Federal Court  Cour fédérale

Date: 20150213

Docket: T-2001-11

Citation: 2014 FC 1200

Ottawa, Ontario, February 13, 2015

PRESENT: The Honourable Madam Justice Gagné

ADMIRALTY ACTION *IN REM* AGAINST THE SHIP "SAMATAN" AND *IN PERSONAM*

BETWEEN:

NORWEGIAN BUNKERS AS and ATLAS BUNKERING SERVICES B.V.B.A.

Plaintiffs

and

THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "SAMATAN", BOONE STAR OWNERS INC. and KRISTIANIA MARINE LTD. BVI

Defendants

AMENDED JUDGMENT AND REASONS

I. Overview

[1] In the present motion for summary trial and judgment, I am asked to determine whether Brazilian law applies to the claim raised by Norwegian Bunkers AS [Norwegian], a Norwegian company, and Atlas Bunkering Services B.V.B.A. [Atlas], a Belgium company, *in personam* against Boone Star Owners Inc. [Boone Star], a Marshall Islands company, and Kristiania Marine Ltd. BVI [Kristiania BVI], a British Virgin Islands company, and *in rem* against the Maltese flag ship M/V Samatan, for the payment of the bunker fuel ordered by Kristiania Marine S.A. [Kristiania Norway], Kristiania BVI's agent, also a Norwegian company, and delivered to the Samatan in Brazil by Petróleo Brasileiro S.A.—Petrobras [Petrobras], a Brazilian company.

[2] If it does, the plaintiffs contend that they have a maritime lien on the Samatan, which was arrested in Vancouver, Canada, to cover the value of the unpaid bunkers (US$ 666,915.19). If it does not, Canadian law is deemed to apply and the defendants contend that the supply of bunkers to a vessel does not give rise to a maritime lien against the vessel thereby determining that the plaintiffs have no *in rem* action. In any case, the defendants argue that the conditions are not met for the *in personam* claim to be successful.

[3] This Court has jurisdiction to enforce valid foreign maritime liens, should the rules concerning Canadian conflict of laws deem that jurisdiction's law applicable. However, Canadian maritime law does not generally create a maritime lien in favour of a supplier of necessaries. While an exception to this rule was enacted in 2009 under subsection 139(2) of the *Marine Liability Act*, SC 2001, c 6 [Act], it has thus far been interpreted as rather limited in scope.

[4] For the reasons discussed below, I will grant the plaintiffs' motion for summary trial and judgment *in rem* against the defendant ship.

II. Background

[5] The facts in this matter are not contested, as the parties have submitted a Statement of Agreed Facts and a Book of Agreed Documents.

III. The Parties

[6] Norwegian and Atlas are in the business of selling bunker fuel to deep sea ships in a variety of jurisdictions across the world. Atlas has been assigned Norwegian's claim arising out of the sale of bunkers to the Samatan.

[7] Bominflot is the name of a group of companies incorporated in multiple jurisdictions which also supply bunkers to deep sea ships. In this case, the German Bominflot company was involved in the purchase and sale of the bunkers.

[8] Boone Star is the registered owner of the Samatan and employed its Masters, Officers and Crew.

[9] Cargill International SA [Cargill], a company incorporated under the laws of Switzerland, time chartered the Samatan from Boone Star on or about July 1, 2011, on the New York Produce Exchange [NYPE] form.

[10] Kristiania BVI sub-time chartered the Samatan from Cargill on or about July 19, 2011, also on the NYPE form.

[11] The NYPE form is the most commonly used time charter form for bulk carriers. It provides, among other things, that the charterer agrees neither it, nor its agents, are to create maritime liens against the vessel it is chartering which might have priority over the title and interest of the owners in the vessel.

[12] Kristiania Norway was the agent for Kristiania BVI, whereas Seabulk Management [Seabulk], a company incorporated under the laws of Norway, was its managing commercial agent.

[13] TMS Bulkers LTD [TMS], a company incorporated under the laws of Greece, was the ship manager of the Samatan.

[14] Agencia Maritima Cargonave LTDA [Cargonave], a company incorporated under the laws of Brazil, was the port agent of Kristiania BVI.

[15] Petrobras was the physical supplier of the bunkers, and though not mentioned in the agreed statement of facts, it is a Brazilian operation, located in Rio de Janeiro.

IV. Ordering the Bunkers for the Samatan

[16] Norwegian had supplied bunkers to Kristiania BVI through the agency of Kristiania Norway on 24 occasions, excluding this case, between November 2009 and August 2011. It had supplied those bunkers all over the world.

[17] On or about August 9, 2011, Kristiania Norway placed a telephone order, on behalf of its principal Kristiania BVI, with Norwegian for heavy fuel oil and marine gas oil for the Samatan, to be delivered in Brazil.

[18] The same day, Norwegian sent Kristiania Norway a standard form Bunker Confirmation, which was addressed in its standard manner stating that the bunkers had been ordered for "Master and/or Owner and/or Operator and Kristiania [Norway]" for the Samatan for delivery in Paranagua, Brazil.

[19] The Bunker Confirmation specified amounts, price rates, approximate delivery dates and payment terms, including interest on late payment. It also identified the physical supplier of the bunkers as "Petrobras" and stated that its terms were subject to the physical supplier's general terms and conditions. The Petrobras General Terms and Conditions were never supplied to Kristiania Norway or Kristiania BVI and neither ever requested a copy.

[20] All oral and written communications between Norwegian and Kristiania Norway with respect to the ordering of the bunkers, in circumstances of both this order and previous orders,

took place in Norway. For previous orders, all payments had occurred in Norway and payment in this case was expected to be made in Norway.

[21] Norwegian knew that Kristiania BVI was a time charterer of vessels, but did not know which charter party was in use.

