Excerpts From:

Admiralty and Maritime Law

Second Edition

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Introduction

Article III of the U.S. Constitution defines the boundaries of subject-matter jurisdiction for the courts. Specifically, it extends the judicial power of the United States to "all Cases of admiralty and maritime Jurisdiction." This grant of judicial power has been implemented by Congress in 28 U.S.C. § 1333, which states that "The [United States] district courts shall have original jurisdiction, exclusive of the Courts of the States, of (1) any civil case of admiralty or maritime jurisdiction …." In current usage the terms "admiralty jurisdiction" and "maritime jurisdiction" are used interchangeably. The Constitution does not enumerate the types of "matters" or "cases" that fall within the terms "admiralty and maritime jurisdiction."

The Admiralty Clause in Article III does not disclose or even provide the means for ascertaining whether a particular dispute is an admiralty or maritime case. This task has been performed primarily by the courts and, to a lesser extent, by Congress. Also, the Constitution does not specify the legal rules to apply in resolving admiralty and maritime disputes. It does not even point to the sources of substantive law that judges should consult to derive such rules. This task also has been performed primarily by the courts and, to some extent, by Congress. In this regard, federal courts have not merely created rules to fill gaps or to supplement legislation as they have in other areas; they have played the leading role in creating a body of substantive rules referred to as the "general maritime law."[1] Thus, as will be discussed later, the power of federal courts to entertain cases that fall within admiralty and maritime jurisdiction has required courts, in the exercise of their jurisdiction, to formulate and apply substantive rules to resolve admiralty and maritime disputes.

1. Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 St. Louis U. L.J. 1367 (1999).

No federal statute provides general rules for determining admiralty jurisdiction. No statute comprehensively enumerates the various categories of cases that fall within admiralty jurisdiction. With two exceptions, the few instances where Congress has expressly conferred admiralty jurisdiction on federal district courts have always been in connection with the creation of a specific, new statutory right. Notable examples include the Limitation of Vessel Owner's Liability Act,[2] the Ship Mortgage Act,[3] the Death on the High Seas Act,[4] the Suits in Admiralty Act,[5] the Public Vessels Act,[6] the Outer Continental Shelf Lands Act,[7] and the Oil Pollution Act of 1990.[8] By contrast, the Carriage of Goods by Sea Act[9] and the Federal Maritime Lien Act[10] make no reference to admiralty jurisdiction. The Jones Act provides an action on the law side but is silent as to whether an action can be brought in admiralty.[11] The tort and indemnity provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA) likewise make no reference to admiralty jurisdiction. Congress has not taken up the issue of jurisdiction over collision cases or cases involving towage, pilotage, or salvage. No statutes confer admiralty jurisdiction over marine insurance disputes. With the exceptions of the Death on the High Seas Act (DOHSA), the Jones Act, and the LHWCA, Congress has not addressed the substantive law of maritime personal injury and death claims, let alone the issue of jurisdiction over such claims.

2. 46 U.S.C. §§ 30501–30512 (2006).

3. *Id.* §§ 31301–31342.

4. *Id.* §§ 30301–30308.

5. *Id.* §§ 30901–30918.

6. *Id.* §§ 31101–31113.

7. 43 U.S.C. § 1331 (2006).

8. 33 U.S.C. § 2701 (2006).

9. 46 U.S.C. § 30701 note (2006).

10. *Id.* §§ 31341–31343.

11. *Id.* §§ 30104–30105. The Jones Act, which provides for recovery for injury to or death of a seaman, is discussed *infra* text accompanying notes 425–79.

In addition to 28 U.S.C. § 1333, the Admiralty Extension Act[12] and the Great Lakes Act[13] are the only instances where Congress has enacted admiralty jurisdiction statutes that are not tied to a specific statutorily created right. By and large, it appears that Congress has been content to allow the federal courts to define the limits of their admiralty jurisdiction.

Admiralty Jurisdiction in Tort Cases

Navigable Waters of the United States

There has never been any doubt that admiralty jurisdiction extends to the high seas and the territorial seas.[14] The same may not be said of inland waters. Originally, U.S. courts applied the English rules for determining admiralty jurisdiction. Those rules, however, would exclude from admiralty jurisdiction incidents and transactions involving the Great Lakes and inland waterways. In a series of cases, the U.S. Supreme Court overruled its earlier precedents and abandoned the English rules as unsuited to the inland water transportation system of the United States.

In place of the English rules, the Court equated the scope of admiralty jurisdiction with "navigable waters."[15] The term "navigable waters of the United States" is a term of art that refers to bodies of water that are navigable in fact. This includes waters used or capable of being used as waterborne highways for commerce, including those presently sustaining or those capable of sustaining the transportation of goods or passengers by watercraft. To qualify as "navigable waters," bodies of water must "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway

12. 46 U.S.C. § 30101 (2006).

13. Great Lakes Act of Feb. 26, 1845, ch. 20, 5 Stat. 726, 28 U.S.C. § 1873 (2006). *See also* Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 451 (1851) ("The law, however, contains no regulations of commerce; nor any provision in relation to shipping and navigation on the lakes. It merely confers a new jurisdiction on the district courts; and this is its only object and purpose.").

14. Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty, § 1-11 at 31 (2d ed. 1975) [hereinafter Gilmore & Black].

15. Jackson v. The Steamboat Magnolia, 61 U.S. (20 How.) 296 (1857).

over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."[16]

A body of water that is completely landlocked within a single state is not navigable for purposes of admiralty jurisdiction. It is important to note, however, that a body of water need not flow between two states or into the sea to be navigable. A body of water may be navigable even if it is located entirely within one state as long as it flows into another body of water that, in turn, flows into another state or the sea. A body of water need only be a link in the chain of interstate or foreign commerce.[17] Thus, if a small river located completely within a state flows into the Mississippi River, it satisfies the navigability requirement, provided its physical characteristics do not preclude it from sustaining commercial activity. Furthermore, commercial activity need not be presently occurring as long as the body of water is "capable" of sustaining commercial activity.[18]

A body of water may be nonnavigable because obstructions, whether natural or man-made (e.g., dams), preclude commercial traffic from using the waters as an interstate or international highway or link thereto.[19] Removal of the obstruction may then make the waters navigable. The converse is true. A body of water may at one time have been navigable and have supported interstate or foreign commerce; however, the construction of dams or other obstructions may render certain portions of the waterway impassable to commercial traffic. If the obstruction precludes interstate or foreign commerce, the body of water has become nonnavigable and will not support admiralty jurisdiction.[20] The fact that a body of water was historically navigable does not mean that it will remain so in the future.

16. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

17. *Id.*

18. LeBlanc v. Cleveland, 198 F.3d 353 (2d Cir. 1999). *See also* Lockheed Martin Corp. v. Morganti, 412 F.3d 407, 412-13 (2d Cir. 2005).

19. *LeBlanc*, 198 F.3d 353.

20. *Id.*

The term "navigable waters" may have legal relevance on issues other than admiralty jurisdiction and may have different meanings that apply in other contexts. In *Kaiser Aetna v. United States*,[21] the Supreme Court identified four separate purposes underlying the definitions of "navigability": to delimit the boundaries of the navigational servitude, to define the scope of Congress's regulatory authority under the Commerce Clause, to determine the extent of the authority of the Army Corps of Engineers under the Rivers and Harbors Act, and to establish the scope of federal admiralty jurisdiction.[22]

Man-made bodies of water, such as canals, may qualify as navigable waters if they are capable of sustaining commerce and may be used in interstate or foreign commerce.[23] A body of water need not be navigable at all times, and some courts have recognized the doctrine of "seasonal navigability."[24] For example, a body of water may be used for interstate and foreign commerce during certain times of the year but may not support such activity during the winter when the water freezes. Events that occur during the period when the waterway is capable of being used may be subject to admiralty jurisdiction.

The Admiralty Locus and Nexus Requirements

In tort cases, the plaintiff must allege that the tort occurred on navigable waters and that the tort bore some relationship to traditional maritime activity.[25] The first requirement is referred to as the maritime location or locus criterion, and the second as the maritime nexus criterion.

21. 444 U.S. 164 (1979).

22. *Id.* at 171–72.

23. *In re* Boyer, 109 U.S. 629 (1884).

24. Wilder v. Placid Oil Co., 611 F. Supp. 841 (W.D. La. 1985). *See also* Missouri v. Craig, 163 F.3d 482 (8th Cir. 1998); Gollatte v. Harrell, 731 F. Supp. 453 (S.D. Ala. 1989).

25. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995). *See also* Hamm v. Island Operating Co., 450 F. App'x 365 (5th Cir. 2011).

