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Foreign Suppliers May Have a Maritime Lien Enforceable in the United States

In a significant expansion of the enforcement rights of foreign ship suppliers, the U.S. Court of Appeals for the Fourth Circuit (covering the Mid-Atlantic States) has held that fuel sold by a foreign supplier to a foreign ship in a foreign port may give rise to a maritime lien. The decision has the potential for increasing risks to those chartering out vessels. Owners have long been responsible for liens incurred in the United States for such "necessaries" as stevedoring, repair, supplies and towage, even when ordered by a charterer or sub-charterer. Now, debts incurred worldwide are enforceable in the United States courts, at least where the contract of supply has a United States choice-of-law provision.

In *Triton Marine Fuels Ltd., S.A. v. M/V PACIFIC CHUKOTKA*, 2009 WL 2341980, the vessel had been bareboat chartered to a Russian company and subsequently sub-chartered to Emerald Reefer Lines of the Cayman Islands. Emerald ordered bunkers for the PACIFIC CHUKOTKA, for delivery in the Ukraine, from Triton of Panama. Emerald did not pay for the fuel and became insolvent soon after delivery.

Triton had the vessel arrested in Baltimore, asserting a maritime lien under the General Maritime Law and the Federal Maritime Lien Act, enforceable because of the United States choice-of-law provision in the fuel supply contract. Owners ultimately posted a cash bond and the vessel was released. Owners and Triton each filed a motion for summary judgment on the issue of the lien's enforceability by arrest of the vessel. The district court sided with Owners, holding that there was no maritime lien. On appeal, the Fourth Circuit reversed and entered judgment for Triton.

The Circuit Court agreed with the recent Ninth Circuit decision of *Trans-Tec Asia v. M/V HARMONY CONTAINER*, 518 F. 3d 1120 (9th Cir.), *cert. denied*, 129 S. Ct. 628 (2008), and held that the choice of United States law provision in the bunker supply contract was controlling. The court cited the "well established" principle that absent a contrary compelling public policy, a freely negociated choice-of-law provision in a maritime contract will be enforced. The Court affirmed the principle that the vessel herself was the obligor, regardless of Owner's obligation. Emerald had the authority to bind the vessel to the contract. The Fourth Circuit rejected old Second Circuit cases and relied on more recent decisions of the Fifth and Ninth Circuits. The Court recognized the principle that "maritime liens cannot be created by contract." By including the

reference to United States law a lien was not necessarily created—it would still have to arise by operation of United States law.

In the second part of the seventeen page decision, the Circuit Court carefully analyzed the United States Federal Maritime Lien Act. In interpreting "the plain language of the statute," it found no basis for restricting maritime liens to United States suppliers, or providers to United States flag vessels, so long as the law of the United States (which, of course, includes the Maritime Lien Act) applied.

Thus, owners must be even more careful in vetting their charterers and, to the extent practical, sub-charterers. We also note that the supplier of necessaries delivered in the United States pursuant to a contract incorporating foreign law generally does not have a maritime lien. Whether such suppliers will now insist on United States law applying to such contracts remains to be seen.

This case was argued by **Geoffrey S. Tobias** of our office, with significant assistance on the brief from Manuel L. Llorca of Llorca & Hahn in Norwalk, Connecticut. The Court has denied Owners requests for rehearing and rehearing *en banc*.