scott in *The Tolten*, where he stated that:

“The essence of the ‘privilege’ was and still is, whether in Continental or English law, that it comes into existence automatically without any antecedent or formality and simultaneously with the cause of action, and confers a true charge on the ship and freight of a proprietary kind in favour of the ‘privileged’ creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages”.

---


14 *The Tolten* at 356.
Judge Gorrel Barnes in *The Ripon City* further emphasised the proprietary nature of the *in rem* remedy by describing it as:

“a right acquired by one over a thing belonging to another – *a jus in re aliena.*”

It becomes apparent from these extracts that the maritime lien is a unique form of security over the vessel. It arises at the time the claim comes into existence and follows the vessel, surviving changes of ownership (although not judicial sale), until it is enforced through a proceeding *in rem*. Once completed through an *in rem* action, it will be ranked above most other creditors’ claims and ranked against other liens according to the time in which it came into existence.

At first glance, the maritime lien appears rather extraordinary. It does not require possession of the vessel, nor does it require registration or notice to third parties. It cannot be contracted for, but simply arises and follows the ship in secret. Furthermore, it survives a purchase by a bona fide purchaser without notice.

For necessaries liens in particular, these features were historically developed for practical purposes. Due to the impossibility of communicating with the vessel’s owner or acquiring financing while at sea, the Master had the authority to issue a lien over the vessel in exchange for the provision of necessaries. The vessel could then avoid being retained in port by the supplier in exchange for the supplier acquiring a prioritised security which followed the vessel wherever it went in the world. This, in turn, facilitated efficient international trade.

---

15 From the Latin; “against the thing”, it refers to an action brought directly against the property.

16 *The Ripon City* at 242.

17 The ranking of liens may also be subject to domestic statutes or judicial practice of the forum.


19 *The Nestor* at [84]-[85].
However, the necessaries supplier may find that this lien on which they rely only provides cold comfort if it is not enforceable in other jurisdictions. Common law jurisdictions, along with many others\textsuperscript{20}, do not consider the provision of necessaries warrant a maritime lien over the vessel. Should a lien which arises under one country’s laws be enforced in a jurisdiction where the lien is not recognised? How this question is answered depends on whether the maritime lien is considered to be a substantive right or a procedural remedy in the \textit{lex fori}\textsuperscript{21}.

### 2.4 Substantive right vs. procedural remedy

Whether liens are classified as substantive or procedural by the \textit{lex fori} will affect the courts’ process for determining whether a foreign lien can be enforced. If it is classified as procedural, the court does not need to consider whether the lien has arisen under the \textit{lex causae}\textsuperscript{23}. It only needs to determine whether the claim can be enforced under the \textit{lex fori}. Whereas if liens are considered substantive; the court has to find the ‘proper law’ of the claim and check whether the claimant has a right to a lien under that law. If it would, the court will likely give effect to the lien. Notwithstanding, it will prioritise the claim in accordance with the \textit{lex fori}.

The US courts favour the substantive approach.\textsuperscript{24} Whereas, the Privy Council in \textit{The Halcyon Isle} held, by a bare 3:2 majority, that a lien must be procedural as the right is only completed through an \textit{in rem} proceeding. This conclusion led the Court, in accordance with its private international law rules, to apply the \textit{lex fori} to determine whether a lien existed. Under English law, repairs carried out in the US did not grant a recognisable lien over the

\begin{itemize}
\item \textsuperscript{20} For example, Scandinavia: \textit{c.f.} 4.5
\item \textsuperscript{21} From the Latin “law of the forum”.
\item \textsuperscript{23} From the Latin “law of the cause” or the ‘proper law’; using its private international rules the court will determine which law is the closest and most appropriate for governing the transaction.
\item \textsuperscript{24} Tetley (1998) at 40.
\end{itemize}
vessel (despite warranting a lien under US law) and therefore, would rank as a statutory right in rem\textsuperscript{25} behind a British registered mortgage when the proceeds of the vessel were divided.\textsuperscript{26}

*The Halcyon Isle* has been heavily criticized, with Canada, and most recently Australia deciding not to follow the decision.\textsuperscript{27} Nevertheless, *The Halcyon Isle* sheds doubt on Justice Story’s confident proclamation that “the maritime law will not suffer the lien to be defeated by the mere departure of the ship from the port with or without the consent of the material-man”.\textsuperscript{28}

\textsuperscript{25} This statutory right gives the claimant a right to arrest the vessel to recover debt owed by its owner.

\textsuperscript{26} As mentioned in 1.1, it is particularly important for the supplier to rank above the mortgagee, otherwise there may be little left of the proceeds to satisfy their claim.

\textsuperscript{27} *The Ioannis Daskalelis* (Can), *The Sam Hawk* (Aust). *The Halcyon Isle* has been widely criticised for failing to properly reflect the substantive nature of the lien, which, similar to other inchoate rights, require enforcement by a court. That it requires enforcement, does not mean that it is only a procedural remedy; Jackson (2005) at 481-482. This approach led to the expectations of the mortgagee being preferred over the equally legitimate expectations of the US supplier who had provided necessaries in the US on the assumption that the credit was secured by a lien over the vessel. Tetley (2002) at 16 suggests that this outcome was influenced by thinly veiled favouritism towards the English mortgagee. However, there is support for the *Halcyon Isle* in academic literature, see Cohen (1987). Davies (2009) at 142 also arguably indirectly supports the procedural view.

\textsuperscript{28} *The Nestor* at [85]. See also: *The Tojo Maru* at 290G-291B where Lord Diplock considered that there was no “maritime law of the world”.

9
2.5 The personification theory

Even if the court follows the substantive approach, whether it will allow the choice of law in the supply terms to determine the *lex causae* will depend on whether the court strictly adheres to the personification theory.

The personification theory is a legal fiction which personifies the *res* (or the property) so that it may be held directly accountable for damage it causes or debts it accrues independently from that of its owner.\(^{29}\) The vessel can settle its own debts through a court ordered sale and distribution between the creditors. This has a dual purpose in that it provides an enforceable remedy for claimants who may not have a direct claim against the shipowner,\(^{30}\) as well as avoiding the impracticalities of finding and serving a distant shipowner.

However, the personification theory has been criticised for only providing an artificial distinction between the liability of the vessel and its owner. Rather, the ability to pursue and arrest the vessel is merely to gain access to the owner behind the vessel, and that it is the owner that will be held liable for the sums owed by way of the sale of their property.\(^{31}\) Further, the owner will usually have to provide security to have the vessel released from arrest or will settle the claim to avoid the sale of the ship.

\(^{29}\) “Since the idea that ship can be a defendant in legal proceedings was always a fiction, this should be regarded as a metaphor rather than as a literal statement of the legal position”; Dicey (2012) at 646.

\(^{30}\) *For example*, liens for salvage, damage or wages.

\(^{31}\) See *The Indian Endurance (No 2)* where Lord Steyn considered than an *in rem* and *in personam* action were one in the same and the owner was a party to both. Whilst this decision has been heavily criticised, it is not a new theory. Lord Watson in *The Castlegate* considered “every proceeding *in rem* is in substance a proceeding against the owner of the ship” and it has received early academic support in the US; *see* Shipman (1892-1893) at 9.
The court’s position on the personification theory will affect the weight it places on the shipowner’s lack of privity to the choice of law. If the court decides that the vessel is responsible, independent of the owner’s *in personam* liability, and there is a presumption that the charterer was contracting on behalf of the vessel, then the court will be more likely to respect the choice of law. The vessel itself will be considered a party to the contract and the court may accept contractual terms agreed to by the parties. On the other hand, if the court rejects the personification theory, the charterer is unable to contractually bind the vessel without the consent of the owner.

### 2.6 The International framework

The International Maritime Organization sought to harmonise the international approach to maritime liens by drafting the Lien Convention, as well as the Arrest Convention. Unfortunately, but perhaps not surprisingly, the Lien Convention has not proved to have been a success. Three versions have been attempted, but only 18 countries have signed the latest version, and this does not include the US or the UK. As so few have ratified the Lien Convention and those that have, ratified different versions, the Convention has had the inadvertent effect of creating further discrepancies in the approach to maritime liens.

The Arrest Convention garnered more wide-spread support than the Lien Convention, however, it also fails to address the issue of maritime liens. Instead, it clumps liens and non-liens under the wide umbrella of ‘maritime claims’, whilst also maintaining that nothing in the convention creates liens beyond the scope of the contracting state’s domestic

---

32 From the Latin; “against the person”, it refers to proceedings brought against the person.
33 The US courts have tended to favour the personification theory; Schoenbaum at §14-3.
34 The latest version is 1993.
35 The latest version is 1999. This replaced the 1952 version, which had been a particular success with the UK ratifying it in 1959.
law or the Lien Convention.\textsuperscript{36} Furthermore, to add to the confusion, the respective Conventions appear to have been drafted without correlating the two, notwithstanding that the Lien Convention, in theory, should establish the substantive claims upon which arrests or proceedings \textit{in rem} can be made under the Arrest Convention.\textsuperscript{37}

### 2.7 Conclusion

This chapter introduced the core features of a maritime lien and highlighted two unsettled premises; firstly, whether a lien is substantive or procedural, and secondly, the legitimacy of the personification theory. A court’s stance on these concepts will influence its approach to the supplier’s claim.

Due to the lack of international consensus, it is necessary to consider individual jurisdictions in order to properly test the effectiveness of a choice of law clause as a mechanism for acquiring a lien, as well as to assess the viability of necessaries liens as a cross-border form of security.

\textsuperscript{36} Article 9.

\textsuperscript{37} Berlingieri (2006) at §99.80 and chapter 3.
3 The Applicability of a US Choice of Law Clause before a US Court

3.1 Introduction

As explained in 1.2, the US is a relevant jurisdiction for this discussion as it is the law which suppliers frequently choose to govern the supply terms. This is because, unlike most other jurisdictions, the US has traditionally protected necessaries suppliers and has codified their right to a lien.

However, US courts are currently divided on the effect of the choice of law clause and whether it removes the need to determine the *lex causae*. Moreover, the Courts are undecided as to whether the statutory right to a lien can be extended extraterritorially on the basis of a US choice of law.

