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LAWS ADRIFT: ANCHORING CHOICE OF LAW PROVISIONS IN ADMIRALTY TORTS

Marcus R. Bach-Armas^{*} & *Jordan A. Dresnick*[†]

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I. INTRODUCTORY REMARKS¹

Below the shimmering hulls of “The Love Boat”² and “Fun Ship”³ lies a murky world that few passengers ever see. Employment-related maritime torts lurk deep within the bowels of crew quarters, only to surface years later as the subsequent litigation (or arbitration) begins to run its course. Both the passenger cruising and marine shipping industries have experienced exponential growth since the mid to late twentieth century.⁴ Despite the well-documented perils of the high seas⁵ – and accompanying active docket of maritime law-suits⁶ – there is an astounding void in legal scholarship relating to choice of law provisions in maritime employment contracts.⁷

¹ The authors would like to acknowledge University of Miami School of Law Dean Patricia D. White for illuminating a clear path to law teaching and scholarship, J. Raul Cosio and Alex Gonzalez for inspiring excellence in the practice of law, Yara Lorenzo for helpful comments, and the dedicated editorial staff of the *University of Miami International and Comparative Law Review* for carefully preparing this article for publication. The opinions expressed in this article are solely those of the authors and are not necessarily reflective of Holland & Knight, LLP or its affiliates.

² Sarah J. Tomlinson, *Smooth Sailing? Navigating the Sea of Law Applicable to the Cruise Industry*, 14 VILL. SPORTS & ENT. L.J. 127, 133 n.37 (2007) (citing Lydia Boyd, *Brief History of the Passenger Ship Industry*, <http://scriptorium.lib.duke.edu/adaccess/ship-history.html> (last visited Aug. 26, 2009)).

³ *Id.*

⁴ Profile of the U.S. Cruise Industry, CRUISE LINES INTERNATIONAL ASSOCIATION, http://www.cruising.org/Press/sourcebook2009/profile_cruise_industry.cfm.

⁵ See, e.g., Thomas A. Gionis, Comment, *Paradox on the High Seas: Evasive Standards of Medical Care – Duty Without Standards of Care; A Call for the International Regulation of Maritime Healthcare Aboard Ships*, 34 J. MARSHALL L. REV. 751, 764-65 (2001) (discussing an increase in maritime injuries reported to the U.S. Coast Guard in the last two decades of the twentieth century); see also Sarah J. Tomlinson, *supra* note 2, at 128-29 (2007) (noting that even while the only statistics available for the cruise industry are those that the cruise lines voluntarily report to the Federal Bureau of Investigations, cruise industry officials estimate that fifty cruise ship crimes occur each year and an astonishing thirteen people vanish from ships each year); Sharnelle Samuel Porter, *Passenger Protections Will Not Sink the Cruise-ship Industry*, 23 T.M. COOLEY L. REV. 597, 597-98 (2006) (providing that, between 2003 and 2005, twenty-four people were reported missing from cruise ships, 178 victims complained of sexual assault aboard the high seas, and the FBI initiated 305 investigations based on crimes that occurred on cruise vessels).

⁶ See Marva Jo Wyatt, *High Crimes on the High Seas: Re-evaluating Cruise Line Legal Liability*, 20 U.S.F. MAR. L.J. 147, 147 (2008) (“There are hundreds of cases

Although the U.S. Supreme Court has issued various opinions on forum selection clauses in maritime torts,⁸ these opinions have done little to inform lower courts regarding the role of choice of law provisions in maritime employment agreements. As a result, clumsy and unpredictable multi-factor frameworks continue to dominate maritime tort choice of law jurisprudence, even as an increasing number of maritime agreements contain unambiguous and bargained-for choice of law provisions.⁹

Modern choice of law principles in general admiralty law are steeped in tacit approval for the international norms that historically governed trade between nations and international actors in maritime commerce.¹⁰ However, the advent of technology has quickly changed the trade winds that have fueled global shipping and altered the relevant interests.¹¹ As a result, maritime actors have sought to circ-

that illustrate the perils of sea passage, from the past century, and the one before it . . .").

⁷ The current literature is largely refined to discussion of the duty of care owed to passengers and forum selection provisions in the cruise industry. *See, e.g.*, Kristopher E. Pearson, *Hope for Temporary Citizens Aboard Floating Cities: Carlisle v. Carnival Corporation*, 59 U. MIAMI L. REV. 295 (2005); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323 (1992); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 U.C.L.A. L. REV. 423 (1992).

⁸ *See, e.g.*, *M/S Bremen v. Zapata Off-Shore Company*, 407 U.S. 1 (1991); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (honoring a forum-selection clause over argument that the agreement should be invalidated as it was a provision in an adhesive consumer contract).

⁹ *See, e.g.*, *Lockwood v. M/S Royal Viking Star*, 663 F. Supp. 181, 183 (C.D. Cal. 1986) (applying multi-factor maritime tort choice of law framework even though seafarer's employment contract contained presumptively valid choice of law clause).

¹⁰ B. Otis Felder, *Unifying Choice-of-Law Rules and Their Effects on Maritime Remedies*, 11 U.S.F. MAR. L.J. 213, 221, 227 (1998).

¹¹ *See* Sara Dillon, *A Farewell to "Linkage": International Trade Law and Global Sustainability Indicators*, 55 RUTGERS L. REV. 87, 91 n.12 (2002) ("Most scholars agree that a distinction between internationalization and globalization is that the latter is impelled by the exponential increase in flows of information across national boundaries occasioned by information technology. If the international era was characterized by the liberalization of trade in goods and multilateral cooperation achieved through national and supranational political processes, globalization is denoted almost singularly by its minimization of the role and importance of territorial boundaries and the resulting implications for sovereignty."), *see generally*

unpredictable multi-factor interest analyses by including provisions in commercial agreements that purport to select the applicable governing law. This article focuses on the role of these provisions in the maritime tort setting. In particular, we focus on the enforceability of choice of law clauses in maritime employment agreements entered into between parties of differing allegiances. Should U.S. admiralty law govern maritime tort claims where the employment agreement stipulates that foreign law will apply, or should the bargained-for choice of law provision supersede the common law choice of law analysis? Notwithstanding the Supreme Court's proclamations in *Bremen* and *Shute* encouraging the enforceability of forum selection clauses in maritime agreements, many questions remain unanswered as to the validity of choice of law provisions in maritime tort cases.

