

THE MARITIME LAW YEAR IN THE
UNITED STATES OF AMERICA

PAPER PREPARED BY:
HOWARD McCORMACK
HEALY AND BAILLIE
NEW YORK

Table of Contents

I. INTRODUCTION	1
II. THE FEDERAL COURT SYSTEM IN THE UNITED STATES.....	1
A. Supreme Court	1
B. Circuit Courts.....	2
C. District Court.....	2
D. Reports of Opinions.....	3
E. Scope of Paper.....	3
III. SUPREME COURT OF THE UNITED STATES.....	3
IV. THE PAPER WILL NOW DISCUSS DIFFERENT MARITIME LAW ISSUES THAT HAVE BEEN CONSIDERED BY THE FEDERAL COURTS ON MARITIME LAW MATTERS.....	4
A. ARBITRATION	4
B. CARRIAGE OF GOODS BY SEA AND RELATED ISSUES	7
1. Forum Clauses	7
2. Package Limitation.....	10
3. Warranty of Seaworthiness	10
4. Substitution of Cargo in Containers.....	11
5. Deviation.....	11
C. LIMITATION OF LIABILITY	11
D. ISSUES OF MARINE INSURANCE.....	12
1. Uberimmae Fidei.....	12
2. Breach of Trading Warranty	15
3. Latent Defect and the Inchmaree Clause	16
4. General Average.....	16
E. MARITIME PERSONAL INJURY AND DEATH ISSUES	17
1. Seaman's Status.....	17
2. Forum Clauses	19
3. Base of Operations	20
4. Death Claims - What Law Applies	20
5. Jones Act Exclusions	21
6. Causes of Action for Wrongful Death	22
7. Death on the High Seas Act.....	22
F. OIL POLLUTION	23
1. Criminal Issue on Environmental Law	25
G. SALVAGE.....	25
V. CONCLUSION	29

MARITIME LAW YEAR IN THE UNITED STATES OF AMERICA

I. INTRODUCTION

As a member of the Maritime Law Association of Australia and New Zealand, I am most pleased to be able to give some background of the Maritime Law Year in the United States of America. As Immediate Past President of the Maritime Law Association of the United States, I am also quite familiar with the Maritime Law Year, in particular, the time frame of the centennial activities of our Association, which we celebrated in the United States in May of 1999. We have just concluded our centennial year at the meeting of the Association this May in New York.

It is my intention to discuss various maritime law issues in the United States in the Maritime Law Year which will be the time frame of 1999 and 2000 to the extent that the cases have been reported and available for discussion.

II. THE FEDERAL COURT SYSTEM IN THE UNITED STATES

The Federal Courts in the United States are the courts which issue the most maritime and admiralty decisions due to the grant of admiralty jurisdiction of Article III of the our Constitution as well as the further grant of exclusive admiralty jurisdiction in Title 28 U.S. Code Section 1333. States courts have concurrent jurisdiction on issues received under the Savings to Suits clause of the Constitution. It is not my intention to discuss some of the decisions from the courts of the 50 states of the United States that may consider admiralty matters.

In order to understand more fully the issues and the cases discussed, some of which may be in conflict, a brief word about the federal judicial system of the United States may be in order. The highest court in the United States is the Supreme Court which, in the past, has rarely granted writs of certiorari involving cases on maritime and admiralty issues. There is one in this maritime year which is of substantial importance to the entire maritime industry.

A. Supreme Court

The Supreme Court of the United States is composed of nine Justices, who, as are all federal judges, are appointed by the President for a lifetime term. It is why the appointment process not only of Supreme Court justices but also of all federal judges is quite important. They have a substantial impact upon not only ruling on business activities in maritime matters, but also on many other matters which impact on the everyday lives of most Americans. There is, of course, substantial interest in this presidential election as it may impact on the Supreme Court. It is anticipated that any new president will have the opportunity to appoint between three to four justices, given the age of some of the present justices and their health situation.

Underneath the Supreme Court in terms of jurisdiction and activity, are the United States Court of Appeals for the various circuits. There are 12 Circuit Courts in the United States designated by numbers, e.g. first, second etc. as well as the United States Court of Appeals for the Federal Circuit, which encompasses solely the District of Columbia. A good number of the cases heard by the Federal Circuit are those involving administrative law issues as well as highly politicized cases that emanate from the Federal District Court in Washington D.C.

B. Circuit Courts

The Circuit Courts have under their jurisdiction a number of District Courts which may encompass the courts in more than one state. A copy of the geographical distribution of the Circuit Courts is annexed, from which you will observe the of states involved in each circuit. As will be evident in the paper, the majority of the maritime issues are heard by the Circuit Courts in New York (Second Circuit), the U.S. Gulf (Fifth and Eleventh Circuits), and the Pacific Northwest (Ninth Circuit). It is not that the work of the other circuits is lesser, but the majority of maritime related matters obviously originate in areas where there is substantial port activity. The Circuit Courts of Appeal hear arguments from the Federal District Court. Those Court of Appeals sit in argument in panels of three. In my own circuit, the Second Circuit, there are approximately 13 active circuit judges and 8 senior judges. Only three of those sit at one time unless the entire Court is called upon to act and, in fact, agrees to accept an appeal hearing *en banc* which involves only the active judges. This is a rare occasion, so that it is evident that there may well be conflicts within each circuit based upon the fact that only 3 of the possible 13 judges sit on a panel for any hearing.

C. District Court

The majority of the cases in the United States on maritime matters are commenced in the Federal District Courts. Each state has a Federal District Court within it. In some instances states, such as New York, have four District Courts. Other states may only have one District. The allocation is based to a great extent upon population etc. Federal District Judges as well as the Circuit Judges and Supreme Court Judges are all appointed for a lifetime term by the President of the United States.

Unlike the system with which you may be familiar in England and perhaps in Australia, there is no special commercial court or a special admiralty court or even a special admiralty judge within the federal judiciary. The federal judicial system encompasses a wide jurisdictional base. The judges are involved in federal criminal matters, patents and copyright issues, intellectual properties matters, securities transactions, commercial disputes as well as various admiralty and maritime matters. The Court system is such that when a case is filed, the judge is assigned to the case in a purely arbitrary manner, normally by lot, which prevents participants from being able to determine in advance the identity of the judge.

That judge will then be allocated to that case until it is ultimately resolved one way or the other. The judges are assisted in these issues by magistrate judges who are not Article III judges but are judges appointed for a term of 10 years. They have wide ranging powers and are particularly involved in criminal matters.

To give you an idea of the number of Federal District judges involved, the Southern

District of New York, which encompasses the counties of New York, (Manhattan), the Bronx, Westchester and Rockland has approximately 28 active judges and approximately 14 senior judges. The latter are judges who have a lower case load and are permitted to take senior status after they achieve a certain time in grade as a judge plus their age. It is estimated that there are approximately over 950 federal District Court judges throughout the United States and its possessions. It is evident therefore that the federal judicial system does not enjoy the special knowledge or background that the Admiralty Court or the Commercial Court in England has so that admiralty matters do at times require substantial expert testimony and assistance to the court.

D. Reports of Opinions

The opinions of the various federal court are printed in Official Court reports. In addition to the Official Reports, maritime related cases also get reported in the American Maritime Cases (AMC). To those of you who have had access to the United States law or United States lawyers, you will probably recall seeing these brightly yellow bound books in the offices. They are issued 10 times a year in a pamphlet form and then ultimately bound into a book which appears during the next year.

The AMC utilizes the services of its associate editors in various ports throughout the United States who are commissioned to furnish the AMC with the most recent maritime related cases that would be of interest to the entire maritime industry. Generally, it is the first source of reference in a maritime case that practitioners would utilize for quick research. The official reports are also cross referenced in the AMC so that with an AMC reference, it is easy to determine the official citation of the opinions.

E. Scope of Paper

It is the intent of this paper to discuss various topics on maritime law and how various Federal Courts have dealt with them. There have been many cases that are reported but only a few have been chosen, primarily from those District or Circuit Courts that are considered the more important maritime jurisdiction courts throughout the United States. The paper will discuss topics that do not necessarily reflect the entire gamut of the maritime law but will attempt to highlight those cases that should be of interest and, hopefully, of importance to the members of the MLA of Australia and New Zealand.

III. SUPREME COURT OF THE UNITED STATES

There was one impressive and important Supreme Court decision during the maritime law year. This was the case of the *United States v. Locke Governor of Washington et al.* 529 U.S., 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000), 2000 AMC 913 decided March 6, 2000. A unanimous Supreme Court reversed the decision of the United States Court of Appeals for the Ninth Circuit. That Court had upheld particularly stringent regulations of the State of Washington on tanker operations. The Supreme Court held these impacted adversely upon existing United States Coast Guard regulations, United States statutes and prior Supreme Court decisions. The Court felt that the Washington oil spill prevention regulations, which were the result of the 1990 Oil Pollution Act

(OPA) would compromise the requirement of uniformity and were therefore invalidated by field preemption as reserved to the federal government by Title II of the Port and Waterway Safety Act of 1972 (PWSA) and other legislation. The Court remanded the matter to the lower courts to consider the remaining Washington State regulations that it had not overruled to determine whether they were conflict preempted under Title I of the PWSA or field preempted under Title II.

Subsequent to the remand to the lower court, the State of Washington has withdrawn the disputed regulations. The Supreme Court stated that

“when one contemplates the weight and immense mass of oil ever in transit by tankers, the oil’s proximity to coastal life, and its destructive power, even if a spill occurs far upon the open sea, international federal and state regulations may be insufficient protection. Sufficiency, however, is not the question before us. The issue is not adequate regulation but political responsibility; and it is in large measure, for Congress and the Coast Guard to confront whether their regulatory scheme, which demands a high degree of uniformity, is adequate. States, as well as environmental groups and local port authorities, will participate in the process.”
2000 AMC at 932.

The Maritime Law Association of the United States was the one of many organizations filing *amicus curiae* briefs in support of the petitioner’s United States and Intertanko. The court’s significant decision upheld the argument of Intertanko that Washington’s standards invaded areas long occupied by the Federal Government and imposed unique requirements in an area where national uniformity was mandated. I was most pleased to have been co-author of the MLA brief and attend the oral argument before the Court on December 6, 1999.

IV. THE PAPER WILL NOW DISCUSS DIFFERENT MARITIME LAW ISSUES THAT HAVE BEEN CONSIDERED BY THE FEDERAL COURTS ON MARITIME LAW MATTERS.

