Trans-Tec Asia v. M/V Harmony Container: Should American Judges Don Foreign Hats (or Wigs)?

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Abstract

The application of foreign law in U.S. federal courts is often spotty at best. Many decisions pay lip-service to the need for international comity and the fair application of foreign law, but this requires extensive research into a wholly unfamiliar body of law which courts and parties are rarely willing to do. This article examines the Ninth Circuit's recent decision in Trans-Tec Asia v. M/V Harmony, a case that is indicative of this problem. Next, it argues that a more faithful application of foreign law is both increasingly possible and increasingly necessary. A petition for certiorari has been filed in Trans-Tec, underscoring this growing necessity.

* Anthony R. Bessette is a graduate of the University of Richmond School of Law, J.D., and the University of Virginia, B.A. The author would like to thank Professor Wan Izatul Asma of the Universiti Malaysia Terengganu, Dean Clark Williams of the University of Richmond, Professor Simon Young of the University of Hong Kong, and especially Professor John Paul Jones for their assistance, reviews and feedback.
I. Introduction

The application of foreign law in U.S. federal courts is often spotty at best. Even when a case cannot be decided without applying foreign law, U.S. judges will find a reason to apply forum law to avoid letting foreign law determine the outcome.\(^1\) Many decisions pay lip-service to the need for comity between U.S. and foreign courts, and acknowledge that comity calls for the fair application of foreign law.\(^2\) Still, the gulf between the real and the ideal is large, and comity is least likely to be achieved in cases which call for careful “analysis of and immersion in foreign law.”\(^3\) Such cases require extensive research into a wholly unfamiliar body of law, research which courts (and parties) are often unwilling to do.

Last year’s decision in *Trans-Tec Asia v. M/V Harmony Container* is an example of this problem.\(^4\) In applying Malaysian law to a non-U.S. contract, the court cited a single Malaysian case, which was only tangentially relevant.\(^5\) In part, this may have been because the parties did not present the appropriate Malaysian authorities, but the court had access to a few Malaysian cases which it ignored.

This article will examine the decision in *Trans-Tec* and the issues it raises. Section II reports the factual background of the *Trans-Tec* case. Section III discusses the court’s decision. Section IV argues for a more complete application of foreign law, as is advocated and to an extent practiced in continental European jurisdictions.\(^6\) There, judges applying foreign law enforce rights similar to those of foreign courts when possible.\(^7\) Section IV also predicts the likely outcome had the court applied Malaysian law more thoroughly. Section V concludes with some final comments.

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5. *See infra* note 54.
II. Background of the Case

Splendid Shipping SDN BHD is a private Malaysian company, and owner of the M/V Harmony, a vessel flagged in Malaysia. In June 2000, Kien Hung Shipping Co., a Taiwanese entity, chartered the Harmony from Splendid for ten years. That charter-party specifically forbade Kien Hung from incurring any liens on the Harmony. Between 2000 and 2003, Kien Hung operated the vessel in a loop between Japan, China, Korea, and North and South America, including regular stops in Long Beach, California.

In February 2003, a manager at Kien Hung contacted another company, Yee Foo Marine Industrial Co., seeking a price quote for fuel bunkers for the Harmony. That middleman contacted a Singaporean bunker supplier, Trans-Tec Asia. Trans-Tec sent a quote through the middleman to Kien Hung. Kien Hung ordered U.S. $251,850 of fuel from Trans-Tec. Trans-Tec sent KienHung a one page “Bunker Confirmation” e-mail through the middleman.

The Bunker Confirmation named the vessel and her owner, rather than Kien Hung, as buyer. Trans-Tec did not negotiate the bunker supply transaction with Splendid or the master of the vessel. The Bunker Confirmation purported to incorporate Trans-Tec’s “General Terms and Conditions.”

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8. SDN BHD stands for “Sendirian Berhad,” a Malaysian term roughly equivalent to “Limited Liability Company” in U.S. law.
9. Trans-Tec, 518 F.3d at 1122.
10. Id.
11. Id. at 1129.
12. Id. at 1122.
13. Id.
14. Id. nn.98-99. Trans-Tec contended that it should be treated as a United States corporation since its parent company is owned by World Fuel Services, a Miami-based company. However, in its complaint Trans-Tec identified itself as a division of a corporation organized and existing under the laws of Singapore. For the importance of labeling Trans-Tec as Singaporean or American, see infra notes 98-99 and accompanying text.
15. Trans-Tec, 518 F.3d at 1122, 2008 A.M.C. at 685.
16. Id.
17. Id.
18. Id. (In this case, the Harmony and Splendid, although they were never referenced by name in the transaction.)
19. Id.
20. Trans-Tec Asia v. M/V Harmony Container (Summary Judgment), 435 F.Supp.2d 1015, 1021, n. 9 (C.D. Cal., 2005). The master of a vessel is usually an agent of the shipowner and has authority to bind the vessel.
21. Trans-Tec, 518 F.3d at 1122, 2008 A.M.C. at 685.
Conditions were not attached; instead the e-mail invited Kien Hung to request a copy.22

Trans-Tec’s Terms and Conditions included an incorporation and merger clause, which provided that those Terms and Conditions, along with the Confirmation, constituted the entire contract.23 More importantly, though, it contained a choice-of-law clause reading:

Seller shall be entitled to assert its lien or attachment in any country where it finds the vessel. 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 legal action.24

Kien Hung never saw, nor requested, a copy of the Terms and Conditions.25 In February 2008, Trans-Tec delivered the bunkers in Busan (Pusan), South Korea.26 Kien Hung went bankrupt in May, and never paid Trans-Tec.27 A German company bought Kien Hung, took over the Harmony’s charter, and the vessel continued on to Long Beach.28

Trans-Tec sued the Harmony in rem in the United States District Court for the Central District of California, claiming it had a maritime lien against the vessel under United States law, and against Splendid as her owner.29 The district court granted the defendants, Splendid and the Harmony (collectively “Splendid”), summary judgment on all claims.30 The court held that (1) Malaysian law governed contract formation; (2) under Malaysian law, the United States choice-of-law clause found in the Terms and Conditions was incorporated into the bunker confirmation;31 and (3) Trans-Tec was denied a maritime lien on the Harmony