Maritime Locus

"Maritime locus" is satisfied by showing that the tort occurred on navigable waters.[26] Thus, maritime locus is present where a person on shore discharges a firearm and wounds a person on a vessel in navigable waters.[27] Locus is similarly present where a person injured on a vessel in navigable waters subsequently dies following surgery to treat the injury in a hospital on land.[28]

The Admiralty Extension Act

Congress expanded the maritime location test by enacting the Admiralty Extension Act (AEA),[29] which confers on the federal courts admiralty jurisdiction over torts committed by vessels in navigable waters notwithstanding the fact that the injury or damage was sustained on land. The AEA was enacted specifically to remedy situations referred to as allisions, where vessels collide with objects fixed to the land, such as bridges that span navigable waterways.

The language of the AEA, however, is not limited to ship–bridge allisions. In one of the most extreme situations, maritime jurisdiction was found under the AEA in a case where a "booze cruise" passenger, after disembarking the vessel, was injured in an automobile accident caused by the driver of another car who allegedly became drunk while also a passenger on the cruise.[30] It is crucial to AEA jurisdiction that the injury emanate from a vessel in navigable waters. The mere fact that a vessel may be involved in an activity is not enough. The party who invokes jurisdiction under the AEA must show vessel negligence. Vessel negligence relates not only to defective appurtenances or negligent navigation but also to any tortious conduct of the crew while on board the vessel that results in injury on land.

26. The Plymouth, 70 U.S. 20 (1865). *See also* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 582 (1995); Sisson v. Ruby, 497 U.S. 358, 360 (1990).

27. Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

28. Motts v. M/V Green Wave, 210 F.3d 565 (5th Cir. 2000).

29. 46 U.S.C. § 30101 (2006).

30. Duluth Superior Excursions, Inc. v. Makela, 623 F.2d 1251 (8th Cir. 1980).

Maritime Nexus

The maritime nexus criterion is of relatively recent origin, and its meaning is still being developed. It was created by the Supreme Court to restrict the scope of admiralty tort jurisdiction for various policy reasons, not the least of which are considerations of federalism, and a desire to confine the exercise of admiralty jurisdiction to situations that implicate national interests. "Maritime nexus" is satisfied by demonstrating (1) that "the incident has 'a potentially disruptive impact on maritime commerce'" and (2) that "'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'"[31]

The nexus requirement evolved from four Supreme Court cases. The first case, *Executive Jet Aviation, Inc. v. City of Cleveland*,[32] held that federal courts lacked admiralty jurisdiction over an aviation tort claim where a plane during a flight wholly within the U.S. crashed in Lake Erie.[33] Although maritime locus was present, the Court excluded admiralty jurisdiction because the incident was "only fortuitously and incidentally connected to navigable waters" and bore "no relationship to traditional maritime activity."[34] The Court supplemented the maritime locus test by adding a nexus requirement that "the wrong bear a significant relationship to traditional maritime activity."[35] In the second case, *Foremost Insurance Co. v. Richardson*,[36] the Court made the nexus criterion a general rule of admiralty tort jurisdiction and held that admiralty tort jurisdiction extended to a collision between two pleasure boats. The third case, *Sisson v. Ruby*,[37] confirmed that a vessel need not be engaged in commercial activity or

31. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995) (citing Sisson v. Ruby, 497 U.S. 358, 364, n.2, 365 (1990)).

32. 409 U.S. 249 (1972).

33. The Court declined to hold that admiralty jurisdiction could never extend to an aviation tort. *Id.* at 271–72.

34. *Id.* at 273.

35. *Id.* at 268.

36. 457 U.S. 668 (1982).

37. 497 U.S. 358 (1990).

be in navigation and extended tort jurisdiction to a fire on a pleasure boat berthed at a pier.

The fourth and last case to address tort jurisdiction is *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co*.[38] Workers on a barge in the Chicago River were replacing wooden pilings that protected bridges from being damaged by ships, and the workers undermined a tunnel that ran under the river. Subsequently, the tunnel collapsed, and water flowed from the river into the "Loop" (the Chicago business district), causing extensive property damage and loss of business. Refining the previous three cases, the Court articulated the latest version of the nexus criterion: The plaintiff must show that the tort arose out of a traditional maritime activity.[39] This, in turn, requires a showing (1) that the tort have a potentially disruptive effect on maritime commerce and (2) that the activity was substantially related to traditional maritime activity.[40] The first factor is not applied literally to the facts at hand; rather, the facts are viewed "at an intermediate level of possible generality."[41] The Court focused only on the "general features" of the incident, which it described as "damage by a vessel in navigable water to an underwater structure."[42] Damage to a structure beneath a waterway could disrupt the waterway itself and disrupt the navigational use of the waterway. Such an incident could adversely affect river traffic, and in this case it did. River traffic actually ceased, stranding ferryboats and preventing barges from entering the river system. Applying the second factor, the Court focused on whether the general character of the activity giving rise to the incident reveals a substantial relationship to traditional maritime activity. As the Court said: "We ask whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the

38. 513 U.S. 527 (1995).
39. *Id.* at 534.
40. *Id.*
41. *Id.* at 538.
42. *Id.* at 539.

suit at hand."[43] Observing that the requisite relationship was found in *Foremost* (navigation of vessel) and *Sisson* (docking of vessels), the Court similarly found that repair and maintenance work on a navigable waterway performed from a vessel met the test.

There are several clues as to where the Court may be going with the nexus test, especially in torts involving vessels. The parties in the damage actions who opposed admiralty jurisdiction in *Grubart* had argued that applying the nexus test by looking at "general features" rather than the actual facts would mean that any time a vessel in navigable waters was involved in a tort the two criteria will be met. The majority responded by stating that "this is not fatal criticism,"[44] and the concurring opinion observed that inasmuch as *Executive Jet* formulated a rule to deal with airplane crashes, no complex nexus test should be required where a tort involves a vessel on navigable waters.[45] Ultimately, the locus test may once again become the sole criterion in tort cases involving vessels.

It would appear that after *Grubart* it is inappropriate for a court to use any test for nexus other than the criteria approved in that case. In the aftermath of *Executive Jet*, lower federal courts had attempted to fine-tune the nexus requirement; many courts of appeals followed the lead of the Fifth Circuit, which formulated four factors to be applied in determining if the maritime nexus requirement was satisfied.[46] The Supreme Court, however, indicated its disapproval of these factors,[47] and ultimately expressly rejected them.[48]

43. *Id.* at 539–40.

44. *Id.* at 542.

45. *Id.* at 550, 551 (Thomas, J., and Scalia, J., concurring).

46. Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). Subsequently these four factors were supplemented by several others. Molett v. Penrod Drilling Co., 826 F.2d 1419 (5th Cir. 1987), *cert. denied*, 493 U.S. 1003 (1989).

47. Sisson v. Ruby, 497 U.S. 358 (1990).

48. *Grubart*, 513 U.S. at 544.

Admiralty Jurisdiction in Contract Cases

In contract cases, courts have not used the locus and nexus criteria but have focused instead on the subject matter of the contract. One commentator suggests the following approach for determining admiralty contract jurisdiction:

> In general, a contract relating to a ship in its use as such, or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment is subject to maritime law and the case is one of admiralty jurisdiction, whether the contract is to be performed on land or water.
>
> …
>
> A contract is not considered maritime merely because the services to be performed under the contract have reference to a ship or to its business, or because the ship is the object of such services or that it has reference to navigable waters. In order to be considered maritime, there must be a direct and substantial link between the contract and the operation of the ship, its navigation, or its management afloat, taking into account the needs of the shipping industry, for the very basis of the constitutional grant of admiralty jurisdiction was to ensure a national uniformity of approach to world shipping.[49]

However, some contract cases have formulated jurisdictional distinctions that defy logic. Consider the following contracts that have been held to lie within admiralty jurisdiction:

> Suits on contracts for the carriage of goods and passengers; for the chartering of ships (charter parties); for repairs, supplies, etc., furnished to vessels, and for services such as towage, pilotage, wharfage; for the services of seamen and officers; for recovery of indemnity or premiums on marine insurance policies.[50]

Compare the foregoing with the following that have been held not to be within admiralty jurisdiction: "Suits on contracts for the building and sale of vessels; for the payment of a fee for procuring a

49. Steven F. Friedell, 1 Benedict on Admiralty § 182, at 12-4 to 12-6 (7th rev. ed. 1999).

50. Gilmore & Black, *supra* note 14, § 1-10, at 22.

charter; for services to a vessel laid up and out of navigation."[51] A mortgage on a vessel was not deemed by courts to be a maritime contract until Congress so provided.[52]

Although it is not without dispute, executory contracts may satisfy admiralty jurisdiction, notwithstanding the fact that breaches of such contracts do not give rise to maritime liens.[53] However, it appears that so-called "preliminary" contracts are not maritime contracts.[54] The criterion for determining which contracts are preliminary contracts is not perfectly clear. Generally, when a contract necessitates or contemplates the formation of a subsequent contract that will directly affect the vessel, the first contract is characterized as a preliminary contract. Examples of contracts that have been deemed preliminary include contracts to supply a crew[55] and to procure insurance.[56] At one time, "agency" agreements were thought to be preliminary contracts. The Supreme Court, however, has rejected this per se rule that deemed all agency contracts to be nonmaritime contracts.[57] Thus, it appears that contracts that obligate a person to provide services directly to a vessel may be maritime contracts as distinguished from ones in which a person merely obligates himself or herself to procure another to provide services to a vessel. In any event, the Supreme Court has indicated that the determination as to whether agency contracts are maritime or not should be made on a case-by-case basis.