The article proceeds as follows. Part II discusses the applicable domestic and international maritime laws to set the background. Part III describes the history of maritime tort choice of law analyses. Part IV relates the current state of choice of law provisions in the admiralty context. Part V speaks to drafting for naught: the (in)significance of choice of law clauses in maritime torts. Part VI presents the role of choice of law provisions in maritime torts post-*Bremen* and charts the course for the future of choice of law provisions.

II. THE VIEW FROM THE CROW'S NEST: UNWRAPPING CHOICE OF LAW PROVISIONS

A fallacy in legal thought leads many practitioners to the false notion that a ship is merely a floating portion of the country under which the vessel flies its flag.¹² To the contrary, the complex web of laws governing the maritime industry is governed largely by international law and self-regulation.¹³ Even in the face of a multi-billion

Alastair J. Walling, *Early to Bed, Early to Rise, Work Like Hell and Globalize*, 13 KAN. J.L. & PUB. POL'Y 161 (2004) (discussing the import of technology to the rapid pace of globalization).

¹² Felder, *supra* note 10, at 222.

¹³ See Tomlinson, *supra* note 2, at 134 (citing International Maritime Organization, *Introduction to IMO*, http://www.imo.org/About/mainframe.asp?topic_id=3 (providing an overview of International Maritime Organization's history and purposes and informing that the United Nations established it through convention)). In fact, the

dollar cruise industry,¹⁴ there is a surprising paucity of consistent choice of law jurisprudence to guide the industry.¹⁵

There are advantages and pitfalls to enforcing choice of law provisions.¹⁶ The primary benefit is that agreements between parties foment efficiency by reducing the uncertainty of default conflicts rules and enable parties to avoid expensive litigation stemming from the application of inefficient and unpredictable choice of law frameworks.¹⁷

United States is a party or signatory to over a dozen conventions governing admiralty law. Felder, *supra* note 10, at 223 n.45 (citing the following statutes to which the United States is a party: Convention for the Safety of Life at Sea, June 17, 1960, 16 U.S.T. 185, 536 U.N.T.S. 27; Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 278; International Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, 12 U.S.T. 2989, 327 U.N.T.S. 3, as amended Apr. 11, 1962, 17 U.S.T. 1523, 600 U.N.T.S. 332 and Oct. 21, 1969, 28 U.S.T. 1205, T.I.A.S. No. 8505; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, 26 U.S.T. 765, T.I.A.S. No. 8068, and Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other than Oil, Nov. 2, 1973, T.I.A.S. No. 10561; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120, and Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, Feb. 17, 1978, 17 I.L.M. 546; Convention on Facilitation of International Maritime Traffic, Apr. 9, 1965, 18 U.S.T. 411, 591 U.N.T.S. 265; International Convention on Load Lines, Apr. 5, 1966, 18 U.S.T. 1857, 640 U.N.T.S. 133, Proces-Verbal of Rectification of the International Convention on Load Lines, Jan. 30, 1969, 20 U.S.T. 17, T.I.A.S. No. 6629, and Proces-Verbal of Rectification of the International Convention on Load Lines, May 5, 1969, 20 U.S.T. 2577, T.I.A.S. No. 6720; Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, T.I.A.S. No. 8587).

¹⁴ See, e.g., ROYAL CARIBBEAN CRUSES, LTD., 2008 ANNUAL REPORT 21 (2008), available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzMzOTgxENoaWxkSUQ9MzE2MzcxfFR5cGU9MQ==&t=1> (showing \$6.5 billion in total revenues); CARNIVAL CORP. & PLC, 2008 ANNUAL REPORT 5 (2008), available at http://library.corporate-ir.net/library/14/140/140690/items/327186/640EC6CE-AF08-40EF-8827-93964454BB34_Carnival%20Corp%202008%20AR.pdf (showing \$14.6 billion in total revenues).

¹⁵ See Felder, *supra* note 10, at 234-36.

¹⁶ See, e.g., William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 4-22 (1963) (arguing that choice of law should maximize the interests and power of individual states).

¹⁷ Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 366 (2003).

Through much of the twentieth century, the United States largely adhered to the Restatement (First) of Conflict of Laws and territorial principles in the enforcement of rights and duties arising from a contract.¹⁸ Under these principles, a court could only regulate people and events within the borders of its jurisdiction.¹⁹ Joseph Beale, the reporter for the Restatement (First) of Conflict of Laws, set forth the "vested rights" rationale and accompanying rules that separated the territorial boundaries of a state's lawmaking authority.²⁰ Under the Restatement, a dispute with connections to multiple jurisdictions would be adjudicated pursuant to the laws of the jurisdiction where the rights became "vested," which was generally the location of the last act or event necessary to create the dispute.²¹

Today, most courts have adopted section 187 of the Restatement (Second) of Conflict of Laws, which uses the choice of law agreed to between the parties as the first step in determining the law applicable to resolving a given dispute.²² Most scholars agree that such an approach is sensible and efficient, allowing the parties to determine, at low cost and ex ante, that certain given conduct will

¹⁸ Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1152-53 (2000).

¹⁹ See generally JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 332.2 (1935); Ernest G. Lorenzen, *Validity and Effects of Contracts in the Conflict of Law*, 30 YALE L.J. 655, 658 (1921).

²⁰ O'Hara & Ribstein, *supra* note 18, at 1152.

²¹ RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 332 (1934).

²² RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 187 (1971) ("(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue. (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties. (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.").

trigger the application of a particular state's law.²³ With full knowledge of the binding agreements as to future litigation, parties can structure their behavior to avoid laws ill-suited to their affairs while minimizing the costs of contracting for efficient laws, or avoiding inefficient ones.²⁴

Before delving into the jurisprudence of maritime choice of law provisions, we briefly survey several alternative means by which courts have confronted conflicts when parties seek divergent laws as governing rules. The traditional approach in the tort setting has generally been to apply *lex loci delicti commissi*, i.e., the law of the jurisdiction in which the injury has occurred.²⁵ This approach affords parties with uniformity and predictability, as courts can easily determine the place of injury and apply the law of that jurisdiction. This, however, may also lead to arbitrary results when the injury occurs in a pass-through jurisdiction which bears no relation to the parties.²⁶ In more factually complex cases, courts can consider where the defendant undertook significant steps that led to the injury or where negligent action occurred.²⁷

Another approach is the governmental interest analysis. This approach allows the court in which the dispute is pending to examine legislative action to determine those laws viewed as important.²⁸ The web of conflict of laws grows more complex when, as often is the case in the maritime context, the choice of law provisions specify

²³ See O'Hara & Ribstein, *supra* note 18, at 1152; see also Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990); Erin A. O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1569 (2000); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 938 (2002).

²⁴ See O'Hara & Ribstein, *supra* note 18, at 1152.

²⁵ See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934) (defining *lex loci delicti* as the law of the place "where the last event necessary to make an actor liable for an alleged tort takes place").

²⁶ Helen Shin, *Oh, I Have Slipped the Surly Bonds of Earth: Multinational Space Stations and Choice of Law*, 78 CAL. L. REV. 1375, 1391 (1990).

²⁷ *Id.* at 1391 n.79 (citing *Beattie v. United States*, 756 F.2d 91, 104-05 (D.C. Cir. 1984) (Federal Tort Claims Act focuses on place where negligent or wrongful act or omission occurred); *Sami v. United States*, 617 F.2d 755, 761-63 (D.C. Cir. 1979) (same)).

²⁸ *Id.* at 1399 (citing BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 181-82 (1963)).

laws of states that tend to inhibit a plaintiff's redress to court or limit recoverable damages.²⁹

Under the government interest analysis, the court reviews the reasons for which the legislature passed certain laws so as to determine the law's underlying policy.³⁰ According to this analysis, the laws of the forum should be utilized if their application advances the legislature's policies.³¹ A "true conflict" can emerge under Professor Currie's analysis when more than one jurisdiction maintains a valid interest in applying its laws to the matter at hand.³² Forums should mitigate and avoid conflicts of laws whenever possible;³³ however, the court should apply the substantive law prescribed by the legislature rather than attempt to size the merits of a particular matter.³⁴

Other approaches exist to resolve conflicts of law. Professor Luther McDougal proposes the comprehensive interest analysis model as a means to consider all interests. This analysis creates a novel corps of law to address concerned parties, including actors and states not directly involved in the dispute.³⁵ This model is closely

²⁹ See, e.g., *Thomas v. Carnival Cruise Lines*, 2009 WL 1874098 (11th Cir., July. 1, 2009) (questioning enforceability of agreements in which choice of law and choice of forum provisions operate as a prospective waiver of statutory rights).

³⁰ See Brainerd Currie, *Married Women's Contracts: A Study in Conflict of Laws Method*, 25 U. CHI. L. REV. 227 (1958); Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); Alfred Hill, *For a Third Conflicts Restatement-But Stop Trying To Reinvent the Wheel*, 75 IND. L.J. 535, 535 (2000) ("Forty-two years ago Brainerd Currie announced his discovery that the traditional choice-of-law rules are so mired in technical arbitrariness as to be irrelevant to our economic and social institutions and shared values-indeed, worse than irrelevant, for to consider the traditional rules would only obscure the problem, so that the sensible course is to refrain from examining them for even glimmerings of light, which in any event would not be found. Currie's demonstration of this point has been accepted as irrefutable both by those who have followed his prescriptions for interest analysis and those who have not. Virtually all have agreed that choice-of-law rules, if there are to be such rules, must be formulated anew.").

³¹ Shin, *supra* note 26, at 1399.

³² *Id.* (citing Brainerd Currie, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 181-82 (1963)).

³³ Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 769-72 (1963).

³⁴ Shin, *supra* note 26, at 1399.

³⁵ See Luther L. McDougal III, *Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law*

associated with policy-oriented theories of jurisprudence.³⁶ The comprehensive interest analysis rejects the traditional conflicts of laws theories, including the vested rights theory, but also unquestionably shuns the modern interest analysis as inadequate.³⁷

III. THE HISTORY OF MARITIME TORT CHOICE OF LAW ANALYSIS

The importance of maritime commerce is not a novel phenomenon, as evidenced by the fact that the Founding Fathers expressly placed admiralty law within the purview of the United States district courts.³⁸ A few years later, Congress passed the Judiciary Act of 1789 pursuant to its Article III mandate.³⁹ The Act codified the admiralty jurisdiction of the federal courts and bestowed upon them original jurisdiction over "any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."⁴⁰ Indeed, Congress attempted to create uniformity in the arena of maritime commerce by vesting the lower federal courts with exclusive original jurisdiction over "all civil causes of admiralty and maritime jurisdiction."⁴¹ Because the Constitution does not specify the rules of decision, federal courts have played a major role in molding the substantive rules that have come to be known as "general maritime law."⁴²

Problems Concerning Contributory and Comparative Negligence, 26 U.C.L.A. L. REV. 439 (1979).

³⁶ See generally Harold D. Lasswell & Myres S. McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971); Harold D. Lasswell & Myres S. McDougal, *Jurisprudence in a Policy-Oriented Perspective*, 19 U. FLA. L. REV. 486 (1967).

³⁷ Marc S. Firestone, *Problems in the Resolution of Disputes Concerning Damage Caused in Outer Space*, 59 TUL. L. REV. 747, 774-75 (1985).

³⁸ U.S. CONST. art. III, § 2, cl. 1.

³⁹ *Id.*

⁴⁰ 28 U.S.C. § 1333(1) (2003).

⁴¹ *Judiciary Act of 1789*, ch. 20, § 9, 1 Stat. 76-77; see also Harrington Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460, 468-69 (1925).

⁴² Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 TUL. L. REV. 1421, 1431 n.70 (2001) (citing *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864-75 (1986) (creating a maritime law of products liability); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 397-403 (1970) (creating a maritime wrongful-death remedy)).