22. Id.
23. Id.
24. Trans-Tec, 518 F.3d at 1122, 2008 A.M.C. at 686.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id. at 1123, 2008 A.M.C. at 686. Trans-Tec actually filed a number of in personam claims against Splendid as well, including a maritime claim in contract and a claim for unjust enrichment. Id.
31. In its earlier disposition, the Central District of California applied Florida law as called for in the choice-of-law clause to determine whether that same clause, along with the rest of the Terms and Conditions, would be incorporated. Id. at 1029-30, 2006 A.M.C. at 897. It ruled they were not. Guided by the U.C.C., the court ruled that the addition of the Terms and
because the Federal Maritime Lien Act\textsuperscript{32} (the “FMLA”) did not grant liens to “foreign necessaries providers servicing foreign-flagged ships in foreign ports.”\textsuperscript{33} In arriving at this decision, the court acknowledged that the Terms and Conditions “specifically mentioned that a maritime lien was included in its choice of United States law,” but decided that it was “irrelevant because maritime liens may not arise by contract, but only by operation of law.”\textsuperscript{34} Note that the district court’s decision defeating the lien was based on its understanding of the FMLA rather than an analysis of Malaysian law.

Trans-Tec appealed the decision to the United States Court of Appeals for the

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\textsuperscript{33} Trans-Tec, 518 F.3d at 1123, 2008 A.M.C. at 687.

\textsuperscript{34} Trans-Tec Asia v. MV Harmony Container (Lower Court Decision), 437 F.Supp.2d 1124, 1137 n.10, 2006 A.M.C. 1011, 1026 (C.D.Cal., 2006). The Supreme Court has held likewise as early as 1856. See The Steamship Yankee Blade, 60 U.S. 82, 89 (1856); Rainbow Line, Inc v. M/V Tequila, 480 F.2d 1024, 1026, 1973 A.M.C. 1431, 1433 (2d Cir. 1973) (“[M]aritime 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.”); see also The Bird of Paradise, 72 U.S. 545, 555 (1866); Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 10 (1920); GRANT GILMORE & CHARLES BLACK, THE LAW OF ADMIRALTY, § 7-1, at 481-482 (1957). Although the doctrine is an old one, decisions among the circuits show that it still holds water. See, e.g., Cornish Shipping Ltd. v. International Nederlanden Bank N.V., 53 F.3d 499, 1995 A.M.C. 2582 (2d Cir. 1995); Bominflot, Inc. v. M/V Henrich S, 465 F.3d 144, 147-46, 2006 AMC 2510, 2513 (4th Cir. 2006) (“[M]aritime liens are\textit{ stricti juris} and cannot be created by agreement between the parties; instead, they arise by operation of law[]”); Redcliffe Americas Ltd. v. M/V Tyson Lykes, 996 F.2d 47, 50, 1993 A.M.C. 2294, 2297 (4th Cir. 1993) (“[A] maritime lien is a secret one, arising by operation of law.”); Silver Star Enterprises, Inc. v. Saramacca MV, 82 F.3d 667, 1996 A.M.C. 1715 (5th Cir. 1996); Vestoil, Ltd. v. M/V M Pioneer, 148 Fed.Appx. 898, 900, 2005 A.M.C. 2404, 2407 (11th Cir. 2005) (“[I]t is settled law in the United States that a maritime lien can arise only by operation of law, regardless of any agreement between the parties.”); see also ROBERT FORCE & A.N. YIANNOPOULOS, 2 ADMIRALTY AND MARITIME LAW 2-1 (2001) (“Although parties may waive or surrender the right to a maritime lien by contract or otherwise, they may not agree to confer a maritime lien where the law does not provide for one.”).
Ninth Circuit,\textsuperscript{35} taking issue with the district court's holding that the FMLA does not grant liens to foreign necessaries providers servicing foreign-flagged ships in foreign ports. Splendid cross-appealed on the grounds that the district court should not have applied the U.S. choice-of-law clause.\textsuperscript{36}

\section*{III. The Decision in Trans-Tec}

Because it is a legal issue, the question whether Trans-Tec enjoyed a maritime lien was reviewed de novo.\textsuperscript{37} The Ninth Circuit began its analysis by pointing out the significance of the U.S. choice-of-law clause in the Terms and Conditions. The U.S. is "one of a handful of countries that recognizes a maritime lien for the provision of necessaries."\textsuperscript{38} The countries involved in the bunker sale do not.\textsuperscript{39}

Splendid raised two points on appeal: first, that the choice-of-law clause in the Terms and Conditions was not incorporated into the Bunker Confirmation; and second, that the FMLA does not apply to necessaries provided by a foreign provider.\textsuperscript{40} The court noted that, "[b]ecause the availability of a maritime lien under United States law is the ultimate question, the temptation is to skip directly to United States law,"\textsuperscript{41} but held that "[t]hat approach . . . 'put[s] the barge before the tug.'"\textsuperscript{42} Because the contract embodied in the Bunker Confirmation was not made in the U.S. or between U.S. parties, the Ninth Circuit held that it first had to determine which country's law governed contract formation.\textsuperscript{43} Once the court identified the controlling foreign law, that law would control whether the choice-