The US position will determine, to a large extent, the overall effectiveness of choice of law clauses as it will influence how other jurisdictions treat a choice of US law. If US courts reject the choice, other jurisdictions, faced with applying US law, are likely to follow suit. For these reasons it is necessary to undertake a thorough analysis on the US position on necessaries liens and their treatment of foreign maritime liens, including US choice of law clauses.
3.2 The status of necessaries claims in the United States

As the US is not a party to the Lien Convention, domestic legislation and judicial precedent govern whether a lien will apply in the US. The primary statute on maritime liens is the Commercial Instruments and Maritime Liens Act (‘CIMLA’)\(^{38}\) (formerly known as the Federal Maritime Lien Act). The Federal Maritime Lien Act (‘FMLA’) was enacted, to a significant extent, in 1910 to protect the interests of American necessaries suppliers.\(^{39}\) This policy was retained in the 1971 amendments.\(^{40}\)

Under §31342, a person providing necessaries to a vessel on the order of the owner, or a person authorised by the owner, has a maritime lien on the vessel and may bring an action \textit{in rem} to enforce the lien. The owner, master and any person entrusted with the management of the vessel at the port of supply have presumed authority to procure necessaries for the \textit{vessel}.\(^{41}\) This means that the personal liability of the owner under the supply transaction is irrelevant. In addition, an officer or agent appointed by the owner, charterer or buyer in possession of the vessel, may also have the necessary authority.\(^{42}\) There is no duty on the supplier to exercise due care in ascertaining the authority of the person with whom they are contracting.\(^{43}\) Any provision in the charterparty which specifies that the charterer is not to permit a lien over the vessel will be considered void, unless the supplier had actual knowledge of the provision.\(^{44}\) US courts have tended not to consider a stamp on the bunker receipt by the Master to be sufficient for establishing the supplier’s actual knowledge,\(^{45}\) therefore, ‘actual knowledge’ refers to actual \textit{prior} knowledge.

\begin{itemize}
  \item \(^{38}\) 46 U.S.C §§31301-31343
  \item \(^{39}\)  Dampskiøbselskabet at 273, Taylor (2008-2009) at 338.
  \item \(^{40}\)  1971 U.S.C.C.A.N 1363 at 1365 considered the FMLA would “be of great assistance to American materialmen in collecting amounts owed on necessaries”.
  \item \(^{41}\)  46 USC §31341(a)(1)-(3)
  \item \(^{42}\)  46 USC §31341(a)(4)(A)-(D)
  \item \(^{43}\)  1971 U.S.C.C.A.N 1363 at 1365-66, \textit{M/V Freedom}
  \item \(^{44}\)  1971 U.S.C.C.A.N 1363, ibid.
  \item \(^{45}\)  See \textit{Hebei Prince} at [12] and \textit{M/V Gardenia} at 1510.
\end{itemize}
The US differs from the UK in that it does not distinguish between a maritime lien and a statutory right *in rem*. Rather, all maritime claims will be granted lien status. “The existence of the lien and the privilege of resorting to the proceeding in rem are correlative, “where one exists, the other may be taken, and not otherwise.” According to Herbert’s (1931) opinion, contractual claimants may have the benefit of a lien in the US if the contract is subject to admiralty jurisdiction and the claim is a ‘maritime claim’. This extends to contracts which are not directly for the benefit of the ship, such as contracts of affreightment and charterparties. This approach has resulted in the US providing a far greater range of maritime liens than most other jurisdictions. However, not all maritime liens are treated equally.

The CIMLA defines a small class of ‘preferred maritime liens’, thereby providing an indication to the courts of the quality of the lien and a basic priority ranking. The provision of necessaries falls within this ‘preferred’ category if it arose before the filing of a preferred mortgage on a US flagged vessel. This means that it will rank above a US mortgage, if registered after the lien, and a foreign mortgage regardless of when it was registered. It will, however, rank after the traditional liens of salvage, damage and wages.

---

46 Herbert (1931) at 122 quoting *The Rock Island Bridge* at 215.
47 In order to fall within the Admiralty jurisdiction, the claim must arise out of a ‘maritime contract’; Shipman (1892-1893) at 13.
49 §§31301(5)-(6).
50 Ibid.
52 Tetley (1998), ibid.
3.3 The application of US law

3.3.1 Finding the proper law

As previously mentioned\textsuperscript{53}, the US considers liens to be substantive rights which arise as a matter of law under the \textit{lex causae}. Therefore, before enforcing a foreign maritime lien, a US court will have to first determine whether it exists under the \textit{lex causae}. As the Appeals Circuits are divided as to whether the choice of law replaces the need for determining the \textit{lex causae}, it is necessary to consider the conflict rules both for when there has not been a choice of law and for when there has been a choice of US law.

3.3.1.1 Where there is no choice of law in the contract

In the event that a vessel is arrested in the US and the claimant seeks to enforce a maritime lien over the vessel, the court will apply US conflict rules to determine which law should govern the claim.\textsuperscript{54} Whether or not the lien is then enforceable will depend on the \textit{lex fori}.\textsuperscript{55} The \textit{lex fori} may allow a lien where the \textit{lex causae} would not and vice versa.

US conflict rules can be divided between the federal and state level. The Restatement (Second) of Conflict of Laws presents a “clarification of conflicts law as it has been or is currently applied under state law”.\textsuperscript{56} However, the Restatement is intended as a guideline for state courts and does not provide an exhaustive prescription of conflict rules.\textsuperscript{57} As maritime law falls within the federal domain\textsuperscript{58}, in exercising its admiralty jurisdiction the court will look to federal conflict of laws rules as opposed to state rules, such as the

\textsuperscript{53} Supra 2.4
\textsuperscript{54} Davies (2009) at 1436.
\textsuperscript{55} Ibid. at 1442-1445.
\textsuperscript{56} Anderson (2010-2011) at 50, Restatement (Second) Conflict of Laws (1971).
\textsuperscript{57} Anderson, ibid.
\textsuperscript{58} 28 U.S.C §1333(1)(2006)
Restatement.\textsuperscript{59} Notwithstanding, the Supreme Court’s decision in \textit{Lauritzen v Larsen} is the seminal authority on conflict of laws analysis at the federal level and takes a similar approach as the Restatement.\textsuperscript{60} Hence, “even when sitting in admiralty, U.S federal courts readily apply the provisions of the Restatement (Second) of Conflicts of Laws”.\textsuperscript{61}

Under both the Restatement and \textit{Lauritzen}, when considering the connecting factors, the Court should take into account all the points of contact between the transaction and the different jurisdictions and “weigh and evaluate them” to determine which law has the “most significant relationship” to the transaction.\textsuperscript{62} This may mean that the law of the place of supply will not automatically qualify as the ‘proper law’ for determining whether a lien exists.\textsuperscript{63} The court will then need to determine whether the lien is enforceable in the US, as the \textit{lex fori}. If it is, it will be ranked in accordance with US rules on priorities, regardless of the determination of the \textit{lex causae}.\textsuperscript{64}

\subsection{3.3.1.2 Where there is a choice of US law in the contract}

If the parties have chosen US law to govern the contract, the Restatement will aid the court in deciding whether the choice should be upheld.\textsuperscript{65} However, the court will first have to determine whether the clause is duly incorporated under the law governing the contract.

\textsuperscript{59} Andersen (2010-2011) at 56.
\textsuperscript{60} Regardless of which test is used, the most important point is that the court carries out separate analysis for the underlying claim and the lien; Davies (2009) at 1451.
\textsuperscript{61} Andersen (2010-2011) at 66.
\textsuperscript{62} \textit{Lauritzen} at 582 and Restatement §188.
\textsuperscript{63} Donovan (2001) at 187. See \textit{M/V Tento} where the connections with the US were considered more influential than the \textit{lex situs}.
\textsuperscript{64} Tetley (2002) at 22.
\textsuperscript{65} In addition to the Restatement there is also the Uniform Commercial Code which is considered representative of the federal common law of admiralty and requires stricter standards than the Restatement. However, it does not seem to have been widely applied by the courts to maritime choice of law clauses; See Donovan (2001) at 91.
formation. The court will have to find this law using a *Lauritzen*/Restatement analysis as discussed above. If the clause is duly incorporated, the Restatement then provides a two-pronged assessment for determining whether it should be enforced:66

1. The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

2. The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue unless either:

   (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or

   (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which under the rule of §188 [law of forum], would be the state of the applicable law in the absence of an effective choice of law by the parties.

The Court should consider “the reasonable relationship of the contract to the [chosen state], the substantial contacts of the parties with [chosen state] and considerations of the [forum’s] fundamental policy with respect to usury” when assessing whether the choice of law should apply.67 Notwithstanding, the Courts will usually uphold the parties’ choice of

66 Restatement §187
67 *Mencor Enterprises* at 440.
law in order to preserve their expectations and provide certainty in international transactions.\(^68\)

Whether a US court should allow a US choice of law clause to replace the *lex causae* when there is no other connection to the US, and when it significantly affects a third party who did not acquiesce to the choice, remains an unsettled issue amongst the Appeals Circuit courts.

### 3.3.2 The divided appeals circuits

#### 3.3.2.1 The Second Circuit

The decision of the Court of Appeals for the Second Circuit in *Rainbow Line* concerned a maritime lien asserted by the charterer for a breach of the charterparty by the vessel’s owner. Whether the charterer was entitled to a lien depended on whether English law, as the law of the flag, applied or whether this was superseded by the choice of US law in the charterparty.

The Court summarily dismissed the charterer’s argument that US law should apply as “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”.\(^69\) However, the Court also considered that the law of the flag was not automatically applicable as the governing law and proceeded to undertake a *Lauritzen* analysis to determine the “proper law” for deciding whether a maritime lien existed.\(^70\) Both the mortgagee and the shipowner were American corporations and, therefore, the Court


\(^{69}\) At 1026

\(^{70}\) At 1026-1027.
concluded that US law was the most appropriate law to apply to the dispute. On this basis, the charterer was granted a lien over the vessel.

Whilst *Rainbow Line* concerned a lien for a charterparty, the central issues are analogous to the focus of this discussion. It is likely that if a US choice of law clause in a bunker contract came before the Second Circuit, the Court would require a more substantial link with the US before allowing such a lien.

3.3.2.2 The Fifth Circuit

The decision of the Fifth Circuit in *Queen of Leman M/V* stands in contrast to the approach taken by the Second Circuit thirty years earlier. As in *Rainbow Line* the *Queen of Leman* did not concern a claim by a bunker supplier, but rather a claim for a lien for unpaid insurance premiums. Nevertheless, the *Queen of Leman* is relevant for the present discussion as insurance premiums are considered necessaries under the CIMLA.

The Court distinguished the reasoning of an earlier judgment of the Fifth Circuit in *Hoegh Shield* on the basis that *Hoegh Shield* had only applied a conflict of laws analysis because there had been no choice of law in the contract.\(^{71}\) In contrast, the parties in the *Queen of Leman* had chosen English law to govern the contract, subject to the disclaimer that nothing in the contract shall affect the right of the Insurer to take action in any jurisdiction to enforce its right of lien in accordance with the local law.\(^{72}\) Thus, the Court held that US law applied to the existence of a maritime lien, notwithstanding the effect the application of the choice of law provision would have on third parties, such as the subsequent owners.\(^{73}\)

\(^{71}\) *Queen of Leman*, at 355.

\(^{72}\) Ibid. at 352.

\(^{73}\) At 355.
A recent judgment from the District Court of the Eastern District of Louisiana applied the principles of the *Queen of Leman* to a dispute involving a Singaporean-based bunker supplier’s claim for a lien over a Panamanian flagged vessel for bunkers delivered in Singapore, under a US choice of law clause. Feldman J considered that firstly; the clause was duly incorporated into the contract under Singaporean law, the law governing contract formation, and secondly; that it was irrelevant that the shipowner was not a party to the contract because the lien is an action *in rem* against the vessel and the charterer had presumptive authority to consent to the choice of law on behalf of the vessel. On this basis, the supplier could access a lien under the CIMLA.

### 3.3.2.3 The Eleventh Circuit

Notably, the Eleventh Circuit denied the extraterritorial application of the CIMLA. In *Trinidad Foundry*, a Trinidadian company repaired a Norwegian-flagged vessel and provided her with necessaries in Trinidad. The owners, who ordered the repairs and supplies, were registered outside the US. The repair contract was subject to English law. The Court upheld the finding of the District Court that they did not have *in rem* jurisdiction because English law applied to the determination of the lien and under English law the supplier only had a procedural right against the vessel, and not a substantive right. As there is no equivalent under US law, the Court held that it did not have jurisdiction to allow an *in rem* action, nor to grant a lien.

In *obiter dicta* the Court also noted that “§31342 does not provide for a maritime lien for goods and services supplied by a foreign plaintiff to a foreign flag vessels in foreign ports.” As the parties had not chosen US law, the Court did not need to decide whether

---

74 Which is bound by precedent of the Court of Appeals of the Fifth Circuit.
75 *Bulk Juliana*.
76 *Bulk Juliana* at 11.
77 At 617.
this would have allowed for the application of the CIMLA. However, it is arguable that, in light of their apparent rejection of the extraterritorial application of §31342, the Court would consider a choice of US law by itself to be insufficient to trigger the application of the CIMLA.