51. *Id.* at 26.

52. *Id.* at 27.

53. Terminal Shipping Co. v. Hamberg, 222 F. 1020 (D. Md. 1915).

54. Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp., 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985).

55. Goumas v. K. Karras & Son, 51 F. Supp. 145 (S.D.N.Y. 1943), *cert. denied*, 322 U.S. 734 (1944).

56. F.S. Royster Guano Co. v. W.E. Hodger Co., 48 F.2d 86 (2d Cir.), *cert. denied*, 283 U.S. 858 (1931).

57. Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603 (1991), discussed *infra* text accompanying note 925.

The Supreme Court has reexamined its approach to maritime contract, as it explained in *Norfolk Southern Railway Co. v. Kirby*:[58]

> Our cases do not draw clean lines between maritime and non-maritime contracts. We have recognized that "[t]he boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw." To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case. * * * Instead, the answer "depends upon … the nature and character of the contract," and the true criterion is whether it has "reference to maritime service or maritime transactions."[59]

Mixed Contracts

Some contracts may have aspects that satisfy the maritime requirement for admiralty jurisdiction, and yet there may be aspects of the contract that are clearly nonmaritime. For example, a contract may call for both ocean and overland transport. The old rule was that a mixed contract is not an admiralty contract unless the nonmaritime aspect of the contract is merely incidental to the maritime aspect, or the maritime and nonmaritime aspects are severable and the dispute involves only the maritime aspect.[60] However, in 2004 the Supreme Court announced a new rule in *Kirby*, extending admiralty jurisdiction to a case involving cargo that had been shipped by sea from Australia to the U.S. and subsequently damaged in a railroad accident. The carriage was pursuant to a "through" bill of lading which covered both the ocean and overland legs. The Court held that the "through" bill was a maritime contract because the bill's "*sea* components" were not "insubstantial."[61] Thus, the test seems to be that a mixed contract is a maritime contract if the sea component is

58. 543 U.S. 14 (2004). The Court's approach to admiralty contract jurisdiction in *Exxon* and *Norfolk Southern* may signal a modification of the *per se* rule that disqualifies all preliminary contracts from admiralty jurisdiction. *See infra* text accompanying notes 925-27.

59. *Id.* at 23-24 (citations omitted).

60. Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F.3d 105 (2d Cir. 1997).

61. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 27 (2004).

substantial. The Court reaffirmed this approach in *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*,[62] another case in which cargo was damaged on land after the completion of an ocean voyage.

Multiple Jurisdictional Bases

Even when the facts of a case satisfy the jurisdictional criteria and would permit the plaintiff to invoke a federal court's admiralty jurisdiction, an alternative basis for bringing suit in federal court may be used. This option occurs most frequently in diversity cases where the plaintiff and defendant are citizens of different states, or where one of the parties is a citizen of the United States and the other party is a citizen or subject of a foreign country.

Rule 9(h) of the Federal Rules of Civil Procedure

When the facts alleged in a complaint satisfy more than one basis for federal jurisdiction, the plaintiff may opt to base the complaint on either ground. However, in order for the case to be heard under the court's admiralty jurisdiction, Rule 9(h) of the Federal Rules of Civil Procedure directs that the plaintiff must designate the claim as one in admiralty;[63] otherwise, the court will proceed at law in order to allow for a jury trial. By invoking diversity of citizenship as the basis for jurisdiction instead of admiralty jurisdiction, or by not opting to designate the claim as an admiralty claim, the plaintiff gains the advantage of a jury trial. However, the plaintiff may lose the advantage of certain procedures available only in admiralty cases, including the remedies of arrest and maritime attachment provided for in the Supplemental Rules to the Federal Rules of Civil Procedure. (These remedies are discussed later in this chapter.)

Multiple Claims

A plaintiff may have multiple claims, some arising under admiralty jurisdiction and some being claims at law. This occurs most often in seamen's personal injury actions where a plaintiff seeks to join a

62. 130 S. Ct. 2433 (2010).

63. Fed. R. Civ. P. 9(h).

claim at law under the Jones Act with admiralty claims for unseaworthiness and maintenance and cure. Joinder of claims raises several issues.

Absent legislation to the contrary, there is no right to a jury trial in an action brought under admiralty jurisdiction, 28 U.S.C. § 1333.[64] Where there are multiple bases of jurisdiction, a litigant can obtain the right to a jury trial by, for example, invoking diversity instead of admiralty jurisdiction. However, if the parties are diverse but the plaintiff specifically designates the claims as admiralty claims pursuant to Rule 9(h), the parties would lose the right to a jury trial. Congress has provided for the right to jury trial in Jones Act and Great Lakes Act cases.[65]

The propriety of joinder of admiralty claims with a Jones Act claim at law was addressed in *Romero v. International Terminal Operating Co.*[66] The plaintiff, a Spanish crewmember injured while the Spanish-owned vessel was docked in New York, filed suit against his employer and other defendants, asserting damages under general maritime law for unseaworthiness and maintenance and cure and under the Jones Act at law for personal injuries. The plaintiff was of diverse citizenship from all defendants except his employer. In order to obtain a jury trial, the plaintiff sought joinder of his claims in one action at law. He asserted that unseaworthiness and maintenance and cure claims could also be brought as claims at law pursuant to 28 U.S.C. § 1331;[67] that "maritime law" is part of the "laws" of the United States and therefore claims that arose under the rules of substantive admiralty law arose under the laws of the United States. As such, claims based on maritime law could be brought in federal court under general federal question jurisdiction. There were two issues in the case: whether the plaintiff may join his maritime law

64. Waring v. Clarke, 46 U.S. (5 How.) 441, 460 (1847).

65. Great Lakes Act of Feb. 26, 1845, ch. 20, 5 Stat. 726; 28 U.S.C. § 1873 (2006).

66. 358 U.S. 354 (1959).

67. General federal question jurisdiction was first created by the Act of March 3, 1875, 18 Stat. 470 (1875). Although the text had been somewhat modified in the version before the Court as now contained in 28 U.S.C. § 1331, the differences were not relevant to the decision.

claims against his employer with his claim at law brought under the Jones Act, and whether the plaintiff may join other defendants of diverse citizenship with his claim brought under the Jones Act against his nondiverse employer.

As to the first issue, a majority of the Supreme Court held that in determining the jurisdiction of federal courts, the word "laws" as used in Article III of the Constitution and in 28 U.S.C. § 1331 did not encompass claims within the admiralty and maritime jurisdiction of the federal courts.[68] Nevertheless, the Court held that the two admiralty claims (unseaworthiness and maintenance and cure) could be "appended" to the Jones Act claim and brought with it on the law side.

As to the second issue, the majority held that the plaintiff's diversity claims could be joined with the Jones Act claim against his nondiverse employer, notwithstanding the fact that the rule of complete diversity would not be satisfied. This deficiency was cured by the Jones Act, which provided an independent basis for jurisdiction over the nondiverse party. The Court did not address the jury trial issue.

Some courts have extended the holding of *Romero*, permitting joinder of an action arising under the general maritime law against a nondiverse defendant with an action against another party of diverse citizenship.[69] In other words, the plaintiff, in one action, may assert diversity jurisdiction against one defendant and another basis of federal jurisdiction, such as federal question or admiralty, against another defendant.

Prior to the enactment of the Supplemental Jurisdiction Act,[70] most federal courts had adopted a liberal approach to joinder of claims and parties under the Federal Rules of Civil Procedure and additionally under various theories of pendent and ancillary

68. *Romero*, 358 U.S. at 367.

69. Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995). *Contra* Powell v. Offshore Navigation, Inc., 644 F.2d 1063 (5th Cir. 1981).

70. 28 U.S.C. § 1367 (2006).

jurisdiction.[71] This liberal approach not only applied with respect to multiple claims asserted by a plaintiff against one defendant and to claims asserted against multiple defendants but was also followed in cases involving counterclaims, cross-claims, and impleader.[72] The Supplemental Jurisdiction Act confirmed the correctness of these decisions and essentially supplanted them. Section 1377(a) of the Act states that

> in any civil action of which the district courts have original jurisdiction, the district courts have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the U.S. Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

In *Fitzgerald v. United States Lines Co.*,[73] the Supreme Court held that where maintenance and cure and unseaworthiness claims are joined in the same action as a Jones Act claim, all claims should be resolved by the jury. The Court's decision was based on several rationales. Congress had made it clear that the right to jury trial was part of the Jones Act remedy. Allowing the jury to resolve all issues was the most efficient manner of resolving the disputes, and having one decision maker would ensure consistency. The Court emphasized that there is a constitutional right to a jury trial in certain instances, but there is no corresponding constitutional right to a nonjury trial in admiralty cases.