\begin{itemize}
\item \textsuperscript{35} Trans-Tec, 518 F.3d at 1120, 2008 A.M.C. at 684.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id. at 1124 n.5, 2008 A.M.C. at 688.
\item \textsuperscript{38} Id.; See also Gulf Trading & Transp. Co. v. The M/V Tento, 694 F.2d 1191, 1192 n.2, 1983 A.M.C. 872, 876 (9th Cir. 1992) and infra note 39.
\item \textsuperscript{39} Neither Malaysian law (the law of the defendant and the vessel's flag), Singaporean law (the law of the bunker supplier), Taiwanese law (the law of the charterer), nor South Korean law (the law of the place where bunkers were provided) provide for a maritime lien for the provision of bunkers. See MARITIME LAW HANDBOOK, MALAYSIA I-10, REPUBLIC OF KOREA I-3, III-15-16, SINGAPORE I-13 TAIWAN III-12 (Hans-Christian Albrecht & Roger Heward eds., 2008).
\item \textsuperscript{40} Trans-Tec, 518 F.3d at 1123, 2008 A.M.C. at 687.
\item \textsuperscript{41} Id. at 1124, 2008 A.M.C. at 688.
\item \textsuperscript{42} Id. (quoting DeNicola v. Cunard Line, Ltd., 642 F.2d 5, 7 n. 2 (1st Cir.1981)).
\item \textsuperscript{43} Id. at 1123, 2008 A.M.C. at 688.
\end{itemize}
of-law clause had been incorporated into the Bunker Confirmation.\textsuperscript{44} Finally, if the U.S. choice-of-law clause was effective, the court would determine whether the FMLA applied to the parties.\textsuperscript{45}

According to the court, deciding which country's law governed contract formation, and thus whether the U.S. choice-of-law clause had been incorporated into the bunker contract, required putting the choice-of-law clause to one side and looking at the contract without it.\textsuperscript{46}

When deciding which jurisdiction's law should govern contract formation in the absence of choice-of-law clauses, federal courts apply a set of factors derived from the United States Supreme Court's decision in \textit{Lauritzen v. Larsen}.\textsuperscript{47} The \textit{Lauritzen} factors are: (1) the place of the wrongful act; (2) the law of the vessel's flag; (3) the allegiance of the injured party; (4) the allegiance of the defendant shipowner; (5) the place of contract; (6) the inaccessibility of a foreign forum; and (7) the law of the forum.\textsuperscript{48} Rather than imposing a mechanical test, Ninth Circuit jurisprudence holds that each factor may be given differing weight based upon the unique circumstances of the contract.\textsuperscript{49} The court also looked to the Restatement of Conflict of Laws, which lists the place of negotiation, the place of performance, and the place of business of each party as instructive.\textsuperscript{50} Equipped with \textit{Lauritzen} and the Restatement, the court agreed with the district court that Malaysian law governed contract formation.\textsuperscript{51}

\textsuperscript{44} \textit{Id.} at 1124, 2008 A.M.C. at 688.
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} (citing DeNicola v. Cunard Line, Ltd., 642 F.2d 5, 7 n.2 (1st Cir. 1981)).
\textsuperscript{47} 345 U.S. 571, 1953 A.M.C. 1210 (1953). See Trans-Tec, 518 F.3d at 1124 n.6.
\textsuperscript{48} \textit{Lauritzen}, 345 U.S. at 583-92, 1953 A.M.C. at 1219-26.
\textsuperscript{49} Trans-Tec, 518 F.3d at 1123, 2008 A.M.C. at 688 (citing Tento, 694 F.2d at 1194-95, 1983 A.M.C. at 876).
\textsuperscript{50} \textit{Id.}, 2008 A.M.C. at 689 (citing \textsc{Restatement (Second) of Conflict of Laws} § 188 (1971).
\textsuperscript{51} \textit{Id.} at 1124. See \textit{Lower Court Decision}, 437 F.Supp.2d at 1129, 2006 A.M.C. at 1014. The most important contacts for the court were Splendid's nationality and the Harmony's flag: both Malaysia. Trans-Tec, 518 F.3d at 1125, 2008 A.M.C. at 689. In this case, the court held the fact that the bunkers were supplied in South Korea was unimportant. \textit{Id.} While the nationality of Trans-Tec, Singapore, was important, the court held without explanation that the Malaysian contacts were more substantial. \textit{Id.}
Applying Malaysian Law

The court cited a single case from the new Malaysian Court of Appeal: *Bauer SDN BHD v. Daewoo Corp.* The first work order (contract) between the parties contained a sweeping arbitration clause, and it was unclear whether later work orders incorporated the first work order's arbitration clause. Looking to the extra-contractual interactions of the two parties, the court concluded that they had treated their relationship as though the first work order had terminated, and so lost effect, by the time the later work orders were signed. Thus there could be no incorporation of the arbitration clause.

According to the Ninth Circuit, *Bauer* is “[t]he only relevant Malaysian case[,]” and “makes crystal-clear that Malaysian courts accord dispositive weight to the ‘words and actings’ of the parties.” In *Bauer*, the court never spoke in

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53. For a discussion of the structure of the Malaysian court system, *see infra* note 114.


55. *Bauer*, 4 M.L.J. at 545.

56. *Id.* at 554.

57. *Id.* at 560.

58. *Id.*

59. Trans-Tec, 518 F.3d at 1125.

60. *Id.* (quoting *Bauer*, 4 M.L.J. at 560).
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terms of "dispositive weight," and as the Ninth Circuit acknowledged, found the "words and actings" of the parties before it insufficient to incorporate an arbitration clause.61 In fact, the Bauer court used the actions of the parties as a means to defeat the choice of a non-Malaysian arbitral tribunal.62

The Bunker Confirmation stated that it incorporated Trans-Tec's Terms and Conditions, and so the Ninth Circuit held that Trans-Tec intended to incorporate them.63 Kien Hung never objected to the Bunker Confirmation, nor requested a copy of the Terms and Conditions, even though it received the Confirmation one week before the bunkers were delivered.64 Based on these two factors and its understanding of Bauer, the court held that Malaysian law was satisfied, so the court could proceed into the more familiar waters of American law.65

ii. The Choice-of-Law Clause Under U.S. Law

The court then moved on to decide whether it should honor a U.S. choice of law clause in a foreign contract between foreign parties, performed in a foreign port.66 There was no discussion of whether a Malaysian court would have honored a U.S. choice-of-law clause.67

The Ninth Circuit considered the intention and actions of the parties to the contract, Trans-Tec and Kien Hung, and not the third party to be bound by that contract, Splendid.68 Trans-Tec intended to bind foreign third-party owners such as Splendid by its Terms and Conditions against their will, and the will of their countries' courts. The Ninth Circuit found this to be fair if the vessel sails into a U.S. port.69 According to the court, "[t]o take Splendid's approach would steer us off course because it ignores ... the long-recognized principle of honoring the

61. Id.; Bauer, 4 M.L.J. at 560.
62. Id. at 563-64.
63. Trans-Tec, 518 F.3d at 1125-26.
64. Id. at 1126.
65. Id.
66. Id. The fact that a foreign third party would be bound to the contract was not considered.
67. This becomes more interesting when one considers the court's recommendation that other countries may avoid U.S. choice-of-law clauses in similar situations by prohibiting contracting parties from choosing U.S. law. See infra notes 88-89 and accompanying text.
68. Trans-Tec, 518 F.3d at 1126.
69. Id. at 1127.

