

**A Comparative Overview of English and American Courts’  
Approach to Transnational Maritime Litigation: the American Approach**

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This paper will analyze the approach taken by American courts to issues presented by transnational maritime litigation, including the availability of forum non conveniens and anti-suit injunctions to defeat an opponent’s choice of forum, choice of law methodology, and the effect of limitation of liability proceedings on choice of forum and choice of law.

**I. MARITIME JURISDICTION OF AMERICAN COURTS: A BRIEF OVERVIEW**

**A. *Subject Matter Jurisdiction***

In Article III, § 2 the Constitution of the United States extends the “judicial Power” of the federal judiciary “to all Cases of admiralty and maritime Jurisdiction.”<sup>1</sup> The Congress of the United States then conferred subject matter jurisdiction over admiralty and maritime cases to the federal district courts in the Judiciary Act of 1789, codified today in 28 U.S.C. § 1333:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

- (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
- (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.<sup>2</sup>

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<sup>1</sup> U.S. CONST. ART III, § 2.

<sup>2</sup> Despite this seemingly broad grant of jurisdiction, due to the inclusion of the “savings to suitors” clause in subsection 1, plaintiffs in maritime actions may sometimes bring suit in either state or federal court. This “savings to suitors” clause gives state courts concurrent jurisdiction with federal district courts in many instances, including suits brought *in personam*. See, e.g., *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222, on remand 800 F.2d 1390 (5<sup>th</sup> Cir. 1986). Further, some seemingly “maritime” causes of action may also be brought in either state or federal court: suits under the Death on the High Seas Act, the Jones Act, and the Outer Continental Shelf Lands Act may be brought in either state or federal court. Other actions, however, including proceedings *in rem* and suits under the Limitation of Shipowners’ Liability Act, the Ship Mortgage Act and the Public Vessels Act, remain exclusively federal suits. 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 174 (4<sup>th</sup> ed. 2004)

If a case is “a civil case within admiralty or maritime jurisdiction,” then the federal courts have subject matter jurisdiction “without regard to diversity of citizenship and the amount in controversy or any other basis of subject matter jurisdiction.”<sup>3</sup> The broad geographical jurisdiction of federal district courts in admiralty matters is not limited to the navigable waters of the United States. Instead, the potential reach of a federal district court in a maritime case is worldwide.<sup>4</sup> Accordingly, American courts can and do adjudicate claims arising in a variety of locations.

### ***B. Jurisdiction in Personam or in Rem***

The federal courts’ admiralty jurisdiction extends to all suits of a maritime nature, even between foreign citizens.<sup>5</sup> A plaintiff must still, however, establish that the district court has jurisdiction over the defendant, whether the suit is brought *in personam* or *in rem*. If a suit is *in rem*, jurisdiction is established by showing custody or control over the res.<sup>6</sup> If a suit is *in personam*, the Due Process Clause of the Constitution provides the standard by which jurisdiction over the person is measured. The analysis under the Due Process Clause includes whether there are “minimum contacts” between the defendant and the forum sufficient to support the exercise of jurisdiction.

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<sup>3</sup> 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 81-82 (4<sup>th</sup> ed. 2004) (hereinafter “SCHOENBAUM”).

<sup>4</sup> Harold K. Watson, *Modern Practice Considerations in Maritime Personal Injury Litigation: Procedural Weapons for Venue Battles*, 68 TUL. L. REV. 473, 477 (1993) (hereinafter “Watson”).

<sup>5</sup> See, e.g., *The Belgenland*, 114 U.S. 355, 365-66, 5 S.Ct. 860 (1885); *In Re Damodar Bulk Carriers, Ltd.*, 903 F.2d 675, 678 (9th Cir. 1990).

<sup>6</sup> See, e.g., *Republic Nat’l Bank of Miami v. United States*, 506 U.S. 80, 84 (1992) (stating “it long has been understood that a valid seizure of the res is a prerequisite to the initiation of an in rem civil forfeiture proceeding” and noting that, “in admiralty, the seizure of the res, and the publication of the monition or invitation to appear, is regarded as equivalent to the particular service of process in the court of law and equity.”) (internal citations omitted).

### ***C. Venue***

Special venue rules apply to cases brought in admiralty. Rule 82 of the Federal Rules of Civil Procedure provides that maritime cases are not subject to the general venue statute, 28 U.S.C. § 1391, which allows suit in the district where the claim arose, or if jurisdiction is founded solely on diversity, also where all plaintiffs reside.<sup>7</sup> Instead, venue is proper either in any district court in which service of process may be obtained on the defendant, where the vessel can be arrested or whether personal property or credits of the defendant can be attached pursuant to Rule B of the Admiralty Supplement to the Federal Rules.<sup>8</sup> Specific venue rules apply to admiralty actions against the United States, in actions limiting shipowners' liability, and the Jones Act—a suit under the Jones Act, for example, may be brought against a corporation in any district in a state in which the corporation is doing business.<sup>9</sup>

## **II. DEFEATING AN OPPONENT'S CHOICE OF FORUM.**

### ***A. Transfer or Dismissal in Favor of Another Forum***

Choice of forum is often a critical decision in maritime litigation. The United States is often perceived as a more advantageous forum, especially for personal injury plaintiffs.<sup>10</sup> One mechanism which may secure a party's choice of forum is that of the doctrine of forum non conveniens, a doctrine that “enables a court to decline to exercise its jurisdiction if the moving

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<sup>7</sup> SCHOENBAUM, *supra* note 3, at 83, n. 35; Watson, *supra* note 4, at 477.

<sup>8</sup> Watson, *supra* note 4, at 477.

<sup>9</sup> *Id.* at 478..