[22] Norwegian knew that Kristiania BVI was not the owner of the Samatan. No one from Kristiania BVI ever advised Norwegian as to whether or not Kristiania BVI had the authority to bind the Samatan, and Norwegian did not ask.

[23] On July 28, 2011, Boone Star's agent TMS instructed Cargonave by email to send an important notice by registered mail, email or fax, to all suppliers of goods or services contracted by the time charterers for suppliers to vessel of goods and services for time charterer's account. The email said:

> IMPORTANT NOTICE GIVEN PRIOR TO THE PROVISION OF GOODS/SERVICES
>
> REF M/V. SAMATAN. ETA: SAO FRANCISCO DO SUL. DATE: AUG/5th wp.
>
> THIS VESSEL IS CHARTERED TO THE HEAD-CHARTERERS M/S "CARGILL" AND SUB-CHARTERED TO M/S "AC CRISTIANIA", WHO HAVE REQUESTED YOU TO PROVIDE GOODS/SERVICES TO VESSEL.
>
> THE OWNERS, MASTERS, OFFICERS, SERVANTS OR AGENTS ARE NOT LIABLE TO YOU IN RESPECT OF THOSE GOODS/SERVICES AND NO LIEN OR OTHER ENCUMBRANCE SHALL BE CREATED BY THE SUPPLY TO THE VESSEL OF THE SAID GOODS/SERVICES THIS NOTICE HAS BEEN GIVEN TO YOU, THE SUPPLIER, PRIOR TO THE PROVISION OF THE GOODS/SERVICES AND YOU, THE SUPPLIER, ACKNOWLEDGE THAT THE CHARTERERS

> OF THE M/S "CARGILL" AND SUB-CHARTERERS "AC CRISTIANIA" ARE SOLELY RESPONSIBLE TO YOU FOR THE PAYMENT OF YOUR ACCOUNT FOR THE SAID GOODS/SERVICES. UPON TERMINATION OF THE SAID CHARTER ALL GOODS ON BOARD THE VESSEL SHALL BECOME THE PROPERTY OF THE VESSEL.

[24] No notice of any no-lien provision was provided by anyone on behalf of the Samatan or its owners to anyone on behalf of the bunkers' suppliers until after the bunkers had been delivered to the Samatan.

[25] On August 15, 2011, Seabulk sent an email to the Master of the Samatan, with copies to Cargill, Kristiania BVI, and TMS, stating:

> Bunkering will take place at Paranagua after completion of loading.
>
> Bunkers stemmed as follows.
>
> 950 mt ifo 380
> 40 mt mdo
> Suppliers Petrobras
> Agents Cargonave Paranagua […]

[26] On August 15, 2011, the Master of the Samatan forwarded Seabulk's email to Cargill and Boone Star's agent TMS.

[27] On August 24, 2011, TMS emailed the Master of the Samatan, *inter alia*, instructing the Master and Chief Engineer: "REMIND TO STAMP THE B.D.N. [Bunkering Delivery Note] WITH 'IMPORTANT NOTICE' STAMP AS ALWAYS."

V. Delivering the Bunkers to the Samatan

[28] On August 30, 2011, Cargonave sent an email to the Master of the Samatan, telling him that:

> VSL IS SCHEDULED TO SHIFT TO INNER ROADS FOR RECEIVED BUNKERS TMNW ARND 17:00 HRS …
> BUNKERS TO BE SUPPLIED: 40 MT/MGO + 950 MT/IFO 380 CST.

[29] The following day, the Master of the Samatan forwarded Cargonave's message to TMS.

[30] Norwegian purchased the bunkers from Atlas, which had purchased them prior from Bominflot, which had previously acquired them from the physical supplier, Petrobras. Petrobras delivered the bunkers to the Samatan in Paranagua, Brazil, on August 31, 2011. Thus, Norwegian owned the bunkers when they were delivered to the Samatan.

[31] Before delivering the bunkers, no agent of the Samatan owners or charterers notified Norwegian, Atlas or Petrobras of the "no-lien" clause in the charter agreements which were not public documents.

[32] The only attempt to give such notice was after the bunkers were delivered. The Chief Engineer of the Samatan signed for the delivery on behalf of the Samatan and the owners, acknowledged receipt of the bunkers and then applied a "No Lien" stamp to the delivery receipt.

[33] On or about August 31, 2011, Norwegian issued an invoice for the bunkers to "Master and/or Owner and/or Vessel and Kristiania Marine Ltd. BVI c/o Kristiania Marine AS" in the amount of US$ 666,915.19.

[34] No part of the invoiced amount has been paid. The invoice provided as follows:

> Terms of payment:
> Payment to be received in our account at the latest […] 27.09.2011
> The buyer agrees to a late payment charge of 2.0% per month, 24% per annum or the maximum permitted by law from the invoice due date and agrees to pay any collection or attorney fees if incurred in the collection of this invoice.

[35] On December 9, 2011, this action was commenced in Canada and a warrant to arrest the Samatan was issued by this Court in order to enforce the maritime lien. The representative of the Samatan posted security for the claim.

[36] On December 12, 2011, Cargill issued a Letter of Undertaking submitting the dispute to this Court's jurisdiction and securing Norwegian's claim herein up to an agreed amount of US$ 730,000. The plaintiffs accepted the Letter of Undertaking.