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expectations of the parties to a contract[.]" The court found that its decision in *Gulf Trading & Transp. Co. v. The M/V Tento* supported this conclusion: after conducting a *Lauritzen* analysis, the *Tento* court held that U.S. law should nevertheless apply to the transaction in that case despite its "foreignness".

The facts and parties involved in *Tento* were not actually all that foreign. "The *Tento* had significant trade at United States ports. The injured parties . . . were United States companies approached by other United States companies in New York City, and their agreements were made there. [It was] not [a] case of a United States corporation entering into a supply agreement overseas with a foreign company. There [were] not even any injured foreign parties." In that case, a Norwegian shipowner time-chartered the Norwegian-flagged *Tento* to an American demise charterer, who sub-chartered it to another American. The original charter-party stipulated that U.S. law would govern certain parts of the contract, but that the charterer was responsible for supplying his own fuel bunkers. The sub-charterer contacted an American fuel provider to order fuel bunkers; the fuel provider hired an Italian company to deliver the bunkers in Italy. The American bunker provider paid the Italian company for its services, but was itself never paid. The court held that the application of American law was appropriate because of the great number of contacts with the United States, not in the face of overwhelming foreignness.

The Ninth Circuit held that its conclusion was also in line with Fifth Circuit precedent, which allows foreign parties to stipulate in their contracts that the applicable lien law will be that of whichever jurisdiction the vessel sails into. However, in *Liverpool & London S.S. Prot. & Indem. v. M/V Queen of Leman*, the Fifth Circuit was considering a defendant confronted with a maritime lien where

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70. *Id.* at 1126.
72. *Trans-Tec*, 518 F.3d at 1127 n.8.
73. *Tento*, 694 F.2d at 1196.
74. *Id.* at 1192.
75. But not maritime liens. *Id.* at 1192, n.2.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Trans-Tec*, 518 F.3d at 1126-27 (citing *Liverpool & London S.S. Prot. & Indem. Ass’n v. Queen of Leman MV*, 296 F.3d 350, (5th Cir. 2002)).
that defendant was actually one of the contracting parties.\textsuperscript{80}

The Ninth Circuit refused to follow a case from the United States Court of Appeals for the Second Circuit, \textit{Rainbow Line, Inc. v. M/V Tequila},\textsuperscript{81} in which a charterer claimed a maritime lien against a third-party creditor.\textsuperscript{82} Curiously, in deciding to refuse to follow \textit{Tequila}, the court found it noteworthy that the adversely affected company in that case would have been a third party with no relation to the contract.\textsuperscript{83} Splendid, the adversely affected shipowner in \textit{Trans-Tec}, was itself a third party, so the distinction is not meaningful.

\textit{iii. The FMLA}

The court then went on to apply the Federal Maritime Lien Act to the \textit{Harmony}. Under U.S. law, the FMLA gives “a person providing necessaries to a vessel on the order of... a person authorized by the owner... a maritime lien on the vessel.”\textsuperscript{84} Charterers are presumed to have authority to bind the vessel in this way, unless suppliers have \textit{actual} knowledge that the charterer is not authorized by the owner.\textsuperscript{85} Prior to the decision in \textit{Trans-Tec}, the common understanding was that transactions outside the United States and not involving U.S. parties were not subject to the FMLA.\textsuperscript{86}

\begin{footnotes}
\item \textsuperscript{80} \textit{Liverpool & London}, supra note 79, at 355.
\item \textsuperscript{81} Rainbow Line, Inc. V. M/V Tequila, 480 F.2d 1024 (2nd Cir. 1973).
\item \textsuperscript{82} Id.
\item \textsuperscript{83} Trans-Tec, 518 F.3d at 1127. While the court noted that the defendant in \textit{Tequila} was even further removed from the contract than Splendid, the rationale for not holding that third party liable was that third-parties are by definition not at fault. Here the court acknowledged that Splendid was not at fault.
\item \textsuperscript{84} 46 U.S.C. § 31342 (2006).
\item \textsuperscript{85} 46 U.S.C. § 31341 (2006).
\end{footnotes}}
Splendid argued that if the FMLA were extended to such transactions, it would interfere with other countries' regulation of their maritime affairs; it would subject nationals of countries that do not allow maritime liens for necessities to U.S. lien law without their contracting in the U.S. or with a U.S. party. But the court did not give credence to this position, holding that recognizing a maritime lien on the Harmony does not interfere with Malaysian law or "curb the sovereignty of any other nation, or another country's ability to regulate its maritime affairs" because [A] country could simply prohibit contracting parties from choosing United States or foreign maritime lien law in their contracts. Alternatively, national law could require charterers to inform suppliers of existing no-lien clauses in the charter-party. And, in the private arena, ship owners could take steps to give suppliers notice of the no-lien provisions.

When the court refers to "national law," presumably this means foreign law. If so, the FMLA's requirement of actual notice would defeat any foreign country's requirement that charterers inform suppliers. If a charterer that was required by foreign law to inform its supplier of a no-lien provision did not do so, the supplier would not have actual notice. While this would put the charterer in breach of contract with the shipowner, this is cold comfort when the charterer is bankrupt. The other alternative for shipowners would be to give actual notice of no-lien provisions to every one of their charterer's potential suppliers, a daunting task.