<sup>10</sup> *Id.* at 473-74. See also Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COMP. L. 31 (2000) (listing “a number of distinctive features of the U.S. judicial system” attractive to litigants, including lower costs, higher recoveries, contingency fee arrangements, no liability for defendants' attorneys' fees, civil juries, extensive pre-trial discovery procedures, simplified access to courts and lawyers, “wider liability law” and “favorable choice of law provisions selecting plaintiff U.S. law.”).

party establishes that the convenience of the parties and the court and the interests of justice indicate that the case should be tried in another forum.”<sup>11</sup>

When a case is pending in federal district court, and the alternative desired venue is also a federal district court, a party may make a motion to transfer venue under 28 U.S.C. § 1404.<sup>12</sup> Section 1404(a) permits a district court to transfer a case to another federal district court “for the convenience of the parties and witnesses, in the interest of justice.”<sup>13</sup>

Alternatively, if the available forum is in a foreign country, the district court may also wholly dismiss the case under the federal doctrine of forum non conveniens. Under the federal doctrine of forum non conveniens, “when an alternative forum has jurisdiction to hear [a] case, and when trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience, or when the chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems, the court may, in the exercise of its sound discretion, dismiss the case, even if jurisdiction and proper venue are established.”<sup>14</sup> To obtain a dismissal on grounds of forum non conveniens, a party must demonstrate: (1) the existence of an available and adequate alternative forum; and (2) that the balance of relevant private and public interest factors favor dismissal.<sup>15</sup> “[T]he ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice.”<sup>16</sup> An alternative forum is “available” if the entire case and all the parties can come

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<sup>11</sup> *Karim v. Finch Shipping Company, Ltd.*, 265 F.3d 258, 268 (5th Cir. 2001).

<sup>12</sup> 28 U.S.C. §1404.

<sup>13</sup> *Id.*

<sup>14</sup> *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447-48 (1994) (internal quotations omitted) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981)).

<sup>15</sup> *See, e.g., Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 671 (5th Cir. 2003); *De Aguilar v. Boeing Company*, 11 F.3d 55, 58 (5th Cir. 1993).

<sup>16</sup> *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147, 1162 (5th Cir. 1987) (en banc), vacated on other grounds by *Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989).

within the jurisdiction of that forum.<sup>17</sup> An available alternative forum is deemed “adequate” if “the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court.”<sup>18</sup> In some circumstances, however, the remedy provided in the alternative forum may be “so clearly inadequate or unsatisfactory that it is no remedy at all. . . .”<sup>19</sup>

Once a court determines that there is an “adequate” and “available” alternative forum, it must balance several “private interest” and “public interest” factors to determine whether dismissal is appropriate.<sup>20</sup> Such private factors include (1) the plaintiff’s choice of forum; (2) the relative ease of access to sources of proof; (3) the availability of compulsory process to ensure the attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses; (4) the possibility of viewing the premises, if a view would be appropriate to the action; and (5) all other practical problems that make trial of a case easy, expeditious, and inexpensive — including the enforceability of any judgment and whether the plaintiff has sought to harass the defendant by selecting an improper forum.<sup>21</sup> If the private interest factors do not weigh in favor of dismissal, then a series of “public interest” factors must be weighed. The public interest factors include (1) the administrative difficulties courts face when litigation is

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<sup>17</sup> *Vasquez*, 325 F.3d at 671; *In re Air Crash*, 821 F.2d at 1165.

<sup>18</sup> *Vasquez*, 325 F.3d at 671 (quoting *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 379-80 (5th Cir. 2002), cert. denied, 538 U.S. 1012 (2003)).

<sup>19</sup> *Piper Aircraft*, 454 U.S. at 254. In such cases, the alternative forum is deemed inadequate because “dismissal would not be in the interests of justice.” *Id.* The Supreme Court explicitly noted in *Piper Aircraft*, however, that ordinarily, the fact that the alternative forum’s substantive law is less favorable to the plaintiffs should not be given substantial weight in forum non conveniens determinations. *Id.* at 247. “An adequate forum need not be a perfect forum.” *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001). Rather, an alternative forum is “adequate” so long as the parties will be treated fairly and will not be deprived of all remedies there. *See Sydow v. Acheson & Co.*, 81 F. Supp.2d 758, 768 (S.D. Tex. 2000); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 393-94 (5th Cir. 1983) (explaining that a foreign forum is inadequate if conditions there “plainly demonstrate that the plaintiffs are highly unlikely to obtain basic justice therein”).

<sup>20</sup> *Vasquez*, 325 F.3d at 672.

<sup>21</sup> *Id.*; *see also Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 508 (1947).

piled up in congested centers instead of being handled at its origin; (2) the burden of jury duty imposed upon the people of a community that has no relation to the litigation; (3) in cases that touch the affairs of many persons, the interest in holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only; (4) the local interest in having localized controversies decided at home; and (5) the appropriateness of having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.<sup>22</sup> These lists of private and public factors are “by no means exhaustive, and some factors may not be relevant in the context of a particular case.”<sup>23</sup>

An important strategic note for parties seeking to combat an adversary’s choice of forum is that a “defendant’s submission to the jurisdiction of an alternative forum renders that forum available for the purposes of forum non conveniens analysis.”<sup>24</sup> A court may condition dismissal on forum non conveniens grounds on the consent of the defendant to jurisdiction in the foreign forum.<sup>25</sup>

Further, when a court undertakes the above analysis, a foreign plaintiff’s choice of an American forum generally receives less deference than an American plaintiff’s choice of a domestic forum. This is not because of “chauvinism or bias in favor of [United States] residents.” Instead, as the Second Circuit observed in *Wiwa v. Royal Dutch Petroleum Company*,

[i]t is rather because the greater the plaintiff’s ties to the plaintiff’s chosen forum, the more likely it is that the plaintiff would be inconvenienced by a

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<sup>22</sup> *Am. Dredging*, 510 U.S. at 448-49 (quoting *Gulf Oil*, 330 U.S. at 508-09).