The Supreme Court has not addressed other jury trial issues outside of the context of the seaman's trinity of claims. For example, in cases where a plaintiff sues in admiralty and the defendant files a counterclaim at law, is the defendant entitled to a jury trial?[74] Where a

71. *See, e.g.,* Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); Roco Carriers, Ltd. v. M/V Nurnberg Express, 899 F.2d 1292 (2d Cir. 1990).

72. *In re* Oil Spill by the Amoco Cadiz, 699 F.2d 909 (7th Cir. 1983). *See also* cases cited *infra* note 75.

73. 374 U.S. 16 (1963).

74. *See*, *e.g.*, St. Paul Fire & Marine Ins. Co. v. Lago Canyon, Inc., 561 F.3d 1181 (11th Cir. 2009); Wilmington Trust v. United States Dist. Ct. for the Dist. of Haw., 934 F.2d 1026 (9th Cir. 1991). For a discussion of the conflicting rulings on

plaintiff sues in admiralty and the defendant impleads a third-party defendant based on a claim at law, does either the third-party plaintiff or the third-party defendant have a right to a jury trial?[75] The situation is particularly difficult where issues of fact in the plaintiff's original admiralty claim are intertwined with those presented in the other claims and where, under the *Fitzgerald* rationale, it makes sense to have all the issues resolved by the same fact finder. Similar problems are presented where the plaintiff originally files an action at law and a counterclaim or third-party action is based on an admiralty claim.

In these various situations there are four possible solutions: (1) Try everything to the jury (the *Fitzgerald* approach); (2) try everything to the court (this could present Seventh Amendment issues in some cases); (3) have the jury resolve the actions at law and the court resolve the admiralty claims, an approach that presents a possibility of inconsistency; and (4) have the jury resolve the claims at law and use the jury as an advisory jury[76] on the admiralty claims. Some federal courts have concluded that the rationale underlying *Fitzgerald* applies in other contexts and have opted in favor of jury trial of all claims.[77] The Supplemental Jurisdiction Act, in liberalizing joinder of claims and joinder of parties, is silent on the issue of jury trial.[78]

The Supreme Court has not addressed the availability of admiralty remedies when admiralty claims are joined with claims at law. When a plaintiff joins a claim at law with admiralty claims, some courts have allowed all claims to be resolved by the jury and have allowed the plaintiff to invoke admiralty remedies such as arrest and attachment on the admiralty claims.[79]

whether a party in an admiralty case who asserts a counterclaim at law is entitled to a jury trial, see *Concordia Co. v. Panek*, 115 F.3d 67 (1st Cir. 1997).

75. *See, e.g.,* Gauthier v. Crosby Marine Serv., Inc., 87 F.R.D. 353 (E.D. La. 1980); Joiner v. Diamond M Drilling Co., 677 F.2d 1035 (5th Cir. 1982).

76. Fed. R. Civ. P. 39(c).

77. Zrncevich v. Blue Haw. Enters., Inc., 738 F. Supp. 350 (D. Haw. 1990); *Wilmington Trust*, 934 F.2d 1026.

78. 28 U.S.C. § 1367 (2006).

79. Haskins v. Point Towing Co., 395 F.2d 737 (3d Cir. 1968). *See also* Luera v. M/V Alberta, 635 F.3d 181 (5th Cir. 2011).

Judges and lawyers often speak of "admiralty cases" and "actions at law," and yet these labels may be misnomers. Where a person presents a case involving two claims, it is possible that one claim will be resolved according to substantive rules of admiralty and the other claim will be resolved by nonadmiralty rules. Such a "case" is neither an "admiralty case" nor is it a "nonadmiralty case." In the days before the unification under the Federal Rules of Civil Procedure of the various actions, law, equity, and admiralty, each constituted a separate docket. The merger of law, equity, and admiralty under the Federal Rules, and the emergence of the "civil action" subjecting law, equity, and admiralty claims to a unified set of procedural rules, combined with the consequent liberalization of the rules on the joinder of claims and parties, have set the stage for hybrid actions involving claims at law and admiralty.

Hybrid claims arise in various contexts. On the one hand, it is common for a seaman to file a personal injury claim and seek recovery under the Jones Act and under the general maritime law for unseaworthiness and for maintenance and cure. The seaman may in fact have suffered a single injury but has alleged three different theories for recovery. The legal basis for each claim is different, and it is possible for the seaman to prevail on one theory and lose on another. In these situations each claim stands on its own footing.

On the other hand, a plaintiff may have one claim, such as one based on the general maritime law. If diversity of citizenship exists, the seaman, under Federal Rule of Civil Procedure 9(h), has the option of pleading his or her case in law with a right to trial by jury or as an admiralty claim with trial to the court but with the opportunity to invoke special remedies that are available only in admiralty cases. The Federal Rules do not give this plaintiff a right to plead the case as both a claim at law and a claim in admiralty.[80]

Arguably, the two situations are different because in the latter, the plaintiff only has one claim and one cause of action as to which the

80. *See, e.g.,* T.N.T. Marine Serv., Inc. v. Weaver Shipyards & Dry Docks, Inc., 702 F.2d 585 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983). *See also* Apache Corp. v. Global Santa Fe Drilling Co., 435 F. App'x 322 (5th Cir. 2011). *Cf.* Luera v. M/V Alberta, 635 F.3d 181 (5th Cir. 2011); Hamilton v. Unicoolship, Ltd., No. 99 CIV 8791 (LMM), 2002 WL 44139 (S.D.N.Y. Jan. 11, 2002).

Rule 9(h) option applies. The same substantive rules will be applied regardless if the plaintiff pleads at law or in admiralty. In the first situation, although it may be correct to say that the plaintiff has suffered but one injury and may not receive double or triple recovery, the claims are legally separate and are based on different substantive rules. The plaintiff does not truly have the 9(h) option because, lacking diversity, he or she cannot plead general maritime claims as claims at law. Perhaps these differences explain the apparent disagreement in the lower courts and the difficulty that some courts have had with hybrid claims.[81]

The Saving to Suitors Clause

Admiralty Cases in State Courts

Section 1333 of title 28 not only confers admiralty jurisdiction in the federal courts, it also contains a provision characterized as the "saving to suitors" clause. This provision saves to suitors (plaintiffs) whatever nonadmiralty "remedies" might be available to them.[82] This means that plaintiffs may pursue remedies available under the common law or other laws in state courts. Ordinarily, when plaintiffs seek monetary damages for tort or contract claims that fall within admiralty jurisdiction, they have a choice of bringing a suit in admiralty in federal court or bringing suit in state court.[83] One advantage of bringing suit in state court is the availability of a jury trial.

There are some limitations on the remedies that plaintiffs may pursue in state court, the most significant being that admiralty remedies, such as the action *in rem*, may be brought only in an admiralty action in federal court.[84]

81. *Luera*, 635 F.3d 181.
82. 28 U.S.C. § 1333 (2006).
83. *Id.*
84. The Hine, 71 U.S. 555 (1866).

Admiralty Actions at Law in Federal Courts

There is another dimension to the saving to suitors clause. Ordinarily, in diversity of citizenship cases brought in federal court, state law provides the substantive rules for the resolution of the dispute. The saving to suitors clause, however, does not provide that a state remedy is saved or even that a remedy in a state court is saved. As originally worded, the clause saved "the right of a common-law remedy where the common law was competent to give it."[85] Today, it simply saves to suitors "all other remedies to which they are entitled." Thus, the saving to suitors clause has been interpreted to permit a plaintiff to seek a common-law remedy in a federal court where diversity of citizenship is present.[86] This means that the plaintiff files the action under 28 U.S.C. § 1332. In such cases, both the plaintiff and defendant may demand a jury trial.

Law Applicable

Where a plaintiff invokes the saving to suitors clause to bring an action in a state court or in federal court under diversity jurisdiction, the issues in most cases will be resolved by the application of the substantive rules of admiralty and maritime law, whether enacted by Congress or as part of the general maritime law. The application of federal law in saving to suitors cases is known as the "Reverse *Erie*" doctrine. Pursuant to this doctrine, state courts are required to apply substantive maritime law even if a case is properly brought in state court.[87] However, federal courts (and state courts for that matter), in

85. Judiciary Act of 1789, ch. XX § 9 (1789).

86. *In re* Lockheed Martin Corp., 503 F.3d 351 (4th Cir. 2007); Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995).

87. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 545–46 (1995) (stating that "the exercise of admiralty jurisdiction does not result in the automatic displacement of state law"). *See*, *e.g.*, Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 259 (1922) ("general rules of maritime law apply whether the proceeding be instituted in an admiralty or common-law court"). *See also* Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading, Inc., 697 F.3d 59, 69 (2d Cir. 2012) ("plaintiffs who have viable admiralty claims may choose to pursue them in state court, either under federal law or under other laws").

some circumstances, may apply state substantive law even where the case before them falls under admiralty jurisdiction.[88]

Removal

Generally, it is the plaintiff who has the choice to sue in federal or state court. Under certain circumstances, defendants are given the right to remove a case from state court to federal court.[89] Once a case is properly removed, it proceeds in federal court as though it had been originally filed there. The most common basis for removing a case from state to federal court is that the case could originally have been filed in federal court—that is, it meets the constitutional and statutory jurisdictional criteria.[90]

In *Romero v. International Terminal Operating Co.*,[91] the Supreme Court, in dictum, recognized an important exception to the right to removal: Where a suit is commenced in a state court, and it could have been brought in federal court under 28 U.S.C. § 1333 (admiralty and maritime jurisdiction), the case may not be removed to federal court if admiralty jurisdiction is the only basis for federal jurisdiction.[92] This means that plaintiffs who exercise their option under the "saving to suitors" clause and sue in state court can keep their cases in state court unless there is diversity of citizenship or some statutory basis other than § 1333 to support the assertion of federal jurisdiction. The lower federal courts applied *Romero*'s dictum.[93] Based on a literal reading of the amended removal statute,

88. *See*, *e.g.*, Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199 (1996).
89. 28 U.S.C. § 1441 (2006).
90. *Id.*
91. 358 U.S. 354 (1959).
92. *Id.* at 371–72.
93. *See, e.g.,* Pierpoint v. Barnes, 94 F.3d 813 (2d Cir. 1996):

> Common law maritime cases filed in state court are not removable to federal court, due to 28 U.S.C. § 1333's "saving to suitors" clause. Dating back to the Judiciary Act of 1789, this clause preserves a plaintiff's right to a state court forum in cases arising under the common law of the sea.

however, at least one commentator has questioned the viability of the *Romero* dictum.[94]

Sources of Admiralty and Maritime Law

There are several sources of admiralty and maritime law. The Constitution has been interpreted as authorizing both Congress[95] and the courts[96] to formulate substantive rules of admiralty law. The United States has ratified numerous international maritime conventions, particularly those that promote safety at sea and the prevention of pollution.[97] At times, Congress has gone beyond ratification and has actually enacted an international convention as the domestic law of the United States: The Carriage of Goods by Sea Act (COGSA) is an example.[98] However, with the exceptions of COGSA (discussed *infra* Chapter 2) and the Salvage Convention (discussed *infra* Chapter 8), the United States has not enacted international conventions that deal with liability between private parties or with procedural matters. Conventions aside, as the following discussion elaborates, Congress has enacted statutes creating substantive rules of admiralty and maritime law. Various federal agencies, particularly the U.S. Coast Guard, have promulgated numerous regulations that deal with vessels and their operations.

The General Maritime Law

Like Congress, federal courts have created substantive rules of maritime law. These court-made rules are referred to as "the general maritime law," which has two dimensions. To some extent, the

Id. at 816 (citing *Romero*, 358 U.S. at 363). *See also* Nesti v. Rose Barge Lines, Inc., 326 F. Supp. 170, 173 (N.D. Ill. 1971); Commonwealth of P.R. v. Sea-Land Serv., Inc., 349 F. Supp. 964, 977 (D.P.R. 1970).

94. *See, e.g.,* Kenneth G. Engerrand, *Removal and Remand of Admiralty Suits*, 21 Tul. Mar. L.J. 383 (1997).

95. *See* The Thomas Barlum, 293 U.S. 21 (1934).

96. *See* The Lottawanna, 88 U.S. 558 (1874); E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986).

97. *See generally* Frank Wiswall, 6–6F Benedict on Admiralty (7th rev. ed. 2001).

98. 46 U.S.C. § 30701 note (2006).

general maritime law applies rules that are customarily applied by other countries in similar situations. This reflects that certain aspects of the general maritime law are transnational in dimension, and custom is an important source of law in resolving these disputes. The other aspect of the general maritime law is purely domestic. Because Congress has never enacted a comprehensive maritime code, the courts, from the outset, have had to resolve disputes for which there were no congressionally established substantive rules. In the fashion of common-law judges, the courts created substantive rules out of necessity. Occasionally, federal courts have looked to state law to resolve maritime disputes.

Choice of Law: U.S. or Foreign

The shipping industry operates worldwide. Vessels on a single voyage may call at one or more foreign ports. Vessels often are supplied and repaired in foreign ports. Cargo may be damaged or lost while at sea in the course of an international voyage or in a foreign port, and likewise seamen may be injured on the high seas or in the waters of foreign countries. Today, international shipping is a complex business, and its activities are conducted in a manner that often implicates the interests of several countries. Some admiralty cases filed in U.S. courts involve personal injury and wage claims of foreign seamen; others arise out of transactions and occurrences that involve contacts with other countries. Such cases often present jurisdictional, choice-of-law,[99] and *forum non conveniens* issues.[100]

99. Choice-of-law and forum selection clauses are discussed *infra* Chapter 2 (COGSA; Charter Parties), Chapter 3 (Personal Injury and Death), and Chapter 8 (Salvage).

100. The Supreme Court has formulated the rules for determining when an action brought in federal court should be dismissed under the doctrine of *forum non conveniens*. Admiralty cases are subject to those rules. Am. Dredging Co. v. Miller, 510 U.S. 443 (1994) (holding, however, that states are not bound to apply these rules). The criteria were articulated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and reaffirmed in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). Ships are engaged in international and interstate commerce, giving a special importance to the doctrine of *forum non conveniens*.

In such situations, the jurisdictional issue is usually resolved first. Then, if the court concludes that it has jurisdiction over the claim, it must determine the law to be applied to that claim. Finally, if the court determines that the law of a foreign country should be applied, it may have to rule on a motion to dismiss on grounds of *forum non conveniens*.

The open-ended jurisdictional criteria often compel federal courts to deal with choice-of-law and *forum non conveniens* issues. Because the admiralty jurisdiction of the federal courts is extremely broad, subject-matter jurisdictional issues may not be the most difficult ones to resolve. Consider that an injury aboard or caused by a vessel in navigable waters usually meets the locus and nexus tests, and, if proper service of process can be effected on the defendant or defendant's property, a federal court would have admiralty jurisdiction over the claim. Likewise, contracts to repair vessels and to supply vessels with necessaries are maritime contracts, and, if service of process can properly be made, a federal court would have jurisdiction over such claims.

Two leading Supreme Court cases provide the rules for choice-of-law analysis. Although both of these cases involved personal injury claims by foreign seamen, the Court's approach has been used by lower federal courts as a point of departure or as a guideline to resolve choice-of-law issues in many other kinds of admiralty cases. The first case, *Lauritzen v. Larsen*,[101] involved a foreign seaman employed by a foreign shipowner on a foreign-flag vessel who brought suit in a U.S. court seeking to recover damages under the Jones Act.[102] The Court enumerated and discussed various criteria that have been commonly resorted to in resolving international choice-of-law issues in the maritime context. These factors include (1) the place of the wrongful act, (2) the law of the flag, (3) the allegiance or domicile of the injured seaman, (4) the allegiance of the defendant shipowner, (5) the place where the contract of employment

101. 345 U.S. 571 (1953).

102. Suit was brought for injuries the foreign seaman had sustained in U.S. waters. The Jones Act provides a remedy for "any seaman" and as such is not limited to U.S. seamen or even to seamen who serve on U.S. vessels.

was made, (6) the inaccessibility of a foreign forum, and (7) the law of the forum.

In *Hellenic Lines, Ltd. v. Rhoditis*,[103] the Court added an eighth factor: the shipowner's base of operations. At times, this last factor may be the most crucial, as it was found to be in *Rhoditis*. But the fact that a shipowner has a U.S. base of operations does not automatically trigger the application of U.S. law.[104]

The *Lauritzen–Rhoditis* criteria are regarded as the proper criteria to be applied in admiralty cases and, as stated, have been used in cases other than seamen's personal injury cases.[105]

Choice of Law: Congressional Preemption and State Law

Legislative preemption in the maritime area is merely a species of the general doctrine of congressional preemption and is exemplified in the case of *United States v. Locke*.[106] In *Locke*, the Supreme Court decided that a complex series of safety requirements for oil tankers imposed by the state of Washington could not coexist with various federal statutes and regulations promulgated thereunder by the U.S. Coast Guard. The Court applied its rules relating to "conflict preemption" [107] and "field preemption," [108] and also applied the approach it had previously formulated in *Ray v. Atlantic Richfield Co.*,[109] where it had invalidated much of the state of Washington's comprehensive regulation of oil tankers and their operations.

103. 398 U.S. 306 (1970).

104. *See, e.g.,* Reino de Espana v. American Bureau of Shipping Inc., 691 F.3d 461, 466-68 (2d Cir. 2012) (citing Carbotrade S.p.A. v. Bureau Veritas, 99 F.3d 86, 89 (2d Cir. 1996)); Warn v. M/Y Maridome, 169 F.3d 625, 628 (9th Cir.), *cert. denied*, 528 U.S. 874 (1999).