The Supreme Court has long construed the admiralty clause of the U.S. Constitution as vesting federal courts with jurisdiction over all maritime contracts and torts.⁴³ Although the admiralty clause was originally limited to commerce involving "the sea," the clause soon gave rise to suits involving all navigable waters. Accordingly, if a tort cause of action sounds in admiralty, the admiralty side of the federal district courts will have original subject matter jurisdiction over that matter pursuant to 28 U.S.C. §1333.⁴⁴

Because most maritime cases are litigated in federal courts, there is a widespread misconception that admiralty jurisprudence is of exclusive concern to the federal judiciary. However, numerous maritime torts are equally adjudicable in state courts.⁴⁵ This can be achieved by way of the "savings to suitors clause" of 28 U.S.C. §1333, which "leave[s] state courts competent to adjudicate maritime causes of action in proceedings *in personam*, that is, where the defendant is a person [or entity], not a ship or some other instrument of navigation."⁴⁶ Thus, "[o]rdinarily, where plaintiffs seek monetary damages for tort or contract claims that fall within admiralty jurisdiction,

⁴³ Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters*, 64 COLUM. L. REV. 1084, 1086 n.17 (1964) (citing *Delovio v. Boit*, et al., 7 Fed. Cas. 418 (No. 3776) (C.C. Mass. 1815)).

⁴⁴ *Id.* at 1086. It bears mentioning that there are a number of federal statutes providing that certain maritime claims can be brought on the "law side" of the federal district courts, i.e., the side where litigants are entitled to a jury trial and proceedings are governed by traditional rules of procedure. *See, e.g.*, 46 U.S.C. 30104(a) (2007) (stating that "seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer"). Likewise, jurisdiction on the "law side" of federal courts can also be proper pursuant to the diversity jurisdiction statute, 28 U.S.C. § 1332. *See, e.g.*, *Saroza v. Royal Caribbean Corp.*, No. CV 91-0917, 1991 WL 341356 (C.D. Cal. Oct. 17, 1991). However, the U.S. Supreme Court has expressly disapproved of the notion that *all* claims brought pursuant to the common law of admiralty should be cognizable on both the admiralty *and* law sides of federal courts because they essentially "arise under" the laws of the United States or the Constitution for purposes of 28 U.S.C. § 1331. *Romero v. Int'l Terminal Co.*, 358 U.S. 354, 380 (1959).

⁴⁵ *See, e.g.*, *Cruise Ships & Catering Servs. Int'l, N.V. v. Tananta*, 823 So. 2d 258 (Fla. 3d Dist. Ct. App. 2002).

⁴⁶ *Madruza v. Superior Court*, 346 U.S. 556, 560-61 (1953) (internal quotations omitted); *cf. Pennoyer v. Neff*, 95 U.S. 714, 734 (1878) ("[A] proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants.") (emphasis retained in original).

plaintiffs have a choice of bringing a suit in admiralty in federal court or of bringing suit in state court."⁴⁷

Given that *in personam* maritime tort claims can be brought in state or federal court pursuant to 28 U.S.C. §1333, the critical issue for practitioners becomes whether or not a particular tort claim qualifies as a maritime tort and is therefore subject to admiralty jurisdiction. On the surface, this inquiry appears to be purely jurisdictional in nature (i.e., if a claim for relief is a "maritime claim," then § 1333 can be invoked to bestow jurisdiction on a federal *or* state court; if not, then there must be an independent basis for jurisdiction). In reality, however, this determination informs various aspects of the proceedings, including the applicable rules of procedure,⁴⁸ the right to a jury trial,⁴⁹ and most importantly for the purposes of this article, choice of law.⁵⁰

Traditionally, tort claims were considered maritime torts for purposes of admiralty jurisdiction only if: (1) the tort occurred on navigable waters; and (2) the resultant injury was "wholly" sustained on navigable waters.⁵¹ If both prongs of this locality inquiry were satisfied, then admiralty jurisdiction was proper; if not, courts would require some independent basis for the retention of jurisdiction.⁵²

This rigid locus-based rule was modified by Congressional statute in 1948 with the passage of the Extension of Admiralty Jurisdiction Act,⁵³ which has since been re-codified at 46 U.S.C. §

⁴⁷ 1 ROBERT FORCE & MARTIN J. NORRIS, *THE LAW OF SEAMEN* § 1:8 (5th ed. 2003).

⁴⁸ See FED. R. CIV. P. 9(h), 14(c), 38(e), and 82.

⁴⁹ In federal court, the right to a jury trial in a maritime tort suit is determined by whether the claim is brought on the "law side" or the "admiralty side." *Crookham v. Muick*, 246 F. Supp. 288, 290 (W.D. Pa. 1965) (noting that right to jury trial which the Jones Act makes available if seaman elects to sue on "law side" is not available if action is brought on the "admiralty side"). However, "[w]hen a maritime matter is brought in state court, there may be trial by jury (depending upon state law)" FRANK L. MARAIST & THOMAS C. GALLIGAN, *Admiralty in a Nutshell* § XIX.B (5th ed. 2005).

⁵⁰ If the tort is maritime for jurisdictional purposes, maritime substantive law applies. See, e.g., *In re Dearborn Marine Service, Inc.*, 499 F.2d 263, 277 n.27 (5th Cir. 1974), *cert. dismissed*, 423 U.S. 886 (1975).

⁵¹ See *John B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531-32 (1995).

⁵² See, e.g., *The Plymouth*, 70 U.S. 20 (1865).

⁵³ Extension of Admiralty Jurisdiction Act, ch. 526, 62 Stat. 496 (1948) (codified as 46 U.S.C. § 740).

30101.⁵⁴ The Extension of Admiralty Jurisdiction Act provides that "[t]he admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land."⁵⁵ This modification was intended to "end concern over the sometimes confusing line between land and water, by investing admiralty jurisdiction over 'all cases' where the injury was caused by a ship or other vessel on navigable water[s], even if such injury occurred on land."⁵⁶ Thus, in one fell swoop, Congress hoped to put to rest the uncompromising rigidity of the former rule and eliminate an increasing number of impractical and illogical rulings, such as the "non-maritime" classification of tort claims arising out of a ship's collision with a pier.⁵⁷

While this expansion of admiralty jurisdiction initially served its purpose insofar as it brought certain hybrid cases within the jurisdiction of the nation's admiralty courts – both state and federal – its ultimate effect was more inclusive than originally intended, and certain classes of cases had to be excluded from its purview by judicial fiat.⁵⁸ This was accomplished over a span of thirty years in a well-known trilogy of United States Supreme Court cases that narrowed the scope of 28 U.S.C. § 1333(1) with a two-part test designed to reveal whether a particular claim bears a sufficient connection to traditional maritime activity to be classified as a "maritime tort."⁵⁹

This two-part "locus-nexus" test is applied summarily by admiralty judges at the outset of a case⁶⁰ and requires that tort claims

⁵⁴ Extension of Admiralty Jurisdiction Act, Pub. L. 109-304, § 6(c), 120 Stat. 1509 (2006).