<sup>23</sup> *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988).

<sup>24</sup> *Vebe-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1245 (5th Cir. 1983).

<sup>25</sup> *Vasquez*, 325 F.3d at 671; *Nolan v. Boeing Company*, 762 F. Supp. 680, 682 (E.D. La. 1989), *aff’d*, 919 F.2d 1058 (5th Cir. 1990), *cert. denied*, 499 U.S. 962 (1991).

requirement to bring the claim in a foreign jurisdiction. Also, while our courts are of course required to offer equal justice to all litigants, a neutral rule that compares the convenience of the parties should properly consider each party's residence as a factor that bears on the inconvenience that party might suffer if required to sue in a foreign nation.<sup>26</sup>

Finally, a dismissal on forum non conveniens grounds is a final judgment and therefore immediately appealable under 28 U.S.C. § 1291. While the United States Supreme Court explicitly stated in *Piper Aircraft Co. v. Reyno* that, after the district court "has considered all relevant and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference,"<sup>27</sup> appellate courts often undergo a thorough review of the factors analyzed by the district court in a fashion more akin to a de novo review.<sup>28</sup>

### ***B. Forum Selection Clauses***

Any analysis of the American approach to forum selection clauses in maritime contracts, including transnational contracts, begins with *The M/S Bremen v. Zapata Off-Shore Company*.<sup>29</sup> *The Bremen* involved a contract between an American offshore drilling contractor, Zapata, and a German towing company, Unterweser. The contract contained a forum selection clause designating the London Court of Justice as the forum for disputes arising out of the contract. After the rig was damaged in international waters, Zapata brought suit against Unterweser and *The Bremen*, Unterweser's deep sea tug, in U.S. District Court in Florida, where the rig had been towed. Both the district and appellate courts refused to enforce the forum selection clause.

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<sup>26</sup> *Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88, 102 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001) (citations omitted).

<sup>27</sup> *Reyno*, 454 U.S. at 257.

<sup>28</sup> See, e.g., *Pollux Holding Ltd. v. The Chase Manhattan Bank*, 329 F.3d 64, 70 (2d Cir. 2003) ("An evaluation of a motion to dismiss on the grounds of forum non conveniens proceeds in several stages."); *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001); William L. Reynolds, *The Proper Forum for A Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1686 (1992) ("The 'substantial deference' standard enunciated in *Reyno* sees little real use in appellate opinions.")

<sup>29</sup> 407 U.S. 1 (1972). Actually, *The Bremen* built on a long history. See Note, 33 LA.L.REV.481 (1973).

The United States Supreme Court, however, reversed. Opining that the forum selection clause was a “freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power,” the Supreme Court held that the clause should control, absent a strong showing that it should be set aside.<sup>30</sup> A choice of forum clause will be set aside if “unreasonable,” when: (1) their formation was induced by fraud or overreaching; (2) the plaintiff effectively would be deprived of its day in court because of the inconvenience or unfairness of the chosen forum; (3) the fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of such provisions would contravene a strong public policy.<sup>31</sup>

The Supreme Court expanded its holding in *The Bremen* to maritime consumer contracts in *Carnival Cruise Lines v. Shute*.<sup>32</sup> In *Shute*, plaintiff, a resident of the State of Washington, allegedly suffered personal injuries on a cruise off the Mexican coast. The fine print on the back of the ticket required all suits to be brought in Florida, where Carnival was headquartered. Suit was brought in Washington where the ticket had been purchased. The Supreme Court held that the forum selection clause was enforceable, despite the fact that the contract was one of adhesion. The Court reasoned that, because cruise ships typically carry passengers from many different states and countries, the cruise line could be subjected to litigation in many locations. Enforcing the forum selection clause would avoid confusion about the proper forum.<sup>33</sup> The Court, however, indicated that forum selection provisions would not be enforced where to do so would be “fundamentally unfair,” but refused to conclude such was the case there, merely

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<sup>30</sup> *Id.* at 10 - 15.

<sup>31</sup> *Id.* at 15-18.

<sup>32</sup> 499 U.S. 585 (1991).

<sup>33</sup> *Id.* at 593-94.

because the plaintiff was an individual who would be forced to travel across the country to litigate a personal injury claim. The Court also pointed out that the plaintiff admitted there had been adequate notice of the provision.

Whether a passenger plaintiff has received notice from the boilerplate fine print on a cruise ticket has been the subject of considerable litigation since *Shute*. Other cruise line plaintiffs have been unwilling to concede that they have had adequate notice, forcing the courts to wrestle with the issue. The passenger typically does not receive anything spelling out the terms and conditions of passage when the trip is booked, and only receives a ticket some time relatively close to the time of departure. Some courts have held that so long as the passenger has actual or constructive notice of the forum selection provision prior to boarding the ship, the provision is binding.<sup>34</sup> Other courts have held that these provisions are unenforceable unless the passenger is informed of the forum selection clause at the time of contracting.<sup>35</sup>

The Supreme Court extended the *Bremen/Shute* rationale to bills of lading in *Vimar Seguros y Reaseguros, S.A. v. MV SKY REEFER*.<sup>36</sup> There, the bill of lading called for disputes to be arbitrated in Japan. Previous decisions had held that a forum selection clause in a bill of lading governed by the Carriage of Goods by Sea Act was unenforceable as an impermissible lessening of liability.<sup>37</sup> In *SKY REEFER*, the lower courts distinguished these cases on the basis that the Federal Arbitration Act expressly permitted enforcement of clauses calling for foreign

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<sup>34</sup> *Hicks v. Carnival Cruise Lines, Inc.*, 1994 WL 388678, 1995 AMC 281 (E.D. Pa. 1994); *Schaff v. Sun Line Cruises, Inc.*, 999 F. Supp. 924 (S.D. Tex. 1998).