VI. Issues

[37] The issues raised by this motion are:

A. *Whether the laws of Brazil apply to the Bunker transaction;*

B. *Whether, pursuant to the laws of Brazil, the plaintiffs have a valid and enforceable maritime lien against the Samatan;*

C. *If the laws of Brazil do not apply, whether the laws of Canada provide the plaintiffs a maritime lien against the Samatan;* and

D. *Whether, in enforcing the maritime lien, the plaintiffs are entitled to summary trial and judgment in rem against the Samatan and in personam against Boone Star.*

VII. Analysis

A. *Whether the laws of Brazil apply to the bunker transaction.*

[38] In the matter brought before this Court, the task is to determine which body of law governs Plaintiffs' claim, pursuant to the conflict of law rules in force in Canada (*Tropwood A.G. et al v Sivaco Wire & Nail Co et al,* [1979] 2 SCR 157 at para 14). If these rules lead to the conclusion that the transaction is governed by the laws of another jurisdiction, and that law is proven to be different from Canada's, then Canadian courts will give effect to the foreign law. Reprising the words of Justice Harrington, "the Court will apply its own domestic law unless satisfied that another law is applicable, a law which must have been alleged and proven as a fact to be different." (See also *World Fuel Services Corporation v Nordems (Ship),* 2010 FC 332 [*The Nordems, FC*] at para 40, aff'd 2011 FCA 73 [*The Nordems, FCA*]).

[39] Should foreign law be deemed applicable, as Justice Nadon confirmed in *The Nordems, FCA*, above, para 40, Canadian courts will recognize and enforce a foreign maritime lien in an action *in rem* in Canada even in circumstances where no lien would arise under Canadian maritime law.

[40] In such situations, barring the application of public policy principles, Canadian courts are free to defer to the choice of law expressly stipulated by the parties in a contract. Otherwise, the Court is required to weigh the factors that connect the case before it, to one system of law or another (*The Nordems, FC* at para 39).

[41] In the case at bar, there is no contract between the owner of the Samatan, Boone Star, and the supplier of the bunkers, Norwegian. The parties therefore agree that in such circumstances the proper law is "determined not by reference to the choice of law provision (in the supply contract), but by an attempt to determine, on the basis of the facts and events of the case, which jurisdiction has the closest and most substantial connection to the transaction" of supply (*The Nordems, FCA*, above at para 90). Of course, absent a contract between the parties to the litigation, the term "transaction" is to be understood as the factual context of the supplying of necessaries.

[42] In *Imperial Oil Ltd v Petromar Inc*, 2001 FCA 391 [*Imperial Oil*], at paras 16-17, the Federal Court of Appeal, relying on jurisprudence of the Supreme Court of the United States, set out seven factors that this Court must weigh to find "With what jurisdiction did the transactions have the 'closest and most substantial connection'?"

(1) the place of the wrongful act;

(2) the law of the flag;

(3) the allegiance or domicile of the injured seaman;

(4) the allegiance of the defendant shipowners;

(5) the place where the employment contract was made;

(6) inaccessibility of a foreign forum;

(7) the law of the forum.

[43] While the parties agree as to the applicability of this test, they diverge on the weight to be afforded to the listed factors. In my view, this list must be adapted to the particular nature of a given situation, as some factors might be irrelevant to a given case while factors not listed above might need to be considered.

[44] The plaintiffs argue the fact that fuelling occurred in Brazil takes precedence over all the facts related to the other factors. Citing Justice Harrington discussing a similar factual situation in *The Nordems, FC*, they submit that the "pride of place must be given to the place where the necessaries were provided":

> [66] In my opinion [the factors to be considered] include the flag of the ship (Cyprus), the domicile of her owners (Germany), the place where the offer to purchase bunkers was accepted (South Korea), the place where the bunkers were delivered (South Africa), and the place where the ship was arrested (Canada). If it is necessary to choose among these laws, the proper law is that of South Africa.
>
> [67] […] Absent a contract, we must tote up the points of contact. In a fact situation which has contact with several jurisdictions, pride of place must be given to the place where the necessaries were provided. In my opinion, in the circumstances of this case, that fact alone, or if necessary coupled with the place of arrest, outweighs the other factors.

[45] On this point, they also cite Janet Walker, *Canadian Conflict of Laws*, 6th ed vol 2 (Toronto: LexisNexis, 2013) [Walker] at pages 31-58:

> […] The proper law of the supply contract will not be decisive, however, if the necessaries are supplied to a party, such as a charterer, under a contract that does not bind the ship owners. In the latter case, the ship cannot be bound by the terms of the

> contract, so the non-contractual elements, such as the nationality of the purchaser and supplier and the location of the transaction, assume greater importance. […] [Emphasis added]

[46] The plaintiffs contend that in this case, a Maltese flagged vessel owned by a Marshall Islands company, managed by a Greek company and served by a Brazilian port agent, was bunkered in Brazil by a Brazilian supplier acting for a Norwegian bunker seller which had contracted with a British Virgin Islands company to supply bunkers to the vessel in Brazil. Moreover, Boone star operated its ship in Brazil where the bunkers were to be supplied.

[47] While six distinct jurisdictions are implicated, only Brazil has the closest and most substantial connection to the supply of bunkers. They argue that no other jurisdiction has more than a single connection to the transaction. To the extent that the contract between Norwegian and Kristiania BVI may be relevant to determining the proper law, said contract involves Brazilian law by virtue of the reference contained in the Bunker Confirmation, to the Petrobras' general terms and conditions, the latter of which makes Brazilian law applicable under clause 18.2.

[48] For their part, the defendants cite *Imperial Oil*, to the effect that the Court must consider all the listed factors and not take the place where the necessaries were supplied as the most important connecting factor:

> [36] The appellant submits that while all relevant factors are to be weighed and valued, the place where the marine lubricants were supplied i.e. Montreal and Sarnia, is the most important connecting factor to be considered in this case. The submission here is that the selection of this factor would provide commercial interests with a simple, certain and straight-forward test that could be easily applied in practice. The selection of a single connecting factor