105. *See, e.g.,* Trans-Tec Asia v. M/V Harmony Container, 518 F.3d 1120 (9th Cir. 2008); Oil Shipping (Bunkering) B.V. v. Sonmez Denizcilik Ve Ticaret A.S., 10 F.3d 1015 (3d Cir. 1993); Klinghoffer v. S.N.C. Achille Lauro, 795 F. Supp. 112 (S.D.N.Y. 1992).

106. 529 U.S. 89 (2000).

107. *Id.* at 109.

108. *Id.* at 110–11.

109. 435 U.S. 151 (1978).

In some cases, however, the Court has allowed states substantial leeway. For example, in *Huron Portland Cement Co. v. City of Detroit*,[110] a case involving the validity of a city smoke-abatement ordinance, the majority stated that "[e]venhanded local regulation to effectuate a legitimate local public purpose is valid unless preempted by federal action."[111] The Court held that there was no statutory preemption and concluded that, in the absence of legislation, "[s]tate regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." [112] After referring to numerous cases where state and local regulations had been upheld,[113] the Court found no impermissible burden on commerce. Likewise, *Kelly v. Washington*[114] upheld a state hull and machinery inspection statute, rejecting an argument that it conflicted with federal statutory standards and an alternative argument that the subject matter required uniformity that only federal legislation can provide: "When the state is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the state of the power which it would otherwise possess."[115]

The issue of statutory preemption has presented itself in various contexts, including the preemption of state remedies for personal injury and death for seamen and for certain maritime workers under the Jones Act [116] and the Longshore and Harbor Workers' Compensation Act,[117] the preemption of state remedies under the Death on the High Seas Act,[118] the preemption of certain liens under

110. 362 U.S. 440 (1960).

111. *Id.* at 443.

112. *Id.* at 448.

113. *Id.* and authorities cited therein.

114. 302 U.S. 1 (1937).

115. *Id.* at 14.

116. *See*, *e.g.*, Lindgren v. United States, 281 U.S. 38 (1930).

117. *See*, *e.g.*, Davis v. Dep't of Labor & Indus. of Wash., 317 U.S. 249 (1942).

118. *See*, *e.g.*, Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986).

the Federal Maritime Lien Act,[119] the preemption under the Carriage of Goods by Sea Act,[120] and the nonpreemption of a state's remedies for damage to its environment whether caused by the discharge of smoke[121] or oil.[122] In such cases, the issue is not whether the federal legislation is valid but whether or not state legislation can be applied to supplement federal law.

Maritime law, in one way or another, has accommodated the application of state law under certain circumstances.[123]

In *Southern Pacific v. Jensen*,[124] the Supreme Court articulated an approach for delineating impermissible state encroachment on federal maritime law. There, the Court held that the family of a longshoreman killed aboard a vessel in navigable waters was not entitled to recover an award under the New York workers' compensation statute. There are three situations in which state law may not be applied: (1) where state law conflicts with an act of Congress, (2) where it "works material prejudice to the characteristic features of the general maritime law," or (3) where it "interferes with the proper harmony and uniformity" of the general maritime law "in its international or interstate relations."[125] Subsequent decisions, however, have not developed a coherent body of law that describes the "characteristic features of the general maritime law" or explains what types of state

119. *See*, *e.g.*, *In re* Mission Marine Assocs., Inc., 633 F.2d 678 (3d Cir. 1980).

120. *See*, *e.g.*, Polo Ralph Lauren, L.P. v. Tropical Shipping & Constr. Co., 215 F.3d 1217 (11th Cir. 2000).

121. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960). *See also* UFO Chuting of Hawaii, Inc. v. Smith, 508 F.3d 1189 (9th Cir. 2007).

122. 33 U.S.C. § 2718(a)(1) (2006) (providing express nonpreemption of state remedies in cases of oil pollution damage). *See also* Askew v. Am. Waterways Operators, Inc., 411 U.S. 325 (1973); Bouchard Transp. Co. v. Updegraff, 147 F.3d 1344 (11th Cir. 1998), *cert. denied*, 525 U.S. 1140 and 525 U.S. 1171 (1999).

123. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 546 (1995); Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 373–75 (1959). *See also* Steven F. Friedell, 1 Benedict on Admiralty § 105 (7th rev. ed. 1999); Robert Force, *Deconstructing* Jensen: *Admiralty and Federalism in the Twenty-First Century*, 32 J. Mar. L. & Com. 517 (2001).

124. 244 U.S. 205 (1917).

125. *Id.* at 216.

law might "work[ ] material prejudice" to those features.[126] Likewise, subsequent decisions have not clarified the meaning of the "*proper* harmony and uniformity" of the general maritime law "in its *international and interstate relations*."[127] The Court has not routinely used the *Jensen* criteria as the point of departure and has not applied *Jensen* in a consistent manner.[128] Also, it created exceptions, such as the "maritime but local"[129] and the "twilight zone"[130] rules.

Of all the post-*Jensen* cases, the most helpful one from a methodological perspective is *American Dredging Co. v. Miller*.[131] The case involved the validity of a Louisiana statute that precluded the application of the doctrine of *forum non conveniens* in admiralty cases. The majority opinion begins, "The issue before us here is whether the doctrine of *forum non conveniens* is either a 'characteristic feature' of admiralty or a doctrine whose uniform application is necessary to maintain the 'proper harmony' of maritime law."[132] A characteristic feature is one that either "originated in admiralty" or "has exclusive application there."[133] The Court concluded that the *forum non conveniens* rule does not satisfy either criterion.

The Court went on to consider the impact of the *forum non conveniens* rule on the proper harmony and uniformity of maritime law. The federal rule of *forum non conveniens* "is procedural rather than substantive, and it is most unlikely to produce uniform results."[134] Furthermore, "[t]he discretionary nature of the doctrine

126. *Id*.

127. *Id*. (emphasis added).

128. Am. Dredging Co. v. Miller, 510 U.S. 443, 452 (1994). *See generally* David W. Robertson, *The Applicability of State Law in Maritime Cases After* Yamaha Motor Corp. v. Calhoun, 21 Tul. Mar. L.J. 81, 95–96 (1996); Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 Tul. L. Rev. 1421, 1439–64 (2001).

129. W. Fuel Co. v. Garcia, 257 U.S. 233 (1921).

130. Davis v. Dep't of Labor & Indus., 317 U.S. 249 (1942).

131. 510 U.S. 443 (1994).

132. *Id.* at 447 (Scalia, J.).

133. *Id.* at 450.

134. *Id.* at 453.

[*forum non conveniens*], combined with the multifariousness of the factors relevant to its application, . . . make uniformity and predictability of outcome almost impossible."[135]

The dissent does not merely assume that *forum non conveniens* is important to maritime law but rather engages in an analysis absent in virtually all other discussions of choice of law in prior decisions of the Supreme Court. In this respect, the dissent explains why a uniform application of the maritime *forum non conveniens* rule is important to the national interests of the United States. The dissent's approach is innovative and instructive in three respects. First, it remarks on the fact that no state interest seems to be promoted by not applying *forum non conveniens* in admiralty cases, and no state interest would seem to be undermined if the general maritime rule were followed. Second, it faults the majority for making a mistake in formulating the test to be applied. It is not where the admiralty rule originated or whether it has unique application in admiralty that is critical—the issue is whether *forum non conveniens* is an "important feature of the uniformity and harmony to which admiralty aspires."[136] Third, the dissent concludes that it is important for the *forum non conveniens* rule to be uniformly applied and links it to the Admiralty Clause of the Constitution by pointing out that a uniform rule of *forum non conveniens*

> serves objectives that go to the vital center of the admiralty preemption doctrine. Comity among nations and among States was a primary aim of the Constitution. At the time of the framing, it was essential that our prospective trading partners know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers to commerce. The individual States needed similar assurances from each other.[137]

135. *Id.* at 455 (citations omitted).
136. *Miller*, 510 U.S. at 463 (Kennedy, J., dissenting).
137. *Id.* at 466.

5. Limitation of Liability

Introduction

In the United States, a shipowner's right to limit its liability is governed by the Limitation of Vessel Owner's Liability Act of 1851.[704] The Limitation Act permits a shipowner to limit its liability following maritime casualties to the value of the owner's interest in its vessel and pending freight, provided that the accident occurred without the privity or knowledge of the owner.[705] However, the owner of a seagoing vessel involved in a marine casualty that results in the loss of life or personal injuries may be required to set up an additional fund if the value of the vessel and pending freight is insufficient to pay such losses in full.[706] The United States has not adopted either of the international conventions relating to limitation of liability that apply in many other countries.[707]

Practice and Procedure

The Limitation Act and Rule F of the Supplemental Rules of Civil Procedure specify the procedures for limitation proceedings. To initiate a limitation proceeding, a shipowner must file a complaint within six months of its receipt of a claim in writing.[708] It is not the date of the casualty that is controlling but the date the shipowner receives notice of a claim. The complaint may seek "exoneration" as well as limitation of liability—that is, the owner may plead that it is not liable at all, and in the alternative that if it is liable it is entitled to

704. 46 U.S.C. §§ 30501-30512 (2006).