A. ARBITRATION

The Federal Court in New York is among the leading courts in the United States to consider arbitration issues in the maritime field. An owner was permitted to go beyond the charter and bind to arbitration pursuant to a bare boat charter, the guarantor of the charter. The guarantor’s estate resisted on the grounds that he did not sign the charter agreement containing the arbitration provision and therefore was under no obligation to participate in the arbitration. The court dismissed that argument and held the estate could be compelled to arbitrate on the basis that the guarantee incorporated the charter agreement by reference, and therefore the guarantor was bound by the arbitration provision. *Limonium Maritime S.A. against Mizushima Marinera S.A. et al.*, 2000 AMC 343 (SDNY 1999), aff’d without published opinion 2nd Cir November 18, 1999.

A court can only order parties to a suit before to arbitrate pursuant to the terms of their

contract. A party in a separate suit cannot force them to arbitrate if they have waived the right to do so, even if it had a contract with some of the parties. The plaintiff in *Skaarup Shipping Corporation v. Universal Boat Transport Limited*, 1999 AMC 1147 (D Conn. 1999) was claiming indemnity against the charterer, with whom it had no contract, for negligently or intentionally inserting the plaintiff's name as a carrier or owner in a bill of lading without having had the authority to do so. The plaintiff alleged it was caused to be sued for cargo damage in a separate action to which the charterer was not a party.

The court found that the charterer defendant seeking to stay the pending suit and the other cases pending arbitration could not force the parties in the separate suit to arbitrate. The courts of the United States are extremely reluctant, particularly in the Second Circuit, to order consolidation of arbitration where the parties have not agreed to it on the basis that arbitration is a contractual arrangement and the court will not order consolidation in the absence of agreement.

This was most recently articulated by the Second Circuit in *Glencore Limited v. Schnitzer Steel Products Co et al*, 189 F. 3rd 264, 2000 AMC 57 (2nd Cir. 1999). The lower court had granted Glencore's petition for a joint hearing in two pending and related arbitrations between Glencore and two other entities. The Second Circuit vacated that order basing its opinion on the Federal Arbitration Act (FAA), 9 U.S. Code Section 1 et seq. which required courts to enforce privately negotiated agreements to arbitrate like other contracts in accordance with their terms. The Federal Rules of Civil Procedure did not give the District Court power to order either consolidation or a joint hearing of two separate arbitrations where the arbitration provisions in the relevant agreement did not provide. The court referred the participants to its prior decision in *Government of the United Kingdom of Great Britain v The Boeing Company*, 998 F 2d 68 (2nd Cir. 1993) which held that federal courts do not have the power to order consolidation of two or more arbitration proceedings unless it was within the terms of an agreement among the parties.

The Second Circuit also considered an international problem on the issue of the recognition of foreign arbitration awards under the New York Convention. *Baker Marine (NIG) Ltd. v. Chevron (NIG) Ltd. et al*, 191 F. 3d 194, 2000 AMC 509 (2nd Cir. 1999). A dispute had arisen between a marine barge company, an oil company and marine contractor concerning contracts to provide barge services for oil production in Nigeria. The Nigerian Federal High Court set aside a Nigerian arbitration award originally granted in favor of Baker by arbitrators in Nigeria. Baker then sought assistance from the federal court in the United States to enforce the original arbitration award under Chapter 2 of the Federal Arbitration Act 9 U.S. Code 201 et al. which implemented the 1958 UN Convention on Recognition and Enforcement of Foreign Arbitration Awards in the United States. (The New York Convention).

The District Court denied Baker's petition to confirm the foreign award and the Court of Appeals upheld that denial. The Appellate Court was of the view that the parties had contracted in Nigeria that their disputes would be arbitrated under Nigerian law. There was nothing in the contract as reviewed by Court of Appeals that suggested the parties intended any United States domestic arbitral law to govern their disputes. Baker had failed to show the court any adequate reason for the court's refusing to recognize the judgment of the Nigerian court. It stated the primary purpose of the FAA was to insure that private agreements to arbitrate were enforced according to their terms, citing *Volt Information Sciences Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989).

In the more typical case, where a cargo plaintiff sues the vessel's owner for damage to

cargo, where the bill of lading contains an arbitration agreement, the court considered these issues when the vessel owner requested a stay pending arbitration. *Thyssen Inc. v. M/V MARCOS N et al*, 1999 AMC 2515 (SDNY 1999). The plaintiff, a steel importer, had contracted to ship steel and requested a copy of the shipper's charter party. The bill of lading incorporated the broad arbitration provision that the defendant vessel owner sought to enforce since it required arbitration of "any dispute" which "arises under" the charter party and required arbitration of the dispute under the bill of lading. The defendant owner however was not a signatory to the charter party. The court upheld the shipowner's application to stay pending arbitration on the basis that the inclusion of the statement that arbitration was required for any dispute arising under this "charter party or bills of lading" anticipated the assumption of rights and liabilities by subsequent parties. It believed that this language demonstrated an intent to expand the scope of that clause to embrace persons other than the original signatories.

The court discussed at length the historical background of incorporation of arbitration clauses in charter parties and the requirement that it be in writing. The court disposed of those arguments by finding the arbitration clause was incorporated in the bill of lading and was in writing and therefore considered the remaining issue of non signatories. The opinion contains an excellent discussion on the issue of the binding of non signatories. It also disposed of the plaintiff's argument that the defendant owner had waived any right because it waited almost two years to seek arbitration and held that the parties were bound by a valid arbitration agreement.

The Baker decision was revisited by Judge Charles S. Haight, a former leading admiralty practitioner, in another matter involving a foreign arbitration award. *Martin I. Spier v. Calzaturificio Tecnica, Spa.*, 71 F. Supp. 2d 279 (SDNY 1999). Spier, an American citizen, renewed his petition to enforce an arbitration award rendered in Italy by Italian arbitrators against the defendant Tecnica. The Italian courts had entered judgment nullifying the Italian arbitration award. Spier sought enforcement of the Italian arbitration award, notwithstanding the decision of the Italian courts.

The court felt that the three Italian courts nullified the award because they concluded the arbitrators' decision to award Spier money arose from an obligation completely outside the contract and therefore it was not within the arbitrators power to decide. The petition to enforce the award fell once again under the New York Convention which was considered in Baker. As a federal judge within the District Court of New York, which was subject to the jurisdiction of the Second Circuit, the court was bound by that decision. Judge Haight felt that the Baker case and an earlier Second Circuit arbitration New York convention case required that Spier's petition be denied. The court rejected Spier's attempt to have the court extract from the arbitration award amounts which were claimed to be due to him. Judge Haight, as a practical matter, felt that the exercise would involve amending or modifying the arbitrators' award or the judgment of the three Italian courts or all of the above. It was his view that these functions lay well beyond the limited subject matter jurisdiction conferred on the court by the Convention and its implementing domestic legislation. He felt that he could do only one of two things, enforce the award or refuse to do so upon proof of one of the grounds contained in the Convention, which was not shown. He refused to enforce the award.

In a bankruptcy issue, the Second Circuit had occasion to consider the continuing conflict between the bankruptcy laws and the FAA. Plaintiffs, debtors and their successor in interest trust appealed the interlocutory order of the District Court in New York, which had reversed a bankruptcy court order which had held that the insurance contract disputes were not

core proceedings and ordered arbitration of the proceedings to go forward. In *re United States Lines Inc. et al.* 197 F.3d 631 (2nd Cir. 1999) 2000 AMC 784 (certiorari denied March 27, 2000), the Second Circuit reversed the District Court and held that the declaratory proceedings brought by the plaintiff trust directly affected the bankruptcy court's core administrative function of asset allocation among creditors and for that reason they were "core". It was within the bankruptcy court's discretion to refuse to compel arbitration because it believed it would prejudice the trust's effort to preserve the trust

The case involved some claims by 12,000 seamen employees of various steamship owners. The claimants had filed more than 18,000 claims, most of which were for asbestos related injuries. The Second Circuit's discussion of the annulment of the arbitration clause is extremely significant because it discusses the continuing conflict between the Bankruptcy Code and the FAA. The court recognized that there would be occasions where a dispute involving the Bankruptcy Code and the FAA "presents a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization and arbitration policy advocates a decentralized approach towards dispute resolution." The Court found that the bankruptcy court had the discretion to stay arbitration therefore it showed due deference to that court's determination that arbitration would seriously jeopardize a particular core bankruptcy proceeding.

B. CARRIAGE OF GOODS BY SEA AND RELATED ISSUES

1. FORUM CLAUSES

Since the relatively recent Supreme Court decision in *SKY REEFER* the lower Federal Courts of the United States have considered issues of forum selection clauses with various and divergent views. The Supreme Court in 1995 in *Vimar Seguros Y Reseguros, S.A. v. The M/V SKY REEFER*, 515 U.S. 528 directed enforcement of a forum selection clause involving a shipment from Spain to the United States which provided that disputes relating to cargo claims should be arbitrated in Japan. After the Supreme Court decision, the lower courts were called upon to consider not only foreign forum clauses but foreign arbitration clauses once again.

In *Reed and Barton Corp. et al. v. M/V TOKYO EXPRESS et al.*, 1999 AMC 1088 (SDNY 1999) the bill of lading contained a provision for resolution by the federal law of the Federal Republic of Germany as determined in the Hamburg courts to the exclusion of jurisdiction of courts of any other place. Plaintiff sued the vessel and its shipowner to recover damages for non delivery of cargo onboard the vessel. The cargo was shipped from ports in Europe for discharge in New York and Boston. The court found the forum selection clause to be broad enough to cover the *in rem* claim brought by cargo against the vessel. German law did not recognize an action *in rem* against the vessel nor did it allow a maritime lien for cargo loss.

The underwriters for the vessel issued a letter of undertaking. The court then considered the validity of the clause under the provisions of the United States Carriage of Goods by Sea Act (COGSA). The court found that since the German law would apply the Hague Visby Rules, a fraternal equivalent of COGSA, plaintiff had failed to show that the application of those rules would in any way reduce the carrier's obligation below what COGSA guarantees, which was an issue considered by the Supreme Court in the *SKY REEFER*. The court then followed the precepts of the Supreme Court in *The BREMEN*, 407 U.S. (1972) viz, that in light of the present day commercial realities and expanding international trade, forum selection clauses should control, absent a strong showing that it should be set aside. The court

found no such provision and upheld the German forum clause and dismissed the action in the United States.