> without regard to others has been frowned upon by the courts in the United States. Thus in *M/V TENTO, supra*, Circuit Judge Kennedy pointed out, at 1195, that the selection of the place where supplies are furnished to the exclusion of other factors would be "unwise in the maritime context". Here in Canada, too, Professor Tetley has emphasized in *Maritime Liens and Claims* (London: Business Law Communications; Montreal: International Shipping Pub., 1985), at 527, that in the absence of statutory or contractual directions:
>
> > ...facts and circumstances of the problem...are "connecting factors" or "contacts" and are the basic "raw materials" of conflict of laws...It is these factors that the court uses to link the particular set of circumstances of the case to a particular law. Usually there are many connecting factors to consider. They may be the place of the contract, the place of the delict or tort, the place of carrying out of the contract, the flag of the ship, the nationality of the crew, the domicile of the vessel owners or the domicile of the charterers. All the connecting factors must be ascertained and valued in order to determine the applicable law amongst the laws of the competing states.
>
> I accept that it would be unwise to single our one factor as controlling but, rather, that all connecting factors be considered and evaluated in order for legitimate state interests to be accommodated. To my mind, in the present case the places of delivery in Canada should be accorded somewhat greater weight when viewed in the context of the several other factors connecting the transactions to Canada. [Emphasis added]

[49] The defendants argue that Justice Harrington's holding in *The Nordems, FC*, which places great significance on the place where necessaries were provided, is not determinative of the present case, as it was *obiter dicta*. In that case, the issue was whether or not American law applied to the transaction, and it was otherwise unnecessary for Justice Harrington to select the law of a particular jurisdiction. On appeal, Justice Nadon stated, at paragraph 97 of *The Nordems, FCA*, that Justice Harrington's choice was "clearly open to him", but had nonetheless

emphasized at paragraph 80 that no single factor should be determinative in selecting the applicable law.

[50] In weighing the *Imperial Oil* factors on the facts of the present case, the defendants contend that the non-Brazilian factors related to the transaction greatly outweigh the Brazilian factors. Norway has at least three connections: the bunker supply contract was made entirely in Norway, and it was entered into by a Norwegian seller and the Norwegian agent of the sub-time charterer. Meanwhile, payment was made to a Norwegian Bank. Kristiania BVI also used a Norwegian managing agent, Seabulk. The parties to the contract have a history of dealing in Norway, having negotiated previously 24 contracts there.

[51] Unlike in *Imperial Oil* or *The Nordems*, the defendants submit that there was a continuing relationship between the parties all of which was conducted in Norway. It is unreasonable to conclude that the parties would have expected their relationship be governed by the law of wherever jurisdiction the bunkers were being supplied. It is much more reasonable to conclude that the parties would have expected their relationship be governed by the jurisdiction of the country in which they were negotiating the transaction.

[52] Meanwhile, the defendants argue that the choice of law clause in the Petrobras general terms and conditions should be given no weight in determining the law applicable to the transaction, as there is no contract between Boone Star and Norwegian. For this point they cite *The Nordems, FCA*:

> [85] […] [W]here, 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.

[53] With all due respect, I arrive at a largely different conclusion than the defendants. The connecting factors to Norway alleged by the defendants, for the supply contract, are not much stronger than those factors found insufficient by Justice Harrington in *The Nordems,* as he considered the plaintiff's best case for connecting it to the United States.

[54] In both cases, the country submitted as the connecting jurisdiction is common to all of the following: the plaintiffs' principal place of business, the place where the contracts were made, and the location of payments for the supply of the necessaries, also being their respective country's banks. In neither case did the owner operate its vessel in its own country's waters during the relevant time, nor was it arrested in its jurisdiction (see *The Nordems, FC*, above at para 53).

[55] I do recognize the contractual history between the plaintiffs and the sub-time charterer in Norway for supply contracts executed all over the world. I also note that Norwegian regularly used various physical suppliers to execute those contracts, and did not pay "too much attention to" the choice of law clauses, if any, in those country specific documents.

[56] However, the defendants' position is contradictory. One the one hand, they enumerate all the connecting factors that would make the laws of Norway applicable to the contract between themselves and Kristiania BVI (e.g. it is the parties country of residence, the place the contract

was entered to, the place payment was expected to be made, etc.), but on the other hand, they argue that privity of contract prevents the application in the case at bar of the Brazilian choice of law clause in the Petrobras' terms and conditions.

[57] In fact, as all the factors enumerated by the defendants relate to the contract between the plaintiffs and Kristiania BVI, they would mostly be helpful in determining the law governing that particular contract, absent a choice of law clause. And although I do not have to address the issue, it could nevertheless be said that the plaintiffs and Kristiania BVI rather chose the law of Brazil by accepting the terms and conditions of the physical supplier Petrobras.

[58] In other words, the defendants enumerate those factors that would connect their contract with Kristiania BVI to a particular body of law and not "factors that the Court [should use] to link the particular set of circumstances of the case to a particular law" (*Imperial Oil*, above, at para 36, citing Professor Tetley *Maritime Liens and Claims*, at 527). In a non-contractual claim, the perspective to consider should be that of the parties involved in the claim rather than that of the contracting parties. Therefore, the outcome of this claim boils down to a question of applying the law, be it Brazilian or Canadian, and not the interpretation of contract, along with its accompanying consequences or effects. The law governing the contract between Norwegian and Kristiania BVI has some relevancy but it is only one amongst many factors to be considered.

[59] I would add that in practice, the supply contract was formed with the specific intent that it be executed between the Far East and South America, for a ship that was plying Brazilian waters at the time. Moreover, the contract was carried out by Petrobras, a Brazilian physical supplier, on

behalf of Norwegian, which dealt directly with the Brazilian port agent, and Cargonave, on behalf of the sub-charterer, Kristiania BVI.