3.3.2.4 The Ninth Circuit

The Court of Appeal of the Ninth Circuit in *Trans-Tec* held that a US choice of law provision in the bunker supply contract was valid and thus the CIMLA applied, granting the foreign bunker supplier a lien over the vessel. In *Trans-Tec*, the Owner was a Malaysian corporation, the time charterer was a Taiwanese company and the bunker supplier was Singaporean.\(^78\) The bunkers were supplied in Busan, South Korea. The only factors connecting the transaction with the US were the bunker supplier’s terms and conditions, which included a US choice of law provision, and that the vessel’s route between North and South American ports and Asia.

The Court considered that; first, it must determine the law of contract formation\(^79\); second, it must apply that law to determine whether the US choice of law provision found in the seller’s General Terms and Conditions was duly incorporated into the bunker confirmation; and lastly, if the choice of law is applicable, it will apply US law to decide whether the supplier is entitled to a maritime lien.\(^80\)

To find the law governing the formation of the contract, the Court based its analysis on “both the Supreme Court and the Ninth Circuit law”.\(^81\) Thus, the Court referred to the principles set out in *Lauritzen*, as well as the Restatement §188, and considered the

\(^{78}\) At 1122
\(^{79}\) Supra 3.3.1.2
\(^{80}\) At 1124. Supra 3.3.1.1
\(^{81}\) Ibid., Supra 3.3.1.1
transaction’s points of contact. After weighing the various connections with other jurisdictions, the Court concluded that Malaysian law was the ‘proper law’ to apply to the formation of the contract, as the owner was a Malaysian corporation and the vessel was Malaysian-flagged.\textsuperscript{82} The Court considered that the place of delivery was largely irrelevant.\textsuperscript{83}

The Court then considered whether Malaysian law, which at the admittance of the Court relies heavily on English law, would consider the choice of law clause incorporated into the contract.\textsuperscript{84} The Court decided that it would on the basis of tacit acceptance by way of the charterer’s conduct.\textsuperscript{85}

In considering whether the choice of law should be accepted\textsuperscript{86}, the Court followed the approach taken in the \textit{Queen of Leman} that “the ship’s presence in the jurisdiction represents a substantial contact”\textsuperscript{87} and held “that a maritime lien might exist on the vessel under United States law, but would not exist under Malaysian law, was a consequence obviously contemplated by the contracting parties, and because the \textit{Harmony} sailed into a United States port, results in no fundamental unfairness.”\textsuperscript{88}

In its final stage of analysis, the Court considered the applicability of the CIMLA and concluded that the statute was intended to apply extraterritorially as it did not refer specifically to US suppliers, vessels or ports, and therefore, can be extended to situations where there is no connection with the US.\textsuperscript{89} At any rate, the Court considered that the arrest

\textsuperscript{82} \textit{Trans-Tec}, at 1124-1125.
\textsuperscript{83} At 1125
\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid.
\textsuperscript{86} \textit{Supra} 3.3.1.2
\textsuperscript{87} \textit{Queen of Leman}, at 354 as quoted in \textit{Trans-Tec} at 1126.
\textsuperscript{88} \textit{Trans-Tec} at 1127.
\textsuperscript{89} At 1129-1131.
in the US, combined with the vessel’s previous visits to US ports, meant there was no issue of extraterritoriality.\(^\text{90}\)

In a recent unpublished decision of the Ninth Circuit the Court of Appeals affirmed the application of \textit{Trans-Tec} and held that the bunker supplier had a lien as a result of the choice of US law in the bunker contract.\(^\text{91}\) Watford J, whilst concurring as the bench was bound to follow the precedent set by \textit{Trans-Tec}, considered that “\textit{Trans-Tec} was wrongly decided”.\(^\text{92}\) The Judge came to this conclusion on the basis that the Ninth Circuit should not have applied \textit{Queen of Leman}, as in that case the contract was between the claimant and the shipowner. Instead, he reasoned that;

\begin{quote}
“the Fifth Circuit’s reasoning has no application in a case like \textit{Trans-Tec}, which involved a non-party that neither knew about nor consented to the contractual provision at issue. \textit{Trans-Tec}’s holding is in conflict with what our court had earlier described as “an obvious truism – non-parties cannot be bound by an agreement” \textit{Gulf Trading & Transp. Co v M/V Tento}, 694 F.2d 1191, 1196 n.8 (9\textsuperscript{th} Cir. 1982).”\(^\text{93}\)
\end{quote}

Judge Watford considered that the Court in both \textit{Trans-Tec} and the present case should apply \textit{Lauritzen} to determine the proper law to apply to the maritime lien.\(^\text{94}\)

\begin{flushleft}\footnotesize\(^{90}\) At 1132 \\
\(^{91}\) \textit{M/V Trogir}. As an unpublished decision, it is not of precedential authority. \\
\(^{92}\) Per Watford J at 1. \\
\(^{93}\) Ibid. \\
\(^{94}\) Per Watford J at 2. \textit{Supra} 3.2.1\end{flushleft}
3.3.2.5 The Fourth Circuit

3.3.2.5.1 Triton Marine

*Triton Marine* concerned the provision of bunkers in Ukraine by a Panamanian corporation to a Norwegian-owned vessel, bareboat chartered to a Russian company and sub-chartered to a Cayman Islands corporation with its headquarters in Seattle. The vessel was registered in Malta but sailed under a Russian flag under the bareboat charter. The bunker confirmation identified the sub-charterer as the buyer acting “[o]n behalf of the M/V ‘Pacific Chukotka’ and jointly and severally her Master, Owners, Managing Owners/Operators, Managers, Disponent Owners, Charterers, and Agents”\(^95\). The confirmation also provided for US law to apply to the agreement. The connecting factors with the US were the sub-charterer’s headquarters and the vessel’s journeys to the US.

The Court identified two principal issues arising from the proceedings. Firstly, whether the US choice of law clause was enforceable, and secondly, if it was, whether the claimant was entitled to a maritime lien under the CIMLA. The bench considered that in light of the choice of law by the parties, there was no need for a *Lauritzen*/Restatement analysis on the ‘proper law’.\(^96\) Therefore, US law applied to determine the existence of a lien. The Court applied the personification theory and rejected the shipowner’s argument that they were not a party to the contract, on the basis that the proceedings were *in rem* against the vessel.\(^97\) The Court quoted *Trans-Tec* and stated that it was a “fundamental tenet of maritime law” that the charterer had presumed authority to bind the vessel when ordering necessaries.\(^98\) Therefore, the vessel could be bound by the presumed authority of the charterer “even without [the shipowner’s] knowledge or consent”.\(^99\) Consequently, the Court did not

---

\(^95\) At 412
\(^96\) At 413
\(^97\) *Supra* 2.5
\(^98\) At 414, referring to *Trans-Tec* at 1127-1128.
\(^99\) At 414
consider the imposition of a maritime lien to unfairly prejudice the shipowner or other third parties.\textsuperscript{100}

The Court further rejected the shipowner’s argument that a choice of law clause served to create a lien by contract, instead reasoning that the choice of US law did not grant a lien in itself, but rather the lien arose from the operation of US law.\textsuperscript{101}

In deciding whether the CIMLA applied, the Court again followed the reasoning in \textit{Trans-Tec} and held that the CIMLA is not restricted to American suppliers or vessels.\textsuperscript{102} Nevertheless, the Fourth Circuit considered that there were no issues of extraterritoriality as the charterer’s headquarters in Seattle and the vessel’s visits to US port’s constituted sufficient connections to warrant the application of US law, including the CIMLA.

\textbf{3.3.2.5.2 \textit{Hebei Prince}}

The recent decision of \textit{Hebei Prince} followed the approach taken by \textit{Trans-Tec} and \textit{Triton Marine} indicating that, without a Supreme Court judgment on the matter, the state of the law is settled in the Fourth Circuit. \textit{Hebei Prince} concerned the delivery of bunkers to a Hong-Kong flagged vessel in the United Arab Emirates upon the order of the time charterer, a Greek corporation. The bunker supplier was a company incorporated in the United Arab Emirates and the vessel’s owner was a Chinese company. The only factors connecting the proceedings to the US was a US choice of law clause in the supplier’s terms and conditions and the vessel’s arrest in Virginia.

\begin{flushend}
\textsuperscript{100} At 414-416.
\textsuperscript{101} At 416
\textsuperscript{102} At 416-417
Similar to *Triton Marine*, the Court considered it unnecessary to undertake a *Lauritzen* analysis of the applicable law in light of the choice of US law\textsuperscript{103} and rejected the argument that upholding such a choice was unfair against the vessel owner who was not a party to the contract.\textsuperscript{104} Furthermore, in *obiter*, the Court also held that it was unnecessary to decide whether Greek or US law was the law governing the contract formation as both would treat the choice of law as duly incorporated into the contract.\textsuperscript{105}

Applying the US choice of law, the Court in turn upheld the application of the CIMLA and held that as the supplier did not have actual knowledge of the charterer’s authority to bind the vessel, the supplier was entitled to a maritime lien under §31342.\textsuperscript{106}

\textsuperscript{103} At 514
\textsuperscript{104} Ibid.
\textsuperscript{105} At 514 and 519.
\textsuperscript{106} At 522
3.3.3 Discussion

The aim of this discussion is to weigh the respective Circuits’ approaches, both in light of the choice of law analysis set out in 3.3.1 and their handling of the issues introduced in Chapter 2. This analysis is useful as it will frame the commercial strategies of suppliers and shipowners and provide guidance for other US Circuits, as well as other jurisdictions faced with a US choice of law clause.

3.3.3.1 The choice of law analysis

Bolstered by the decision of the Fifth Circuit in the *Queen of Leman*, the Fourth and Ninth Circuits placed considerable weight on upholding the commercial expectations of the contracting parties in order to promote certainty and predictability. This led to the courts to accept the choice of law. The extent to which each court tested the appropriateness of the choice under the Restatement §187 varied.\(^{107}\)

*Trans-Tec* did not explicitly ‘test’ the parties’ choice. However, it did follow the *Queen of Leman*, which held that “the ship’s presence in the jurisdiction represents a substantial contact”\(^{108}\), suggesting that the Ninth Circuit considered §187(2)(a) to be satisfied nonetheless. It is unclear why the courts accepted the vessel’s arrest at a US port to be a sufficiently substantial connection, whilst also considering the place of supply to be merely fortuitous.\(^{109}\) Arguably, the place of supply has more connection to the transaction than the jurisdiction where the claimant chooses to enforce a claim.

Whereas the Fourth Circuit considered it unnecessary to test the applicability of US law under the Restatement, *Lauritzen* or the UCC and simply upheld the parties’ choice.\(^{110}\) It

---

\(^{107}\) Supra 3.3.1.2  
\(^{108}\) *Queen of Leman* at 354.  
\(^{109}\) *M/V Tento* at 1195.  
\(^{110}\) Raudebaugh (2009-2010) at 654.
reasoned that there was no “compelling reason of public policy” to refuse the choice.\textsuperscript{111} Thus, \textit{Triton Marine} only briefly considered §187(2)(b) and overlooked (a). Due to the framing of §187, this was open to the bench, as courts can choose to test the choice under §187(2)(a) or the more cursory comity test in (2)(b).

The District Court in \textit{Bulk Juliana} did not disagree with the “compelling argument” that courts should not simply accept the parties’ choice of law but test its connection with the US, but nonetheless considered itself bound by the \textit{Queen of Leman} to enforce the parties’ choice.\textsuperscript{112}

The main benefit of the approach taken by the Fourth, Fifth and Ninth Circuits is that it arguably “provides a functional blueprint” for “complex international maritime contracts” and helps achieve the goal of keeping trade moving.\textsuperscript{113} However, the disadvantage is that it forgoes a proper ‘quality check’ of the choice of law and does not acknowledge the role of the shipowner.