<sup>35</sup> *Carnival Cruise Line v. Superior Court*, 286 Cal. Rptr. 323 (Cal. Ct. App. 1991). *But see Schlessinger v. Holland America, N.V.*, 16 Cal.Rptr.3d 5, 12 (Cal.App. 2 Dist. 2004). The courts have rejected any requirement of notice in bills of lading cases. *American Home Assurance Co. v. TGL Container Lines, Ltd.*, 347 F.Supp.2d 749, 2005 AMC 305 (N.D. Cal. 2004).

<sup>36</sup> 515 U.S. 528 (1995).

<sup>37</sup> *See, e.g., Indussa Corp. v. SS RANBORG*, 377 F.2d 200 (2d Cir. 1967).

arbitration.<sup>38</sup> The Supreme Court rejected the distinction between arbitration clauses and forum selection clauses, overruling the cases that had held that forum selection clauses in bills of lading were unenforceable.

The standard established by these cases has remained the standard applied by American courts for the enforceability of forum selection clauses in maritime contracts in most every context, including contracts of employment. Forum selection clauses in foreign seamen's employment contracts traditionally have been enforced by American courts under *The Bremen* and *Shute*. However, at least two courts have refused to enforce forum selection clauses in American seamen employment contracts with local corporations, finding such clauses "unreasonable" as against public policy under the Jones Act.

In *Marinechance Shipping Limited v. Sebastian*,<sup>39</sup> the United States Fifth Circuit Court of Appeals held that a forum selection clause in a foreign seaman's employment contract was enforceable under a *Bremen/Shute* analysis. In *Marinechance*, two Filipino seamen were injured aboard a Marinechance – a Cypriot corporation – vessel while in navigable waters of the Mississippi River. The employment contracts, which had been approved by the Filipino government, incorporated a Philippines and Cyprus treaty provision that required that any dispute arising out of the contract be litigated "in the country of the seaman's nationality where the contract of employment was signed and approved."<sup>40</sup> Applying United States maritime law, the Fifth Circuit held that under *The Bremen*, the forum selection clause must be enforced absent any evidence that the plaintiff would be prevented from pursuing a remedy.<sup>41</sup> Further, relying on

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<sup>38</sup> 29 F.3d 727 (1<sup>st</sup> Cir. 1994).

<sup>39</sup> 143 F.3d 216, 1998 AMC 2819 (5<sup>th</sup> Cir. 1998).

<sup>40</sup> *Id.* at 220.

<sup>41</sup> *Id.* at 220-21.

*Shute*, the court held that the forum selection clause in the employment contract also governed the tort actions.<sup>42</sup>

With respect to American seaman, statutory provisions and Supreme Court precedent require a different result. In *Boyd v. Grand Trunk Western Railroad Company*,<sup>43</sup> the Supreme Court held a provision in a contract between a railroad worker and his employer purporting to limit the venue of any future suit for personal injuries was void under the Federal Employers Liability Act (“FELA”),<sup>44</sup> which prohibits contractual provisions that lessen a railroad’s liability to its employees. Because the Jones Act adopts FELA, at least two courts have held that forum selection clauses are unenforceable as to Jones Act seaman.

In *Nunez v. American Seafoods*,<sup>45</sup> a seaman filed a Jones Act claim against his employer in state court in Alaska. The employer moved to dismiss, asserting the forum selection clause in the employment contract required the matter be litigated in Washington State. The Alaska Supreme Court held that, because the Jones Act incorporated FELA, the forum selection clause was unenforceable under *Boyd*. The court distinguished *Marinechance*, finding the facts in that case to be purely international, concerning issues of uniformity and comity with no application of the Jones Act or *Boyd*.<sup>46</sup> The *Nunez* court also stated that its holding was not contrary to *The Bremen* and *Shute*, because the Supreme Court held in those cases that forum selection clauses should be unenforceable if against public policy of the forum, such as section 5 of FELA, applicable through the Jones Act.

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<sup>42</sup> *Id.* at 220-22.

<sup>43</sup> 338 U.S. 263 (1949).

<sup>44</sup> 45 U.S.C. § 51-60 (1988).

<sup>45</sup> 52 P.3d 720 (Alaska 2002).

<sup>46</sup> *Id.* at 723-24.

Most recently, in *Boutte v. Cenac Towing, Inc.*,<sup>47</sup> the Southern District of Texas addressed the issue of whether a forum selection clause designating Louisiana the proper forum in a Louisiana seaman's employment contract with a Louisiana corporation was enforceable in a personal injury suit arising out of the seaman's alleged injuries that occurred in Texas and Kentucky. Plaintiff argued that the forum selection clause was void as against public under the Jones Act and FELA. The Southern District of Texas surveyed the jurisprudence in all jurisdictions on the issue, acknowledging the Fifth Circuit's holding in *Marinechance*. However, the court declined to extend *Marinechance* to the facts at bar, distinguishing it on its predominantly international facts.<sup>48</sup> The court instead was persuaded by *Nunez*, subscribing to the reasoning that forum selection clauses were unenforceable in Jones Act cases under *Boyd*.<sup>49</sup> The court noted the Fifth Circuit's silence as to the application of *Boyd* in *Marinechance* and its progeny, and recognized that it was not clear how *Boyd* would apply in seaman's cases that were international in character.<sup>50</sup>

Until the United States Supreme Court addresses the issue of forum selection clauses in seaman's contracts and the application of *Boyd*, courts have two options – they can either apply *Bremen/Shute* strictly, enforcing forum selection clauses absent evidence demonstrating “unreasonableness,” or they may follow the courts' reasoning in *Nunez* and *Boutte* and void the clauses as against the Jones Act. What appears to be clear, however, is that a Jones Act claim must be available before a court can adhere to the *Nunez* reasoning. This likely will require a

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<sup>47</sup> 346 F.Supp.2d 922 (S.D. Tex. 2004).