[60] While not argued by either party, I also consider, based on the foregoing, the core economic activity underscored by this transaction was at least partly performed in Brazil. On this point, I note Justice Stone's discussion of this additional connecting factor to consider in *Imperial Oil*:

> [38] […] Among these several factors the one that, in my view, is deserving of significant weight is that the operations of Socanav, the demise charterer, was based in Canada at the time the marine lubricants were supplied and it was Canada, where the vessels traded and were based, that was most economically benefited by the lubricants. In the United States, the base of operations of the shipowner was regarded by the Supreme Court in *Hellenic Lines, supra*, at 309, as "another factor of importance" to be assessed. This factor has been weighed ever since in appropriate cases by the courts of that country. Thus in the *M/V TENTO, supra*, involving a claim for a maritime lien by an American supplier of fuel oil in Italy by arrangement with the charterer of a Norwegian vessel, Circuit Judge Kennedy stated, at 1193:
>
> > In a subsequent decision, the Supreme Court declared that the factors in the *Lauritzen* were not exhaustive. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 309, 90 S. Ct. 1731, 1734, 26 L. Ed. 2d 252 (1970). The vessel's "base of operations," that is, the shipowner's centre of management and the location most benefited economically by the business of the vessel, is also relevant. *Id*. at 309, 90 S. Ct. at 1734.
>
> These views were later adopted in a case involving the supply of bunker oil in South Africa by a London based supplier to a vessel whose owners were also based in London: *Forsythe International U.K. Ltd. v. M/V RUTH VENTURE*, 633 F. Supp. 74 (D. Or. 1985), at 77.
>
> [39] The base of operations factor was not considered and weighed by the Trial Judge. However, during oral argument on appeal, at the invitation of the bench, counsel addressed this factor. When the

> factor is weighed with other factors connecting the transactions to Canada, that which connected the transactions to the United States i.e. the supply contracts, seems less substantial. The actual deliveries of the marine lubricants were made in Canada where the vessels were registered, where both the shipowner and the demise charterer had their respective bases of operations and centres of management and where the vessels traded. Although the parties agree that Socanav carried on its business primarily on the Great Lakes, St. Lawrence Seaway and the Canadian East Coast, it is clear from the agreement of January 26, 1993 that Socanav acquired the right under Article 6.1 thereof to provide all of the appellant's transportation requirements of liquid petroleum products in Eastern Canada. The underlying purpose of that agreement, apparently, was to provide for the continuing use of the vessels to that end while the two demise charter-parties remained in effect. Nothing in the record suggests that in transporting petroleum products in Eastern Canada the vessels traded into the United States. All of this would suggest that Canada was the location most benefited economically by the business of the vessels. It is probably unnecessary to add that it was not by mere happenstance, mishap or some other fortuitous circumstance that the vessels were supplied in Canada, but more likely because the charterer's base of operations was located here. [Emphasis added]

[61] On the whole, I am not saying that the place where the necessaries were provided must inevitably take precedence over all other factors. The seven *Imperial Oil* factors must be considered. The defendants are incorrect in suggesting that Justice Harrington misapplied the test. A careful reading of *The Nordems* suggests that he meticulously weighed the competing factors, ultimately finding that South Africa alone must be the applicable forum. For Justice Harrington, the deciding factor was the place where the necessaries had been provided. The Federal Court of Appeal confirmed his application of *Imperial Oil*.

[62] While the factual situation strongly differs from that in *Imperial Oil*, I agree with Justice Stone at paragraph 36, and I too find that "[t]o my mind, in the present case the places of delivery in [Brazil] should be accorded somewhat greater weight." The Court in that case had the

benefit of several other factors connecting the transactions to Canada, namely that the ships in question were Canadian-flagged, owned by a Canadian corporation and under demise charter to another Canadian, and they traded in the Great Lakes, i.e. in both Canada and the United States. On the other hand, the Court had to also consider that the demise charterers' managers were American and contracted with an American bunker supplier on terms subject to American law.

[63] In the present case, there are six jurisdictions involved in this transaction. The question I am tasked with answering is which of these jurisdictions has "the closest and most substantial connection" with the particular set of circumstances of this case, in the perspective of the non-contracting parties involved in the claim. In this respect, for the reasons I have mentioned, the Brazilian factors outweigh the non-Brazilian ones.

B. *Whether, pursuant to the laws of Brazil, the plaintiffs have a valid and enforceable maritime lien against the Samatan.*

[64] The plaintiffs have submitted the affidavit of Mr. Marcus Alexandre Matteucci Gomes who is an attorney licensed to practice law in Brazil and a former law professor with experience in Brazilian maritime law and ship arrests in Brazil. He asserts that Brazilian law grants a maritime lien in favour of the plaintiffs for the provision of bunkers.

[65] Mr. Gomes explains that by virtue of articles 470 and 471 of the Brazilian Commercial Code and article 2 of the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages [Brussels Convention of 1926] to which Brazil

ratified in 1931, the credit of the supply of the necessaries is considered "privileged" in relation to a ship. Essentially, marine fuel expenses give rise to a maritime lien against a vessel because they are expenses incurred for the vessel's preservation and because they are necessary for the continuation of the vessel's voyage.

[66] In the case at bar and according to Mr. Gomes, Brazilian law would grant a maritime lien in favour of Norwegian against the Samatan because the bunkers were physically supplied to Samatan by Petrobras on the order of either Kristiania (sub-time charterer) or Boone Star (owner). He offers no explanation of Brazilian law principles as regard to how the supplier of necessaries is presumed to have contracted on the credit of the ship.

[67] "Privileged" credits are considered to be the equivalent to "tacit mortgages" on the ship. Accordingly, they have *in rem* effects, constituting a maritime lien that persists and follows the ship, whether it is domestically or foreign owned, even if it is sold or transferred, by any means whatsoever, to a different owner. This is confirmed by article 8 of the Brussels Convention of 1926 and article 470 of the Brazilian Commercial Code.

[68] This privileged credit gives the plaintiffs rights under Brazilian law, to seek arrest of a defendant ship as a provisional remedy, in order to enforce the collection of its debts (article 479 of the Brazilian Commercial Code and article 813 of the Brazilian Code of Civil Procedure). That ship would then be allowed to provide security for its release, pending the determination of a judgment in an action at law.