A cursory application of the Restatement §187 may cause comity concerns, as suppliers will be able to easily avail themselves of US law to circumvent the laws of the \textit{lex causae}. Furthermore, the US is at particular risk of usury, being one of the few countries which allow a lien for necessaries. Although §187 allows the courts to give preference to the parties’ choice for the sake of certainty, it is arguable this should not be given as much weight when the effect of the choice is to grant security in a third parties’ property without their knowledge. Similarly, all three courts relied heavily on the \textit{Queen of Leman}, when they could have, and arguably should have,\textsuperscript{114} distinguished it on the basis that the

\textsuperscript{111} \textit{Triton Marine} at 413, referring to \textit{Bremen} at 12-13 and \textit{Lauritzen} at 588-589.
\textsuperscript{112} At footnote 1.
\textsuperscript{113} Taylor (2008-2009) at 345.
\textsuperscript{114} \textit{Trogir}, per Watford J at 1.
shipowner was a party to the contract in that case, and thus there had been greater reason to uphold the parties’ choice.

In contrast, the Second Circuit and the minority judgement in *Trogir* considered the choice of law to be irrelevant because firstly; enforcing it would disadvantage third parties who were not a party to the contract, and secondly; a maritime lien cannot arise out of a contract. Thus, proceeding on the basis that there had been no choice of law, the Second Circuit had to determine the *lex causae* in accordance with the process set out in 3.3.1.1. Both deemed *Lauritzen* as particularly instructive for determining the *lex causae*. This approach is preferable as it provides certainty for the shipowner, who can more easily predict the governing law based on established conflict of laws analysis, than if it is prescribed under a contract to which they are not a party and have no knowledge.

### 3.3.3.2 Contractual privity

In *Trans-Tec*, the owner argued that the clause was not duly incorporated into the contract between the supplier and charterer. However, the Court considered that under the law governing contract formation (Malaysian law), the charterer had tacitly accepted the term. Arguably, in applying Malaysian law – which is based on English law – the court should have instead considered the tacit acceptance of the shipowner, whose security was at stake under the clause.

In *Triton Marine* and *Bulk Juliana* the owners argued that they could not be bound by the choice of law as they were not parties to the bunker contracts. Both courts applied the personification theory\(^{115}\) to hold that, as the action was *in rem*, the shipowner did not need to be a party to the contract. Acknowledging that the vessel cannot physically contract by

\(^{115}\) *Supra* 2.4
itself, the three courts agreed that it is a “fundamental tenet of maritime law” that the charterer has presumed authority to enter into a contract on the ship’s behalf.\footnote{116}

Whilst this ‘tenet’ may be correct when applying the CIMLA, \emph{Bulk Juliana} and \emph{Triton Marine} applied this assumption to determine that the vessel was bound by the term \emph{before} having determined that the CIMLA was applicable.\footnote{117} The courts should have instead considered whether the vessel (or its owner) was bound by the contract from the view of the law governing the contract formation.\footnote{118}

In any event, the issue of contractual privity is arguably peripheral to this discussion considering that maritime liens cannot be created by contract.\footnote{119} Some contend that this premise can no longer be supported when the US allows liens for breach of charterparties and the provision of necessaries, where a lien “would not arise without the […] agreement”.\footnote{120} However, there is a clear difference between liens which are \emph{created} by the contract and would not otherwise apply under the governing law, versus liens which are recognised by the contract as an available remedy under the governing law. For instance, if the vessel was supplied in the US by a US supplier, the choice of law clause would merely reflect that US law governed the transaction as the \emph{lex causae} and the supplier was entitled to a lien under the CIMLA. Whereas, if the vessel is supplied in Singapore and none of the parties are American, the governing law is unlikely to grant a lien to the supplier. Thus, the contract containing the choice of law allows the supplier to access a lien when they otherwise would be prevented from doing so.

\footnote{116} Triton Marine at 414, Trans-Tec at 1127-28, Bulk Juliana at 11. Compare: The Yuta Bondarovskykaya at 362-365, where the UK court held that actual authority was “almost inconceivable” and implied was not arguable.

\footnote{117} Bulk Juliana at 11-12, Triton Marine at 414.

\footnote{118} The owner argued this in the Bulk Juliana but the Judge quickly dismissed it on the basis that the position of the foreign law had not been sufficiently proven; at 9.

\footnote{119} Supra 2.2

\footnote{120} Donovan (2001) at 198.
On a similar note, *Triton Marine* considered that “the inclusion of this choice-of-law provision, however, did not “create [] by agreement” any such lien; the maritime lien would still have to arise by operation of law”.\(^{121}\) This is true in that the supplier would still have to meet the criteria of the CIMLA. Nevertheless, the effect “is to allow the parties to do indirectly (by choosing the law of the nation that recognizes maritime liens for necessaries) that which they are prohibited from doing directly”\(^{122}\). Thus, the “fundamental distinction” that liens arise separately and independently of a contract could be lost if future courts decide to follow the Fourth, Fifth and Ninth Circuits.\(^{123}\)

In contrast, the Second Circuit firmly upheld this “fundamental distinction” and considered that upholding the choice of law would effectively allow the suppliers to contractually create a maritime lien.

Moreover, both the Second Circuit and Watford J in *Trogir* rejected the notion that the vessel could be bound independently of its owner. Neither referred to the presumption in the CIMLA that the charterer had authority to bind the vessel; suggesting that they did not consider it relevant for establishing contractual privity.

### 3.3.3.3 The effect on third parties

It is not uncommon that third parties will be inadvertently affected by a contract and *Triton Marine* and *Trans-Tec* reasoned that as the third party was the shipowner, the burden was not unreasonable.\(^{124}\) As the owner had a contractual relationship with the charterer and oversight of its vessel, it had access to information on the supplier and location of the bunkering and the vessel’s journey to the US. The supply terms can also often be easily

\(^{121}\) At 416.

\(^{122}\) Davies (2009) at 1457

\(^{123}\) Raudebaugh (2009-2010) at 654.

\(^{124}\) *Trans-Tec* at 1127, *Triton Marine* at 415.
found on the supplier’s website under their General Terms and Conditions. *Rainbow Line* was thus distinguished on the basis that in that case the third party was further removed from the transaction, and consequently had less access to the terms of the contract. Furthermore, this position echoes the policy behind the 1971 amendments to the FMLA:

“As a practical matter, the owner can more easily protect himself contractually by bonds or otherwise at the time he charters the vessel, than can the American materialman who furnishes necessaries to a vessel under great economic pressure to put back at sea”\textsuperscript{125}.

However, Professor Davies argues that distinguishing *Rainbow Line* makes little sense as a “third party is a third party is a third party”.\textsuperscript{126} The Circuits also did not consider that the shipowner is not the only third party who will be affected by the contract. Mortgagees and other creditors, who have little or no control over the vessel or knowledge of its whereabouts, will also risk having their security relegated.

3.3.3.4 The extraterritorial application of the CIMLA

After having upheld the choice of US law, the Fourth and Ninth Circuits turned to apply the CIMLA. Both considered the lack of explicit reference to US suppliers, vessels or ports was indicative of the provision’s extraterritorial applicability. By focusing on the plain meaning of the provision, the courts side-lined the historical purpose of the CIMLA which was directed at protecting “American materialmen”.\textsuperscript{127}

\begin{tabular}{l}
\textsuperscript{125} 1971 U.S.C.C.A.N 1363 at 1365.  \\
\textsuperscript{126} Davies (2009) at 1457  \\
\textsuperscript{127} 1971 U.S.C.C.A.N 1363 at 1364. \\
\end{tabular}
The Ninth Circuit dismissed *Trinidad* as “a house of cards that quickly tumbles with even the gentlest examination”.\(^{128}\) This is notwithstanding that the approach taken in *Trinidad* is more consistent with the position of the Supreme Court than *Trans-Tec*. The Supreme Court has held on multiple occasions that US Acts should only have extraterritorial reach if expressly granted such application by Congress.\(^{129}\) Without such indication, there is a presumption against extraterritoriality.\(^{130}\) In the context of liens, extraterritorial application is an especially “valid concern” as so few countries recognise a necessaries lien.\(^{131}\)

### 3.3.3.5 Conclusion

The reasoning of the Fourth and Ninth Circuits hinges on the personification of the vessel. As discussed at 2.4, this is an unsettled premise which is even harder to apply within the context of a contract. It is evident that a vessel cannot enter into a contract on its own volition. Under US law this is solved by the statutory presumption in the CIMLA that the charterer is the vessel’s agent. However, this presumption cannot be extended to determine that the vessel has agreed to the application of US law.

*Trinidad* and *Rainbow Line* are older judgments than *Trans-Tec* and *Triton Marine* and reflect the ‘minority’ position in the division between the Circuits.\(^{132}\) Further, neither judgment had to directly address the issue of whether a necessaries supplier could acquire a lien through the choice of law. Whilst, these decisions have been endorsed recently this was only in a minority judgement in an unpublished decision.\(^{133}\) Notwithstanding, it is submitted that the reasoning of these Circuits and Watford J gives greater consideration to

---

\(^{128}\) *Trans-Tec* at 1133.


\(^{130}\) Smerek and Hamilton (2011) at 21.

\(^{131}\) Taylor (2008-2009) at 344.

\(^{132}\) Davis (2015) at 405. The Second and Eleventh Circuits are a minority both in geographical terms and because they are outnumbered 3:2 by the Fourth, Fifth and Ninth Circuits.

\(^{133}\) *Trogir* per Watford J.
both the unique nature of the lien and the serious consequences of allowing the parties to contract for such privileged security to the detriment of third parties.

By undertaking a Lauritzen choice of law analysis, the Second Circuit afforded more weight to “comity concerns” than the Fourth, Fifth and Ninth Circuits which only “make some informal reference to U.S points of contact to satisfy any concerns about public policy, unreasonableness and comity”\(^{134}\). Moreover, along with Watford J, it distinguished more clearly between the choice of law analysis and the application of the CIMLA. Instead of applying the CIMLA presumption to determine whether the vessel was bound by the choice of law, it used ordinary contract law principles to hold that a third party cannot be bound by a contract. By disregarding the choice of law, both judgments also placed more importance on the core feature of the maritime lien; that it arises as a matter of the (proper) law.

Furthermore, the Eleventh Circuit’s approach reflected the underlying purpose of the CIMLA, which was to protect American suppliers. It is a domestic statute which pursues a domestic policy. Thus, there is no reason to extend this protection to foreign suppliers who have no reasonable expectation for such protection when supplying non-US vessels outside of the US.

It is submitted that the combined effect of these ‘minority’ judgments balances the risks between the shipowner and the bunker supplier and results in a more predictable and commercially-minded outcome.

\(^{134}\) Davis (2015) at 431.
3.4 Conclusion: Are US choice of law clauses effective before a US court?

The analysis in Chapter 3 has demonstrated that the effectiveness of a US choice of law provision depends entirely on the Circuit which it comes before. The outcome of Trans-Tec and Triton Marine is that a US choice of law clause will automatically apply if the vessel is arrested within the jurisdiction of the Fourth or Ninth Circuit. This is by no means inconsequential as three of the ten largest US ports (by volume of international trade) are situated within these Circuits.\textsuperscript{135} Moreover, a further six lie within the scope of the Fifth Circuit, including Houston - the port with the largest volume of international trade in the US.\textsuperscript{136}

However, the Bulk Juliana was only a District Court decision and the Appeals Circuit could still distinguish Queen of Leman on the basis that the shipowner was a party to the choice of law. Furthermore, the position of the Second Circuit is influential as both New York and New Jersey fall within its jurisdictional reach and rank third equal amongst US ports.\textsuperscript{137} Based on Trinidad Foundry, the Eleventh Circuit is also likely to give little effect to the choice of law clause when there is no other connection with the US. The First and Third Circuits are yet to side with either position.