<sup>48</sup> *Id.* at 932.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

court to first analyze the choice of law to determine whether a Jones Act claim is available before determining the enforceability of a forum selection clause.

### *C. Arbitration clauses*

The Federal Arbitration Act<sup>51</sup> provides that arbitration provisions in maritime contracts are enforceable.<sup>52</sup> As noted above, in *SKY REEFER*, the Supreme Court held that this required the enforcement of arbitration provisions that called for foreign arbitration.

Section 1 of the Federal Arbitration Act expressly states that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” On its face, this would appear to preclude enforcement of arbitration provisions in seamen’s articles or other contracts of employment, and the courts have indeed given it that construction with respect to contracts between a U.S. employer and an U.S. seaman.<sup>53</sup> With respect to employment contracts with international dimensions, however, the broad language of Section 1 must be read in conjunction with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been adhered to and implemented by legislation in the United States.<sup>54</sup> This legislation expressly states that the Federal Arbitration Act only applies “to the extent that [it] is not in conflict with this chapter or the Convention as ratified by the United States.” Accordingly, the courts have held that arbitration agreements in employment contracts between foreign seamen and their employers are enforceable.<sup>55</sup> And in *Freudensprung v. Offshore Technical Services, Inc.*,<sup>56</sup> the

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<sup>51</sup> 9 U.S.C. § 1-16.

<sup>52</sup> 9 U.S.C. § 2.

<sup>53</sup> *Brown v. Nabors Offshore Corp.*, 339 F.3d 391 (5<sup>th</sup> Cir. 2003).

<sup>54</sup> 9 U.S.C. §§ 201 *et seq.*

<sup>55</sup> *Francisco v. Stolt Achievement MT*, 293 F.3d 270 (5<sup>th</sup> Cir. ), *cert. den.* 537 U.S. 1030 (2002).

Fifth Circuit held that even an agreement between U.S. citizens was subject to mandatory arbitration if the agreement calling for arbitration had “some reasonable relation with one or more foreign states.”<sup>57</sup> The court relied on the language of the Convention, which provides that it does not apply to an agreement entirely between U.S. citizens “unless the relationship involves property located abroad, envisages performance or enforcement abroad, or has some reasonable relation with one or more foreign states.” Accordingly, the court held that a U.S. citizen’s Jones Act claim arising out of work performed in west Africa was subject to arbitration.

### **III. CHOICE OF LAW METHODOLOGY IN AMERICAN COURTS FOR TRANSNATIONAL MARITIME ACTIONS**

In cases involving foreign parties or occurrences, the particular facts and circumstances of the litigation determine the law under which the dispute is to be adjudicated. In addition to the laws of the United States, a federal district court sitting in admiralty may also apply the law of foreign nations. A district court must therefore undertake a choice of law analysis in order to determine the law under which the dispute will be adjudicated.

There is some disagreement, however, regarding the proper relationship between a forum non conveniens analysis and a choice of law or conflict of laws analysis. As discussed above, choice of law is often merely one factor that may play into a district court’s determination of whether the suit has been brought in the proper forum. In *Camejo v. Ocean Drilling & Exploration*, the Fifth Circuit noted that the United States Supreme Court in *Piper* held that “a choice of law analysis is only tangentially relevant to the *Gulf Oil* forum non conveniens analysis and that a court need not perform a choice of law analysis before its forum non conveniens

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<sup>56</sup> 379 F.3d 327, 2004 A.M.C. 2059 (5<sup>th</sup> Cir. 2004).

<sup>57</sup> *Id.* at 2070.

analysis.”<sup>58</sup> Some courts, however, still continue to perform a choice of law analysis prior to evaluating a forum non conveniens motion.<sup>59</sup> Further, in some circuits, if a choice of law analysis in a Jones Act case reveals that American law applies, the district court has no discretion to dismiss on the grounds of forum non conveniens.<sup>60</sup>

In determining what law to apply, and in the absence of a contractual relationship between the parties with a forum selection clause mandating a particular forum, district courts are guided by the principles set out by the United States Supreme Court in *Lauritzen v. Lauritzen*,<sup>61</sup> *Hellenic Lines v. Rhoditis*<sup>62</sup> and *Romero v. International Terminal Operating Co.*<sup>63</sup>

According to these seminal cases, eight factors are to be weighed:<sup>64</sup>

- i. The place of the wrongful act;
- ii. The law of the flag;
- iii. The allegiance or domicile of the injured worker;
- iv. The allegiance or domicile of the defendant shipowner;
- v. The place of the contract;
- vi. The inaccessibility, if any, of the foreign forum;
- vii. The law of the forum; and
- viii. The shipowner’s base of operations.<sup>65</sup>

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<sup>58</sup> 838 F.2d 1374, 1378 (5th Cir. 1988) (citing *Piper*).

<sup>59</sup> See *SCHOENBAUM, Watson, supra* note 3, at § 6-13 n.45 (noting that the Ninth, Tenth and Eleventh Circuits still continue make a choice of law analysis before determining whether to dismiss a case on the grounds of forum non conveniens).