705. *Id.* § 30505.

706. *Id.* § 30506.

707. International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships (1957) and International Convention on Limitation of Liability for Maritime Claims (1976).

708. 46 U.S.C. § 30511(a) (2006); Fed. R. Civ. P. Supp. R. F(1).

limit its liability as provided in the Limitation Act.[709] A complaint seeking limitation may only be filed in a federal district court.

Upon filing a complaint for limitation, the owner of the vessel must "deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight."[710] Alternatively, the owner may transfer its interest in the vessel and pending freight to a trustee. If the owner chooses to transfer its interest in the vessel to a trustee, the owner must include in its complaint any prior paramount liens and any existing liens that arose upon any voyages subsequent to the marine casualty.[711] The owner must also provide security for costs.[712] There is no requirement either in the statute or Rule F that these other liens be satisfied by the owner as a precondition to its right to limitation. The lien claimants may seek to intervene and file their claims in the limitation proceeding. Any claimant to the fund may file a motion to have the fund that has been deposited with the court increased on the ground either that it is less than the value of the owner's interest in the vessel and pending freight, or that the fund is insufficient to meet all of the claims against the owner in respect to loss of life or bodily injury.[713] Upon filing such a motion, the burden of proof is on the movant.

Once the owner of the vessel complies with the requirements of Rule F(1), the court "shall" enjoin all claims and proceedings against the owner of the vessel or its property with respect to the matter in question.[714] The court must then give notice to all parties asserting claims with respect to the incident for which the owner of the vessel has sought limitation, advising the parties to file their claims in the limitation proceeding. The owner of the vessel is also required to mail a copy of the notice to all persons known to have made claims against

709. Fed. R. Civ. P. Supp. R. F(2).

710. *Id.* Supp. R. F(1).

711. *Id*. Supp. R. F(2).

712. *Id*. Supp. R. F(1). If the owner of the vessel chooses to post security, it must include interest at the rate of 6% a year from the date the security is posted. *Id*.

713. *Id*. Supp. R. F(7).

714. 46 U.S.C. § 30511(c) (2006); Fed. R. Civ. P. Supp. R. F(3).

the owner or its vessel regarding the incident for which limitation is sought.[715]

Rule F, therefore, results in a single proceeding, referred to as a "concursus" of claims, in which all suits arising out of the marine casualty must be litigated. There are two situations, however, in which a claimant will be allowed to maintain its claim outside of the limitation of liability proceeding. First, when the owner of the vessel has deposited with the court an amount in excess of all claims, a concursus is not necessary because there is no possibility that the owner could be held liable in an amount in excess of the limitation amount. In such circumstances, claimants must be allowed to pursue their actions in the forum of their choice.[716] The second exception to the concursus originally applied to situations where there was but a single claimant who stipulated that (1) the admiralty court had exclusive jurisdiction to adjudicate the limitation of liability issues and (2) the claimant would not seek to enforce a damage award in excess of the limitation fund established by the federal court.[717] Some courts have extended this exception to include cases involving multiple claimants who protect the shipowner's right to limited liability with similar stipulations.[718] The Supreme Court has reaffirmed these exceptions and stated that the right of a claimant to sue in a state court cannot be undermined by a shipowner's filing a federal limitation proceeding if the shipowner's protection under the Limitation Act is not in jeopardy.[719] Furthermore, the fact that a shipowner is permitted to plead exoneration in a limitation proceeding does not mean that it has the right to compel the adjudication of that issue in a federal court.[720]

When a vessel owner files a limitation petition, the supposition is that the limitation fund will be insufficient to pay all claims in full.

715. Fed. R. Civ. P. Supp. R. F(4).

716. Lake Tankers Corp. v. Henn, 354 U.S. 147 (1957).

717. *In re* Port Arthur Towing Co., 42 F.3d 312 (5th Cir.), *cert. denied*, 516 U.S. 823 (1995).

718. *In re* Texaco, Inc., 847 F. Supp. 457 (E.D. La. 1994).

719. Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438 (2001).

720. *Id*.

Under the Limitation Act, if the owner of the vessel is held liable but is allowed to limit its liability, the funds deposited with the court, or the proceeds from the sale of the vessel and the amount of pending freight, are distributed by the court on a pro rata basis among the claimants in proportion to the amounts of their respective claims. The distribution is subject to all relevant provisions of law, such as the rules relating to priority of claims.[721] Priorities among claimants are discussed *infra* Chapter 9.

Limitation of liability petitions may not be filed in state courts. Some courts have held that a shipowner sued in a federal or state court may plead its right to limitation of liability as a defense to the claim.[722]

The Limitation Fund

The limitation fund is generally equal to the amount of the owner's interest in the vessel and pending freight.[723] The value of the vessel is determined at the termination of the voyage or of the marine casualty.[724] If a vessel is a total loss, then its value is zero. Insurance proceeds received by a vessel owner as a result of the marine casualty, such as where a vessel is a total loss, are not included in the limitation fund.[725] "Pending freight" refers to the owner's total earnings for the voyage.[726] It includes both prepaid earnings, which by contract are not to be returned to shippers should the voyage not be completed, and uncollected earnings.[727] A question may arise as to what constitutes a voyage.[728] Depending on the circumstances, a round-trip voyage may be the equivalent of a single adventure (which

721. Fed. R. Civ. P. Supp. R. F(8) (1992).

722. Mapco Petroleum, Inc. v. Memphis Barge Line, Inc., 849 S.W.2d 312 (Tenn.), *cert. denied*, 510 U.S. 815 (1993).

723. 46 U.S.C. § 30505 (2006).

724. Norwich & N.Y. Transp. Co. v. Wright, 80 U.S. (13 Wall.) 104 (1871).

725. Place v. Norwich & N.Y. Transp. Co., 118 U.S. 468 (1886).

726. The Main v. Williams, 152 U.S. 122 (1894).

727. *Id.* at 132. *See also* 3 Benedict on Admiralty § 65 (7th rev. ed. 1983).

728. *In re* Caribbean Sea Transp., Ltd., 748 F.2d 622 (1984), *amended*, 753 F.2d 948 (11th Cir. 1985).

requires earned freight to be surrendered for the entire round-trip), or it may be broken into distinct units (with freight considered pending for the particular leg of the voyage in which the marine casualty occurred).[729]

If there are personal injuries or death associated with the marine casualty, and the limitation fund is not adequate to cover such losses in full, then the shipowner must increase that portion of the limitation fund allocable to personal injury and death claims up to a maximum of $420 per ton of the vessel's tonnage.[730] The limitation fund needs to be increased only in instances where the owner of a "seagoing vessel" seeks limitation.[731] The term "seagoing vessel" is defined in the statute and excludes, among other vessels, pleasure yachts, tugs, and towboats.[732]

The computation of the limitation fund may be complicated when a marine casualty involves two or more vessels in a tug and tow situation. In a "pure tort"[733] situation, only the vessel actively at fault is valued or surrendered for purposes of the limitation fund.[734] In contrast, under the "flotilla rule,"[735] where a contractual relationship exists between the vessel owner and the party seeking damages, both the active vessel and the vessels in tow must be included in the computation of the fund.[736] The continued vitality of the distinction between a "pure tort" situation and a contractual relationship situation

729. *Id.* at 626–27.

730. 46 U.S.C. § 30506 (2006).

731. *Id.*

732. *Id.* § 30506(a).

733. Sacramento Navigation Co. v. Salz, 273 U.S. 326 (1927).

734. Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn E. Dist. Terminal, 251 U.S. 48 (1919). Notwithstanding this decision by the Supreme Court, several lower courts have required that the limitation fund equal the value of several vessels engaged in a common project. *In re* United States Dredging Corp., 264 F.2d 339 (2d Cir.), *cert. denied*, 360 U.S. 932 (1959); *In re* Offshore Specialty Fabricators, Inc., 2002 AMC 2055 (E.D. La. 2002).

735. Standard Dredging Co. v. Kristiansen, 67 F.2d 548, 550 (2d Cir. 1933), *cert. denied*, 290 U.S. 704 (1934).

736. *Salz*, 273 U.S. 326.

is questionable.[737] As a result, some courts have applied the flotilla rule in tort cases to situations where all the vessels belong to the same owner, are under common control, and are engaged in a common enterprise at the time of the marine casualty.[738]

Parties and Vessels Entitled to Limit

The owner of any vessel may petition for limitation of liability under the Limitation of Vessel Owner's Liability Act. The Act is available to both American and foreign vessel owners.[739] Demise or bareboat charterers may apply for limitation of liability under the Act as well.[740] However, time charterers are not allowed to limit their liability. The United States may apply for limitation of liability under the Act when a vessel owned by the government is involved in a marine casualty.[741]

A shipowner's insurer is not authorized to limit liability under the Limitation Act.[742] Most states do not allow a direct action by an injured party against the tortfeasor's liability insurer. Thus, a party who is precluded from recovering full damages from a vessel owner who has successfully limited its liability may not proceed directly against the vessel owner's insurer to recover its full damages. However, both Louisiana and Puerto Rico provide a statutory right to proceed directly against the insurer. These "direct action statutes" have survived constitutional challenges in the Supreme Court.[743] Despite the fact that the insurance carrier is not allowed the same protection as the vessel owner under the Limitation Act,[744] the

737. Wirth Ltd. v. S.S. Acadia Forest, 537 F.2d 1272 (5th Cir. 1976); Valley Line Co. v. Ryan, 771 F.2d 366 (8th Cir. 1985).