Without an indication from the United States Supreme Court as to which approach should be favoured, the Circuit Courts of Appeal remain divided, creating uncertainty for both suppliers and shipowners, as well as other jurisdictions faced with a US law provision.\textsuperscript{138}

\begin{footnotesize}
\begin{enumerate}
\item AAPA 2013, Los Angeles, CA (#4), Hampton Roads, VA (#5), Long Beach, CA (#8).
\item Ibid., Houston, TX (#1), New Orleans, LA (#2), Port Arthur, TX (#6), South Louisiana, LA (#7), Corpus Christi, TX (#9), Morgan City, LA (#10)
\item Ibid.
\item The Supreme Court rejected a certiorari application by the shipowner in Trans-Tec; Splendid Shipping SDN BHD v Trans-Tec Asia, 129 S.Ct. 628, 2008 WL 4106794 (Dec.). However, it is hoped that in light of the problems caused by the lack of accord between the Circuits, the Supreme Court may reconsider; Davis (2015).
\end{enumerate}
\end{footnotesize}
4 The Applicability of a US Choice of Law Clause in Other Jurisdictions

4.1 Introduction

After having discussed the US position, this chapter will now analyse and compare the approaches of the jurisdictions identified in 1.2. Once again, the courts’ appraisal of the competing interests, as well as its position on the personification theory and whether liens are substantive or procedural,\(^\text{139}\) will determine whether the choice of law is accepted.

If the choice of law is not accepted, the court will either apply the *lex fori* to assess the claim or conflict rules to try to find the *lex causae*. Thus, it is necessary to consider the status of necessaries liens within each forum.

Even if the courts accept the application of US law, it may be difficult to implement. Firstly, as seen in 3.3.2 and 3.3.3 the US courts are divided in their approach. Secondly, it may not fit within the jurisdiction’s admiralty framework. For instance, the jurisdiction may not have the mechanisms for recognising and enforcing a foreign maritime lien. Lastly, there is the question of whether it should be enforced if it disadvantages the shipowner, other creditors and the jurisdiction’s own suppliers.

\(^{139}\) *Supra* chapter 2.
4.2 The United Kingdom

4.2.1 The status of necessaries claims

The United Kingdom, along with most other jurisdictions, does not recognise a maritime lien for the provision of necessaries.140 Unlike the US, the UK has for the most part limited the availability of liens to the three traditionally recognised liens; damage, salvage and wages.141 This is to reflect the special nature of the maritime lien and protect lien holders from unlimited competing claimants, and the shipowner and creditors from losing their security. Thus, the personification theory only applies to the vessel’s tortious liability. For contractual claims such as necessaries, the claimant only has a statutory right in rem to arrest the vessel.142 Once an in rem writ has been issued the claimant will be granted the status of a secured creditor but their claim will rank lower than a lien-holder.143

However, a statutory right in rem is merely a procedural right which allows the claimant to pursue the liable party using their property as security.144 Thus, the supplier can only proceed in rem if the person who would be liable in personam at the time the claim arises is also the owner or demise charterer when the action is brought.145 For instance, if the time charterer ordered the bunkers and failed to pay, the necessaries supplier will only be able to arrest the vessel if the charterer has become the owner or demise charterer when the in rem

---

140 Jackson (2005) at 261: the Senior Courts Act 1981 (formerly the Supreme Court Act), which provides the courts with admiralty jurisdiction, does not define which claims are worthy of a lien. Instead, this has been left to judicial development.

141 Bottomry and Respondentia are still considered to grant a lien, however, due to modern communication and financing, they are now obsolete.

142 UK courts have jurisdiction to hear necessaries claims under s 20(2)(m) Senior Courts Act 1981 (including non-British vessels or non-British owners (s 20(7)(a)), and is not limited to claims arising in the UK (s 20(7)(b)). If the defendant is domiciled in an EU Member State or Convention State, Brussels I Regulation or the Lugano Convention must be satisfied before a UK court has jurisdiction.

143 The Monica S

144 White (2014) at 86-87.

145 Senior Courts Act, s 21.
action is brought. Ordinary principles of agency are able to overcome this dual-limbed test.\textsuperscript{146} Hence, if the bunkers are ordered for the owner by their agent, the \textit{in personam} requirements will be satisfied. However, unlike in the US, there is no presumption that the time charterer is an agent of the shipowner and, thus, there is no need to notify the supplier of the charterer’s lack of actual authority.\textsuperscript{147} The supplier may even be obliged to take reasonable measures to ascertain whether the agent has the necessary authority.\textsuperscript{148} Further, the bunker supplier has the burden of showing that the agent had authority (either ostensible or actual) to bind the shipowner and/or the vessel.\textsuperscript{149}

Therefore, the UK approach to necessaries claims fundamentally differs from the US in that a bunker supplier will not be entitled to a maritime lien but only a lower ranked maritime claim. This means that, firstly; under UK law the right in the \textit{res} does not arise automatically by operation of the law, but is contingent on the supplier arresting the vessel and bringing a claim under the domestic law of the UK. Secondly, in order to attain a statutory right \textit{in rem}, the party liable \textit{in personam} must also be the vessel’s owner at the time the \textit{in rem} action in brought, as the function of the \textit{in rem} remedy is only to acquire security for the claim against the ship’s owner.

\textsuperscript{146} Tetley (1998) at 565.
\textsuperscript{147} Ibid, at 572.
\textsuperscript{148} \textit{The Tolla (no duty) vs. Cann v Roberts (duty)}
\textsuperscript{149} Tetley (1998) at 565.
4.2.2 The application of US law

Almost thirty years ago the Privy Council in *The Halcyon Isle* held that a maritime lien is a procedural remedy as opposed to a substantive right and, therefore, whether it could be enforced was a matter for the *lex fori*.\(^{150}\) This means that a UK court will not look to whether the lien exists under the *lex causae*, but only whether the lien is capable of being enforced in the UK.\(^{151}\) Despite having been heavily criticised by many legal scholars and other jurisdictions for encouraging forum shopping and destroying the legitimate expectations of American bunker suppliers,\(^{152}\) the position taken by the Privy Council is not new.\(^{153}\) Moreover, it is understandable to the extent that it provides a simple solution to a complicated matter and seeks to reduce the availability of maritime liens so as to protect their privileged status and the rights of non-lien creditors. The extensive liens available under US law is driven by a policy to protect US service and supply industries, and this domestic policy should not necessarily affect the standing of registered international creditors, nor disadvantage service suppliers from other countries.\(^{154}\) The UK courts have not considered it necessary to overturn *The Halcyon Isle* and it remains ‘good law’ in the UK.

If the Privy Council previously refused to recognise a lien claimed by a US necessaries supplier for necessaries supplied in the US, UK courts will be especially loath to accept a necessaries lien when the transaction has no connection to the US other than a choice of law clause in a contract to which the vessel’s owner is not a party.

---

\(^{150}\) *Supra* 2.4

\(^{151}\) *Supra* 2.4

\(^{152}\) *Supra* footnote 27.

\(^{153}\) Thomas (1980) at 371-374 predates the *Halcyon Isle* and considered that the general approach by UK courts was to classify the lien as procedural.

\(^{154}\) Cohen (1987) at 154 where the author reasoned that a court applying its own laws should not give a foreign claimant greater standing than it gives to local claimants.
In *The Fesco Angara*(No 2), the bunker supply contract between the English supplier and the Danish charterers was subject to US law. In *obiter*, the Court of Appeal considered that in accordance with “a well established legal framework”[sic], English law applied to the existence of a lien and the UK did not recognise a lien for necessaries. 155 Hence, without an *in personam* connection with the shipowner, the supplier was unable to enforce their claim against the vessel in the UK.

### 4.3 Canada

#### 4.3.1 The status of necessaries claims

Canada, similar to the US and UK, is not a party to the Lien Convention. The governing law can instead be found across three domestic statutes; the Federal Courts Act (1985), the Canada Shipping Act (1985) and the Marine Liability Act (2001). In accordance with the Federal Courts Act, the Federal Court of Canada has jurisdiction for *in rem* claims. 156

The maritime law of Canada largely reflects its Common Law background with one notable exception; its approach to liens for necessaries suppliers. In 2009, the Canadian Parliament amended the Marine Liability Act and added section 139, creating a maritime lien for Canadian necessaries suppliers. This was done in an attempt to secure “parity in treatment between the claims of American and Canadian ship suppliers”. 157

Notwithstanding, the new section fell somewhat short of industry expectations, with some lamenting that the change did not do enough to achieve parity with US suppliers. 158

155 At [38]-[39].
156 Section 22.
section restricts the availability of a lien to suppliers “carrying on business in Canada”\textsuperscript{159} and supplying “foreign vessels”\textsuperscript{160}. This appears at odds with the universal application of the Canadian \textit{in rem} jurisdiction in the Federal Courts Act\textsuperscript{161} and contrary to the very nature and purpose of a maritime lien, which is to provide security which follows the vessel around the world\textsuperscript{162}.

The section has also caused some confusion by removing the requirement for an \textit{in personam} link with the shipowner except for the provision of lighterage and stevedoring services\textsuperscript{163}. The Federal Court in \textit{The Nordems}\textsuperscript{164} concluded there was no indication that the section had removed the requirement that “services must have been provided at the request of the owner or person acting on his behalf”. Although this makes practical sense, whether this was a correct interpretation of the statute is uncertain given the explicit restriction of an \textit{in personam} link to lighterage and stevedoring\textsuperscript{165}.

A more workable solution, which would have avoided the above issues, would have been for the drafters to use the same legal test as for the statutory right \textit{in rem}, but promote the claim to the status of a lien\textsuperscript{166}.

As in the US, there is a presumption that the bunkers are ordered on behalf of the vessel and its owner, however, this presumption is more easily rebutted under Canadian law\textsuperscript{167}. Constructive knowledge that the purchaser of the bunkers did not have authority to bind the

\begin{flushleft}
\textsuperscript{159} s 139(2)  \\
\textsuperscript{160} Ibid.  \\
\textsuperscript{161} s 22(3), \textit{see also:} Myburgh (2010) at 289 and footnote 35.  \\
\textsuperscript{162} Myburgh (2010) at 289.  \\
\textsuperscript{163} Shipping Federation of Canada (2009) at 2-3.  \\
\textsuperscript{164} (2010) at [15]  \\
\textsuperscript{165} Marine Liability Act, s 139(2.1)  \\
\textsuperscript{166} Jette (2009) at 7.  \\
\textsuperscript{167} \textit{The Nordems} (2011) at [18]-[19], \textit{Har Rai} at [3]-[11].
\end{flushleft}
vessel is sufficient to override the presumption.\footnote{The Nordems (2011) at [18]-[19].} Furthermore, the supplier may also have a duty to inquire as to the buyer’s authority if circumstances indicate that the buyer is not the vessel’s owner.\footnote{Ibid., at [60], Tetley (1998) at 572.}

4.3.2 The application of US law

Canadian courts have continued to follow the decision of the Canadian Supreme Court in \textit{The Ioannis Daskalelis}, despite having been based on the UK decision of \textit{The Colorado} which was overturned by the Privy Council in \textit{The Halcyon Isle}. \textit{The Ioannis Daskalelis} favoured the substantive over the procedural approach. Therefore, under Canadian conflict of laws rules, the court will apply the \textit{lex causae} to establish the existence of a lien and the \textit{lex fori} to determine its ranking.\footnote{Tetley (1998) at 1280.} Generally, Canadian courts can defer to the parties choice of law, but absent a choice, the court will weigh the various connecting factors to determine which law has the closest and most substantial connection to the transaction.\footnote{\textit{M/V Samatan}}