[69] Mr. Gomes adds that in the case at bar, the "no lien" stamp on the bunker delivery receipt has no effect as the Chief Engineer of the Samatan only applied it after the bunkers were loaded onto the ship. Plaintiffs argue that if anything, its only relevance is that its use by Boone Star is evidence that Boone Star knew that Brazilian law gave a maritime lien for bunkers supplied to a ship.

[70] However, the foregoing analysis is based on the assumption that the supply contract between the parties is subject to Petrobras' general terms and conditions, which are governed by Brazilian law (page 2 of Mr. Gomes' affidavit). In addition, Mr. Gomes' operating presumption for the creation of the maritime lien is that the Chief Engineer of the Samatan signed on behalf of the vessel and acknowledged and approved receipt of the marine fuel. This is despite the fact that the sub-charterer (and not the owner of the ship) was responsible for its own fuel, and was the one who had ordered the bunkers, thus the one benefiting from its delivery.

[71] In their written submissions, the defendants do not seriously challenge the fact that should I determine that Brazilian law applies, it provides for a maritime lien on the Samatan for the supply of bunkers. At the hearing however, counsel for the defendants pointed to paragraph 8, subparagraphs 8 ii) and v) and paragraph 23 of Mr. Gomes' affidavit which read as follows:

> 8. I have been informed of the following facts by J. Stephen Simms, which I assume to be true and upon which my analysis and conclusions are based:
>
> Assumed Facts
>
> […]
>
> ii) Kristiania Marine Ltd. BVI ("Kristiania") was, at all material times, a sub-time charterer and/or operator and/or charterer of the

> same vessel (Boone Star and Kristiania are hereinafter collectively referred to as "Owners");
>
> […]
>
> v) The sale contract between Norwegian and the Owners is subject to Petrobras' general terms and conditions, which are governed by Brazilian law;
>
> […]
>
> 23. Assuming these facts to be true and correct, and based upon my comments and assertions above on the relevant Brazilian laws on maritime liens and arrest of ships, it is my opinion that:
>
> i. Brazilian law grants a maritime lien in favor of Norwegian against M/V Samatan because the Bunkers that were physically supplied to M/V Samatan by Petrobras in Paranaguá on the order of either Kristiana or Boone Star as marine fuel expenses. Pursuant to Brazilian law, including Article 2 of the Brussels Convention of 1926, marine fuel expenses give rise to a maritime lien against a vessel because they are expenses incurred for the vessel's preservation and because they are necessary for the continuation of vessel's voyage;
>
> ii. Norwegian's claim against M/V Samatan is *in rem*, and follows the vessel regardless of its ownership or location under Article 8 of the Brussels Convention of 1926 and Article 470 of the Brazilian Commercial Code; and
>
> iii. Under Brazilian law, the maritime lien existing in favor of Norwegian gives grounds to the arrest of M/V Samatan. Article 479 of Brazilian Commercial Code allows for the arrest of a vessel where one of the credits that are qualified as "privileged" by Brazilian law under Articles 470 and 471 of the Brazilian Commercial Code and Article 2 of the Brussels Convention of 1926 exists.

[72] In my view, it was certainly not the best idea to refer to both Boone Star and Kristiania BVI as the "owners". Counsel for the defendants argues that it could make a difference whether the necessaries are ordered by the owner of the vessel or by a time-charterer. However, I think that paragraph 23 dispels the doubts we might have on that subject. Mr. Gomes thereby confirms

that whether it was ordered by the owner or by the sub-charterer, the delivery of bunkers created a maritime lien on the Samatan.

[73] Finally, the defendants did not challenge Mr. Gomes' exposition of Brazilian law, nor have they cross-examined him. In that context, I am satisfied that the plaintiffs have met their burden to allege and prove that Brazilian law provided, in the context of this claim, a maritime lien in favour of Norwegian on the Samatan.

C. *If the laws of Brazil did not apply, whether the laws of Canada provide the plaintiffs a maritime lien against the Samatan.*

[74] If I was not of the view that the laws of Brazil applied to the supply of bunkers to the Samatan, the outcome would be far different. As the law of Norway has not been alleged or proven by the parties, I would have had to apply Canadian domestic laws (*The Nordems, FC* at para 40).

[75] As previously noted, Canadian maritime law generally does not create a maritime lien in favour of a supplier of necessaries. A limited exception to this general rule is found in section 139 of the Act, which was enacted in 2009. Subsection 139(2) provides as follows:

139. (2) A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise	139.(2) La personne qui exploite une entreprise au Canada a un privilège maritime à l'égard du bâtiment étranger sur lequel elle a l'une ou l'autre des créances suivantes :
(*a*) in respect of goods,	*a*) celle résultant de la

materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; […]	fourniture — au Canada ou à l'étranger — au bâtiment étranger de marchandises, de matériel ou de services pour son fonctionnement ou son entretien, notamment en ce qui concerne l'acconage et le gabarage; […]
. . .	

[76] The plaintiffs argue that the reference to "Canada" in paragraph 139(2)(*a*) should be read as a reference to "Norway," and that the plaintiffs should thus be granted a maritime lien against the Samatan, a foreign vessel. They concede that no Court has granted one in such circumstances, but maintain hope that Canadian law is moving in that direction.