⁵⁵ *Id.*

⁵⁶ *Grubart*, 513 U.S. at 532 (internal citations omitted).

⁵⁷ *Martin v. West*, 222 U.S. 191, 197 (1911) (concluding that tort claim arising out of ship's collision with pier did not satisfy traditional locality test because pier was considered extension of land).

⁵⁸ *See, e.g., Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 260 (1972).

⁵⁹ *See Executive Jet*, 409 U.S. 249 (1972); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Sisson v. Ruby*, 497 U.S. 358 (1990).

⁶⁰ *Grubart*, 513 U.S. at 537-38 (stating that "[n]ormal practice permits a party to establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements . . . and any litigation of a contested subject-matter jurisdictional fact issue occurs in a comparatively summary procedure before a judge alone . . .") (citation omitted)).

"satisfy conditions both of location and of connection with maritime activity" to be considered "maritime torts."⁶¹ The location prong requires courts to "determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water."⁶² The second prong, often referred to as the "[m]aritime nexus requirement[.]" . . . is satisfied by demonstrating that (1) 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.'"⁶³

IV. CURRENT MARITIME CHOICE OF LAW JURISPRUDENCE

Once both prongs of the maritime tort test are satisfied and jurisdiction is properly vested pursuant to § 1333 or some other federal statute,⁶⁴ the maritime choice of law analysis begins in earnest.

Maritime torts are subject to the application of "substantive admiralty law,"⁶⁵ which was defined by the U.S. Supreme Court as "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules."⁶⁶ This holds true whether the claims are initiated in federal or state court; consequently, state courts often apply federal common law in cases brought pursuant to the "saving

⁶¹ *Id.* at 534.

⁶² *Id.* (citation omitted).

⁶³ ROBERT FORCE & MARTIN J. NORRIS, *THE LAW OF SEAMEN* § 1:17 (5th ed. 2003) (quoting *Grubart*, 513 U.S. at 534).

⁶⁴ Jurisdiction may also be proper on the "law side" of a federal district court pursuant to the diversity jurisdiction statute, 28 U.S.C. § 1332(a)(2) (2006), and/or the federal question jurisdiction statute, 28 U.S.C. § 1331 (2006). Regardless of the basis for jurisdiction, however, once a tort claim is determined to be a "maritime tort," the same maritime choice of law analysis applies. *See, e.g., Romero*, 358 U.S. at 379-81 (applying maritime common law choice of law analysis to Jones Act claims initiated pursuant to federal question jurisdiction); *Saroza v. Royal Caribbean Corp.*, 1992 A.M.C. 428, 429 (C.D. Cal. 1991) (applying maritime common law choice of law analysis to Jones Act claim initiated in federal court pursuant to both admiralty and diversity jurisdiction statutes).

⁶⁵ *See Grubart*, 513 U.S. at 545 (quoting *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986)).

⁶⁶ *East River*, 476 U.S. at 864-65.

to suitors" clause of § 1331 – a counterintuitive phenomenon commonly referred to as the "Reverse *Erie*" doctrine.⁶⁷

However, though maritime torts are subject to substantive admiralty law once they are properly labeled as such, this does not *ipso facto* result in all maritime torts being governed by federal rules of decision. In fact, it is a "fundamental feature of admiralty law" that all maritime torts are subject to a maritime choice of law analysis,⁶⁸ which can sometimes result in the application of state⁶⁹ or foreign law⁷⁰ to the claims at issue.

TOWARD A RISING TIDE OF CHOICE OF LAW JURISPRUDENCE

The U.S. Supreme Court has supplied a rich choice of law jurisprudence in the context of maritime torts beginning with the seminal case of *Lauritzen v. Larsen*,⁷¹ continuing with *Romero v. International Terminal Operating Co.*,⁷² and concluding with *Hellenic Lines Ltd. v. Rhoditis*.⁷³

In *Lauritzen*, a Danish seaman sued the Danish owner of the *Randa*, a Danish vessel, in the Southern District of New York, under the Jones Act⁷⁴ for negligent injuries suffered in the course of his employment aboard the *Randa* while it was in a harbor in Havana, Cuba.⁷⁵ The seaman was temporarily in New York when he joined the crew of the *Randa*, which was registered in Denmark and flew under the Danish flag.⁷⁶ The seaman had signed a contract, written in Danish, which stated that the rights of crew members would be

⁶⁷ ROBERT FORCE & MARTIN J. NORRIS, *THE LAW OF SEAMEN* § 1:10 (5th ed. 2003) (internal citation omitted).

⁶⁸ See *Grubart*, 513 U.S. at 545-46 (citations omitted).

⁶⁹ See, e.g., *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994).

⁷⁰ See, e.g., *Warn v. M/Y Maridome*, 169 F.3d 625 (9th Cir. 1999); *Tarasenko v. Cardigan Shipping Co., Ltd.*, 671 F. Supp. 997 (S.D.N.Y. 1987); *Bautista v. Cruise Ships Catering and Servs. Int'l, N.V.*, 350 F. Supp. 2d 987 (S.D. Fla. 2003); *Solano v. Gulf King 55, Inc.*, 212 F.3d 902 (5th Cir. 2000).

⁷¹ 345 U.S. 571 (1953).

⁷² 358 U.S. 354 (1959).

⁷³ 398 U.S. 306 (1970).

⁷⁴ 46 U.S.C.A. § 688 (1975) (current version at 46 App. U.S.C.A. § 688 (2006)).

⁷⁵ *Lauritzen v. Larsen*, 345 U.S. 571, 573 (1953).