In \textit{The Lanner} the majority of the Federal Court of Appeals accepted that the US choice of law clause in the contract between the supplier(s) and the ship’s management company applied to the determination of a maritime lien, notwithstanding there otherwise being no connection with the US. Although recognising that maritime liens cannot be created by contract, the Court considered that, in the interests of “certainty and predictability in maritime transactions of a jurisdictionally diverse character”, the parties’ choice of law should be upheld.\footnote{The Lanner at [24].} However, the Court left room for this to be overridden when the transaction is so strongly connected to a jurisdiction other than that chosen by the parties.
that it should govern the transaction instead.\textsuperscript{173} The Court also left open the question of whether the shipowner had to be a party to the supply contract in order for the choice of law to apply. In the present case the contract was between the supplier and the ship’s manager who had been given authority by the owner to enter into contracts for the provision of necessaries on their behalf.\textsuperscript{174}

When turning to the application of US law, the Court considered whether a US court would allow a lien when there was no connection to the US other than the choice of law clause. The Court acknowledged that there were differing opinions across the US Appeals Circuit but decided to follow the approach taken by the Ninth Circuit in Trans-Tec as it was the latest Appellate decision and shared analogous facts with the case before the Court.\textsuperscript{175}

Notably, Justice Pelletier disagreed with the application of US law on the basis that, due to the lack of harmonisation across the Appellate Circuits, there was no such thing as “US law”. The Judge reasoned that the “state of the law” depended on “the presence of the arrested vessel in a port within the geographical jurisdiction of one or the other of the circuits of the United State Court of Appeals”.\textsuperscript{176} This also dictated whether the CIMLA would be granted ‘extraterritorial’ application.\textsuperscript{177} Therefore, as the applicability of foreign law had not been proved, the \emph{lex fori} should apply in accordance with Canadian conflict rules.\textsuperscript{178}

\begin{flushright}
\footnotesize
\begin{itemize}
\item \textsuperscript{173} Ibid., at [26].
\item \textsuperscript{174} At [29]
\item \textsuperscript{175} At [33]-[47]
\item \textsuperscript{176} At [55]
\item \textsuperscript{177} At [52].
\item \textsuperscript{178} At [57]-[59]. Recently, the place of delivery of the bunkers has been endorsed as an important factor for determining the proper law; see \textit{M/V Samatan} and Buteau (2009) at 11-12.
\end{itemize}
\end{flushright}
Recent decisions of the Federal Courts and the Federal Court of Appeals have indicated that in order for a choice of law in the bunker supply contract to be applicable, the shipowner must have also been a party to the contract.\textsuperscript{179} Justice Nadon in the Federal Court of Appeal stated that:

“[…] 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.”\textsuperscript{180}

Therefore, the Canadian courts have stuck with the substantive approach to liens, affording respect to liens which arise legitimately under the \textit{lex causae} and avoiding the disadvantages of the UK position. They have also kept the personification theory within a more reasonable scope than the Fourth and Ninth Circuits in the US and require contractual privity with the shipowner. This approach is preferable to the extent that it balances the interests of the supplier and shipowner.

\textsuperscript{179} \textit{The Nordems} (2011) at [85], \textit{The Nordems} (2010), and \textit{Imperial Oil}.

\textsuperscript{180} \textit{The Nordems} (2011) at [85].
4.4 **Australia**

4.4.1 The status of necessaries claims

As a member of the Commonwealth, Australian maritime law has largely followed the approach taken by the UK. Historically, the Colonial Courts of Admiralty Act 1890 (Imp) provided Australian courts with the same admiralty jurisdiction as the High Court in England held in 1890\(^\text{181}\) and “was the foundation law for the admiralty law in Australia for almost 90 years”\(^\text{182}\). The introduction of the Admiralty Act 1988 (Cth) (‘the Act’) modernised Australian maritime law but nonetheless kept it firmly rooted in the UK position, having been modeled on the Supreme Court Act 1981 (UK)\(^\text{183}\). Although Australia is not a party to the Lien Conventions, these Conventions along with the 1952 Arrest Convention have “coloured the law relating to admiralty liens” and influenced the Admiralty Act\(^\text{184}\).

In adherence with the nature of the Supreme Court Act, the Act is a jurisdictional and procedural act\(^\text{185}\). It does not codify the liens available in Australia, nor does it provide guidance on the priority of claims\(^\text{186}\). It merely provides the Federal and Supreme Courts with *in rem* jurisdiction for maritime liens and claims\(^\text{187}\).

Section 15 gives a lien-holder the right to proceed *in rem*. 15(2) states that reference to a maritime lien *includes* a reference to salvage, damage done by the ship, wages and master’s

---

\(^{181}\) Further developments to the UK admiralty jurisdiction after 1890 were not passed onto Australia.

\(^{182}\) White (2014) at 42.

\(^{183}\) Ibid.

\(^{184}\) Ibid. at 53.

\(^{185}\) See Section 14: claims *in rem* may only be brought under the Admiralty Act.

\(^{186}\) Priorities have not been codified in Australia. However, in accordance with judicial precedent and equity, the courts apply a generally accepted ranking whereby liens are prioritised above mortgages and statutory claims in rem rank after mortgages.

\(^{187}\) Section 10
disbursements. A claim by a necessaries provider falls under the lower ranked category of a maritime claim. \(^ {188}\) This gives the claimant a right under section 17 to proceed \textit{in rem} against the vessel only if the party that would otherwise be liable \textit{in personam} was not only the owner/charterer when the cause of the action arose \(^ {189}\), but also the owner of the vessel when the proceeding is commenced. \(^ {190}\) Therefore, as in the UK, a necessaries supplier will only be able to bring an \textit{in rem} action in Australia if they can also bring an \textit{in personam} claim against the vessel’s owner.

4.4.2 The application of US law

In keeping with this tradition, Australia has tended to follow the procedural approach of \textit{The Halcyon Isle} and applied the \textit{lex fori} to determine whether a foreign lien should be recognised. \(^ {191}\) In \textit{The Skulptor Vuchetich}, Justice Sheppard felt bound to follow the Privy Council’s decision and denied the claimant a lien which had arisen in the US under the FMLA, as it would only qualify as a statutory right \textit{in rem} under Australian law. \(^ {192}\)

The recent decision of \textit{The Sam Hawk} seems to represent a departure from this conservative position and may open the way for the acceptance of foreign maritime liens by Australian courts. \textit{The Sam Hawk} concerned the arrest of a Hong Kong owned and registered vessel in Australia by the Canadian bunker supplier. The time charterer had ordered the bunkers from the supplier in Turkey. The (amended) bunker confirmation was subject to the claimant’s General Terms and Conditions. These stipulated that the contract should be construed under Canadian law, but that the seller was entitled to a lien under the law of the United States, wherever the vessel was situated.

\(^ {188}\) S 4(3)(m)
\(^ {189}\) S 17(a)
\(^ {190}\) S 17(b)
\(^ {191}\) However, prior to the \textit{Sam Hawk}, the Australian position had not received thorough judicial examination; Davies (2002) at 777.
\(^ {192}\) At 13.
The suppliers claimed a lien under section 15 on the basis that the proper law was that of Canada and/or the US, and that the lien was expressly governed by US law which allows a lien for necessaries supply. Further, under US law, there is a rebuttable presumption that the charterer had the authority to purchase bunkers on the credit of the vessel. Alternatively, under Canadian law, it is possible to contractually incorporate a lien of the US. Otherwise the claimant, as a Canadian business, was entitled to a lien under section 139 of the Marine Liability Act 2001 (Canada).

Lastly, and in the alternative, the supplier argued it had a statutory right in rem under section 4(3)(m) and section 17 as the charterer entered the supply contract on behalf of the shipowner thereby satisfying the in personam requirement.

After considering expert opinions on the state of the law in the US and Canada, McKerracher J concluded that Canadian concepts of agency are tantamount to the Australian position. Thus, the issue of whether the shipowner is a party to the bunker supply contract can be determined with reference to Australian law. His Honour then appeared to leave the assessment of agency and the role of the owner and moved straight to ‘the jurisdiction issue’.

McKerracher J considered that the interpretation of “lien” under section 15 depended on whether Australian conflict of laws rules would recognise a foreign maritime lien. This hinged on the language of the provision and on whether The Halcyon Isle should continue to be followed. The Judge acknowledged that the issue of foreign maritime liens is

---

193 Sam Hawk at [27]
194 Ibid., at [32]-[64]
195 At [67]
196 At [72]
unsettled in Australia.\textsuperscript{197} He relied heavily on the dissenting judgments of Lord Salmon and Lord Scarman in \textit{The Halcyon Isle}, notwithstanding the obvious differences in the two cases.\textsuperscript{198} In \textit{The Halcyon Isle}, the claim for a maritime lien was based on repairs furnished in the US and a contract between the repairer and the vessel’s owners. The dissenting Law Lords placed emphasis on the fact that the “contract was governed by the lex loci contractus, \textit{as both parties to the contract must have known}” (emphasis added).\textsuperscript{199} It is foreseeable that “injustice would prevail” by applying the \textit{lex fori} when both the repairer and the owner had an expectation that US law would apply.\textsuperscript{200} This stands in stark contrast to \textit{The Sam Hawk} where there were no points of contact between the transaction and the US, other than a contractual provision to which the owner was not a party.\textsuperscript{201}

McKerracher J also considered that as section 15 was non-exhaustive, it could apply to foreign liens as well.\textsuperscript{202} This reading was arguably open to the Court given the unsettled approach to the interpretation of section 15.\textsuperscript{203}

\begin{flushleft}
197 Australian Law Reform Commission (1986) at [123]: On the one hand, the Commission considered the minority view in the \textit{Halcyon Isle} to be “more consistent with general conflicts of law principles”. However, the Commission also recognized that allowing foreign liens would leave local claimants disadvantaged “even where the foreign law’s classification of the claim as a lien is out of line with any international consensus on the scope of liens”, suggesting that countries would be able to grant comparatively greater protection to their own industries simply by creating new liens which would then have to be recognised internationally.

198 \textit{Sam Hawk} at [99]-[102]

199 \textit{The Halcyon Isle} at 246.

200 Ibid., at 247.

201 Stewart (2015) at [40].

202 At [103].

203 Compare: \textit{Elbe Shipping} per Allsop J at 724: “includes” leaves open the possibility of Australian Courts recognizing other maritime liens, either new liens which develop under Australian law or recognition of foreign liens., \textit{with}: Australian Law Reform Commission (1986) at [121]: the scope of maritime liens should not be extended without international agreement.
\end{flushleft}
Further, McKerracher J placed considerable weight on the decision of the Australian High Court in *John Pfeiffer*. 204 Although that decision did not concern admiralty jurisdiction, it reaffirmed the distinction between substantive and procedural matters. 205 Ultimately, he took this decision to indicate that the principles of the majority in *The Halcyon Isle* were no longer in line with Australian jurisprudence. 206

McKerracher J seemed to simply assume that if *The Halcyon Isle* does not apply; the Court has jurisdiction to hear the claim for a lien under section 15.207 This implies that he rejected the procedural approach in favour of the substantive, notwithstanding that the Act classifies liens as procedural. In taking the substantive approach, McKerracher J should have established whether the lien arose under the *lex causae*. 208 As this was not attempted, it seems that the choice of US law was accepted as replacing the *lex causae*. However, even if the choice of law was accepted *prima facie*, it should have then been tested under Australian conflict rules to check whether it should be upheld.209 This would have necessitated looking at, for instance, the role of the shipowner. To make matters more confusing, after having assumed US law applies, Justice McKerracher also concludes that “the resolution of the applicable choice of law rule is a matter for final hearing”. 210 This is notwithstanding that the lien, which apparently qualifies for section 15 and grants the court jurisdiction, would only exist if the choice of law applied.