738. Cenac Towing Co. v. Terra Res., Inc., 734 F.2d 251, 254 (5th Cir. 1984).

739. 46 U.S.C. § 30505 (2006).

740. *Id*. § 30501.

741. Dick v. United States, 671 F.2d 724 (2d Cir. 1982).

742. Md. Cas. Co. v. Cushing, 347 U.S. 409 (1954).

743. *Id*.

744. Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970). *Olympic* was "overruled" by *Crown Zellerbach Corp. v. Ingram Indus., Inc.*, 783 F.2d 1296 (5th Cir.), *cert. denied*, 479

availability of a direct action may be small consolation because a marine insurer may indirectly limit its liability by contract. It may do so by including a provision in its insurance policy stating that the insurer is not liable for any amount greater than that for which its insured owner could be held liable under the Limitation Act.[745]

The Limitation Act applies to "all seagoing vessels" as well as "all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters."[746] Most courts have held that the Act is applicable to pleasure crafts, including personal watercraft, as well as commercial vessels.[747]

Grounds for Denying Limitation: Privity or Knowledge

Under the Limitation Act, limitation will be denied if the owner had "privity or knowledge" of the act or condition that caused the marine casualty.[748] In the case of an individual owner, privity or knowledge refers to the owner's personal participation in the act or awareness of the condition that led to the marine casualty.[749] Where a corporate owner seeks to limit its liability under the Limitation Act, limitation will be denied only if a managing officer or supervisory employee had knowledge or privity.[750] The term "managing officer" generally does not include the master of the vessel in the corporate context.[751] However, where there is a claim for personal injury or death, the

U.S. 821 (1986) (en banc), but its holding that insurers have no statutory right to limit their liability is still valid.

745. *Crown*, 783 F.2d 1296.

746. 46 U.S.C. § 30502 (2006).

747. *In re* Young, 872 F.2d 176 (6th Cir. 1989), *cert. denied*, 497 U.S. 1024 (1990); Gibboney v. Wright, 517 F.2d 1054 (5th Cir. 1975); *In re* Guglielmo, 897 F.2d 58 (2d Cir. 1990); *In re* Hechinger, 890 F.2d 202 (9th Cir. 1989), *cert. denied*, 498 U.S. 848 (1990).

748. 46 U.S.C. § 30505(b) (2006).

749. Coryell v. Phipps, 317 U.S. 406 (1943).

750. Great Lakes Dredge & Dock Co. v. City of Chicago, 3 F.3d 225 (7th Cir. 1993), *cert. granted*, 510 U.S. 1108 (1994), *aff'd*, 513 U.S. 527 (1995).

751. Waterman S.S. Corp. v. Gay Cottons, 414 F.2d 724 (9th Cir. 1969).

master's privity or knowledge prior to and at the beginning of the voyage of an act or condition that resulted in the injury or death will be attributed to the owner of a "seagoing vessel."[752] Furthermore, the owner of a vessel will be denied limitation if the court finds that the individual or corporate owner was negligent in that it failed to provide adequate procedures to ensure the maintenance of equipment,[753] failed to provide the vessel with a competent master or crew,[754] or failed to use reasonable diligence to discover the act or condition that caused the marine casualty.[755] Finally, the owner of a pleasure craft will be denied limitation of liability for negligently entrusting its vessel to a person who subsequently causes a marine casualty.[756]

Claims Subject to Limitation

The Limitation Act allows the owner of a vessel to limit its liability "for any embezzlement, loss, or destruction … of any property, goods, or merchandise … or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned or incurred."[757] A shipowner may also limit liability for debts.[758] However, a vessel owner may not limit its liability for wages owed to its employees[759] or for maintenance and cure.[760] Further, liability for wreck removal under the Wreck Act[761] is not subject to limitation,[762] nor is liability for pollution damages under

752. 46 U.S.C. § 30506(e) (2006).

753. *Waterman*, 414 F.2d 724.

754. *Coryell*, 317 U.S. 406.

755. China Union Lines, Ltd. v. A.O. Anderson & Co., 364 F.2d 769, 787 (5th Cir. 1966), *cert. denied*, 386 U.S. 933 (1967).

756. Joyce v. Joyce, 975 F.2d 379 (7th Cir. 1992).

757. 46 U.S.C. § 30505(b) (2006).

758. *Id.* § 30505 .

759. *Id.* § 30505(c).

760. Brister v. A.W.I., Inc., 946 F.2d 350 (5th Cir. 1991).

761. 33 U.S.C. § 409 (2006).

762. Univ. of Tex. Med. Branch at Galveston v. United States, 557 F.2d 438 (5th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).

federal law subject to limitation under the Limitation Act.[763] The various statutes that deal with pollution have their own superseding limitation of liability provisions.[764]

The owner of a vessel may also be denied limitation of liability under the "personal contract doctrine."[765] This rule exempts from limitation claims based on the failure to perform contractual obligations that the owner personally undertook to perform.[766] For example, the owner of a vessel who breaches a charter party will be denied limitation of liability.[767] Similarly, contracts made for supplies and repairs are excluded from limitation of liability.[768] However, a vessel owner will be allowed to limit liability where he or she personally enters into a contract that is breached by the negligence of the vessel's master or crew.[769]

Choice of Law

The Supreme Court held, in *The Titanic*,[770] that limitation of liability is a procedural device, and when a foreign shipowner seeks to limit its liability in a limitation proceeding brought in a U.S. court, U.S. law determines the amount of the limitation fund. A subsequent Supreme Court case, *The Norwalk Victory*, [771] concerned casualties that occurred not on the high seas but in the territorial waters of a foreign

763. Oil Pollution Act of 1990, 33 U.S.C. § 2718 (2006).

764. *See* Robert Force, Martin Davies & Joshua S. Force, *Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases*, 85 Tul. L. Rev. 889 (2011); Robert Force & Jonathan M. Gutoff, *Limitation of Liability in Oil Pollution Cases: In Search of Concursus or Procedural Alternatives to Concursus*, 22 Tul. Mar. L.J. 331, 338 (1998).

765. Richardson v. Harmon, 222 U.S. 96 (1911).

766. The Soerstad, 257 F. 130 (S.D.N.Y. 1919).

767. Cullen Fuel Co. v. W.E. Hedger, Inc., 290 U.S. 82 (1933).

768. *Richardson*, 222 U.S. 96.

769. Signal Oil & Gas Co. v. The Barge W-701, 654 F.2d 1164 (5th Cir. 1981), *cert. denied*, 455 U.S. 944 (1982).

770. Ocean Steam Navigation Co. v. Mellor (The Titanic), 233 U.S. 718 (1914).

771. Black Diamond S.S. Corp. v. Robert Stewart & Sons (The Norwalk Victory), 336 U.S. 386 (1949).

country. The Court admonished lower federal courts not to assume that all countries classify their limitation laws as procedural. Therefore, if a limitation proceeding is filed in federal district court based on a casualty that occurred in the waters of a foreign country, the court should ascertain whether the law of that country classifies the right to limitation as procedural or substantive. If the court determines that it is procedural, then U.S. law determines the limitation amount. If a court determines that it is substantive, then the limitation law of the foreign country applies. Some lower federal courts apply *The Norwalk Victory* to casualties that occur in the waters of a foreign country[772] and *The Titanic* to casualties on the high seas.[773] The results are far from consistent.[774]

772. *In re* Bethlehem Steel Corp., 631 F.2d 441 (6th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981).

773. *In re* Ta Chi Navigation (Panama) Corp. S.A., 416 F. Supp. 371 (S.D.N.Y. 1976).

774. *Compare Bethlehem Steel*, 631 F.2d 441 (affirming district court finding Canadian limitation statute to be procedural), *with In re* Geophysical Serv., Inc., 590 F. Supp. 1346 (S.D. Tex. 1984) (holding Canadian law to be substantive); *and compare Ta Chi*, 416 F. Supp. 371 (holding U.S. law applied to casualty on high seas involving Panamanian flag vessel), *with In re* Chadade S.S. Co. (The Yarmouth Castle), 266 F. Supp. 517 (S.D. Fla. 1967) (holding Panamanian limitation law was substantive and applied to casualty on high seas).