⁷⁶ *Id.*

determined by Danish law and the Danish Seamen's Union, of which the plaintiff was a member.⁷⁷ The Court awarded a verdict of \$4,267.50.⁷⁸ The Second Circuit affirmed.⁷⁹

In this pre-*Bremen* case, the Supreme Court began with an exercise in interest analytics, comparing the provisions and purposes of U.S. and Danish law, rather than treating the contractual choice of law clause as dispositive.⁸⁰ The Court noted that both legal systems provided the injured seaman with rights to maintenance and cure at the shipowner's expense irrespective of fault or negligence of either party.⁸¹ However, there were sharp distinctions between the Danish and American laws. In Denmark, ill or injured seafarers only had twelve weeks in which to bring suit against the shipowner, while the U.S. law only "limit[ed] this to the period within which maximum possible cure can be effected."⁸² There were also differences as to the funding source for the remedies.⁸³

The injured seafarer argued that "[i]t makes no explicit requirement that either the seaman, the employment or the injury have the slightest connection with the United States All alien seafaring men injured anywhere in the world" may bring suit in the United States under the Jones Act, including 'a hand on a Chinese junk, never outside Chinese waters."⁸⁴ The Supreme Court disagreed.⁸⁵ Couching its decision in a newly devised multi-factor framework designed to serve as a proxy for interest analytics, the Supreme Court held that the Jones Act should not be interpreted to apply to foreigners for acts committed outside the dominion of the sovereignty exerting the power.⁸⁶

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* (citing *Larsen v. Lauritzen*, 196 F.2d 220 (2nd Cir. 1952)).

⁸⁰ The *Lauritzen* Court did not explain why it denied the choice of law provision's dispositive significance. However, *Lauritzen* was decided prior to *Bremen* and *Shute*, which established the presumptive enforceability of choice of law and choice of forum provisions in maritime agreements.

⁸¹ *Id.* at 575.

⁸² *Id.* (citing *Farrell v. United States*, 336 U.S. 511 (1949)).

⁸³ *See id.* at 576.

⁸⁴ *Id.* at 576-77 (internal quotations omitted).

⁸⁵ *See id.* at 578.

⁸⁶ *See id.* ("That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside

Thus, in the wake of *Lauritzen*, the first principle of "substantive admiralty law" to be applied in every maritime tort case is not a rule of decision, but a choice of law determination. Pursuant to the framework first articulated in *Lauritzen* – now commonly known as the *Lauritzen-Rhoditis* framework – courts reviewing maritime tort claims analyze eight different factors to determine the applicable law: (1) the place of the wrongful act; (2) the law of the ship's flag; (3) the allegiance or domicile of the injured; (4) the allegiance of the shipowner; (5) the place of contracting; (6) the accessibility of any alternative forum; (7) the law of the forum; and (8) the shipowner's base of operations and ownership composition.⁸⁷ While some factors weigh more heavily than others (*e.g.*, courts give great weight to the law of the flag⁸⁸ and the allegiance of the claimant),⁸⁹ the framework is neither formulaic nor exhaustive.⁹⁰ The result has been a panoply of decisions pointing in different directions and leaving little predictability for today's practitioners, especially when the factors are incongruous.

V. DRAFTING FOR NAUGHT: THE (IN)SIGNIFICANCE OF CHOICE OF LAW CLAUSES IN MARITIME TORTS

Because practitioners prize predictability, rolling the dice is not a viable solution to the uncertainty that inevitably pervades the jurisprudence of multi-factor frameworks. This lack of predictability is particularly pronounced in maritime tort cases involving foreign seafarers, since the law and accessibility of their home fora are not readily determinable.⁹¹ Take, for example, a slip and fall in Mexican

its own territory.") (quoting Lord Russell of Killowen in *The Queen v. Jameson*, (1896) 2 Q.B. 425, 430)).

⁸⁷ *Id.* at 583-91; *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 308-09 (1970).

⁸⁸ *Lauritzen*, 345 U.S. at 584 (noting that the law of the flag is of "cardinal importance" and is considered "[p]erhaps the most venerable and universal rule of maritime law").

⁸⁹ *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1517 n.6 (11th Cir. 1985) (indicating that allegiance of claimant is "especially significant in the choice-of-law analysis") (citing *Symonette Shipyards, Ltd. v. Clark*, 365 F.2d 464, 467 (5th Cir. 1966)); *see also Lauritzen*, 345 U.S. at 586.

⁹⁰ *See Rhoditis*, 398 U.S. at 309.

⁹¹ *See, e.g., Symonette Shipyards, Ltd. v. Clark*, 365 F.2d 464, 468 n.5 (5th Cir. 1966) (noting that the *Lauritzen* analysis was complicated by the fact that "no body

waters involving a Bahamian crewmember who, while in New York, signed onto a Greek-owned and operated vessel flying a Liberian flag of convenience.⁹² Under the *Lauritzen-Rhoditis* analysis, the rules of decision of five nations (i.e., Bahamas, Greece, Liberia, Mexico, U.S.) could potentially apply with little guidance as to which should properly rule the day.

Thus, in order to add a degree of certainty to the historically murky and sometimes dispositive⁹³ choice of law issues surrounding maritime torts, shipowners and masters have uniformly included choice of law provisions in shipping articles signed by their employees.⁹⁴ In fact, the shipping articles in *Lauritzen*,⁹⁵ *Romero*,⁹⁶ and *Rhoditis*⁹⁷ all contained choice of law provisions, at least one of which expressly encompassed *all rights* of the crewmember – not just contractual claims.⁹⁸ And even though the Court was well-aware of these choice of law provisions and acknowledged that there is "no public policy that would prevent the parties . . . from so settling upon

of reported decisions of Bahamian cases exists and that the only source of Bahamian case law is found in the knowledge and memory of local practitioners").

⁹² *Tjonaman v. A/S Glittre*, 340 F.2d 290, 291 (2d Cir. 1965) (finding that a vessel's flag will be classified as a "flag of convenience" if the "foreign registration is only nominal and the vessel belongs to the nation of the flag it flies only for the purpose of avoiding shipping laws of the United States").