---

204 Sam Hawk at [105]-[108]  
205 *John Pfeiffer* at [99]: “matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure”.  
206 This opinion is shared by Davies (2002).  
207 Stewart (2015) at [39].  
208 Supra 2.3  
209 Stewart (2015) at [39]  
210 At [138]-[139].
Similar to the approach taken by the Fourth and Ninth Circuits in the US, *The Sam Hawk* gives little consideration to the position of the shipowner as a non-contracting party.\(^{211}\) Along with the *Sam Hawk*, those decisions relied heavily on a precedent which should have been distinguished on the basis that it concerned contracts between the shipowner and the supplier. In attempting to move away from *The Halcyon Isle*, *The Sam Hawk* skimmed over the issues introduced in the Introduction and Chapter 2. It would have been preferable for the Court to have followed the Canadian approach which recognises foreign maritime liens which legitimately arise under the *lex causae*, but does not allow suppliers to contractually create a lien without the knowledge of the shipowner.

As *The Sam Hawk* was only a summary judgment, the main outcome of the decision is that it has made Australia more ‘arrest friendly’.\(^{212}\) This does not automatically mean that a foreign maritime lien will be recognised in a proper hearing, especially when it arises from a choice of law clause. Thus, the general excitement that “the Sam Hawk is to be welcomed, both in its advantages to the maritime claimant and its contribution to admiralty jurisprudence”\(^{213}\) arguably overestimates the utility and reach of the judgment.

*The Sam Hawk* is currently on appeal with the judgment expected any day. Even if the Appeal Court continues to favour the minority position of *The Halcyon Isle*, it is likely to overturn McKerracher J’s judgement on grounds that it did not sufficiently consider the applicable law, or because of the lack of privity between the shipowner and supplier, or the lack of connection with the US. Nevertheless, any attempt by the courts to depart from the majority judgment of *The Halcyon Isle* may be somewhat superficial when the Admiralty Act is so strongly rooted in the English tradition of classifying liens as procedural.

\(^{211}\) Stewart (2015) at [44].

\(^{212}\) Already there has been an increase in arrests following McKerracher J’s judgment, see Clyde & Co Insight (2016).

\(^{213}\) Gerrish (2016) at 2.
4.5 Scandinavia

4.5.1 The status of necessaries claims

The Scandinavian countries share a long history of maritime cooperation and, as a result, have largely harmonised their maritime laws.\textsuperscript{214} Denmark, Sweden and Norway are all parties to the 1993 Lien Convention and their respective maritime codes reflect both the Convention and their shared approach to regulating maritime matters.\textsuperscript{215} For ease of reference, this paper will refer to the Norwegian perspective, however, this is largely representative of the state of the law in Sweden and Denmark as well.

The Scandinavian terminology and procedural rules vary from English and American concepts, however, the underlying effect is very similar.\textsuperscript{216} The ability of the vessel to act as security for a claim is based on a lien or mortgage, a right of retention or the right to arrest. The concept of the lien may be broken down into the further two categories; an enforcement lien where an enforcement authority deems that the claim can be secured in a specific object such as a ship, and secondly, a maritime lien which has been codified in the Norwegian Maritime Code (the ‘Code’).\textsuperscript{217}

In accordance with section 51(1) of the Code, only claims for wages, port, canal, waterway and pilotage dues, damage to life or property, salvage, wreck removal and general average contributions can give rise to a maritime lien. Therefore, claims based on contract, including the provision of necessaries, are not entitled to lien status in Scandinavia. The owner (or \textit{reder})\textsuperscript{218} is unable to avoid liability from a lien through contract or by delegating.

\textsuperscript{214} Gombrii (1998) at 1352.
\textsuperscript{215} Falkanger, Bull and Brautaset, (2011) at 125. The Maritime Code(s) were drafted as a common text between the three countries but there are some small discrepancies.
\textsuperscript{216} Ibid., at 123.
\textsuperscript{217} Ibid., at 123-124. See also: Section 75(1): The Norwegian Maritime Code will apply to any lien which is relied on before a Norwegian Court.
\textsuperscript{218} The term \textit{Reder} does not have a direct English translation, however, the preface to the Norwegian
their functions to another party.\textsuperscript{219} The Code also dictates the priorities of the liens, both with respect to each other and to other claims.\textsuperscript{220} As with most other jurisdictions, with the exception of the US, Scandinavia has decided to limit the availability of liens in order to protect viable security in the \textit{res}.

However, a claimant may also arrest the vessel for a ‘maritime claim’, which are a mixture of liens and claims similar to statutory rights \textit{in rem}.\textsuperscript{221} Therefore, a necessaries supplier has a right to arrest the vessel under section 92(2)(k) if the owner of the vessel is also liable \textit{in personam} for the claim.

4.5.2 The application of US law

Similar to the UK, a Norwegian court will only recognise a lien if the claim would also qualify as a lien under Norwegian law.\textsuperscript{222} On this basis, a claim for necessaries supplied in the US will not be entitled to lien status in Scandinavia. However, if the state where the vessel is registered would recognise the claim as a lien, then it will be accepted as such in Norway, even if it falls outside of the scope of section 51. Nonetheless, it will rank after all registered encumbrances.\textsuperscript{223}

---

Maritime Code explains it in the following terms: “The “reder” is the person (or company) that runs the vessel for his or her own account, typically the owner or demise charterer. Time charterers and voyage charterers are not considered “reders”.”

\textsuperscript{219} Section 51(1) and (2)

\textsuperscript{220} Section 52(1) and (2)

\textsuperscript{221} Section 92(1)

\textsuperscript{222} Section 75(1) and Gombrii (1998) at 1352

\textsuperscript{223} Falkanger, Bull and Brautset (2011) at 130.
4.6 Conclusion: Are US choice of law clauses effective outside of the US?

US choice of law clauses will have no effect in the UK, nor in Scandinavia, where the parties’ choice will be disregarded, as well as the application of foreign law, and the lex fori will be applied instead.

The extent to which the clauses will be accepted in Canada and Australia is less certain. Both have indicated that they are willing to consider foreign law to assess whether a lien applies. However, whether this approach will be upheld in Australia is yet to be seen. Moreover, Canadian courts have indicated that they will only accept the choice of law if the owner is a party to the contract. Therefore, a clause in the contract between the supplier and time charterer is likely to have little effect for determining the lex causae.

The Lanner and The Sam Hawk also highlighted the difficulties courts may face in trying to implement US law within their own jurisdiction. The Lanner was uncertain as to which US Circuit’s law should apply, whilst The Sam Hawk struggled to apply a substantive approach within a procedurally framed admiralty statute.

The moderate success of the choice of law clause in the US is undermined by their resoundingly negative treatment across other jurisdictions. Combined with the lack of uniform approach to maritime liens in general – it is unlikely that necessaries liens provide sufficiently reliable international security.

Part three will now consider possible ways in which the clauses could be made more effective – as well as counter-methods for the shipowner – before turning to consider in chapter 7 whether there are more appropriate means available to the supplier forsecuring payment.
5 Practical Considerations for Bunker Suppliers

Based on the analysis in Chapters 3 and 4, if the transaction has no connection with the US, suppliers are more likely to obtain a lien in the US if they choose US law in the bunker supply contract. However, the likelihood of a lien is almost certain if the vessel is arrested within the jurisdictions of the Fourth, Fifth or Ninth Appeal Circuits.

Currently, within these circuits arresting the vessel within the United States is considered a sufficiently proximate relation with the US to justify the application of US law. However, bunker suppliers will have an increased chance of obtaining a lien if there are other factors connecting the transaction with the US, such as one of the parties’ having a place of business in the US, the vessel visiting US ports or the formation of the contract in the US.

In light of the lack of consensus amongst the Appeals Circuits, it may be worth specifying under which Circuit the question of a maritime lien should be considered. In *Trans-Tec*, the bunker contract stipulated that:

> “Each transaction shall be governed by the laws of the United States and the State of Florida, without reference to any conflict of laws rules. The laws of the United States shall apply with respect to the existence of a maritime lien, regardless of the country in which seller takes action.”

The Court appeared to selectively choose which circuit should represent the “laws of the United States” but another court may choose the approach taken by the Second Circuit.

---

224 This clause is preferable to that used by World Fuel Services which refers to the “General Maritime Law of the United States” as the terminology has caused some confusion in the courts; *Hebei Prince* and *Bulk Juliana*. 
Therefore, it is recommended that the contract is subject to a state which falls within the jurisdictional scope of the Ninth Circuit instead, such as California.

This would also avoid the issue brought forward in *The Lanner* where Pelletier J considered that whether or not a lien was accepted in Canada depended on which US Appeals Circuit governed the applicability of a maritime lien. However, it is unlikely that the court will accept a choice of law to which the owner did not agree. A supplier could explicitly reference the FIMLA in order to bring in the presumptive authority of the charterer to enter into contracts on behalf of the owner and/or the vessel. However, whether this would be successful is uncertain.

Another option for the supplier is to set up a ‘place of business’ in Canada in order to fall within the scope of the Marine Liability Act (Canada).

Suppliers may also consider not supplying on credit, or if they do; to require a guarantee or deposit from the charterer.

Notwithstanding the suggestions discussed in this chapter, a US choice of law clause only has limited utility as it will not be enforced in most of the jurisdictions considered in this thesis. Moreover, without a choice of US law the supplier is even less likely to acquire a lien. Suppliers would be better served pursuing other means of recovering payment which can be more easily enforced across jurisdictions. These will be further addressed in Chapter 7.
6 Practical Considerations for Shipowners

The discussion at 3.3.3 demonstrated that the easiest way for shipowners to avoid the application of a lien under US law is to overcome the presumption contained in the CIMLA that the charterer has authority to bind the vessel or the owner. This will circumvent a lien in the US and in any jurisdictions which accepts the choice of US law or applies US law as the *lex causae*. As US courts do not consider “no lien” stamps on the bunker receipt as sufficient for overcoming this presumption, the supplier must have notice of the charterer’s lack of authority before delivering the bunkers.225

The best way for the shipowner to ensure this would be to require the charterer to inform the supplier of the no-lien clause in the charterparty when ordering the bunkers. This can be easily achieved by inserting a clause such as the 2014 BIMCO Bunker Non-Lien Clause for Time Charter Parties. This clause requires the charterer to give prior notice to the supplier, as well as providing the owner with the supplier’s details and a copy of the Non-Lien Notice, at the owner’s request.226 If the charterer fails to provide this information, the master can refuse to receive the bunkers on board and the vessel will remain on-hire.227 The clause also requires the charterer to provide the owner with a confirmation that they have paid for the bunkers.228

BIMCO also provides a No-Lien Notice229; a standard form notice which can be inserted by the charterer into all correspondence with the supplier.

225 See *Hebei Prince* at [12] and *M/V Gardenia* at 1510.
227 (c)
228 (f)
229 BIMCO Special Circular (2014)
The shipowner may also include a provision in the charterparty that the charterer only enters into bunker agreements on 2015 BIMCO terms. This standard bunkering contract represents a compromise between suppliers and charterers/owners. Instead of a lien clause in favour of the suppliers, it is subject to the UK Sale of Goods Act\textsuperscript{230} and allows the supplier to retain title in the bunkers until paid. However, this is “without prejudice to such rights as the sellers may have under the law of the governing jurisdiction against the buyers or the vessel in the event of non-payment”\textsuperscript{231}, thereby allowing a lien if it arises under the “governing jurisdiction”.\textsuperscript{232}

This is preferable as it provides more certainty for the parties and ensures that the lien is relegated to its proper position as arising under the \textit{lex causae} as opposed to arising artificially from a choice of law clause. However, the BIMCO terms will only apply if the seller does not expressly confirm otherwise in the confirmation.