<sup>60</sup> See, e.g., *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1483 (9th Cir.1987), cert. denied, 486 U.S. 1054 (1988), amended on other grounds by 861 F.2d 565 (9th Cir.1988) (special venue provision of Jones Act bars forum non conveniens application); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1148 (9th Cir. 2001) (stating that the purpose of a choice of law inquiry in a forum non conveniens analysis is to determine if a statute requiring venue in the United States such as the Jones Act would apply); *but see In re Aircrash Disaster*, 821 F.2d at 1163-64 (forum non conveniens available under Jones Act notwithstanding special venue provision); *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir. 1983) (per curiam) (“maritime choice of law principles are not involved in a forum non conveniens analysis and . . . the district court’s discussion on the subject was therefore unnecessary”).

<sup>61</sup> 345 U.S.571, 583-91 (1953) (factors one through seven).

<sup>62</sup> 398 U.S. 306, 309 (1970) (eighth factor).

<sup>63</sup> 358 U.S. 354, 382-82 (1959).

<sup>64</sup> *Watson, supra* note 4, at 478-79.

<sup>65</sup> This last factor received significant attention recently in *Williams v. Cruise Ships Catering and Service International*, in which the district court noted that while the *Rhoditis* court used the term “‘shipowner’s base of operations,’ the Court later noted that the operational contacts of both the ship and its owner were to be considered in the choice of law analysis.” 320 F. Supp. 1347, 1350 (S.D. Fl. 2004). *Williams* was a Jones Act suit brought by a

*Lauritzen* stated that the law of the flag is generally of “cardinal importance”,<sup>66</sup> and gave less weight to factors such as the law of the forum and the inaccessibility of a foreign forum.<sup>67</sup> However, these factors are not to be applied “mechanic[ally]” but are instead to be weighed in light of the totality of the circumstances.<sup>68</sup> Nor are the factors listed exhaustive.<sup>69</sup> Instead, courts should “view the case as a whole in order to determine which law can most fairly be applied” to the dispute.<sup>70</sup>

Despite language that indicates that, when applying the *Lauritzen* factors, courts should determine that American law applies when the action involves an American domiciliary or an American flagged vessel,<sup>71</sup> other cases show indicate that those factors do not necessarily mandate the application of United States law.<sup>72</sup>

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Costa Rican citizen for injuries suffered while working aboard an Italian-flagged vessel. The owner of the vessel was an Italian company that was at least 99% owned by a Panamanian company whose principal place of business was in Florida. In *Williams*, the district court noted the internal disagreement on that court as to “whether the United States can be considered the base of operations for a shipowner that is owned by a company that primarily conducts its business in the United States,” and certified the question for interlocutory appeal to the Eleventh Circuit Court of Appeals. *Id.* at 1361.

<sup>66</sup> *See* 345 U.S. at 584-86.

<sup>67</sup> *See* 345 U.S. at 584-86.

<sup>68</sup> *Rhoditis*, 398 U.S. at 308.

<sup>69</sup> *Id.* at 309.

<sup>70</sup> *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1517 (11<sup>th</sup> Cir. 1985).

<sup>71</sup> *Watson*, *supra* note 4, at 479. Some Courts have found that the “base of operations” factor alone can provide adequate grounds for applying the Jones Act or general United States maritime law. *See, e.g., Szumlicz v. Norwegian Am. Line*, 698 F.2d 1192, 1195-96 (11<sup>th</sup> Cir. 1983) (finding that substantial use of a United States base of operations justified application of United States law); *Mattes v. Nat’l Hellenic Am. Line, S.A.*, 427 F. Supp. 619, 623 (S.D.N.Y. 1977) (citing another case where “the fact that the shipowning corporation was wholly owned by American stockholders was alone a sufficient contact”). In *Fantome, S.A. v. Frederick*, No. 02-10890, 2003 WL 23009844 (11<sup>th</sup> Cir. 2003) (unpublished), the Eleventh Circuit reversed the district court’s dismissal based on forum non conveniens where the vessel involved never entered a United States port and all of the vessel’s day-to-day operations and repairs took place outside the United States. The Court nevertheless reversed the dismissal because the vessel’s operating agent was headquartered in Miami, the company handling the vessel’s advertising, reservations, and sales also operated out of and was located in Miami, Florida, and the company’s principal shareholder and operating agent resided in Miami Beach. *Id.* at \*2-3.

<sup>72</sup> *Id.*

In *Phillips v. Amoco Trinidad Oil Co.*, the Ninth Circuit held that the law of the flag should not be accorded controlling weight and the allegiance of the defendant shipowner had diminished importance, while the place of the wrongful act, the allegiance and domicile of the plaintiff workers and the place of contract should be given greater weight.<sup>73</sup> More recently, in *Solano v. Gulf King 55*, the Fifth Circuit noted that “the Supreme Court gave substantial weight to the law of the flag and the allegiance of the defendant ship owner” but nonetheless held that a suit by an alien seaman against U.S. owner of a U.S. flag vessel did not necessarily demand the application of U.S. law.<sup>74</sup> The apparent conflicts in the weight accorded to the *Lauritzen* factors can perhaps be explained by an examination of the facts of the underlying case—*Phillips* and *Solano* both involved injuries sustained in brown-water maritime activities in the territorial waters of Trinidad and Nicaragua, respectively. The Fifth Circuit in *Solano* noted that the *Lauritzen* factors were formulated and are traditionally applied to “cases involving vessels engaged in commercial or maritime activities that traveled the high seas, passing through the territorial waters of more than one nation.”<sup>75</sup> The weight accorded the *Lauritzen* factors in such cases was therefore “dictated by the international nature of the vessels’ regular activities, the fortuity of the location of the plaintiffs’ alleged accident or injury and the need to establish a uniform, consistent law onboard a ship that traveled through waters of more than one sovereign nation.”<sup>76</sup> “Accordingly, in the context of these cases, the Supreme Court gave substantial

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<sup>73</sup> 632 F.2d 82, 87 (9th Cir.1980). *But see Warn v. M/Y Maridome*, 169 F.3d 625, 628-29 (9th Cir. 1999) (holding that the base of operations factor alone does not warrant a choice of United States law and finding that the only factor that, alone, could be dispositive is the law of the flag in light of the fact that *Lauritzen* itself firmly mandates that the law of the flag presumptively controls”).