Not persuaded by Splendid's policy argument, the court went on to analyze the plain language of the statute. It held that the statutory phrase: "a person providing necessaries to a vessel" means "any person, not only an American person." The court did not distinguish between non-Americans and non-Americans not in the

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87. Trans-Tec, 518 F.3d at 1131.
88. As proof of its careful consideration and non-interference with Malaysian law, the court noted that it applied Malaysian law. See id. at 1131.
89. Id. at 1131 & n.10.
90. See supra text accompanying note 84.
91. Kien Hung is an example of this problem. See Trans-Tec, 518 F.3d at 1122.
92. See Trans-Tec, 518 F.3d at 1130.
93. Id.
United States. The court was also not persuaded by Splendid’s argument that all legislation carries a presumption that Congress did not intend for it to have effect outside the United States. Ultimately, the court did subject Splendid to the FMLA. It held that, because the language of the FMLA does not explicitly prohibit its extraterritorial application, it may apply anywhere and to any party.

IV. Discussion: Applying Malaysian Law

Should the Ninth Circuit have allowed Trans-Tec to bind Splendid through its contract with Kien Hung? If some of the parties involved had been American, the answer would have been “yes.” In Trans-Tec, the court saw the most important issue as whether the FMLA could be applied extraterritorially to foreign parties doing business overseas with foreign vessels. It largely overlooked a more important and more far-reaching question: What does it mean for a court to apply foreign law?

Imagine a foreign jurisdiction’s body of law as an apothecary’s cabinet with numerous drawers arranged in rows. One of the many rows might be called “contracts,” made up of drawers with labels such as “what constitutes an offer,” “acceptance by performance,” and of course “choice-of-law clauses.” When dealing with a choice-of-law clause problem, a federal court applying that foreign jurisdiction’s law has two options:

1. Pull out one of the drawers and apply only its contents to the facts, or
2. Consider the contents of the entire cabinet, trying as best it can to

94. Id. Splendid relied on the Supreme Court’s decision in Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (subscribing to the canon of construction that Congress is presumed not to intend its legislation apply extraterritorially, unless a contrary intent is apparent) (citing Blackmer v. United States, 284 U.S. 421, 437 (1932)). On a similar note, the Supreme Court more recently held that it “ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. . . . This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world.” F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164-65 (2004).

95. Trans-Tec, 518 F.3d at 1134.

96. See id. at 1131.

97. See supra note 85 and accompanying text.

98. Trans-Tec, 518 F.3d at 1124.
come to the same conclusion the foreign court would.

When a federal court applies U.S. state law, option two is expected and substitution of substantive federal law is not allowed if it promotes forum shopping.99 Following option two would benefit the foreign jurisdiction whose law is being applied, and lead to greater comity. One may assume that U.S. courts, too, would rather see a foreign court apply U.S. law to U.S. defendants in precisely the same way the U.S. court would. Instead, the general practice within the United States has been to follow option one, filling any gaps in the little foreign law the court has before it with U.S. law.100 One might grimace to imagine a U.S. defendant before a Burmese court applying U.S. law, and filling in the gaps with local law.

In 1972, the Supreme Court warned against this kind of parochialism in M/S Bremen v. Zapata Off-Shore Co.101 Prior to the decision in Bremen, U.S. courts were willing to strike down foreign forum selection and choice-of-law clauses because they "oust[ed] the [rightful] jurisdiction of the courts," and so were "contrary to public policy."102 This effectively led to U.S. courts refusing private agreements to settle disputes in foreign jurisdictions.103

Bremen is perhaps most famous for its holding that foreign choice-of-law clauses are to be honored, and the Trans-Tec court was quick to point this out.104 However, the rationale in Bremen for giving effect to a U.K. choice-of-law clause does not support the decision to honor the choice-of-law clause in Trans-Tec. According to the Court in Bremen, not honoring such agreements would be "a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved

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100. Louise Ellen Teitz, From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in US Courts, 34 J. MAR. L. & COM. 98 (2003) (discussing the use of evidence in Admiralty proceedings).
103. See Bremen, 407 U.S. at 8-9.
104. Trans-Tec, 518 F.3d at 1126, 2008 A.M.C. at 691.
in our courts."\textsuperscript{105} This is precisely what the decision in \textit{Trans-Tec} does. Although U.S. law does not generally allow contracting parties to bind a third party, the legal fiction that liens attach to the vessel and not the third party shipowner makes it possible for charterers and suppliers to bind shipowners.\textsuperscript{106} Besides the United States, France, and those countries that signed onto the 1926 Brussels Convention, other countries do not allow maritime liens for the provision of necessaries.\textsuperscript{107} Malaysia, through which law the Bunker Confirmation and Terms and Conditions had to pass to reach the U.S. choice-of-law clause, does not recognize a lien for providing bunkers.\textsuperscript{108}

Of course, option one is the easier of the two, but, for a number of reasons, option two is no longer the near-impossible task it once was. The Internet and other sources “make research into international and foreign law faster and easier, while judicial assistance initiatives, conferences, and visits promote awareness of the relevance of these sources of law.”\textsuperscript{109} Since 1966, the Federal Rules of Civil Procedure have allowed federal courts to apply any relevant foreign authority they can find, whether introduced by the parties or not.\textsuperscript{110}

\textsuperscript{105} See \textit{Bremen}, 407 U.S. at 9, 1972 A.M.C. at 1413. See also \textit{Romero v. Int'l Terminal Operating Co.}, 358 U.S. 354, 382-383, 1959 A.M.C. 832, 854 (“The controlling considerations are the interacting interests of the United States and of foreign countries.”).

\textsuperscript{106} \textit{FORCE ET AL}, supra note 32, at 163.

\textsuperscript{107} \textit{Trans-Tec}, 518 F.3d at 1123 n.4, 2008 A.M.C. at 687 n.4; International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, May 27, 1967.