⁹³ Where foreign law is held to apply, cases have been disposed of on the grounds of forum non conveniens, lack of subject-matter jurisdiction, or failure to state a claim. *See, e.g.*, *Warn v. M/Y Maridome*, 169 F.3d 625 (9th Cir. 1999) (holding that where court's choice of law analysis indicates that foreign law is applicable to claims, court's order will be treated, on appeal, as dismissal for failure to state a claim); *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512 (affirming dismissal of Jones Act claim on forum non conveniens grounds because of applicability of foreign law); *Rodriguez v. Flota Mercante Grancolombiana, S.A.*, 703 F.2d 1069 (9th Cir. 1983) (dismissing Jones Act claim for lack of subject-matter jurisdiction because of applicability of foreign law).

⁹⁴ Shipping articles are contracts of employment between masters and seafarers. *See The Seatrain New Orleans*, 127 F.2d 878 (5th Cir. 1942).

⁹⁵ 345 U.S. at 588 (noting that "contract was explicit that the Danish law . . . control[led]").

⁹⁶ 142 F. Supp. at 573 (D.C.N.Y. 1956) (noting that seafarer submitted to Spanish laws and regulations).

⁹⁷ 398 U.S. at 308.

⁹⁸ 345 U.S. at 573 (noting that shipping articles provided that the "rights of crew members would be governed by Danish law").

the law of the flag-state as their governing code,"⁹⁹ the decisions seemingly glossed over these clauses, forcing square pegs into round holes by deeming choice of law provisions mere sub-factors for consideration under the rubric of the "place of contract" factor – a factor that has been repeatedly discounted as "fortuitous" and not warranting "substantial influence in the choice between competing laws to govern a maritime tort."¹⁰⁰ Furthermore, while the *Lauritzen* and *Romero* decisions ultimately applied the law specified in the seafarers' shipping articles,¹⁰¹ the *Rhoditis* court did the exact opposite, considering the eight factors and disregarding the choice of law provision with little explanation, thus draping a shroud of mystery over the role, if any, of choice of law provisions in the *Lauritzen-Rhoditis* analysis.¹⁰²

VI. THE ROLE OF CHOICE OF LAW PROVISIONS IN MARITIME TORTS POST-*BREMEN*

But alas, the *Lauritzen*, *Romero*, and *Rhoditis* decisions were all handed down prior to the Supreme Court's landmark decision in *M/S Bremen v. Zapata Off-Shore Co.*,¹⁰³ a case that revolutionized the interpretation and enforceability of maritime contracts, as well as the course curricula of law school jurisdiction courses.

In *Bremen*, the parties entered into a rig towage agreement which included a forum selection clause selecting London, England as the exclusive forum for disputes arising out of the agreement.¹⁰⁴ When severe weather damaged the rig, the towing party brought it to Tampa, Florida, the nearest port of refuge, where the U.S. Marshals had been given advance notice and promptly arrested the boat in port.¹⁰⁵ The customer followed-up by bringing suit against the towing company in admiralty.¹⁰⁶ The towing party moved to dismiss

⁹⁹ *Id.* at 589.

¹⁰⁰ *Id.* at 588-89.

¹⁰¹ *Id.* at 592; *Romero*, 358 U.S. at 383-84.

¹⁰² *See Rhoditis*, 308 U.S. at 308-09.

¹⁰³ 407 U.S. 1 (1972).

¹⁰⁴ *Id.* at 2.

¹⁰⁵ *Id.* at 3-4 n.3.

¹⁰⁶ *Id.* at 3-4.

the case, citing the mandatory forum selection clause in the towage agreement.¹⁰⁷

Citing cases that viewed forum selection clauses unfavorably, the District Court denied the motion to dismiss, treating the motion as having been made pursuant to *forum non conveniens*, the doctrine that would ordinarily apply in the absence of a clause.¹⁰⁸ The District Court concluded the balance of conveniences was not strongly in favor of the defendant and that the plaintiff's choice of forum should not be disturbed in spite of the unambiguous and freely bargained-for forum selection clause.¹⁰⁹ The Fifth Circuit affirmed, concluding that parties cannot contractually "oust the jurisdiction of the [federal admiralty] courts."¹¹⁰

In a seminal eight to one decision that forever changed the interpretation of maritime agreements, the Supreme Court reversed the Fifth Circuit Court, holding that the forum selection clause at issue was enforceable.¹¹¹ The Court concluded that a "freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect" and that the enforcement of such clauses "accords with ancient concepts of freedom of contract."¹¹²

Taking the Court's reasoning one step further, it seems logical that – like forum selection provisions – choice of law provisions appearing in freely negotiated private international agreements unaffected by fraud, undue influence, or overweening bargaining power would also be given full effect. In fact, some commentators and courts have come to precisely this conclusion. For example, Professor Thomas J. Schoenbaum notes in his admiralty and maritime law treatise that "American courts will enforce choice of forum clauses (and by implication choice of law clauses) contractually agreed upon by parties dealing at arms length and in good faith."¹¹³ Likewise, various federal appeals courts reviewing maritime tort

¹⁰⁷ *Id.* at 4.

¹⁰⁸ *Id.* at 6.

¹⁰⁹ *Id.* at 1911.

¹¹⁰ *Id.* at 7.

¹¹¹ *Id.* at 12-13.

¹¹² *Id.* at 11-13.

¹¹³ 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 21-15 (4th ed. 2001).

claims have indicated that "where the parties specify in their contractual agreement which law will apply, admiralty courts will generally give effect to that choice."¹¹⁴

Despite these logical interpretations of *Bremen* by courts and commentators, the majority of American courts faced with presumptively valid choice of law clauses in maritime tort cases remain hesitant to give these clauses dispositive effect and continue to apply the *Lauritzen-Rhoditis* framework in the absence of a more specific directive from the U.S. Supreme Court.¹¹⁵

The post-*Bremen* case of *Tarsenko v. Cardigan Shipping Co.* epitomizes the challenges lower courts face in this context.¹¹⁶ In *Tarassenko*, a Norwegian seafarer domiciled in Miami, Florida signed onto a Bahamian-flagged vessel.¹¹⁷ While serving aboard the vessel in 1985, the seafarer suffered personal injuries not far from the coast of Spain.¹¹⁸ When the foreign seafarer brought suit against his employer in New York, the employer sought to have the case dismissed for lack of subject-matter jurisdiction, citing the existence of an unambiguous Norwegian choice of law clause in the employment agreement.¹¹⁹