Other options would be to require the charterer to provide a bond, a guarantee from their bank or procure insurance to insulate the shipowner from possible arrests for unpaid bunkers.\textsuperscript{233}

Lastly, the owners should choose their charterers carefully and ensure that they are in a position to pay for bunkers. In the current market situation, this may mean entering into shorter term time charterers to enable a continual assessment of the prospects of the charterer’s business.

\begin{footnotes}
\item[230] Cl. 25. \textit{See:} BIMCO Terms 2015: Explanatory notes: This was intended to override the decision of the UK Court of Appeal in \textit{The Res Cogitans} which held that the UK Sale of Goods Act did not apply to a bunker contract which contained a credit period, a retention of title clause and an express right to consume the goods during the credit period. This decision has recently been upheld by the Supreme Court; [2016] UKSC 23.
\item[231] Cl. 10(b)
\item[232] It is unclear whether the “governing jurisdiction” refers to the \textit{lex fori} or to the \textit{lex causae}.
\item[233] Davies (2009) at 455.
\end{footnotes}
7 Steering clear of murky waters

The objective of this thesis was first and foremost to determine the effectiveness of a choice of law clause for the supplier’s ability to acquire a necessaries lien over the vessel. However, the ancillary purposes were to identify ways in which these clauses could be made more effective, as well as to evaluate whether necessaries lien are a form of security worth pursuing for the supplier.

It is submitted that this thesis has established that; firstly, the use of US choice of law clauses are of limited utility for acquiring a lien, notwithstanding the recommendations in Chapter 5. Secondly, suppliers would be better served steering clear of these murky waters altogether as necessaries liens (when not arising under the proper law) are an inefficient and unreliable form of security.

Chapters 3 and 4 demonstrated that a choice of law clause will only help the supplier if the vessel is arrested within the jurisdiction of the Fourth, Fifth and Ninth Circuits in the US. Otherwise, in most situations courts will either deny a lien on the basis that the supplier is not entitled to one under the lex fori,\footnote{C.f. The UK and Scandinavia} or that the choice is irrelevant because the shipowner is not a party to the contract and a lien does not arise under the lex causae.\footnote{C.f US Circuits other than the Fourth and Ninth, Canada and likely Australia.}

Throughout this thesis it has become evident that the differing understandings of the maritime lien, as well as the lack of uniformity in enforcement, present substantial hurdles for the effectiveness of the necessaries lien as a form of security. Previously, necessaries liens had an important historical use as the master could not easily contact the shipowner or obtain financing while away from the vessel’s home port. Thus, supplies were provided on credit and the only viable security the master could offer in exchange was a lien over the

\footnote{C.f. The UK and Scandinavia}\footnote{C.f US Circuits other than the Fourth and Ninth, Canada and likely Australia.}
vessel. This kept trade moving by ensuring the vessel did not “rot in ports” awaiting financing from the shipowner on the other side of the world.  

However, as with bottomry bonds, developments in communication and financing have removed the practical purpose behind the necessaries lien. Communication is now instantaneous and the shipowner can be easily identified through on-line ship registries. Moreover, the bunker order is usually arranged between the charterer and supplier via email and the master no longer has the responsibility of sourcing supplies at port. There is also no longer the same need for the supplier to provide bunkers on credit or for the vessel to be used as collateral, as these days payment can be secured almost immediately through a bank transfer or a letter of credit from the purchaser’s bank. Therefore, it is now commercially practicable for the charterer to be responsible for obtaining credit from their bank and paying for bunkers at delivery. 

The obvious advantage of a letter of credit over a necessaries lien is that it ensures almost immediate payment for the supplier. This will relieve the burden of financing lines and insurance premiums currently faced by suppliers supplying on credit. Moreover, and most importantly for this discussion, it removes the uncertainty of whether the supplier’s security will be internationally recognised. 

---

236 Hebert (1931) at 124. 
237 Under a Letter of Credit, the charterer’s bank guarantees that the charterer has available funds to pay for the bunkers and releases the payment to the supplier upon receiving the necessary documentation; e.g. the bunker receipt signed by the master etc. 
238 Norton Rose Fulbright Shipping Newsletter (2015): suppliers often provide a 60 day credit period for invoices between US$0.5m-US$1m. The supplier’s bank will usually require security in exchange for financing – usually in the form of a charge over the supplier’s receivables.
It also has the additional benefit of removing the shipowner from the equation and instead moves the risk back to where it should rightfully lie; with the charterer who has purchased the bunkers.

If the charterer’s bank refuses to grant credit, the supplier will likely refuse to supply which both protects the shipowner from becoming liable for bunkers received on board and avoids the supplier suffering any loss. This would also put the shipowner on notice as to their charterer’s financial situation. Moreover, any delay caused by a refusal to supply should not affect the shipowner as they can stipulate that such situations will remain “on-hire” events under the charterparty.

The potential barrier to discontinuing supply on credit is that it may be difficult to deny purchasers credit in a competitive market when other suppliers are willing to take the risk. However, this is arguably a worthwhile trade-off if it reduces the overall cost of financing, insurance and irrecoverable high-value losses. Moreover, pressure by shipowners on charterers to pay upfront\(^{239}\) will increase the practicability of Letters of Credit for suppliers.

The supply of necessaries on credit in exchange for a lien over the vessel is an anomaly in international trade and there is no longer the same need for the supplier to operate on such tenuous terms. Necessaries liens are too susceptible to jurisdictional inconsistencies to provide reliable, internationally enforceable security and this thesis has demonstrated that the use of choice of law clauses does little to aid the supplier’s position. It is submitted that suppliers would be better served by steering clear of these murky waters and opting for more effective mechanisms specifically designed for modern international transactions.

\(^{239}\) Supra Chapter 6
# Table of reference

## International Conventions

<table>
<thead>
<tr>
<th>Convention</th>
<th>Description</th>
</tr>
</thead>
</table>

## Statutes/Government Reports

### US

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>CIMLA/FIMLA</td>
<td>Commercial Instruments and Maritime Liens Act 46 U.S.C §§31301-31343</td>
</tr>
<tr>
<td>28 U.S.C §1333</td>
<td>Admiralty, Maritime and Prize Cases</td>
</tr>
</tbody>
</table>

### UK

<table>
<thead>
<tr>
<th>Act</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Senior Courts Act</td>
<td>Senior Courts Act 1981 (formerly the Supreme Court Act 1981)</td>
</tr>
</tbody>
</table>

### Canada

<table>
<thead>
<tr>
<th>Act</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>--------------------------------</td>
<td>-------------------</td>
</tr>
</tbody>
</table>

**Australia**

- Colonial Courts Act
- The Colonial Courts of Admiralty Act 1890 (Imp)
- Admiralty Act
- The Admiralty Act 1988 (Cth)

**Scandinavia**

- Norwegian Maritime Code
- The Norwegian Maritime Code, 24 June 1994 no. 39 with amendments including Act 7 June 2013 no. 30

**Cases**

**United States**

- *The Nestor* 1831) 18 Fed. Cas. 9 (no. 10126).
- *The Ripon City* (1897) P 226
- *Trans-Tec* Trans-Tec Asia v M/V Harmony Container 518 F.3d 1120 (9th Cir. 2008).
- *Triton Marine* Triton Marine Fuels Ltd v M/V Pacific Chukotka 575 F.3d 409 (4th Cir. 2009).
<table>
<thead>
<tr>
<th>Case Name</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>M/V Gardenia</td>
<td>Belcher Oil Co. v M/V Gardenia 766 F.2d 1508 (11th Cir. 1985).</td>
</tr>
<tr>
<td>The Rock Island Bridge</td>
<td>(1867) 6 Wall. 213, 18 L. ed. 753.</td>
</tr>
<tr>
<td>Dampskibsselskabet</td>
<td>Dampskibsselskabet Dannebrog v Signal Oil &amp; Gas Co. 310 U.S 268, 60 S.Ct 937, 84 L.Ed 1197</td>
</tr>
<tr>
<td>M/V Tento</td>
<td>Gulf Trading and Transportation Co. v M/V Tento 694 F.2d 1191, 1983 AMC 872 (9th Cir. 1982).</td>
</tr>
<tr>
<td>Mencor Enterprises</td>
<td>Mencor Enterprises Inc v Hets Equities Corp. 190 Cal. App. 3d. 434.</td>
</tr>
<tr>
<td>Queen of Leman</td>
<td>Liverpool and London Steamship Protection and Indemnity Association Ltd v. Queen of Leman M/V 296 F.3d 350 (5th Cir. 2002).</td>
</tr>
<tr>
<td>Hoegh Shield</td>
<td>Gulf Trading &amp; Transport Co. v. Hoegh Shield 658 F.2d 363 (5th Cir. 1981).</td>
</tr>
<tr>
<td>Trinidad Foundry</td>
<td>Trinidad Foundry and Fabricating Ltd v M/V KAS Camilla 966 F.2d 613, 1992 A.M.C. 2636, 23 Fed.R.Serv.3d 130 (11th Cir., 1992)</td>
</tr>
</tbody>
</table>
M/V Trogir  
*OW Bunker Malta Ltd v M/V Trogir* D.C.No. 2:12-cv-050657-R-FFM, 18 March 2015.

Hebei Prince  

Kiobel  

Bremen  
*M/S Bremen v Zapata Off-Shore Co.,* 407 U.S 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)

**United Kingdom**

The Bold Buccleugh  
*Harmer v Bell* (‘The Bold Buccleugh’) [1850-1851] 7 Moore PC 267. 13 ER 884

The Tolten  

The Halcyon Isle  

The Tojo Maru  

The Indian Endurance  
*Republic of India and another v India Steamship Co Ltd (No 2)* [1997] 4 All ER 380 (“The Indian Grace”)

The Castlegate  
*Morgan v Castlegate Steamship Co.* [1893] A.C. 38

The Yuta Bondarovskyaya  

The Tolla [1921] PD 22.

Cann v Roberts (1874) 30 L.T.R 424.

The Fesco Angara (No 2) Oceanconnect UK Ltd v Angara Maritime Ltd (The “Fesco Angara”) (No 2) [2010] EWCA Civ 1050.


The Colorado [1923] P 102

Canada


Imperial Oil Imperial Oil Ltd v Petromar Inc 2001 FCA 391, [2002] 3 FC 190 (FCA).


M/V Samatan Norwegian Bunkers AS v Boone Star Owners Inc and M/V Samatan 2014 FC 1200.
Australia

Sam Hawk


Skulptor Vuchetich


Elbe Shipping


John Pfeiffer


Books/Book Chapters

Berglingieri (2009)


Dicey (2012)


Falkanger, Bull, Brautaset (2011)


Gombrii (1998)


Jackson (2005)


Russell (1999)


**Articles**


Buteau (2009) Louis Buteau “Enforcement in Canada of Ship Suppliers’ Liens Subject to a US Choice of Law Clause” found at:

http://www.cmla.org/papers/

EnforcementinCanadaofShipSuppliersLiens.pdf

<table>
<thead>
<tr>
<th>Author</th>
<th>Year</th>
<th>Title</th>
</tr>
</thead>
</table>
Rev. 279 (2010).


Presentations/Speeches

Stewart (2015) Stewart, Angus “The “Sam Hawk”: outlier, or the new orthodoxy on foreign maritime liens?” Discussion paper presented at the Australian Maritime and Transport Arbitration Commission (AMTAC) seminar in Sydney, 26 November 2015, found at:


Newsletters

Clyde & Co Insight (2016) “Australian Court recognises Foreign Maritime Lien”, 4 January 2016, found at:


http://www.nortonrosefulbright.com/knowledge/publications/133442/the-ow-bunker-struggle-round-three
### Miscellaneous

<table>
<thead>
<tr>
<th>Source</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAPA2013</td>
<td>American Association of Port Authorities: U.S Waterborne Foreign Trade 2013 Port Ranking by Cargo Volume, found at: <a href="http://www.aapaports.org/search/searchresults2.aspx?SEARCH.Y=0&amp;SEARCH.X=0&amp;QUICKSEARCH=port%20statistics">link</a></td>
</tr>
<tr>
<td>BIMCO Terms 2015: Explanatory Note</td>
<td>BIMCO Terms 2015 Standard Bunker Contract – General Terms and Conditions Explanatory Notes found at: <a href="http://www.bimco.org/">link</a></td>
</tr>
</tbody>
</table>