\textsuperscript{108} Malaysia, like England, recognizes four types of liens: (1) The damage lien. \textit{MARITIME LAW HANDBOOK, MALAYSIA} I-12 (Hans-Christian Albrecht & Roger Heward eds., 2008). When damage is done by a vessel, but only if at the “material time” the vessel was in the hands of the owner or a demise-charterer. \textit{Id.} A Malaysian court would thus not allow such a lien for damage caused by a time-charterer like Kien Hung. (2) The salvage lien. \textit{Id.} This attaches to a vessel as the result of a successful salvage. \textit{Id.} In these cases, the type of charter involved is irrelevant. \textit{Id.} (3) The crew wages lien. \textit{Id.} Crew have a lien over the vessel on which they actually served. \textit{Id.} Here, also, the type of charter involved is irrelevant. \textit{Id.} (4) The master’s disbursement lien. \textit{Id.} This arises in favor of a master for all outstanding disbursements, but only if the true owner of the vessel is personally liable for the claim, and no lien arises if the disbursements were incurred on behalf of any charterer (emphasis added). \textit{Id.} Malaysia also in theory still recognizes liens arising out of bottomry, but as a practical matter such liens no longer exist there.


\textsuperscript{110} FED. R. CIV. P. 44.1. Still, federal judges have been slow to apply foreign law, often opting to employ the more familiar law of the forum. Louise Ellen Teitz, \textit{The Use of Evidence in
Courts need not shoulder the entire burden of researching foreign law. The parties to a suit must bear the lion's share of responsibility for doing so, since Federal Rule of Civil Procedure 44.1 only permits rather than requires the court to do its own research. In a case where the parties do their own thorough research, the court can count on each side’s efforts to satisfy option two, but this will not happen unless parties feel that courts will take their research seriously.

In Trans-Tec, the parties provided the court with citations to a few Malaysian cases, along with other Commonwealth cases that Malaysian courts have cited. Splendid provided citations, while Trans-Tec’s filings cited only American law. Splendid did not research or cite Malaysian law as thoroughly as it could have. Its brief addressed two issues: First, the narrow question of whether,
between Trans-Tec and Kien Hung, Malaysian law would allow the unsigned Bunker Confirmation to incorporate by reference the Terms and Conditions. 115 Second, it partially addressed the wider issue of whether a Malaysian court would apply maritime liens their law does not recognize. 116 Splendid’s discussion of Malaysian maritime lien law is sparse and makes numerous uncited claims. For example, Splendid claims that “Malaysian law does not recognize liens created under foreign law unless Malaysia itself recognizes the underlying claim as giving rise to a lien,” without citing an authority. 117 Instead, it justifies this conclusion based on the fact that “[n]o Malaysian authority exists holding liens not allowed by Malaysia may be enforced elsewhere[.]”118 Few lawyers would feel as comfortable using “the court never held it would, thus it definitely would not” logic in relation to U.S. decisions.119

Despite its thin citation of Malaysian precedent, Splendid does argue the court should apply Malaysian law according to option two: “If Malaysian law is to be applied at all, it should apply to the entire agreement [and not just whether Malaysian courts generally honor amendments to contracts such as the Terms and Conditions].”120 Accomplishing that would require the court to mimic a Malaysian court.


dii. A Wider View: Wearing a Malaysian Hat

A more faithful application of Malaysian law to a maritime lien dispute cannot be made without an understanding of that country’s maritime laws. Original jurisdiction over maritime cases is granted to the High Courts of Malaysia by

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115. See Appellee’s Brief, supra note 113, at 35-43.
116. Id. at 32-35.
117. Id. at 34.
118. Id.
119. As Former Secretary of Defense Donald Rumsfeld’s warned, “the absence of evidence is not the evidence of absence.”
120. Appellee’s Brief, supra note 113, at 34.
Section 24(b) of the revised Courts of Judicature Act 1964. That jurisdiction is based on the United Kingdom’s Supreme Court Act 1981, Chapter 54, Sections 20-24. As discussed earlier, Malaysia has inherited a great deal of its jurisprudence from England and Singapore, and continues to import decisions from those

121. The Courts of Judicature Act 1964 section 24(b) reads:

Civil jurisdiction--specific

Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include—

. . .

(b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981; . . .


122. Sections 21(2)-(4) are of particular interest in cases regarding maritime liens. They read:

Mode of exercise of Admiralty jurisdiction:

. . .

(2) In the case of any such claim as is mentioned in section 20(2)(a), (c) or (s) or any such question as is mentioned in section 20(2)(b), an action in rem may be brought in the High Court against the ship or property in connection with which the claim or question arises.

(3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property.

(4) In the case of any such claim as is mentioned in section 20(2)(e) to (r), where—

(a) the claim arises in connection with a ship; and

(b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against—

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or

(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

jurisdictions, including whole statutes in the case of England. This is especially true in admiralty, where the Rules of the High Court 1980 explain, “in the exercise of the admiralty jurisdiction as well as the substantive law, there is no relevant difference” between the law of Malaysia, England, and Singapore.

Singaporean courts refuse to honor foreign choice-of-law clauses when they are contrary to public policy, like U.S. courts prior to Bremen. There, courts will interfere with the autonomy of contracting parties for public policy reasons. One public policy reason for overriding a foreign choice-of-law clause exists when the parties choose a foreign forum purely to avoid the application of local law. This also goes for parties that choose Singapore law over their own country’s law. In Peh Teck Quee v. Bayerische Landesbank Girozentrale, the Singapore Court of Appeal held that it would not honor a Singapore choice-of-law clause if it was inserted solely to avoid Malaysian law, the default law of the parties. Some acceptable reasons to choose a foreign forum are that one of the parties operates from that jurisdiction or that all its accounts are located there. The court did honor the choice of law clause in that case, reasoning that the purpose of the Singapore choice-of-law clause was not just to avoid Malaysian law, although that may have been one reason.