Quoting the U.S. Supreme Court's decision in *Bremen*, Judge Pollack of the Southern District of New York observed that "[t]he existence of a clause in the employment agreement specifying Norwegian law to govern the rights and obligations of the plaintiff expresses the intent of the parties . . . [and] is generally binding."¹²⁰ Despite this forceful language regarding the enforceability of choice

¹¹⁴ *Chan v. Society Expeditions, Inc.*, 123 F.3d 1287, 1296-97 (9th Cir. 1997); *see also Neely v. Club Med Mgmt. Servs. Inc.*, 63 F.3d 166, 198 (3d Cir. 1995) (noting that "a reasonable choice of law clause whose operation does not contradict a strong public policy of the United States . . . would typically be enforced under federal maritime law"). *But see Thomas v. Carnival Cruise Lines*, 2009 WL 1874098 (11th Cir., July. 1, 2009) (questioning enforceability of agreements in which choice of law and choice of forum provisions operate as a prospective waiver of statutory rights).

¹¹⁵ *McCulloch v. Sociedad Nacional De Marineros De Hond.*, 372 U.S. 10 (1963); *Windward Shipping (London), Ltd. v. Am. Radio Ass'n*, 415 U.S. 104 (1974); *Societe Nationale Industrielle Aerospatiale v. U. S. Dist. Court, S. D. Iowa*, 482 U.S. 522 (1987); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005).

¹¹⁶ *Tarassenko v. Cardigan Shipping Co.*, 671 F. Supp. 997, 998 (S.D.N.Y. 1987).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See id.* at 999.

¹²⁰ *Id.* (citing *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

of law clauses in maritime agreements, Judge Pollack felt compelled to apply all eight *Lauritzen-Rhoditis* factors before concluding that Norwegian law governed the plaintiff's claims, and that dismissal for lack of subject matter jurisdiction was proper.¹²¹

The California case of *Lockwood vs. M/S Royal Viking Star* is similarly confusing in its treatment of a choice of law clause in a maritime tort case.¹²² In *Lockwood*, an American seafarer was injured aboard a Norwegian ship in Hong Kong.¹²³ The seafarer sued the shipowner in the Central District of California for his personal injuries, asserting various causes of action under the Jones Act and the general maritime laws of the United States.¹²⁴ Pointing to the choice of law provision in the contract, the shipowner maintained that the claims should be dismissed for lack of subject-matter jurisdiction because Norwegian law governed.¹²⁵ Meanwhile, the seafarer argued that American law should apply pursuant to the *Lauritzen-Rhoditis* analysis, and claimed "to have been unaware of the choice of law in his employment contract."¹²⁶

Siding with the shipowner, the Court found the choice of law provision presumptively valid, noting that the seafarer "had on a prior occasion signed an identical contract" with the same provision stipulating "that Norwegian law will apply."¹²⁷ And yet – despite this finding of presumptive validity – the Court went on to engage in a full-blown *Lauritzen-Rhoditis* analysis, treating the choice of law provision as a mere sub-factor within the "Place of Contract" factor.¹²⁸

Interestingly, the *Lockwood* court did not explain why a *Lauritzen-Rhoditis* analysis was even necessary in the wake of *Bremen*, given the presumptively valid and unambiguous Norwegian choice of law clause. Ultimately, however, the distinction was inconsequential, for the *Lauritzen-Rhoditis* analysis yielded the same result

¹²¹ See *Tarasenko*, 671 F. Supp. 997, 999-1000.

¹²² See generally *Lockwood v. The M/S Royal Viking Star*, 663 F. Supp. 181 (C.D. Cal. 1986).

¹²³ *Id.* at 181.

¹²⁴ *Id.*

¹²⁵ *Id.* at 183-84.

¹²⁶ *Id.* at 183.

¹²⁷ *Id.*

¹²⁸ *Id.* at 181-83.

as was called for by the choice of law provision, and the seafarers claims were dismissed for lack of subject-matter jurisdiction.¹²⁹

VII. CONCLUDING REMARKS

Rapid globalization, advancements in technology, and pioneered methods in ship engineering have both revolutionized the modern notion of sea travel and globalized international maritime relationships. The challenge is for the jurisprudence to keep pace. Despite the eloquent opinions of the U.S. Supreme Court in the *Lauritzen-Rhoditis trilogy*, there remains an atmosphere of uncertainty in matters involving choice of law clauses.¹³⁰ After a lengthy hiatus, there is a dire need for the Court to plot the chart through the straits of competing principles, customs, and interests to settle the often volatile ebb and flow of tort litigation in admiralty.¹³¹

A clear resolution as to the appropriate role of choice of law clauses in this context will enable courts – both state and federal – to narrow their inquiries. As Chinese philosopher Lao Tzu acknowledged, “Those who have knowledge, don't predict. Those who predict, don't have knowledge.” The majority decision in *Bremen* quieted concerns over the enforceability of forum selection clauses by honoring the concentrated efforts of parties to a contract to select forums to handle potential disputes.¹³² As a consequence, parties and courts are able to tackle choice of forum questions quickly and efficiently in the presence of an otherwise enforceable clause.

¹²⁹ *Id.* at 184.

¹³⁰ *See, e.g.,* *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 308 (1970) (holding that American maritime law applied despite presence of choice of law clause).

¹³¹ In non-maritime matters, for example, courts are directed to apply choice of law clauses so long as the selected law has some relation to the suit and is not purely arbitrary.

¹³² *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

In the choice of law context, however, the waters are much murkier. The current state of the *Lauritzen-Rhoditis* analysis can unnecessarily subject shipowners and maritime employers to unpredictable litigation outcomes, despite cautiously crafted contracts that seek to settle decisions about the law to be utilized in dispute resolution. Though the law favoring enforcement of the parties' intentions seems clear in the wake of *Bremen*, maritime employers and seamen alike would benefit if the Supreme Court were to issue a clear directive on these matters. While Eleanor Roosevelt may have been right when she declared "if life were predictable it would cease to be life, and be without flavor," the law is quite the opposite; pass the Wonder bread please . . . no butter.