Another judge within the Southern District had the occasion to consider a forum selection clause requiring the action be brought in a Croatian court in *Abrar Surgery (Pvt) Limited et al. v. Alligin Shipping Limited et al.*, 2000 AMC 109 (SDNY 1999). The vessel was carrying cargo from New York to Pakistan on a Croatian line vessel. The Court considered the usual arguments raised by cargo interests in these cases and followed the *BREMEN supra* that forum selection clauses are presumtively valid. It considered the *SKY REEFER* and subsequent decisions and held that cargo interests had not carried their burden of persuasion that the substantive law to be applied would reduce the carrier's obligation to the cargo owner below what COGSA guaranteed.

The cargo interests contended that, even if the forum selection clause was valid, it should not be enforced because it was unreasonable, since there were defendants other than Croatia Line, so that there would be duplicative litigation in Croatia and the United States. The court did not accept that argument because to do so would be to allow plaintiffs' to escape enforcement of forum selection clauses simply by adding defendants and claims. The court felt that, notwithstanding the specter of multi fora litigation raised by plaintiffs, there was no compelling reason why the plaintiffs should not be held to their agreement since it was only one claimant and one defendant. Therefore the court granted the shipowner's motion to dismiss.

Judge Haight had the occasion to consider a Korean forum clause in *Asoma Corporation v. M/V SOUTHGATE et al.* 2000 AMC 399 (SDNY 1999). The vessel owner sought dismissal of the cargo plaintiff's claim for damage on cargo transported from Thailand to Houston and Savannah. The owner sought to enforce a forum selection clause designating South Korean Courts as the exclusive jurisdiction for controversies. The court also was aware of the fact that, if it dismissed the action, the one year statute of limitations governing the plaintiff's claim under Korean law had expired and therefore the action would be time barred in Korea.

Once again, the Court considered the Supreme Court's comments in *The Bremen* about the presumptive validity of forum clauses and considered the Second Circuit cases issued prior to the Supreme Court decision in *SKY REEFER*. In those cases the courts, without exception, invalidated foreign forum clauses that were incorporated into bills of lading governed by COGSA as clauses afoul of Section 3(8) of COGSA. This section which provided that any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods arising from negligence, fault or failure in the duties or obligations provided in the section or lessening such liability otherwise as provided in this chapter shall be null and void and have no effect. The reasoning of the earlier Second Circuit case was rejected by the Supreme Court in the *SKY REEFER*.

Judge Haight then considered subsequent court decisions after *SKY REEFER*, including the recently discussed *Reed and Barton* and the *Abrar Surgery* decisions *supra*. Judge Haight held the plaintiff did not identify any aspect of the substantive law of South Korea that would potentially reduce the vessel owners obligations to it. Korea was not a signatory to the Hague Rules and therefore does not necessarily apply COGSA.

Judge Haight upheld the provision of the foreign forum selection clause finding that refusal to do so would be to promote the subversion of the parties' agreement by the plaintiff's

unilateral tactical decision. That decision was to ignore the forum selection clause and bring suit in the United States. Therefore, the plaintiff can now not be heard to complain of any potential timeliness problems that this choice may have created. The Court found that plaintiff had offered no compelling reason to invalidate the forum clause nor any persuasive authority requiring the court to compel the owner to waive the statute of limitation defense.

More recently a California court has held that a forum clause providing for resolution of disputes under the bill of lading to be brought in "The United States District Court at New York" was not ambiguous and transferred the California action to the Southern District of New York, which is the choice made by the court. The Court stated it stands to reason that New York City Hall was in Manhattan, which is within the Southern District of New York. *Tokyo Marine and Fire Insurance Co. Limited v. Nippon Express USA (Illinois) Inc. et al.*, 2000 AMC 810 (CD Cal. 2000).

In one of the few cases recently that failed to enforce a forum selection clause the District Court in New York, in the context of an extraordinary case involving the loss of the MS CARLA and claims of over \$130,000,000, the shipowner sought to enforce a forum selection clause, providing for a forum in Korea. The Court distinguished the other decisions of the Southern District where the shipowner Hyundai had successfully enforced the Korean forum clause because those cases did not involve limitation proceedings of the size and complexity of the CARLA. The court stated

"unjustifiably giving effect to all the various forum clauses in a cargo situation of this complexity and global magnitude would fragment this case beyond recognition." *In Re Complaint of Rationis Enterprises Inc. of Panama, as owner of M/S CARLA*, 1999 AMC 889 (SDNY 1999)

District Courts in New York also enforced German forum clauses *Street Sound Around Electronics v. M/V ROYAL CONTAINER et al.*, 30 F. Supp. 2d 661, 1999 AMC 1805 (SDNY 1999) and a Tokyo forum where it was time barred. *Choyoda Fire and Marine Insurance Co. of America v. M/V. HYUNDAI FREEDOM et al.*, 1999 AMC 1603 (SDNY 1999).

In order to insure you that this paper is indeed complete and up to date, I would like to bring to your attention to a case decided by the Southern District of New York on July 7, 2000 in which the office of Healy & Baillie were involved. It is *LPR/SRL v. Challenger Overseas LLC et al.*, 99 Civ. 8883 (JGK). The plaintiff sued the freight forwarder which in turn impleaded Healy & Baillie clients China Ocean Shipping Group, Cosco Container Lines and their agents Cosco North America Inc. The plaintiff was seeking damages in the amount of \$197,000 for the improper release of two containers of automobile parts. The freight forwarder brought a third party action against the Cosco entities claiming that the loss occurred while in their care, custody and control. The Cosco entities moved to dismiss the complaint, which motion was granted by the court. The Cosco Group was dismissed from the action on the grounds that it was an instrumentality of the People's Republic of China and immune from suit under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1602 et seq. The Cosco Container Line, which was the carrier that transported the containers, sought dismissal, which was granted on the basis of a forum selection clause requiring disputes be brought in the maritime courts in China. The District Court found this was a mandatory forum selection clause and disputes in any other forum would be inconsistent with the explicit clause. The Court considered again the

well repeated comments of the *Bremen* that a mandatory forum selection clause is presumptively valid and must be enforced unless the party resisting the clause makes a strong showing the clause should be set aside.

The Court found that the freight forwarder defendant third party plaintiff had not made a sufficient showing to set it aside. It made no showing that it would be unjust or unreasonable to enforce the clause or that it was invalid for reasons such as fraud or overreaching. They also made no showing that China was not an adequate forum for the resolution of the claims or that the freight forwarder would be deprived of any remedy. The court referred to the prior decisions discussed herein namely Thyssen, Asoma and Abarbrar Surgery.

Cosco North America, an agent of the Cosco Container Line, also sought dismissal on the basis of the forum clause. The objection raised was that a forum clause was not an exemption defense of limitation that would permit the HIMALAYA clause to come into effect, which the court found was without merit. The Court found that the HIMALAYA Clause applies to defenses and the usual understanding of the forum selection clause is that it is a defense to an action and such a clause is normally raised as a defense.

The Court found the plain meaning of the HIMALAYA Clause was that the forum selection clause applied to the carrier's agents and there was no dispute of agency in the case. Ironically, the defendant made a similar challenge against the plaintiff seeking to have the complaint dismissed on the grounds of the forum selection clause requiring claims to be brought in Genoa. The Court essentially said that what was good for the Chinese was also good for the Italians and the fact the claim would be time barred in Italy was not a proper basis to resist a mandatory forum selection clause motion. The decision by Judge Koeltl is one that should be considered by all parties involved in cargo matters where there are forum selection clauses in order to determine the present status of the law of the United States.

2. PACKAGE LIMITATION

In *Nippon Fire and Marine Insurance Company v. M/V TOURCOING et al.* 167 F.3d 99, 1999 AMC 913 (2nd Cir. 1999) the court affirmed the District court's finding of a package limitation of \$500 for a printing press damaged in the amount of \$1,180,000.00. The court concluded that COGSA compulsorily applied, that the parties did not agree to a higher liability limit and that the shipper had a fair opportunity to declare a higher value and pay an excess charge in exchange for greater liability.

3. WARRANTY OF SEAWORTHINESS

A vessel owner was held to breach its warranty of a seaworthy vessel when it experienced an unexpected loss of power and sustained two large gashes in the hull. It was the owner's contemplation of an undertaking of a 1400 mile voyage on the open sea with a jury rigged electrical system that relied on the emergency generator with cargo on board. The Court ruled the vessel was not seaworthy or reasonably fit to carry cargo. *Mobil Shipping and Transportation Company v. Wonsild Liquid Carriers Limited*, 190 F.3d 64 (2nd Cir. 1999).

4. SUBSTITUTION OF CARGO IN CONTAINERS

In *Daewoo International (America) Corp. v. SeaLand Orient Limited et al.*, 196 F. 3d 481, 2000 AMC 197 (3rd Cir. 1999), the Court of Appeals affirmed the lower court's ruling that common carriers issuing bills of lading were not responsible for the loss when cement blocks were found in containers in place of the products. The court found that under COGSA a common carrier with no notice that anything was awry was not obligated to inspect the sealed shipment before issuing a bill of lading. The court felt that the plaintiff, as owner and consignee, was in a better position to have prevented the loss. It also failed to prove that their goods were substituted while in the common carrier's possession. The carrier did not weigh the container nor break the seals to inspect the contents.

5. DEVIATION

An unreasonable course deviation by a vessel did not prevent it from invoking the COGSA one year time bar. Although the deviation have increased the risk of loss, it had no bearing at all on the ability of the plaintiff cargo owner to timely file a lawsuit. *Mesocap Ind. Limited v. Torm Lines*, 94 F.3d 1342, 2000 AMC 370 (11th Cir. 1999). Decisions of the District Courts within the 11th Circuit had reached different conclusions. Therefore the 11th Circuit ruling resolved that issue within its Circuit. The 5th Circuit, from which the 11th Circuit was an offshoot, had also addressed the issue by when it held that the deviation doctrine only nullifies the COGSA \$500 package limit, not the one year time bar. *Bunge Edible Oil Corp. v. M/V. TORM ROSK*, 756 F. Supp. 261 (ED La. 1991), aff'd 942 F.2d 786, 788 (5th Cir. 1992).

C. LIMITATION OF LIABILITY

Under the provision of the Limitation Liability Act of the United States, 46 U.S. Code §183 et seq, the petitioner and vessel owner seeking limitation establishes its lack of privity and knowledge by a preponderance of the evidence. It did this by showing that it took appropriate steps to insure and reasonably believed that the vessel was seaworthy. *Patrick J. Carr v. PMS Fishing Corporation et al.*, 191 F.3d 1 (1st Cir. 1999). The parties had stipulated that the vessel was unseaworthy when she sank, and that the unseaworthiness proximately caused the plaintiffs injuries. The trial court's holding was affirmed by the Court of Appeals that the vessel owner had satisfied the statutory requirements for limitation of liability. This decision is remarkable for the extraordinarily erudite language used by Circuit Judge Selya who was well known among the federal judiciary for his apt phrase and legendary vocabulary.