Unlike the parties in Peh Teck Quee, Trans-Tec chose U.S. law for the express purpose of avoiding the maritime lien law of many of the jurisdictions in which it operates. Trans-Tec’s Terms and Conditions state, “The laws of the United States shall apply with respect to the existence of a maritime lien, regardless of the

123. See LEGAL SYSTEMS OF THE WORLD, supra note 52.
124. Rules of the High Court 1980, Order 70, R. 1, § 5 (on file with author) (citing “Halcyon Isle” Bankers Trust Int’l Ltd v. Todd Shipyards Corp., 2 M.L.J. 217 (Privy Council App. 1980)). Malaysia abolished appeals to the Privy Council in England in stages: on January 1, 1978 appeals in constitutional and criminal matters were abolished, and all other appeals to the Privy Council were abolished on January 1, 1985. SUFFIAN, supra note 52, at 62. All Privy Council appeals from Malaysia decided before those dates is still good law. Id.
125. See Breman, supra note 102.
127. Id. at 154.
128. Id.
129. Id.
130. Id.
131. Id.
132. Trans-Tec, 518 F.3d at 1122, 2008 A.M.C. at 687.
country in which Seller takes legal action."\(^{133}\) The only reason to include such a clause is to avoid the operation of Trans-Tec’s own Singaporean lien laws, as well as those of the majority of its clients.

The courts of the United Kingdom have seen a case which facts are nearly identical to Trans-Tec. In The *Yuta Bondarovskaya*, the Admiralty Division considered a case in which a Norwegian company time-chartered a ship, the *Yuta Bondarovskaya*, to a British charterer.\(^{134}\) The charter-party forbade the charterer from binding the vessel with liens.\(^{135}\) During a voyage, the charterer arranged for a non-American supplier to supply bunkers to the vessel.\(^{136}\) The supplier’s terms and conditions stated that all bunker sales would be made in accordance with the laws of the United States, and so grant it a lien against any ship it supplies.\(^{137}\) Taking the opposite tack from the Ninth Circuit, the Admiralty Division held that a charterer must be expressly authorized to buy necessaries on the vessel’s credit.\(^{138}\) The court held that it is “almost inconceivable” to assume a charterer has authority to bind a vessel.\(^{139}\)

The court found that a necessities supplier has an option to avoid uncertainty of payment: demand payment up front for necessities.\(^{140}\) This option provided to suppliers is much more realistic and reliable than a shipowner’s option under Trans-Tec: to give actual notice to every potential supplier that its charterer has no authority to bind the vessel.

Were a Malaysian court to have heard Trans-Tec, it would naturally consider English admiralty cases when making its judgment. Given that Malaysia claims “[i]ts maritime law is identical with the law of the United Kingdom,”\(^{141}\) it is unlikely a Malaysian court would have come to the decision in Trans-Tec allowing

\(^{133}\) Id.
\(^{135}\) Id.
\(^{136}\) Id.
\(^{137}\) Id. at 361.
\(^{138}\) Id. at 362.
\(^{139}\) Id.; “I can see no reason why an owner, or . . . a demise charterer, should agree [to] any such thing, especially since in practice the supplier would only be likely to claim directly against the owner or demise charterer in circumstances in which the supplier was not paid by his immediate customer, the time charterer, because of insolvency.”
\(^{141}\) Motion for Leave to File Amicus Curiae Brief and Brief of Malaysia as Amicus Curiae in Support of Petitioners, supra note 52, at 1.
U.S. law to govern rather than the decision the Admiralty Division reached.

Neither the court nor the parties in *Trans-Tec* cite any relevant Malaysian caselaw, but that country is not without its own precedent on foreign choice-of-law clauses. In the admiralty case of *Kai Tai Timber Co. Hong Kong v. Inter Maritime Mgmt SDN BHD*, the Court of Appeal upheld Malaysian jurisdiction in the face of an exclusive Japanese choice-of-law clause. The defendant was a Malaysian resident, and the vessel at issue was flagged in Malaysia. The court held that this made Malaysia the most appropriate forum for the case, and ignored the choice-of-law clause.

*Kai Tai Timber* is not the only available Malaysian case that takes this view. In *Globus Shipping & Trading Co. v. Taiping Textiles BHD*, the Federal Court of Malaysia held that "where a cause of action in respect of any dispute in relation to a contract arises and is therefore properly within [a Malaysian high court's] jurisdiction, the court has a discretion whether or not to adjudicate upon the claim in the action *even where the parties have agreed to refer such dispute to a foreign court*.

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145. *Id.* Note that the party insisting on the foreign choice-of-law clause was the Malaysian defendant, and not the foreign plaintiff. *Id.* at 331.

146. The Federal Court was first established in 1963. Globalex, *An Overview of Malaysian Legal System and Research*, Feb. 2008, http://www.nyulawglobal.org/Globalex/Malaysia.htm. At that time, the federal courts were arranged in a three-tier system, as they are today. *Id.* In 1985, the federal court system was collapsed into a binary system: the high courts, and above them the Supreme Court, before finally being reconstituted as a three-tier system, with the Supreme Court being called the Federal Court again. *SUFFIAN, supra* note 52, at 62. 95% of the Federal Court's caseload consists of appeals from lower courts. *Id.* at 63. As the supreme judicial body, the Federal Court's decisions bind all Malaysian courts except itself. *Id.* at 93. Nevertheless, the Federal Court is unlikely to overturn one of its own decision, and usually only does so once every three to four years. *Id.*

After reading *Kai Tai Timber* and *Globus Shipping*, the Ninth Circuit's blanket holding that "Malaysian courts accord dispositive weight to the 'words and actings' of the parties"\textsuperscript{148} is puzzling. In both Malaysian cases, the court refused to honor foreign jurisdiction clauses where both contracting parties had actual knowledge of those clauses, unlike Kien Hung in *Trans-Tec*.