[77] The defendants argue that this interpretation is not consistent with the history and purpose of section 139 of the Act. It was enacted to place Canadian ship suppliers in a more equitable position relative to their American counterparts. The parliamentary debates preceding the enactment of the section testify to that effect:

> [. . .] These are Canadian companies that supply ships that call at Canadian ports with everything from fuel to water, to food and equipment that is being purchased. Today these businesses do not have the same rights as American businesses who supply the same ship in their own port. Not even our own courts here in Canada will do this. That is because American ship suppliers benefit from a lien in American law which can be enforced in Canadian courts.
>
> These Canadian businesses have been telling the government for some time that they also need the same protection. This Conservative government is delivering that protection to them. (*House of Commons Debates*, 40th Parl, 2nd Sess, No 18 (25 February 2009) at 1605 (Brian Jean – Parliamentary Secretary to the Minister of Transport, Infrastructure and Communities, CPC))

[78] In *Comfact Corporation v Hull 717 (Ship)*, 2012 FC 1161, Justice Harrington further confirms that the purpose of the section's introduction was to remedy the unfair situation of Canadian ship suppliers:

> [31] […] [T]he mischief which gave rise to so much complaint related to the unfortunate position Canadian necessaries men found themselves in as compared to American necessaries men who arrested a ship in Canada, the principle of "presumption of coherence" is applicable […]

[79] As such, the defendants claim that this provision is not intended to grant a lien to a supplier of another nationality when dealing with a foreign ship. If that were the intent, then it would not need the phrase "carrying on business in Canada." In substituting "Norway" for "Canada" the plaintiffs are not seeking to apply Canadian law to this case but rather to amend the law as written.

[80] Whether a Canadian maritime lien would flow from the purchase of bunkers by a charterer rather than by the owner is a question that remains to be decided (*The Nordems, FC,* at paras 27–28; *Cameco Corporation v MCP Altona (The Ship)*, 2013 FC 23, at paras 49–54).

[81] In any event, I agree with the defendants that section 139 was not meant to provide a maritime lien to a foreign necessaries supplier, in a context where it failed to allege and prove the foreign law and where Canadian law applies by default. That would defeat the very purpose of section 139 of the Act.

D. *Whether, in enforcing the maritime lien, the plaintiffs are entitled to summary trial and judgment in rem against the Samatan and in personam against Boone Star.*

[82] The plaintiffs argue that they are entitled to an *in rem* judgment against the Samatan as a result of the enforcing of the valid Brazilian maritime lien against it, rather than resulting from a statutory right *in rem* against the ship. The former arises as of right while the latter requires *in personam* liability of the ship owner. As a general rule, under Canadian law, suppliers of necessaries do not enjoy a maritime lien, but can only pursue the ship owner under sections 22 and 43 of the *Federal Courts Act*, RSC, 1985, c F-7, by virtue of having a statutory right *in rem* against the ship, on condition that the ship owner be personally liable. This distinction imports as, unlike a holder of a statutory right *in rem*, the holder of a maritime lien outranks other creditors and his right *in rem* is not defeated by the sale of the ship. On this point, I cite Justice Harrington in *The Nordems, FC,* at paras 11 and 12:

> [11] There are a number of important distinctions between a maritime lien and a statutory right *in rem*. Only one is relevant in this case, that being that a maritime lien may exist even though the owners of the ship are not personally liable. A maritime lien arises at the moment of the transaction, be it for instance a collision, while a statutory right *in rem* only comes into existence when proceedings are instituted, or perhaps only when the action *in rem* is served on the ship (this issue was extensively reviewed in the light of English statutes by Mr. Justice Brandon in the "Monica S", [1968] P. 741, [1967] 3 All E.R. 740, [1967] 2 Lloyd's Rep. 113). The maritime lien travels with the ship into the hands of third-party purchasers for value. However a potential action *in rem* is defeated by a legitimate change of ownership, although the original owners, of course, if personally liable in the first place, remain liable.
>
> [12] In the event of a marshal's sale by which all blemishes on the ship, including maritime liens, are transferred to the fund thereby created (*Osborn Refrigeration Sales and Services Inc. v. Atlantean*

> *I (the)* reflex, (1982), 7 D.L.R. (4th) 395, 52 N.R. 10 (F.C.A.)) and if the fund so generated is not sufficient to satisfy all creditors, maritime lien holders enjoy a high priority. They outrank mortgage creditors, who in turn outrank ordinary creditors. The holder of a maritime lien is, generally speaking, a secured creditor in bankruptcy proceedings while the holder of a statutory right *in rem*, at least a right *in rem* which has not been perfected prior to the bankruptcy, is not. [Emphasis added]

[83] The defendants argue that the plaintiffs are not entitled to an *in rem* action as the ship owners are not liable *in personam*. With respect, I find that they are liable by virtue of the valid Brazilian maritime lien (*The Nordems, FC*, at para 14).

[84] However, I agree with the defendants that in order for Boone Star to be found liable *in personam*, the plaintiffs would have had to prove that it (1) was a party to the bunker supply contract; or (2) had authorized someone to contract on its behalf, "liability as a result of some personal behaviour and attitude on the part of the owner is required" (*Mount Royal/Walsh Inc v Jensen Star (The)*, [1989] FCJ No 450 at para 28).

[85] In the case at bar, the plaintiffs argue that the owner implicitly authorized persons (the Samatan's Master and Chief Engineer) in possession and control of the Samatan, to contract on the credit of the ship and in addition, to ratify the contract under which the bunkers were supplied on his behalf, based on the following behavior of the owner: (1) failure to give notice to a necessaries supplier that "no lien" provisions existed at any time during the more than two weeks it knew that the supplier would be delivering the bunkers to the owner's vessel, (2) permitting its Master and Chief Engineer to allow the supplier to pump the bunkers on board the vessel without notice of the "no lien" provisions and (3) instructing the Master and Chief

Engineer to accept the bunkers for the ship and to give notice of those provisions after the delivery. According to the plaintiffs, Boone Star, by authorizing its Master and Chief Engineer to permit the bunkers to be delivered on board the Samatan without advance notice of the "no lien" provision in the charter party, ratified the contract and took the benefit of using the bunkers.

[86] The plaintiffs further argue that holding Boone Star liable *in personam* is a fair result because it had the use of the bunkers, and even a property interest in them. The last sentence in the "no lien" notice that Boone Star created reads: "Upon termination of the said charter all goods on board the vessel shall become the property of the vessel."