The owner of the tug GULF CAJUN was not entitled to limited liability as a result of an collision by the tow of the tug and an offshore platform in the Gulf of Mexico. *In the Matter of TT Boat Corporation as owner*, 1999 AMC 2276 (ED La. 1999). The court found that the tug did not have updated and corrected charts for the area and the charts were over five years old, which it found was closely connected to the incident. The lack of updated charts made the vessel unseaworthy and that unseaworthiness was within the knowledge and privity of the tug owner.

The owner may not limit its liability for the unseaworthiness of the vessel, if a defect was reasonably discoverable. That duty extended to the duty to ensure that a vessel was equipped with the proper charts. Although the court understood that an owner, such as Tidewater with a large fleet, did not have to monitor its employees by electronic surveillance or submit its captains and crew to invasive questioning or unduly inconvenience safety checks to fulfill its obligation to insure that its vessels were seaworthy, however, the charts were on the average five years old. The owner never performed a spot check on the charts itself. The court found

that a prudent inspection would have alerted the vessel owner to this problem and allow it to take measures to prevent conditions likely to cause losses. Such inspections need not be frequent or burdensome to be adequate and effective, but they must be periodic and systematic. Since that duty was not delegable, the court found that Tidewater was not entitled to limitation of liability under the limitation act. They needed to do a more and reasonable inspection would have led Tidewater to the knowledge that its vessel was unseaworthy. Therefore it had privity and knowledge of the unseaworthy condition.

For an interesting discussion of the issue of concursus within the provisions of the limitation of liability act, we suggest a review of the Second Circuit recent decision in Kreta Shipping S.A. as owner of the M/V AMPHION, 192 F.3d 41, 1999 AMC 2858 (2d Cir. 1999). The decision is a rather lengthy and somewhat technical one. Essentially, it provides that the District Court had authority to vacate the statutory concursus injunction issued in the normal limitation action, where the stipulated claims were less than the limitation amount posted by the vessel's shipowner as security for the claims. In vacating the limitation act injunction, the Court made a security fund available to satisfy any judgments that may be made in other forums.

D. ISSUES OF MARINE INSURANCE

Unlike England and Australia, the United States does not have a Marine Insurance Act. Issues of law on marine insurance cases are difficult to resolve because at times they run afoul of the Supreme Court decision in *WILBURN BOAT v. Firemans Fund Insurance Company*, 348 U.S. 310 (1948), as to whether or not federal admiralty law will apply or whether the law of case should be that of one of the states, which the Supreme Court suggested may be more suited to deal with issues of insurance. This subject matter is too involved for this venue, but those involved in marine insurance matters in the United States have to be more than aware of the proper law to be applied.

1. UBERIMMAE FIDEI

The 9th Circuit had occasion to discuss an interesting issue of bad faith in the context of a claim by a yacht owner for the loss of the yacht. It happened to be the assured's fourth yacht to be sunk. The court affirmed the District Court's finding of rescission on the grounds of bad faith on the part of the assured. *Cigna Property and Casualty Insurance Company et al. v. Polaris Pictures Corporation et al*, 159 F. 3d 412 (9th Cir. 1998) (cert denied October 4, 1999). The District Court's finding that the insurance was obtained with a fraudulent intent to sink the yacht and collect the proceeds was upheld by the Court of Appeals. The insurance carrier argued on the grounds that the assured had failed to disclose material facts, such as the principal's loss history or the close ties among all the parties involved in the ownership of the vessel. The Court of Appeals affirmed on the basis of concealment of material facts.

It stated that whether or not asked, an applicant for marine insurance policies is bound to reveal every fact within his knowledge that is material to the risk. In essence, they defined concept of *uberimmae fidei*. There were close ties between the corporate applicant and its principals and a second company and its principals where the second company or its principals had a long and substantial loss history. The facts of the case are intriguing in that the allegations of the loss was that the vessel was intentionally sunk by Sicilian drug runners, posing as a trial crew for the vessel and seeking to escape from the Italian Coast Guard. The

parties aboard the yacht at the time of the sinking had also been aboard one of the principal owner's other ill fated yachts which also sank off the coast of Italy. That person was now the chief executive officer of Polaris, the alleged owner of the yacht. These facts had a substantial impact on the ultimate decision.

A ferry boat owner having purchased a ferry for \$650,000 then told the insurance underwriter that it wanted \$5.1 million coverage and produced an invoice showing the purchase for \$5.1 million. Subsequently, the ferry had a significant problem and ultimately ran aground after its owner had breached five separate insurance warranties. The Plaintiff underwriter sought rescission of the insurance contract, which was ultimately granted by the court. *Royal Insurance Company of America v. Harbor Shuttle Inc.*, 1999 AMC 929 (EDNY 1999). The misrepresentation of the purchase price voided the contract on the basis that marine insurance policies are governed by the doctrine of "*uberimmae fidei*" which mandates that both parties to a contract exercise the highest degree of good faith. The ferry owner denied it intentionally misrepresented the purchase price. The court held that it was well settled that intent to deceive is not necessary to rescind a contract as the underwriter only needs to prove that representation of the fact was false and material.

A similar situation arose where a certificate by an owner of a yacht stated the repairs recommended by a surveyor had been made, when the repairs had not been made. The value of the yacht was \$78,000, which was true only if the repairs were made. This was a breach of the assured's duty of utmost good faith. The policy was rescinded and voided by the court. *Certain Underwriters at Lloyd's London v. Arthur W. Johnston et al.*, 1999 AMC 1452 (D PR 1999). The surveyor found the vessel to be in a generally distressed and neglected state and recommended 15 separate items affecting the vessel's seaworthiness be repaired. The owner objected to the survey and advised the insurance broker of their objections.

The owner was notified that the policy was going to be cancelled due to their failure to provide evidence of compliance with the surveyor's recommendations. The assured thereafter provided a document which, in fact, was completely false in that they alleged complete compliance with the surveyor's findings. The court then went into a detailed discussion of the issues of *uberimmae fidei* finding this doctrine continued to be a correct statement of the law of American Marine Insurance.

The court held there was no doubt that the doctrine applied, and equally no doubt that the application of the doctrine voided the coverage. The assured made a fraudulent misrepresentation of material fact calculated to mislead the underwriter into believing the repairs had all been made and the vessel was accordingly seaworthy at the inception of the policy. The court found a breach of an express warranty of seaworthiness which also resulted in voiding the cover, when there is an assured's failure to have the vessel in a seaworthy condition at the inception of the policy. The court found the evidence presented at trial was overwhelming that the defendant's breached this warranty.

The good faith issue was considered again in the context of a yacht problem which seems to be representative of a good number of the cases on this issue. In *La Reunion Francaise S.A. v. Michael J. Thompson Sr.* 1999 AMC 2579 (SD Fla. 1999), the insurance company sought rescission of an insurance policy on a auxiliary sailing vessel on the basis that the assured made material misrepresentations in responding to questions on the application, particularly with regard to any commercial use of the vessel. The vessel caught fire and burned.

The assured sought damages and recovery of \$200,000 under the policy. The insurance company submitted substantial evidence that the vessel was involved in commercial activities and invoked the *uberimmae fidei* concept in maritime law which the court applied.

The court found the assured actively engaged in commerce during the time the insurance was in effect, which was a clear misrepresentation of the facts submitted to the underwriter. These were material non disclosures. The court found the assured was in possession of information material to the risk which he did not reveal. These facts should have been disclosed. Because there was misrepresentation on the substantive issues which would entitle the insurance company to avoid the entire contract and therefore the court granted rescission.

La Reunion was involved in another yacht matter also invoking the *uberimmae fidei* concept. In *La Reunion Francaise v. George Christy, et al*, 1999 AMC 2499 (MD Fla. 1999), this again involved a sailing vessel insured in the amount of \$33,000. One of the assureds had been arrested while previously acting as a captain of a vessel and was convicted for possession of marijuana and conspiracy to distribute. The insurance company sought rescission on the grounds the policy was void because the defendant failed to disclose this material information regarding the assured's criminal background, because they breached the navigational limit warranty.

The court however did not find that the failure to disclose these facts was a material misrepresentation. The application provided for information on convictions of or violations in the last 5 years. The defendant's conviction was beyond that time frame. The court found this conviction was not material as a matter of law such that the doctrine of *uberimmae fidei* should apply to void the policy. The underwriter also argued the vessel was outside the navigational limits contained in the policy when she sank. The court did grant judgment for the insurance company on the basis that the defendant did breach the navigational limits warranty. Courts, including those in the 11th Circuit, construed a warranty such as navigational limits narrowly. The court found that the term "navigational limits" meant exactly what it said, namely a navigational limitation which included the location listed in the policy and there was nothing cryptic about the language.

The court then went on to discuss the general rule regarding which law to apply to marine insurance contract. This was that unless there was a federally established admiralty law, state law should apply, citing *Wilburn Boat supra*. The court therefore considered whether the federal courts have addressed the issue of navigational limits warranties in marine insurance contracts. It found that within the 11th Circuit there was a federal admiralty rule regarding interpretation and navigational limit warranties such as the one at issue, and therefore federal law would control.

The most recent decision on this issue is again in the 11th circuit in a May 19, 2000 decision in *HIH Marine Services Inc. v. Roger Frazier M.D. et al*, 2000 U.S. App. Lexis 11086. The 11th Circuit affirmed the District Court's holding that material misrepresentations voided any coverage to the assured of a private recreational yacht.

The Defendant had entered into discussions with a company regarding the chartering the vessel for sightseeing tours in Montego Bay. At the time of the loss there was no chartering agreement between the defendant and the charter operator in effect. The plaintiff underwriter declined coverage on the grounds that the coverage was bound on the condition that the

charter operator had assumed custody of the vessel pursuant to an operative charter agreement. It therefore sought a declaratory judgment that an endorsement adding the vessel to the chartering operator's policy was void because of misrepresentation of material facts.

The court focused on the issue of material misrepresentation because a finding of such in this marine insurance case voids the policy and renders immaterial the defendants arguments on insurable interests and waiver and estoppel. The court said it was well settled that the marine insurance doctrine of *uberimae fidei* was controlling law in the 11th Circuit. Under that doctrine, a material misrepresentation on an application for marine insurance is a ground for voiding the policy. The Court of Appeals upheld the District Court's finding of misrepresentation on the lack of an executed charter agreement was a material misrepresentation that voided the policy.