<sup>74</sup> 212 F.3d 902 (5th Cir. 2000), cert. denied, 531 U.S. 930 (2000).

<sup>75</sup> *Id.* at 906.

<sup>76</sup> *Id.*

weight to the law of the flag and the allegiance of the defendant ship owner.”<sup>77</sup> Where the Nicaraguan plaintiffs’ injuries occurred while serving onboard an American-flagged shrimping vessel operating in Nicaraguan territorial waters, the *Solano* court determined that “the calculus ultimately dictates the application of Nicaraguan law.”<sup>78</sup>

Further, the law of the flag may be of diminished importance in other circumstances, particularly when that law is uncertain or when the flag is merely one of convenience.<sup>79</sup>

In the 1970’s, a flood of cases filed by foreign offshore oilfield workers led Congress to amend the Jones Act by adding subsection (b), which reads as follows:

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred---

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources—including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, construction, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the

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<sup>77</sup> *Id.* at 907.

<sup>78</sup> *Id.*

<sup>79</sup> *See, e.g., Sigalas*, 776 F.2d at 1517 (“As the practice of flags of convenience has grown, ‘our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places on them.’”) (citing *Lauritzen*, 345 U.S. at 587); *see also Neely v. Club Med Management Servs.*, 63 F.3d 166, 193-94 (3d Cir. 1995) (noting that under certain circumstances, the law of the flag may have diminished or even “virtually no significance”); *In re Complaint of Fantome S.A.*, 232 F. Supp. 2d 1298, 1305 (S.D. Fla. 2002) (While the vessel bore the flag of Equatorial Guinea, that nation “bears no relationship to this ship or this case. As a result, both parties concur, and the Court finds, that the flag should be disregarded as a factor.”); *Jose v. M/V Fir Grove*, 765 F. Supp. 1024, 1032 (D. Or. 1991) (finding that “[b]eginning with *Rhoditis*, courts have stressed the flexibility of the test and have begun to place greater emphasis on the contacts of the parties and the national interests involved rather than a strict application of the law of the flag.”).

term “continental shelf” has the meaning state in article I of the 1958 Convention on the Continental Shelf.

(2) The provision of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person—

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

This section provides a choice of law rule, but does not prohibit a foreign offshore worker from bringing suit in U.S. courts, subject to the possible dismissal for forum non conveniens.<sup>80</sup>

### **III. LIMITATION OF LIABILITY PROCEEDINGS: EFFECT ON CHOICE OF FORUM AND CHOICE OF LAW**

The Limitation of Liability Act of 1851 limits shipowner liability arising from the unseaworthiness of the shipowner’s vessel or the negligence of the vessel’s crew unless the condition of unseaworthiness or the act of negligence was within the shipowner’s “privity or knowledge.”<sup>81</sup> The Act provides for the enjoining of pending suits against shipowners and their consolidation in a single federal court “so that liability may be determined and limited to the value of the shipowner’s vessel and freight pending.”<sup>82</sup> A shipowner may file a petition for limitation in admiralty jurisdiction in federal district court, or, alternatively, the owner may plead limitation as a defense to an action seeking damages in federal or state court.<sup>83</sup> However, pleading limitation as a defense involves significant risks, since some courts have held that only

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<sup>80</sup> *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 1999 AMC 1656 (Tex. 1999).

<sup>81</sup> 46 U.S.C. App. §§ 181-196 (amended 1936).

<sup>82</sup> *Magnolia Marine Transport Co. v. Oklahoma*, 366 F.3d 1153, 1155 (10th Cir. 2004) (citing SCHOENBAUM at § 15-1, p. 137). The Act “was primarily patterned after the English limitation act, 26 Geo. 3, ch. 86 (1786).” *Vatican Shrimp Co. v. Solis*, 820 F.2d 674, 677 (5th Cir. 1987); *see also Just v. Chambers*, 312 U.S. 383, 385 (1941) (stating that the limitation of liability statutory provisions were “enacted in light of the maritime law of modern Europe and of legislation in England”).

<sup>83</sup> *Magnolia Marine Transport Co.*, 366 F.3d at 1155.

a federal court exercising admiralty jurisdiction can adjudicate an owner's right to limit.<sup>84</sup> A limitation proceeding must be filed within six months of the owner's receipt of written notice of a claim, and an owner who relies on his right to raise limitation as a defense may find himself precluded from limiting liability if his right to limit is challenged.

If the shipowner chooses to file a limitation proceeding in federal district court, a procedure known as *concursum*, "the limitation court stays all related claims against the shipowner pending in any forum, and requires all claimants to timely assert their claims in the limitation court."<sup>85</sup> "In essence, [this] proceeding is the administration of equity in an admiralty court. The proceeding looks to a complete and just disposition of a many cornered controversy, and is applicable to proceedings in rem against the ship as well as to proceedings in personam against the owner, the limitation extending to the owner's property as well as to his person."<sup>86</sup> Owners of both American and foreign flagged vessels may take advantage of the Limitation of Liability Act.<sup>87</sup> Within six months after written notice of a claim arising from a casualty, the vessel owner, or bareboat/demise charter must file its request for limitation with the federal district court in which the casualty occurred.