[87] I agree with the defendants that the mere fact that the owner allows the charterer of a ship to accept bunkers does not constitute the sort of behavior that would lead to liability on the part of the owner under Canadian law. While there is a presumption that necessaries are supplied on the credit of the ship, this presumption is easier to rebut in contrast to the American context. Justice Nadon sets forth the law on this matter in *The Nordems, FCA*:

> [57] Professor Tetley then goes on to state, again at page 570, that in determining whether there was a "holding out", i.e. whether the shipowners, by their acts and omissions, led the supplier of necessaries to believe that the person purchasing the bunkers was authorized by them to do so, the court will have to "… consider the facts and balance the purported 'holding out' by the owner or demise charterer against the duty to inquire of the supplier". In support of a possible duty to inquire on the part of the supplier, Professor Tetley refers to *Cann v. Roberts*, (1874) 30 L.T.R. 424, an English decision where the Court held that suppliers were not entitled to rely on the master's authority to bind the shipowners where, by reasonable inquiry, they would have been in a position to ascertain the master's lack of authority. I wish to point out here that prior to 1971, U.S. law imposed on a supplier of necessaries a duty to inquire as to a buyer's authority to bind a vessel. That duty was removed with the enactment, in 1971, of *The Commercial*

> *Instruments and Maritime Liens Act* (see Gilmore and Black, pages 670 *et seq.*).
>
> [58] Professor Tetley then concludes his discussion of this issue at page 572 by making the following remarks:
>
> Neither the time nor the voyage charterer is regarded as the servant or agent of the shipowner. Therefore, assuming there is no question of "holding out", there would seem to be no need for the owner to notify suppliers that such a charterer, in contracting with them, does not bind the owner's personal credit. Moreover, the supplier's duty to inquire is another argument available to the owner and ship.
>
> [59] In my view, Professor Tetley's exposition of the law is correct […]
>
> […]
>
> [65] To conclude, although there exists under Canadian law a presumption that necessaries are supplied on the credit of the ship, this presumption is rebuttable. Whether this presumption is rebutted must be determined by a proper assessment of all relevant facts, including whether the supplier made reasonable inquiries to ascertain the authority of the person requesting the necessaries. I would add to this that the extent to which a supplier must make inquiries will depend on the particular circumstances of the case. In determining whether the duty to inquire has been met, we should be mindful of the fact that modern technology makes it much easier for a supplier to obtain, in a timely manner, the type of information which it requires to make an assessment as to whether or not a charterer, or other person, has authority from the shipowner to bind the ship. [Emphasis added]

[88] Norwegian knew that Kristiania BVI was a time charterer, and not the owner of the Samatan, and never inquired as to whether or not it had the authority to bind the ship. In fact, Kristiania BVI did not have the authority to bind the ship due to clause 18 of the NYPE form.

[89] Moreover, Boone Star would not have ratified the supply contract by instructing the Chief Engineer of the Samatan to accept the bunkers and apply the "no lien" stamp to the Bunker

Delivery Note. Applying the stamp did not make Boone Star a party to the contract. Similarly, its knowledge that the sub-time charterer was going to order bunkers for the ship did not have the effect of ratifying the contract.

[90] Contrary to the assertions of the plaintiffs, Boone Star had no use of the bunkers. It did not have a property interest in them. Clause 2 of the NYPE form stipulates "[t]hat the Charterers shall provide and pay for all the fuel except as otherwise agreed…" Clause 35 provides that the charterer will take over and pay for all fuel on the vessel at the port of delivery. These clauses mean the charterers are vested with the property of the bunkers during the currency of the charter; the owners only have possession as bailees (Coughlin et al, *Time Charters*, 6th ed (London: informa, 2008) at p 260, at 13.4).

[91] As such, Boone Star cannot be liable *in personam* as the presumption that the necessaries were provided on the credit of the ship has been rebutted.

VIII. Conclusion

[92] In light of the above reasons, I find that Brazilian law applies to the plaintiffs' claim, as it has the most links to the particular set of circumstances of this case. I further find that Brazilian law gives Norwegian a maritime lien on the Samatan for the bunkers delivered in Brazil, and that said maritime lien entitles the plaintiffs to a summary trial and judgment *in rem* against the Samatan.

[93] The plaintiffs submit they are entitled to damages in the amount of US$ 666,915.19 plus admiralty interests at the prime rate compounded semi-annually from September 1st, 2011. However, in order to comply with section 12 of the *Currency Act*, 1985 c C-52, this amount should be converted in Canadian dollars. On September 27, 2011, the date the payment became due and payable (see paragraph 34 of these reasons), the noon rate of exchange issued by the Bank of Canada was 0.9813 so that the sum of US$ 666,915.19 converted in Canadian dollars equals $ 679,653.27.

JUDGMENT

THIS COURT'S JUDGMENT *in rem* against the defendant ship Samatan and its bail is that:

1. This Motion for summary judgment is granted in part;
2. The plaintiffs are entitled to damages in the amount of $ 679,653.27 plus admiralty interests at the rate of 3%per annum from September 27, 2011 and costs;
3. The plaintiffs' claim against the Samatan ranks as a maritime lien; and
4. The *in personam* action against Boone Star Owners Inc. is dismissed with costs in the amount of $2000.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	NORWEGIAN BUNKERS AS and ATLAS BUNKERING SERVICES B.V.B.A. v THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "SAMATAN", BOONE STAR OWNERS INC. and KRISTIANIA MARINE LTD. BVI
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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DATED:	DECEMBER 11, 2014
AMENDED:	FEBRUARY 13, 2015

APPEARANCES:

Douglas G. Schmitt	FOR THE PLAINTIFFS
John W. Bromley	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Alexander, Holburn, Beaudin & Lang LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE PLAINTIFFS
Bull Housser & Tupper LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE DEFENDANTS