2. BREACH OF TRADING WARRANTY

La Reunion was not successful in all its cases involving declination of coverage. In *La Reunion Francaise S.A. v. Rudolph Halbart et al.*, 1999 AMC 14 (EDNY 1998) the court denied *La Reunion's* motion for declination of coverage on a 33 foot trimaran. The owner had decided to participate in the Caribbean 1500 rally in the Virgin Islands. The owner specifically requested an insurance policy from *La Reunion* to provide him coverage when the vessel would go offshore from the United States. The request for coverage indicated the vessel would be cruising to Tortola with the Caribbean Rally, which was from Virginia to Tortola and would return to its home port in the Caribbean after May 1996.

The ship departed Virginia for Tortola and some two or three days later was dismantled, which caused further cracks in the hull requiring the abandonment of the vessel. The vessel was never found. The owner gave notice of loss and claimed a total loss of \$140,000. Four months after the loss, *La Reunion* issued policies indicating that the insurance did not cover any loss or liability incurred during a race. The underwriter's allegation was that the vessel breached the policy's navigational warranty and that the "rally" was in fact a race, thus the exclusion resulted in the loss of coverage. It also alleged that the owner and another representative breached the duty to disclose material facts concerning the true nature of the rally which the plaintiff contended breached the policy.

In discussing the law regarding the navigational limits warranty, the Court stated the meaning of the navigational limits warranty did not comprehend a mileage limitation and without such a limitation the owner could not have breached it. The Court was particularly annoyed with the position of *La Reunion* in its attempt to decline coverage due to the breach of the racing exclusion. The court indicated the real question of the policy was what is a race, since this was not defined in the policy. The court invoked the usual rule that ambiguous provisions in marine insurance contracts are to be construed against the insurer and in favor of the insured. It discussed the issue of the doctrine of *uberimae fidei* and the underwriter's argument that the insured should have disclosed a rally was a race and that owner would not be traveling in a manner consistent with the policy's permissible navigational scope. The court reiterated its position regarding the failure to determine the term "race" in a manner sufficient to give meaning to the racing exclusion clause.

The court found that this fact was not a material fact and would not control the underwriter's decision. The court was particularly annoyed with the position of *La Reunion* when it claimed it had the power both to make the contract and then interpret it according to its

interests particularly relevant to the warranty on navigational limit which did not say on its face what the plaintiff claimed it did. The court therefore said it would not imply a mileage limitation after the fact when the burden was on the insurer to define the material terms of the contract. It denied La Reunion's motion for declination of policy coverage.

3. LATENT DEFECT AND THE INCHMAREE CLAUSE

In *Continental Casualty Company v. Anderson Excavating and Wrecking Company*, 189 F.3d 512, 1999 AMC 2714 (7th Cir. 1999), the Circuit Court affirmed the District Court's concededly vague opinion granting the motion of the plaintiff underwriter for no coverage on the basis of an exclusion under the Inchmaree Clause for losses caused by want of due diligence of the owners or managers of the vessel. The defendant had been hired to demolish a concrete dock and remove debris. It utilized barges for that service which were damaged during the loading of the debris which weighed up to 10 ton chunks. However, instead of using a rock barge to load the concrete, they used a deck barge, knowing full well the danger involved, particularly since the debris was dropped to the deck of the barges rather than lowered gently onto them. The District Court found and the Circuit court affirmed the finding that this activity on the part of the vessel owner showed a lack of due diligence, thereby triggering the exclusion in the insurance contract, including the terms of the Inchmaree clause since the injury to the barge was not accidental and it was caused by a conspicuous lack of due diligence.

4. GENERAL AVERAGE

The always esoteric concept of general average was considered adversely to plaintiff cargo interests in allowing a vessel to claim as general average for a salvage lien on the cargo for their proportionate share of general average. *Folger Coffee Co. v. The M/V OLIVE BANK*, 201 F. 3d 632, 2000 AMC 844 (5th Cir 2000). During the voyage with the vessel loaded with cargo, she encountered severe heavy weather off South Africa ultimately sustaining damage to her steering capability. The vessel ultimately entered into a salvage agreement pursuant to a Lloyd's open form. Shortly before the salvors arrived on the scene, the crew was able to reengage the emergency electrical system and start the main engines where after she then sailed to a port of refuge on her own power.

The salvor's exercised their salvage lien by threatening arrest of the cargo and the ship. The parties proceeded to a salvage arbitration which ultimately resulted in a settlement. Cargo interests filed an action in the District Court seeking a declaration the vessel was not entitled to general average and claiming recovery for physical damage to cargo. The District Court found the loss of power was caused by a fortuitous combination of events and the vessel was seaworthy when it left port.

It also found and the Circuit Court upheld the finding that the evidence did not support a proposed finding the vessel was unseaworthy due to a defective emergency electrical system. It also denied the position of cargo interests that the vessel was *per se* unseaworthy under an amendment to the 1974 SOLAS Convention on the grounds that they did not meet SOLAS standards regarding alternate and emergency power. The court was not persuaded by this argument that the concept of negligence *per se* may be used to overcome a COGSA burden of proof requirement. It also found no authority to support cargo's contention that the entry of seawater into the vessel led to a presumption of unseaworthiness. Cargo also alleged unseaworthiness in failure to close sky lights in the vessel. The District Court found that this

allegation was caused by a management decision and negligent management was an exception from liability under COGSA. The court affirmed the District Court findings, rejecting the arguments of cargo interests and supporting the District Court's finding that the vessel was seaworthy, thereby imposing a general average contribution from cargo interests.

E. MARITIME PERSONAL INJURY AND DEATH ISSUES

1. SEAMAN'S STATUS

Under United States law, the Jones Act, 46 U.S. Code 688(a) allowed seamen to recover for personal injury suffered in the course of their employment. This statute has given rise to a substantial number of cases over the years as to whether or not the plaintiff has the status of a seaman. The cases are very fact intense. The arguments raised on behalf of counsel for injured plaintiffs are circumscribed only by the imagination of counsel and the vagaries of opinions of the various courts that have considered this elusive issue. I have discussed this issue of seaman status and what was a vessel at the Louisiana State University Personal Injury Seminar 1998. I would be happy to provide a copy of that paper if anyone has an interest in it.

Those plaintiffs who have argued for seaman status include a qualified deck hand assigned to duties at the Staten Island Ferry Terminal who was injured in the course of his employment while assisting in a docking of a ferry. Plaintiff claimed the benefits of the Jones Act. The defendant employer moved for summary judgment on the basis he was not a seaman for the purpose of the Jones Act at the time he was injured. This argument was upheld by the District Court and subsequently by the Court of Appeals. *Sergey Sologub v. The City of New York*, 202 F. 3d 175, 2000 AMC 742 (2nd Cir. 2000). The plaintiff had Liberian licenses as a third officer and third assistant engineer as well as certificates from the Coast Guard certifying him as an able seaman. During the period of his employment, he worked alternately at the ferry terminals and at times on the ferry boats with no fixed schedule. For approximately 8 months he was regularly assigned to terminal duties which consisted of work as opening and closing the terminal doors to allow passengers to pass the terminal to the ferry. He was injured while standing on top of pilings to receive mooring lines from a deckhand aboard the ferry that was laying up for the night.

The District Court found that this was not a jury question and the uncontested facts showed that the plaintiff was assigned as a terminal based deckhand and did not work at sea, therefore he could not be classified as seaman. Ironically, the Jones Act provides no definition of the term "seaman". Since its enactment in 1920, courts have wrestled with the problem of determining which maritime workers are entitled to Jones Act protection.

The Second Circuit considered recent Supreme Court decisions on the issue of seaman status including *Chandris Inc. v. Latsis*, 515 U.S. 347 (1995). In determining Jones Act status, the Supreme Court had rejected a voyage test and adopted a rule of thumb that a worker spending less than approximately 30% of his time serving a vessel in navigation could not be classified as a Jones Act seaman. The Supreme Court considered two elements for the necessity of qualifying as a seaman, namely, (1) the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission and (2) the worker must have a connection to a vessel in navigation for an identifiable group of vessels that are substantial in terms of both its duration and nature. The Jones Act was intended to protect sea based

maritime workers who owe their allegiance to a vessel and not to land based employees who do not.

The Second Circuit felt that the plaintiff could have contributed to the function of the vessel and the Staten Island Ferry fleet in the accomplishment of the mission of the ferries, but his connection with a vessel in navigation, in terms of both duration and nature, was insufficient, when analyzed in light of the Jones Act's intention to protect sea based maritime workers and not land based employees. During the time he was engaged in land based activities, he served only one 8 hour tour aboard a vessel, hardly enough to meet the duration test promulgated by the Supreme Court in *Chandris* and its subsequent analysis in *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548 (1997). The Second Circuit found, as a matter of law, the plaintiff did not meet the test of seaman status set forth in the Supreme Court decisions.

Seaman status issues arise more often in the U.S. Gulf where there is a plethora of activities in the offshore oil field industry. An offshore oil worker seeking seaman status was denied that status in a recent 5th Circuit decision in *Mark St. Romain and Angel St. Romain v. Industrial Fabrication and Repair Service Inc. et al.*, 203 F.3d 376, 2000 AMC860 (5th Cir. 2000). The plaintiff was injured on an offshore platform which was permanently affixed to the Outer Continental Shelf off the coast of Louisiana. The Plaintiff had been employed as a "plug and abandon" (P&A) helper for a period of two years prior to the accident. That work involved decommissioning of oil wells under off shore platforms. Most of the work was done from fixed platforms.

Some of the plaintiff's assignments were performed partly from lift boats, that is, a support vessel using a crane to pull oil casing. The "P&A" worker normally remained at the platform until the job was complete, which may extend from a few days to several weeks. Occasionally the lift boat will also transport the team to the platform. The plaintiff was injured while assisting a removal of the casing.

The 5th Circuit discussed again the anomaly of the lack of a definition of seaman in the Jones Act, since that task had been left to the courts. It considered the Supreme Court criteria in *Harbor Tug supra* as well as its earlier decision in *Chandris supra*. The 5th Circuit had previously defined "fleet" under its analysis of *Harbor Tug* to mean an identifiable group of vessels acting together under one control in its decision in *Barrett v. Chevron USA, Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1986).

Based upon the facts in the case, the 5th Circuit found that St. Romain was not a seaman as a matter of law. He was not permanently assigned to any one vessel in navigation and no lift boat was being used by plaintiff's employer when his injury occurred. Seaman status issue must be determined by examining the plaintiff's overall employment related connection to a vessel in navigation, rather than focusing only on the facts at the time of the injury. Plaintiff also did not work aboard vessels under common ownership or control. The plaintiff also argued that in his offshore assignments he was regularly exposed to the perils of the sea faced by traditional seaman to which the circuit did not agree. Whether or not the plaintiff faced perils of the sea was not outcome determinative of seaman status and therefore his claim must fail.

