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FOREIGN LIENS AND LIEN CLAUSES IN CANADA

Canadian and US courts follow a connecting factors analysis in deciding the law that governs contracts and liens and will give effect to a foreign lien once it is properly proved as fact according to the rules of evidence. Neither Canada nor the US are signatories nor bound by any international conventions governing arrest of ships and applicable liens. As well, neither country considers the question whether or not a lien is available to the claimant as being only a question of procedure of the court seized with the case.

The Supreme Court of Canada in *Holt Cargo Systems v. ABC Containerlines*, confirmed the rights of secured creditors, including claimants of maritime lien status by virtue of foreign law, to realize on their security wherever the ship might be found in Canada. The Court held that this could be done notwithstanding bankruptcy jurisdiction on the part of a foreign court of the domicile of the debtor who was seeking the turnover of funds from a judicial sale for the purpose of distribution in accordance with the applicable law of the forum, including the right to determine the identity of lien-holders. Needless to say, the Supreme Court was well aware that the Belgian courts would not recognize US liens in favour of goods and services providers.

The Court confirmed its position that notwithstanding the UK decision in *The Halcyon Isle*, in Canada, the determination whether or not a claim is secured by a maritime lien is a question of the substantive law with which the cause of action was closely connected (and not a question of procedure of the court under whose custody the ship is arrested). Unless there are public policy issues militating against the recognition of the foreign lien right, it will be recognized and enforced in Canada. In *Holt Cargo*, US

claimants were able to exercise maritime liens granted under US law for stevedoring services and supply of fuel.

As well, the Federal Court of Appeal has issued three decisions closely connected with the issue of recognition and enforcement of foreign lien rights. These decisions deal with the enforcement of supply contract "lien clauses" against vessels owned by third parties who are totally unaware of these contracts. In *Imperial Oil Ltd. v. Petromar Inc.* 2001 F.C.A. 391, (2001) 209 D.L.R. (4th) 158, a ship manager, purportedly acting on behalf of a demise charterer, entered into a supply agreement with an American bunker broker for the supply of goods in Canada. The Court was not satisfied with the evidence that had been led as to whether the ship manager was acting on behalf of the demise charterer or on its own account.

Notwithstanding the US lien clause in the contract, the Court found that the determination of the law governing the lien is not the same as the governing law of the contract itself because the intent of parties to a contract cannot bind the rights of third parties (the shipowner!). As this was the first case in Canada to pose the problem of characterization of the governing law of the lien, the Court made express reference to US caselaw, and most notably the connecting factors test to be found in the judgment of the Supreme Court of the United States in *Lauritzen v. Larsen* (1953) 345 U.S. 571.

The Court found that one of the factors having greater weight than the others was the law governing the place of delivery of the goods. As, in this case, the bunkers were being delivered in Canada (where no lien attaches) and to, incidentally, a Canadian registered ship, the Court found that the factors con-

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necting the lien to the United States were not strong enough to override the shipowner's rights and dismissed the action.

In a second decision, purportedly following *Imperial Oil*, a differently constituted panel of the Federal Court of Appeal in *Richardson International v. The Mys Chikhacheva* upheld the US lien clause in a contract between the demise charterer and the US supplier on the ground that the procurement of supplies originated in the United States, that demise charterers under US law can create liens against the vessels they demise, and because the contract of supply was included in a series of transactions involving a loan of monies with the US supplier acting as lender.

Recently, the Federal Court of Appeal in *Kent Trade and Finance Inc. v. JP Morgan Chase Bank*, upheld yet again a US lien clause and gave priority to the maritime lien holder over a mortgagee bank.

Kent Trade and Finance Inc., which supplied fuel to the vessel in Cartagena, Spain, and in Halifax, Praxis Energy Agents S.A. which supplied fuel to the vessel in Trinidad, as well as CP3500 International Limited which supplied combustion catalysts to the vessel, appealed the decision.

They argued that under their contracts of sale, which included choices of law clauses and in the case of CP3500 an arbitration clause, U.S. law applied and entitled them to maritime liens which ranked before the Canadian mortgages with respect to the vessel's judicial sale proceeds. None of the appellants were based in the U.S.

The Court applied the choice of law analysis using Canadian conflict of law rules and acknowledged that

while the contractual choice of law clause in the contract should dictate the proper law of the maritime transaction, maritime liens are extra-contractual rights. It did not foreclose the possibility that, where a maritime transaction is so strongly connected to a jurisdiction, this jurisdiction's substantive law, rather than the choice of law clause in the contract, should govern the transaction.

The Court however found there was evidence of a contractual link between the vessel's owner and the suppliers and that the choice of law clauses applied to the contracts of fuel sale, the proper law of these contracts thus being American law.

The Court also found the arbitration clause in the CP3500 contract to be indicative of the choice of law under Canadian law.

Based on new expert evidence filed before it, the Court was satisfied that U.S. law would recognize a maritime lien for necessities where, under a supply contract governed by U.S. law, a foreign supplier provides goods or services to foreign vessels in a foreign port. The Court found the three appellants had proven to its satisfaction they each had a maritime lien against the «Lanner» and allowed the appeal.

In summary, cases involving foreign liens are decided according to the facts in each case and particular attention must be paid to the relationships between the various parties. As the *Imperial Oil* case shows, it is very dangerous (for a supplier) to simply rely on a US lien clause without further information concerning the identity of the party, the law governing their capacity to contract liens and the connecting factors that may not justify enforcement of the US lien clause.