#### ***A. Limitation of Liability and Forum Non Conveniens***

As noted, a limitation proceeding must be filed within six months of receipt of a written notice of claim, and an owner who fails to file a limitation proceeding may lose his right to limit if he does not file a limitation action. Accordingly, an owner whose vessel is involved in a

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<sup>84</sup> *In re Vatican Shrimp Co., Inc.*, 820 F.2d 674 (5<sup>th</sup> Cir. 1987); *Cincinnati Gas & Elec. Co. v. Abel*, 533 F.2d 1001 (6<sup>th</sup> Cir. 1976). *But see Mapco Petroleum, Inc. v. Memphis Barge Line, Inc.*, 849 S.W.2d312 (Tenn. 1993); *Howell v. American Casualty Co.*, 691 So.2d 715, 1997 AMC 1739 (La. App. 1997).

<sup>85</sup> *Karim v. Finch Shipping Co., Ltd.*, 265 F.3d 258, 264 (5<sup>th</sup> Cir. 2001) (citing *Magnolia Marine Transport Co. v. Laplace Towing Corp.*, 964 F.2d 1571, 1575 (5<sup>th</sup> Cir. 1992)).

<sup>86</sup> *Karim*, 265 F.3d at 258 (citing *Hartford Accident & Indemn. Co. v. S. Pac. Co.*, 273 U.S. 207 (1927)).

<sup>87</sup> Act of Aug. 29, 1935, ch. 804, § 1, 49 Stat. 960 (current version at 46 U.S.C. § 183 (1976)).

casualty and expects to be sued in a jurisdiction in which he may have a jurisdictional defense or a forum non conveniens argument or a jurisdiction other than one where the parties have contracted for as an exclusive forum faces a quandary: Does he forego filing the limitation proceeding and count on his ability to invoke his jurisdictional or venue defenses, or does he file for limitation and risk waiving those defenses?

This issue was first addressed in *The Bremen*. There, the Supreme Court held that the vessel owner who filed a limitation proceeding in the United States did not waive his right to claim that London was the exclusive venue pursuant to the choice of forum clause in the contract between the parties. On the other hand, in *Karim v. Finch Shipping Co.*,<sup>88</sup> the Fifth Circuit held that a vessel owner may not file a limitation of liability proceeding in a federal district court and then argue that the court has no personal jurisdiction. *Karim* does seem to allow a vessel owner to file a limitation proceeding, invoke a concursus, and then seek to have the case dismissed based on forum non conveniens, although the court in *Karim* concluded that the district court's refusal to dismiss on this basis was not an abuse of discretion.

### ***B. Limitation of Liability and Choice of Law***

Most countries other than the United States have adopted either the Brussels Convention of 1957 or the London Convention of 1976 to govern shipowners' rights to limit liability. These limitation regimes differ significantly from U.S. law.<sup>89</sup> Most notably, these limitation regimes provide for a limitation amount based upon the tonnage of the vessel rather than the post-casualty value of the vessel. Thus, when a limitation proceeding is filed in the United States and there are foreign elements such a foreign flag, a foreign owner, or foreign claimants, the question

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<sup>88</sup> 265 F.3d 258, 2001 AMC 2618 (5<sup>th</sup> Cir. 2001).

<sup>89</sup> For a discussion of the 1976 Convention and how it differs from U.S. law, see Watson, *The 1976 IMCO Limitation Convention: A Comparative View*, 15 HOU.L.REV. 249 (1978).

arises of whether the U.S. Limitation Act or the foreign regime should govern the amount of the fund, the conditions for limitation, etc.

In theory, one would expect these questions to be governed by the Restatement (Second) approach to maritime choice of law questions mandated by the *Lauritzen* and *Romero* decisions. Unfortunately, however, the Supreme Court got its hands on this question before modern conflicts of laws methodology was even a twinkle in Prof. Brainerd Currie's eye. In *The Titanic*,<sup>90</sup> the claimants suffering damage as a result of the sinking of that ill-fated British flag vessel argued that the owner should have to post the higher tonnage-based limitation fund rather than the minimal value of the lifeboats and scrap recovered from the ship. The Supreme Court, however, speaking through Justice Holmes, held that since the claimants had sought to enforce their rights in an American forum, their rights were limited under U.S. law.

Thirty five years later, the Supreme Court spoke again, and, if anything, complicated matters further. In *The Norwalk Victory*,<sup>91</sup> the Court through Justice Frankfurter held that if foreign limitation provisions "attach to the right," as opposed to merely providing procedural machinery to bring claims into concourse, the foreign law could apply.

With all due respect to these two giants of American jurisprudence, both decisions appear to be seriously flawed on any number of planes. *The Norwalk Victory* assumes that a limitation regime will be either substantive *or* procedural, but every limitation scheme is both—it provides a substantive defense to a shipowner, and provides a procedural means for enforcing that right. Moreover, implicit in *The Titanic* is the notion that limitation decrees are to be given only national and not international recognition; a claimant who doesn't want to be limited by U.S. law, for example, can simply not file a claim in the U.S. proceedings, and can then file in another

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<sup>90</sup> *Oceanic Steam Navigation Co. v. Mellor*, 233 U.S. 718 (1914).

<sup>91</sup> *Black Diamond SS Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386 (1949).

forum and require the owner to initiate limitation proceedings in that forum. Thus, these decisions encourage and in fact require duplicative forum-shopping that could have avoided by holding that the substantive limitation law of the jurisdiction with the most significant connection with the casualty applies, to be administered pursuant to the procedural law of the forum where limitation proceedings are commenced.

#### **IV. Conclusion**

Both the marine industry and the legal problems that arise out of maritime commerce transcend national borders. Hopefully this paper will prove useful in addressing these issues.