The District Court in the Eastern District of Louisiana *In the Matter of the Complaint of Endeavor Marine Inc. et al*, 1999 AMC 1101 (ED La. 1999) considered once again the difficult problem of a seaman status claim of a stevedore who operated a crane to load and unload

cargo from oceangoing vessels and whether or not he qualified as a Jones Act Seaman. The plaintiff worked aboard a derrick barge for about a year and a half. The barge was moved to place to place a by tugboat. The plaintiff maintained the crane but did not ride the barge from one location to another but boarded it from land upon its arrival. The court considered the prior Supreme Court decisions referred to above, viz *Chandris* and *Harbor Tug* and the tests set forth in those cases for seaman status.

There was no dispute the plaintiff contributed to the barge's mission as a crane barge. There was no dispute that the barge qualified as a vessel in navigation. However, the court found that plaintiff's connection to the barge was not substantial in nature as required by *Harbor Tug supra*. The court determined that the focus of the substantial connection requirement therefore was whether the plaintiff's duties took him to sea and, in fact, it did not. The very narrow distinction given by the court, which understood that it was an extensively fact oriented issue, took its guidance and followed the precepts set forth in *Chandris* and *Harbor Tug supra* as to the requirement that the worker's connection be substantial in both duration and nature and whether the worker was involved in sea based activities.

An earlier extended discussion on the issue of seaman status can also be found in *Shade v. Great Lakes Dredge and Dock Company*, 154 F. 3d 143, 1999 AMC 147 (3rd Cir. 1998) in which the court considered the extensive history of seaman status cases and the tests required to be utilized in assessing the fact based inquiry.

2. FORUM CLAUSES

Courts have also enforced forum selection clauses in cases where foreign seamen seek to have U.S. courts take jurisdiction of their claims. In *Belloza v. Chios Sky Shipping and Trading S.A. et al.*, 1999 AMC 1607 (ED La. 1999) the court dismissed the action of a Nicaraguan seaman employed onboard a Panamanian flag vessel who was injured while the vessel was moored in New Orleans. Plaintiff had signed an employment contract requiring that disputes from personal injury were to be litigated in the Piraeus courts subject to Greek law. The plaintiff argued that he spoke Spanish and the contract was written in English and it was never explained to him. The court, though sympathetic to the plaintiff's position, found that forum selection clause in employment contracts would be subject to the same criteria as those in passenger contracts and others, namely, that forum selection clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances. At times United States courts than have been more sympathetic to these arguments and have entertained evidence showing overreaching if supported by substantial evidence.

3. BASE OF OPERATIONS

The U.S. Courts are also subjected to claims brought by foreign seamen seeking the benefit of the Jones Act which then triggers a detailed analysis of the various factors articulated by the Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571 and its progeny. A British seaman working aboard a British flag yacht was killed in Greece as a result of negligence of another crew member. The yacht was beneficially owned by a Mexican citizen. A U.S. citizen provided shore side management until days before the accident. The family of the deceased and others brought an action in the United States court seeking damages under the Jones Act, the Death on the High Seas Act and the general United States maritime law as well as remedies under

any foreign law.

The District Court dismissed the Jones Act, the Death on the High Seas Act and general U.S. maritime law claims and dismissed for *forum non conveniens* any foreign law claims they may have pleaded. This finding was affirmed by the court in *Warn v. M/V MARIDOME*, 196 F.3d 625, 1999 AMC 1020 (9th Cir. 1999). The 9th Circuit considered the various factors under *Lauritzen* and subsequent Supreme Court decisions and concluded that the lower court's dismissal was valid. It also held that the yacht's U.S. base of operations alone was not a sufficient basis to apply the Jones Act. The Court of Appeals stated "simply put, we agree with the District Court's conclusion that the courts of either Greece or the United Kingdom provide more appropriate forums for the prosecution of the Warn appellants claims under the laws of those two nations."

4. DEATH CLAIMS - WHAT LAW APPLIES

In the aftermath of the Supreme Court decision *Yamaha Motor Corporation v. Calhoun*, 516 U.S. 199 (1996) the District Court in Pennsylvania, on remand of the action, considered the always troubling issue of the relevant applicable choice of law and the type of damages claimed in the action. *Calhoun et al. v. Yamaha Motor Corporation USA et al.*, 40 F. Supp. 2d 288, 1999 AMC 1771 (ED Pa. 1999) The District Court, on remand from the Supreme Court, was considering a tragic death on the offshore waters of Puerto Rico of a minor daughter of the plaintiff who were residents of Pennsylvania. The daughter was killed while riding a jet ski manufactured by the defendant Yamaha.

The Supreme Court held that damages for death within territorial waters were properly governed by state law. Since the lower courts had not determined whether Pennsylvania or Puerto Rico law applied, the matter was remanded to the District Court.

That court held that whether Puerto Rico or Pennsylvania law would govern was a matter of federal choice of law. With regard to plaintiff's claim for punitive damages, that claim was not cognizable because Puerto Rico did not have putative damages as part of its convention on damages. The plaintiffs may assert whatever claims for compensatory damages are available under Pennsylvania law remedies in wrongful death and survival actions. It is anticipated that this matter will be taken up once again on appeal and ultimately may return to the Supreme Court for further consideration on this troublesome and difficult analysis of the applicability of proper law, choice of law and the remedies available to the plaintiffs.

On June 23, 2000 the 3rd Circuit issued its opinion. It was both affirmed in part and reversed in part the District Court's holdings. The Court made a most apt comment in that admiralty law is considered one of the most complex areas of American law. The District Court on remand from the Supreme Court was asked to resolve problems that the Supreme Court recognized in asking the District Court to rule upon two distinct questions. Those issues were which state's law governed the type of damages available and whether state or federal law governed the standards by which the liability of the *Yamaha* would be defined. In their commentary the 3rd Circuit indicated that the appeal concerned the extent to which state law may coexist in the admiralty arena that historically has been the exclusive domain of federal, legislative and regulatory entities.

The District Court had held that the law of Pennsylvania, which was the law of the

domicile of the estate of the deceased child, would govern the issue of compensatory damages and that the law of Puerto Rico would govern that of punitive damages. It further held that the law of Puerto Rico would govern the issue of the potential liability of Yamaha. The Circuit Court affirmed that part of the District Court's holding with respect to the damages, both compensatory and punitive, (it should be noted that the District Court had found that under Puerto Rico law, punitive damages would not be available), but reversed the District Court's holding that Puerto Rican law would govern the liability issues, finding that federal law must govern the standards by which the liability of Yamaha would be evaluated. There was a concurring opinion with a dissenting part in which the dissenting judge parted ways with the 5th Circuit on its choice of Puerto Rican law and conclusion that the estate should be denied punitive damages. Based upon the position taken by the Supreme Court referred to above, we anticipate that a further petition for certiorari will be filed with the Supreme Court once again by the plaintiffs in this action.

5. JONES ACT EXCLUSIONS

As indicated above, the Jones Act is the basic law in the United States for claims for personal injury and death by those claiming seaman status against their employers. A recently amended section of the Act provides that an alien, while working on the territorial waters of the Continental Shelf of the United States, may not file an action under the Jones Act for damages for injury or death. The 5th Circuit, in *Jackson v. North Bank Towing Corporation et al.*, 201 F.3d 415 (5th Cir. 2000) denied the rights of a non resident alien and citizen of Honduras to pursue his claims for injuries under the Jones Act by virtue of the fact that it fell within the provision mentioned above. However, in addition, plaintiff alleged negligence claims pursuant to the tort laws of Mexico and Honduras and international maritime law as well as unseaworthiness claims pursuant to the maritime law of the United States, Mexico and Honduras. The District Court dismissed the entire action on the grounds that Jones Act barred foreign law claims by foreign seaman, however the 5th Circuit did not agree to the narrow reading of that statute by the District Court.

The Circuit Court found the particular exception sections applied to United States maritime claims brought by foreign seaman and therefore, for a foreign seaman to bring an action under any maritime law of the United States, it must first establish that foreign law remedies were not available to him in any other forum. In considering the statute, the Circuit Court found that section barred only actions brought under the maritime law of the United States and the proviso referred to above did nothing to change that. Therefore, the plaintiff would have his foreign law claims reinstated. The Circuit Court did consider the anomaly that this result appeared to be contrary to the legislative history of the Jones Act, which suggested that Congress did not intend for foreign seaman to be able to sue in American courts except where they would have no other available forum. However the Circuit Court gave consideration to the plain text of the act. It contained no ambiguity as it simply did not refer to foreign law claims and therefore federal courts are not barred from hearing them.

6. CAUSES OF ACTION FOR WRONGFUL DEATH

Our courts are still struggling with the rationale of various Supreme Court decisions considering the issue of general maritime law, and causes of action for death based on unseaworthiness or negligence. In *Moragne v. States Marine Lines Inc.*, 398 U.S. 375 (1970) the United States Supreme Court recognized a general maritime law cause of action for wrongful death based upon unseaworthiness.

In *Garris v. Norfolk Shipbuilding and Dry Dock Corporation et al*, 2000 AMC 1084 (4th Cir. 2000), the Fourth Circuit went into an extensive discussion of the law on this subject, ultimately determining that it would adopt a general maritime law cause of action for death due to negligence of a harbor worker because it was consistent with the principle of uniformity expressed in *Moragne* as well as in the subsequent Supreme Court decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). The *Garris* court considered the wrongful death claim of a sandblaster working aboard a vessel, that was injured and ultimately died as a result of the negligence of an employee of a subcontractor. The Court issued an extremely important and historical opinion in attempting to bring some sense of order out of the difficult and, at times, convoluted prior decisions of the Supreme Court and the Federal Circuit Courts. In its final analysis the court stated

“the language of *Moragne v. States Marine Lines, Inc.* 398 U.S. 375 (1970) combined with its historical and legal context and the absence of persuasive authority to the contrary, leads us to conclude that *Moragne* recognized only a general maritime law cause of action for wrongful death based upon unseaworthiness and not for wrongful death based upon negligence. However, because Congress has not affirmatively precluded a negligence based cause of action, and because such a cause of action is consistent with the principle of uniformity expressed in *Moragne* and *Miles* [498 U.S. 19 (1990)] (“Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under Death on the High Seas Act, the Jones Act, or general maritime law”), we find it appropriate to recognize a general maritime law cause of action for wrongful death based upon negligence.”