Malaysian courts do not allow a charterer to bind the shipowner for provision of repairs if the owner was not a party to the bunker contract.\textsuperscript{149} In *The M/V Yamato Maru*, a high court\textsuperscript{150} held that when a vessel is chartered out during all times material to a repair contract, the shipowner is not liable for the cost of those repairs.\textsuperscript{151} This is telling, since a shipowner is more likely to see a personal benefit from repairs than it would when bunkers are supplied to her charterer. When repairs are done on a vessel, the only way the repairer could proceed in rem\textsuperscript{152} against that vessel would be if the party to be affected by the arrest (the current operator) was the party which contracted for those repairs: If “there was no contract, express or implied, between the owners and the repairers . . . [then] there was no liability on the owners when the cause of action arose.”\textsuperscript{153}

In fact, the situation faced by the *Yamato Maru* court is quite similar to *Trans-Tec*. In the charter-party, the shipowner forbade the charterer from allowing any liens to attach to the vessel, except for crews wages or salvage, and required it to inform all supplier of the no-lien provision.\textsuperscript{154} Because of these clauses, the court concluded “it cannot be held that, unless the owners bound themselves specifically with the agents, they would be liable for the claim the plaintiffs have against the

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\textsuperscript{148} *Trans-Tec*, 518 F.3d at 1125.
\textsuperscript{149} *The M/V Yamato Maru*, [1977] 2 M.L.J. 41, 44 (Malaya).
\textsuperscript{150} “A legal ruling by a High Court judge binds all subordinate courts, but not other High Court judges, though they would treat it with respect and hesitate not to follow it without good reason.” SUFFIAN, *supra* note 52, at 62 (citing Sundralingam v. Ramanatha Chettiar, [1966] 2 M.L.J. 293).
\textsuperscript{151} *The Yamato Maru*, 2 M.L.J. at 44 (citing The St. Merriel, [1963] 1 Lloyd's Rep. 63 (P. 1963) (U.K.)).
\textsuperscript{152} In Malaysian law, being able to proceed in rem is not synonymous with having a lien against the vessel. See *MARITIME LAW HANDBOOK*, Malaysia I-13 (Hans-Christian Albrecht & Roger Heward eds., 2008).
\textsuperscript{153} *The Yamato Maru*, 2 M.L.J. at 44.
\textsuperscript{154} *Id.* Crews’ wages and salvage are two of the four liens Malaysian courts recognize. See *International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, supra* note 107.
Splendid’s charter-party with Kien Hung also forbade the charterer from incurring liens. Given Malaysia’s views on public policy in regard to choice-of-law clauses and its refusal to allow charterers and suppliers to bind shipowners, it is highly unlikely that a Malaysian court would allow a Singaporean and a Taiwanese company to override the rights of a Malaysian citizen the way the Ninth Circuit did in Trans-Tec.

ii. An Alternative for the Faint of Heart

If courts do not have the stomach for wading through an unfamiliar body of law to the depth needed for proper application, there is another alternative: forum non conveniens. In fact, prior to Trans-Tec, the Ninth Circuit espoused transferring cases that required a thorough familiarity with foreign law to those foreign forums. This would have been appropriate in a case such as Trans-Tec, where U.S. law could not apply until the Malaysian issues were addressed. While it is not currently done, there is no reason that the court could not transfer the case to Malaysia with instructions as to how U.S. law would play out if the Malaysian court allowed the choice-of-law clause. This would ensure the proper application of each country’s laws while keeping additional costs to a minimum.

V. Conclusion

i. The Effect of Trans-Tec

Trans-Tec has the potential to give shipowners and sovereigns around the world extreme anxiety. Shipowners, wherever they are located, cannot charter out their vessels under any kind of charter-party without fear that the charterer will run up a

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155. The Yamato Maru, 2 M.L.J. at 45.
156. Trans-Tec, 518 F.3d at 1129.
157. Menken v. Emm, 503 F.3d 1050, 1063 (9th Cir. 2007) (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947)). Of course, per FED. R. CIV. P. 44.1, if a party fails to plead or prove foreign law, the court is free to apply forum law. Lien Huynh v. Chase Manhattan Bank, 465 F.3d 992, 1001 (9th Cir. 2006).
tab for the shipowner that its own country would not allow and in the face of whatever reasonable effort the shipowner makes to protect himself. Giving actual notice to every potential necessaries supplier is simply not a reasonable solution. Sovereigns too have little power to insulate their citizens because any law they may pass requiring parties to inform each other about no-lien provisions would be pointless in light of the Ninth Circuit’s decision that suppliers without actual notice of liens are not bound by them.

**ii. Moving Forward**

On October 2, 2008, Splendid petitioned the Supreme Court of the United States for certiorari. The question it presented to the Court bears more on the Ninth Circuit’s understanding of the FMLA than on its application of foreign law.

Despite the Ninth Circuit’s claim to the contrary, its decision in *Trans-Tec* does interfere with Malaysian law, curb the sovereignty of other nations, and hamper their ability to regulate their maritime affairs. The government of Malaysia itself has announced as much to the Supreme Court in its request for leave to file a brief as amicus curiae. Further, that brief explains that Malaysian law would never "have allowed a third party to impose a lien against a ship for the supply of bunkers or other 'necessaries.'"

This Supreme Court needed to be address this state of confusion, because it is the only tribunal which could announce a uniform rule to clear up the confusion *Trans-Tec* left in its wake. On December 1, 2008, though, the Court refused certiorari, leaving precedent among the circuits in contradiction. In the absence

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159. Id. at i. The issue as defined by Splendid’s petition is, 158 [m]ay a foreign supplier, by use of a U.S. choice-of-law clause in a sales contract with a foreign vessel’s foreign charterer, nevertheless extend the application of the FMLA in order to create a U.S. maritime lien for goods that it furnished to the foreign vessel in a foreign port, as held below by the Ninth Circuit … ?
160. Motion for Leave to File Amicus Curiae Brief and Brief of Malaysia as Amicus Curiae in Support of Petitioners, supra note 52, at 1.
161. Id.
of guidance from the Court, companies such as Trans-Tec will remain able to bind foreign shipowners that do not give suppliers actual notice, so long as the chartered ships pull into a West Coast port. This state of affairs may not last forever, but in the meantime shipowners have a lot of phone calls to make.