The court therefore reversed the District Court's dismissal of the plaintiff's general maritime law negligence claim and remanded it.

Those who are interested in a further analysis would do well to consider the concurring opinion of Judge Hall, which is equally erudite and persuasive in her comments on some areas of disagreement with the reasoning of the majority and which discussed the basic legal decisions of the last 40 years relative to the issue of wrongful death of shore workers.

7. DEATH ON THE HIGH SEAS ACT

In a historic decision involving the TWA crash off Long Island, the Second Circuit Court of Appeals affirmed the lower court's opinion on a very important aspect of the interpretation of the Death on the High Seas Act (DOHSA) 46 U.S. Code §761-767, which is also relevant to maritime death and personal injury claims. Cf. *In Re Air Crash off Long Island, New York on July 17, 1996*, 2000 AMC 1217 (2nd Cir. 2000). The defendants in the TWA crash case had filed an application to dismiss the plaintiffs' claim for non pecuniary damages, which was barred, according to defendants under DOHSA. The Circuit Court said the appeal presented a question of first impression, namely, whether DOHSA applied to an airline crash in United States territorial waters, roughly 8 miles from the coast of the United States.

The District Court had denied the defendant's motion to dismiss, which was affirmed by the Second Circuit when it concluded that DOHSA applied only when the death occurred on both the high seas and beyond a marine league or three nautical miles from shore. It found

that, in this case, the crash did not occur on the high seas by reasoning that, in the term "high seas", Congress limited DOHSA's application to non sovereign waters, meaning international waters not subject to the dominion of any single nation. There was agreement that the crash took place 8 nautical miles off the coast of Long Island, which was beyond a marine league from shore.

The parties differed as to the meaning of "high seas". The plaintiffs argued the term "high seas" referred to those waters beyond the territorial waters of the United States. Since President Reagan in 1988 extended the territorial waters of the United States to 12 miles from shore, their argument was that the air crash occurred within the territorial waters of the United States.

The defendants contended that the term "high seas" meant all waters beyond the low water mark. The Circuit Court's opinion comprised some 34 pages and went into an extensive and fascinating discussion of the history of DOHSA, the concept of high seas, and the impact of President Clinton's proclamation extending the boundaries of the contiguous zone of the United States to 24 nautical miles and its impact on DOHSA. The Circuit Court, in a 2 to 1 decision, upheld the ruling of the District Court and discussed the ramification of remedies in federal territorial waters.

The Circuit Court stated "we conclude the plaintiff's interpretation of the relevant statutory language better reflects the meaning and purpose of the Death on the High Seas Act" accordingly, they affirmed the decision that DOHSA did not apply to the United States territorial waters where the crash occurred. The dissent, by the recently appointed Circuit Judge Sotomayor, is equally informative and persuasive. Ironically, the majority and the minority opinion also considered the position of the Maritime Law Association of the United States in the context of the history of the statute that became DOHSA, since the MLA was instrumental in drafting the bill that ultimately led to the statute known as DOHSA.

F. OIL POLLUTION

The Oil Pollution Act of 1990 (OPA) 33 U.S. Code §2701 et seq. was the result of the unfortunate incident involving the EXXON VALDEZ in Alaska. The Act is difficult at times to comprehend and follow, particularly in cases where there is a dispute as to whether or not the actions of the U.S. government aided or assisted in any way the pollution clean up. This matter was addressed as a matter of first instance in *United States of America v. Hyundai Merchant Marine Co. Limited et al*, 172 F.3d 1187 (9th Cir. 1999) (cert denied November 1, 1999).

The owner of the vessel appealed from an award of over \$1.7 million awarded to the U.S. Government under OPA as a result of the vessel's grounding in an environmentally sensitive area of Alaska. The Coast Guard responded to the initial emergency at once, but the vessel utilized her own engines and eventually removed herself from the strand and performed the actual work of containing the spill and freeing the vessel. The government sued under OPA to recover from the owner its costs for the Coast Guard's response to the emergency. The case was the first time the issue was discussed of the permissible scope of the United States recovery under OPA for a response to a private party's threatened and, to a limited degree, actual oil spill.

The Circuit Court found that OPA allowed the United States to recover the Coast Guard's cost of monitoring the owner's salvage operation. It also rejected the owner's

contention that costs may not be recovered unless the court considered they were necessary. By necessary actions, the owner argued costs other than actual removal must be deemed necessary before they were compensable. The Circuit court rejected this contention. The court took the position that the grounding contained the seeds of a major ecological disaster and it was only prudent for the government to rush personnel and equipment to the scene and maintain them there until the threat was over. OPA does not restrict the recovery of the United States to costs that were prudent or necessary or reasonable.

It also rejected the owner's argument that the Coast Guard base costs, that is, the costs that it would have incurred, even if not responding to the emergency, would have been incurred in any event. The court rejected the owner's interpretation of OPA on this aspect. It also affirmed the lower court's award of attorneys fees to the U.S. as part of the overall claim.

The readers of this paper are also referred to an interesting matter, again arising out of the EXXON VALDEZ, in the case of *Seahawk Seafoods Inc. et al. v. Exxon Corporation et al.* 2000 U.S. App. Lexis 3984 The court was considering whether the \$5 billion punitive damage verdict against Exxon and the \$5,000 punitive damage award against the Master of the EXXON VALDEZ should be set aside because of irregularities during jury deliberations.

The Court did not set it aside. However the Court discussed the specifics of the jury issue. This involved whether or not a retired Florida police officer, serving as a court security officer during the trial had conversations with one of the jurors that strongly suggested that the outcome of the jury's finding should be one way, as opposed to another. This was in regard to the court officer's alleged suggestion or inference that one of the juror's was troublesome and commenting to another juror about a bullet, then showing his gun and suggesting that the juror be put out of her misery. The Circuit Court found and agreed with the District Court that the verdict should not be set aside. The discussion of the case raises somewhat of a novel issue and is intriguing, considering all the other activities that took place with the EXXON VALDEZ. One of the jurors indicated that there were discussions every day on how to kill her which came up in the jury room and that the other jurors definitely wanted one of the jurors dead etc. The decision only shows the intricacies of what goes on in jury deliberations in the United States. In this case, the court listened in a series of intriguing arguments, after hearing evidence from jurors and considered "judicial psychologizing". It further commented "it is logical to disbelieve even a plausible allegation if a witness makes it in the course of a generally implausible account." We leave it to the reader to determine precisely what may have gone on or what their suspicions are that may have gone on in the jury room at this time.

1. CRIMINAL ISSUE ON ENVIRONMENTAL LAW

Jim Hurley of Tampa at the recent South East Admiralty Institute's Seminar, discussed a recent Supreme Court comment on pollution issues. It is set forth verbatim herein.

Hanousek. v. United States, __U.S.__, 120 S.Ct. 860, 145 L.Ed.2d 710 (2000) Hanousek was employed by the Pacific and Arctic Railway and Navigation Company as the roadmaster of the White Pass & Yukon Railroad. In that capacity, he supervised a rock quarrying project which was on an embankment 20 feet above the Skagway River. During rock removal operations, a backhoe operated by an independent contractor struck a petroleum pipeline

causing between 1,000 and 5,000 gallons of petroleum to be spilled into the river. Hanousek, who was off duty and at home at the time of the accident, was indicted and convicted under the Clean Water Act ("CWA") 33 U.S.C 1319 (c)(1)(A) and 1321 (b)(3). He was fined and sentenced to six months in prison, six months in a half way house and six months on supervised home release.

Hanousek appealed to the Ninth Circuit arguing that the sentence violated his due process rights by imposing liability for ordinary negligence. The Ninth Circuit affirmed the conviction, holding that the CWA was "public welfare legislation" designed to protect the public by criminalizing the conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety.

The Supreme Court denied certiorari, however. Justice Thomas, joined by Justice O'Connor wrote the dissenting opinion. Justice Thomas argued that the "Public Welfare Doctrine" should not be applicable as the CWA criminalizes what is otherwise routine industrial activity. Notwithstanding Hanousek's conviction stood

G. SALVAGE

There are a number of interesting and important decisions of various courts throughout the United States on the issue of salvage, including treasure salvage, abandoned ships and commercial salvage operations.

There are a large number of abandoned or ancient wrecks located on the Gulf and East Coasts of the United States. The District Court in Virginia had the occasion to consider the claims of the government of Spain that they had not abandoned vessels sunk in the 1700's and 1800's in their attempt to prevent plaintiff salvors from seeking salvage rights. *Sea Hunt Inc. v. The Unidentified Ship Wreck Vessel et al.*, 47 F.Supp 2d 678, 1999 AMC 1752 (ED Va. 1999). The professional salvor plaintiff was seeking ownership rights against two Spanish vessels sunk in 1750 and 1802 respectively. They were located near the coast off Assateague Island within the state of Virginia. The salvor had obtained permits from a state agency to conduct salvage operations and recover historic artifacts. The state also asserted a claim of ownership under the Abandoned Ship Wreck Act of 1987 (ASA), 43 U.S. Code 2101 - 2106.

The Kingdom of Spain intervened and asserted that the wrecks had not been abandoned and remained the sovereign property of Spain. The court held, based upon an interesting series of facts and after consideration of treaties entered into between the United States and Spain, that Spain had indeed abandoned one vessel but had not abandoned the other. The District Court indicated it was following the guidelines laid down in the 4th Circuit decision of *Columbus America Discovery Group v. Atlantic Mutual Insurance Company*, 974 F. 2d 450 cert denied 507 U.S. 1000 (1993) with regard to the issue of abandonment. The Court stated that, under the Columbus America rule, whether or not the vessels were war ships, their owner, the King of Spain had appeared to claim ownership to them and therefore the plaintiff in pressing his claim for possession of the vessel under the law of finds must show by strong and convincing evidence that the shipwrecks had been expressly abandoned by Spain. Unless the salvor did that, the Court would apply the law of salvage, which operates under the premise that the original owners still retained their ownership interest in the property.

21/7/2000 Court of Appeal
reversed this & held that
abandonment must be specific

The Court then discussed the proof on the issue of abandonment and considered the 1763 and 1819 treaties with Spain as well as the Spanish American War and whether or not the U.S. had the right to confiscate Spanish vessels in U.S. waters. The court found the plaintiffs had succeeded in showing, by strong and convincing evidence, that Spain had expressly abandoned one vessel and the title therefor lay with Virginia under the ASA. Plaintiff could continue with salvage efforts. However, there was no evidence of abandonment of the second vessel and Spain retained title to the wreck. Virginia had no claim to the wreck and plaintiff may not, without Spain's permission continue salvage operations.

ASA was considered once again in *Fairport International Exploration Inc. v. The Ship Wreck Vessel Known as the Captain Lawrence*, 177 F.3d 49, 1999 AMC 2432 (6th Cir. 1999) (rehearing denied June 23, 1999). This case involved the ASA in connection with the attempted salvage of the vessel CAPTAIN LAWRENCE which was sunk in Lake Michigan in 1933. The case was before the 6th Circuit once again, after remand from the Supreme Court, which had vacated the 6th Circuit's earlier decision in light of its ruling in *THE BROTHER JONATHAN*, 523 U.S. 491 (1998).

The court then had to consider the burden of proof faced by the State of Michigan regarding whether the original owner had abandoned the vessel and the quality of the proof. Thus, the dual issues of salvage and abandonment were considered. Under maritime law, those who wish to raise sunken ships are governed by either the law of salvage or the law of finds.

Salvage applies when the original owner retained an ownership interest in the vessel. The salvor receives a salvage award but not title. When the owner has abandoned the vessel, the court finds title vesting to the finder of the ship. The Court considered the *Columbus America* and earlier cases. The 1987 passage of the ASA altered this approach. The Act transferred title to the state of all abandoned ship wrecks embedded in the submerged lands of the state. The court held that a state may prove by inference that a shipwreck, last owned by a private party, is abandoned for the purposes of admiralty law and the ASA. The case was remanded to the District Court for the third time to attempt a resolution. The District Court was to conduct an inquiry as to whether the original owner abandoned the wreck; if he did, the ASA vested title in the state of Michigan and, if he did not, the ASA did not apply. The Circuit Court also considered the evidence that would be considered in seeking proof of these facts. This case is undoubtedly going to remain with the courts for some time since it commenced in 1994.

There are two recent cases involving *Columbus America* Discovery issues *supra*. In *Yukon Recovery LLC. v. Certain Abandoned Property et al.*, 205 F. 3d 1189, 2000 AMC 883 (9th Cir. 2000) plaintiff filed an *in rem* action seeking to arrest artifacts, seeking title to the vessel and cargo at the wreck site, exclusive rights as salvor and injunctive relief against competing salvors. The District Court entered judgment in favor of a competing claimant. The 9th Circuit Court of Appeals affirmed the lower court's ruling. The issue before the Court was what standard of evidence the District Court would apply as to whether or not the property had been abandoned, i.e. a preponderance of evidence rule or a higher standard of clear and convincing evidence.

The District Court found that the competing claimant was the first to find, observe, record and make a timely claim to the wreckage of the vessel sunk in 1901. The competing salvor had

conducted a thorough historical investigation and was the first in recent times to locate the wreckage. The Court held the prior claimant was entitled to exclusive salvage rights, even absent actual possession or physical presence at the site.

The competing salvor had entered into a prior salvage contract with the cargo insurance company for the salvage of any gold on the vessel. Yukon argued that the prior competing claimant had abandoned this claim because the insurance company should have asserted its rights during the commencement of an earlier salvage activity in 1934 and had not done so. The District Court dismissed the petition of Yukon, granted the prior salvor exclusive rights to salvage the vessel, enjoined Yukon from exploring and conducting salvage operations, and required the competing salvor to submit a salvage plan which decision was upheld by the 9th circuit.

The Circuit Court considered the issue of the use of sonar and remote diving technology to locate and explore the wreck, which was not available some years ago. This had an impact on the concept of whether or not there was an abandonment. The Court stated "it is only by virtue of modern technological advances that the current salvage attempt is within the realm of possibility. The District Court properly acknowledged that lack of technology is one factor to consider in determining whether inaction constitutes abandonment."

There was further activity in the famous Columbus America Discovery Group case in the 4th Circuit on its third review of various issues, 2000 AMC 934 (4th Cir. 2000). The issue was whether or not the parties to the salvage of the COLUMBUS AMERICA validly entered into orders of settlement and dismissal. The sinking of the COLUMBUS AMERICA in 1857 and the loss of over 400 lives has been subject of much historical discussion. It was also discussed in the excellent work *Ship of Gold* describing the loss and the ultimate finding of the wreck of the Central America in 8500 feet of water.

Substantial disputes arose out of how to dispose of the recovered gold bullion and other gold that had been brought up from the wreck. Prior decisions of the courts had awarded the plaintiff Columbus America salvage group 92% of the find; the underwriters of the gold were awarded 8%. The Circuit Court also discussed the differences between its prior ruling on abandonment and contrasted that with the rulings of other Circuit courts including the 6th Circuit in *Fairport supra*, and the 9th Circuit in *Deep Sea Research v. THE BROTHER JONATHAN*, and some discussion in the Supreme Court's decision in the *BROTHER JONATHAN*, 523 U.S. 491 (1998). The 4th Circuit recognized there may well be conflicts between the circuits but the Supreme Court did not resolve those conflicts in *BROTHER JONATHAN* and therefore, under the law of the case doctrine, the 4th Circuit's prior ruling on the issue of abandonment stood. Circumstances did not exist for the panel to change the decision of its previous panel and that subject was better addressed by an *en banc* court. The time for such a petition has lapsed. Counsel for one of the parties in Columbus America was considering a possible petition for certiorari to the Supreme Court. It is our assessment that they will not make such a request.

The TITANIC case is still with us in the United States. It is obvious that the movie as well as the media hype about the sinking and the subsequent salvage activity has created more interest in the case. The 4th Circuit Court of Appeals, once again had occasion to consider issues of the salvage of the TITANIC in *RMS Titanic Inc. v. Haver et al.*, 171 F. 3d 943, 1999 AMC 1330 (4th Cir. 1999) cert denied October 4, 1999. That appeal raised questions about the

authority of a U.S. Court to regulate salvage rights in the wreck of the TITANIC which was sunk in international waters.

The Circuit Court discussed the extraordinary historical background of the TITANIC sinking and the original finding of the vessel in 1985 by a joint American French expedition. The District Court in Virginia issued an injunction excluding salvors other than the plaintiff RMS Titanic from taking any actions interfering with their activities, as well as precluding other salvors from taking photographs of the wreck. The Fourth Circuit had also to consider the authority of a federal court to adjudicate salvage rights in international waters. It considered the nature and scope of admiralty jurisdiction, the applicability of salvage law, and common law of maritime nations, that is, the *jus gentium* and the admiralty court's *in rem* jurisdiction.

The 4th Circuit found that there was admiralty jurisdiction of the District Court outside U.S. territorial waters. It discussed the issues of the law of finds and salvage and the authority and jurisdiction of an admiralty court to resolve claims in international waters. It looked back into ancient history for the rule in considering the principles of the Rhodian Code and the laws of Oleron for support that admiralty law would apply in salvage activities. It discussed issues of the *in rem* jurisdiction of the District Court where it did not have actual constructive possession of the vessel when it was in international waters. It also considered the United Nations Convention on Law of the Sea and prior court decisions. It concluded that when persons and property are beyond the nation's zone of exclusive legal power, its ability to adjudicate rights as to them is limited but not meaningless.

The 4th Circuit considered some historical precedents and upheld the authority of the District Court stating it had acted in accordance with the *jus gentium* in awarding RMS Titanic exclusive salvage rights in the wreck of the vessel. There was a more difficult problem however in how the admiralty court could enforce its order. It found that the District Court's use of the term "constructive *in rem* jurisdiction" meant an imperfect or inchoate *in rem* jurisdiction, which fell short of giving the court sovereignty over the wreck. It rather represented a shared sovereignty with other nations enforcing the same *jus gentium*.

It concluded that the lower court was correct in declaring the plaintiff had salvage right in the wreck and those included the right to exclusively possess the wreck for purposes of enforcing the maritime lien it had obtained as a matter of law. Therefore the District Court acted properly in entering an injunction against persons over whom it had jurisdiction, prohibiting them from interfering with the salvage efforts pursued by the plaintiff. However, this power was effectively limited until persons and property were brought within the Court's territorial jurisdiction.

The 4th Circuit did however modify the lower court's injunction in the context of the rights of a party other than plaintiff to photograph images of the wreck. The District Court had expanded salvage rights to include the right exclusively to photograph and otherwise record images of the wreck for the purpose of compensating salvors for their effort, which the District Court felt was creative and novel. However, the Circuit Court was aware of no case in the United States or in the body of *jus gentium* that had expanded salvage rights to include this type of a right. They were not satisfied that the law of salvage would properly be extended to give salvor's exclusive image recording rights of the yet to be solved property.

Even if the salvors had title to the yet recovered ship wreck, if the law of finds would be applied, it was doubtful that such title to property lying in international waters would include the

right to exclude others from viewing or photographing it while in its public site. The 4th Circuit was also reluctant to recognize a right to exclude others as a part of salvage law as it might alter the law of salvage as at a risk to its uniformity in international comity. Therefore, it concluded the District Court was in error in extending the law of salvage to vest in plaintiff exclusive rights to visit, view and photograph the wreck in international water locations. The reader is encouraged to review this opinion as it is a fascinating analysis of a historic wreck and the difficulties encountered in considering jurisdiction of courts over wrecks outside the territorial waters of their country.

There is at present a new declaratory action filed in the District Court in Virginia by RMS TITANIC seeking to enjoin the U.S. Government and others from interfering with the RMS TITANIC salvage rights. It also involved the 1986 TITANIC Act and the recent draft guidelines and proposed treaty for dealing with the wreck. The writer was quoted extensively in the Complaint based on his recent paper on The TITANIC - "Who Owns the Ocean Deep?" delivered at the Houston Marine Insurance Seminar in September 1999.

V. CONCLUSION

This paper covers many different aspects and areas of maritime law in the United States that have been the subject of opinions by the various federal courts in the Maritime Year.. I have attempted to choose from the multitude of opinions on the subjects those that would be of interest to our colleagues in other common law countries, but have not chosen those that are more unique to legal issues in the United States. For that reason, I have excluded opinions on maritime liens, discovery and procedural issues as well as cases involving the Longshore and Harbor Workers Compensation Act activities etc.

It is hoped that this resume may prove interesting and provocative, particularly in connection with a contrast of the positions under US law with those of Australia and New Zealand. I hope to have the pleasure to address the next meeting of the Association in person and return once again to the Antipodes, to the land of beauty and charm, as well as its excellent and outstanding maritime bar.

Friday, July 14, 2000

Howard M. McCormack
Healy & Baillie LLP
Immediate Past President
Maritime Law Association of
The United States